



COMMISSION OF INQUIRY RESPECTING THE DEATH OF DONALD DUNPHY

The Honourable Leo Barry, Commissioner

PROMOTING
PUBLIC TRUST:
Police
Investigating
Police-Involved
Shootings

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Submitted to:

**The Honourable Andrew Parsons
Minister of Justice and Public Safety
for the Province of Newfoundland and Labrador**

June 27, 2017

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The Honourable Andrew Parsons
Minister of Justice and Public Safety
for the Province of Newfoundland and Labrador
4th Floor, West Block
Confederation Building
St. John's, NL A1B 4J6

Dear Minister:

Enclosed you will find my Report on the Inquiry Respecting the Death of Donald Dunphy, pursuant to Order-in-Council 2016-205.

The Report has been written in accordance with the Terms of Reference. I thank you and your Cabinet colleagues for the honour you bestowed by entrusting me with this significant task.

It is difficult to budget for a public inquiry, as at the outset it is impossible to know the number of documents or witnesses that will be required for a full review. In the end, our Commission reviewed over 100,000 pages of documents and heard from 56 witnesses.

Knowing the Province's need for financial prudence, I decided that the best way to minimize costs was to keep a tight schedule as each additional day added considerable legal and administration fees. I was fortunate that all those involved with the Inquiry cooperated fully and our schedule was met, while all evidence was heard and thoroughly considered.

It is my hope that the recommendations contained in this Report will help to ensure that the type of tragedy resulting from Mr. Dunphy's encounter with police will not occur again in this Province.

Yours truly,

A handwritten signature in blue ink that reads "Leo Barry".

Leo Barry
Commissioner

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ABBREVIATIONS

ACIIS	Automated Criminal Intelligence Information System
A/Insp.	Acting-Inspector
ASIRT	Alberta Serious Incident Response Team
BBM	BlackBerry Message
CID-IOC	Criminal Investigation Division, Intelligence and Organized Crime Section
CFRO	Canadian Firearms Registry Online
Chief Supt.	Chief Superintendent
CPC	Commission for Public Complaints Against the RCMP
CPIC	Canadian Police Information Centre
Cpl.	Corporal
CRCC	Civilian Review and Complaints Commission for the RCMP
Cst.	Constable
FIS	Forensic Identification Services
IACP	International Association of Chiefs of Police
ICAN	Integrated Constabulary Automated Network
Insp.	Inspector
JOPIS	Ontario Provincial Police, Justice Officials Protection & Investigations Section
MCU	Major Crimes Unit
MHA	Member of the House of Assembly
NUFM	National Use of Force Model
OPP	Ontario Provincial Police
PARC	Police Assessment Resource Center
PERF	Police Executive Research Forum
PROS	Police Reporting and Occurrence System
PSU	Protective Services Unit
PTSD	Post-Traumatic Stress Disorder
RCMP	Royal Canadian Mounted Police
REACT	Rapid Entry Active Criminal Threat

RNC Royal Newfoundland Constabulary
RNCA Royal Newfoundland Constabulary Association
Sgt. Sergeant
SIRT Serious Incident Response Team
SIU Ontario Special Investigations Unit
SPS Saskatoon Police Service
S/Sgt. Staff Sergeant
Supt. Superintendent
TPS Toronto Police Service

EXECUTIVE SUMMARY

1. INTRODUCTION

In September 2016, the Chief Justice of Newfoundland and Labrador requested that I let my name go forward as a Commissioner to conduct a Public Inquiry into the 2015 police shooting of Donald Dunphy of Mitchell's Brook. I agreed and, on September 23, 2016, pursuant to the *Public Inquiries Act, 2006*,¹ Order in Council 2016-205² was issued with my appointment as a sole Commissioner.

2. MANDATE

My Terms of Reference mainly required me to examine the circumstances of Mr. Dunphy's death, inquire into whether the relevant use of force protocols were properly adhered to, ascertain whether there were any material deficiencies in the investigation of the death, and make necessary and advisable recommendations regarding matters of public concern. I have considered specifically how lethal police encounters with members of the public might be avoided in the future, while allowing police to properly perform their role of preserving public order. My mandate included determination of the significance of communication and, specifically, of social media in the case.

3. APPROACH TO THE REPORT

Like the Inquiry, this Report has been divided into two phases. The first deals with the circumstances of Mr. Dunphy's death and the subsequent investigation by the Royal Canadian Mounted Police (RCMP). The second examines the policy and institutional questions which relate to preventing a similar tragedy from occurring in the future.

The main focus of the Inquiry has been to carefully examine the evidence to determine whether it is consistent or inconsistent with the claim of justification and self-defence put forth by Cst. Joseph Smyth of the Royal Newfoundland Constabulary (RNC).³ Part of

¹ See Appendix 1: *Public Inquiries Act*, SNL 2006, c P-38.1.

² See Appendix 2: Gazetted Order in Council 2016-205 Establishing the Commission and Terms of Reference.

³ In the Report, police officers are referred to by the rank they held at the time of public hearings, which was not necessarily the rank they held in 2015. For example, on April 5, 2015, Cst. Smyth was A/Sgt. Smyth.

the examination involved obtaining and reviewing the tweet which set the unfortunate wheels in motion leading up to Mr. Dunphy's death. Witnesses differed on whether the language and tone of the tweet constituted a threat or not.

Since the tweet had been referred to the police by an individual in the Premier's Office, early comments via Twitter and other media went so far as to hold open the possibility that monitoring of social media was being employed by government to identify critics of government, who could then be silenced. Despite absolutely no evidence of this extreme conspiracy being put forward by anyone, the seriousness of the allegation warranted a thorough 'clearing of the air' through an examination of what probably occurred in the hours leading up to the shooting. Ultimately, I identified 16 questions for which answers should be sought. The findings on these questions are discussed in Chapter 10.

4. KEY CONCLUSIONS AND RECOMMENDATIONS

Having considered in detail the facts established by the evidence put forth over 39 days of hearings with 56 witnesses and 1017 exhibits, including thousands of pages of documents, and applying the burden of proof required of Commissions in treating all parties fairly, my analysis leads me to the following five key conclusions and five key recommendations:

Five Key Conclusions:

(1) RCMP correct not to charge

The RCMP was correct in its decision not to charge Cst. Smyth. Despite some troublesome aspects of his testimony, I received no evidence to refute his version of events and there is forensic evidence to support it.

(2) Cst. Smyth used appropriate force in self-defence

Cst. Smyth demonstrated certain errors of judgment and noncompliance with aspects of his training but responded with appropriate force when Mr. Dunphy with no warning threatened him with a rifle. It would be improper speculation to decide whether Cst. Smyth may have avoided the need to use lethal force had he not made these errors.

(3) No evidence Cst. Smyth's visit politically motivated

I received absolutely no evidence to support the allegation that the Premier's Office directed Cst. Smyth to attend at Mr. Dunphy's house or that Cst. Smyth's visit was politically motivated.

(4) Tweet not a threat but warranted follow-up

The tweet was not a threat but still warranted follow-up because of the language used in this tweet and in previous ones.

(5) No evidence Mr. Dunphy raised stick, not gun

The 'stick theory' put forth by Meghan Dunphy, that Mr. Dunphy had raised a stick rather than a rifle, had no evidence to corroborate it.

Five Key Recommendations:**(1) Better crisis intervention and de-escalation training**

How to reduce lethal encounters between police and citizens?
Step 1: ensure police officers receive modern updated training in crisis intervention and de-escalation (defusing) of situations (the CID approach) to keep the use of force as a last resort.

Commentary: Had Cst. Smyth received better training in how to avoid the need to use force, he might have prevented the situation from escalating as it did or he might have been prompted to remove himself from the residence before lethal force was required. The goal must be to train towards keeping the use of force as a last resort.

(2) Better supervision of the PSU

Step 2 in reducing risk: keep the Protective Services Unit (PSU) of the RNC 'in house' at RNC Headquarters, where its threat assessment operations may be properly supervised by senior officers.

Commentary: The PSU in April 2015 was acting without proper supervision.

(3) Better promotion of *Charter* values

Step 3 in reducing risk: ensure police officers engaged in threat assessments are regularly reminded to scrupulously respect the requirement of s. 8 of the *Canadian Charter of Rights and Freedoms* to protect the sanctity of the home. Entry into private residences without a warrant should occur only with the voluntary and informed consent of the home owner.

Commentary: Informed consent requires that the officer properly identify him or herself, including rank and unit assignment. Cst. Smyth did not reveal he was with the PSU before entry.

(4) Better testing of police officer's version

Require investigating officers in police-involved serious incidents to follow policy and maintain an attitude of suspicion, continuing with a rigorous and robust investigation, until the subject police officer's version of events has been completely examined and tested.

Commentary: The RCMP were too quick to accept Cst. Smyth's version of events in this case.

(5) Better investigation by a SIRT

Avoid the appearance of preferential treatment for police officers by arranging for the investigation of police-involved serious incidents by a civilian-led oversight agency, such as the Nova Scotia Serious Incident Response Team (SIRT), either by participation in a regional organization or through memoranda of agreements with other provinces.

Commentary: The success of civilian-led oversight in this Province will depend upon adequate long-term funding. Also, provision must be made for proper annual training. Given the

relatively small population in the Province and the need for continuous training and on the job experience for investigators, a regional solution may be most effective.

My complete set of 34 recommendations are found in Appendix 44. They are also included in the body of the Report, where they are identified by their number from Appendix 44.

Defects in RCMP Investigation:

The RCMP investigation had some material deficiencies. For example, it created the appearance of preferential treatment by:

- (1) Permitting Cst. Smyth to meet with RNC colleagues at the RCMP detachment before providing his statement to the investigators;
- (2) Readily agreeing to delay Cst. Smyth's statement for approximately 24 hours;
- (3) Giving the appearance of friendly support in the interview process and 'going too easy' on Cst. Smyth;
- (4) Failing to rigourously challenge Cst. Smyth's version of events;
- (5) Failing to maintain for a sufficient period an appropriate degree of suspicion in analysing Cst. Smyth's version of events; and
- (6) Supplying Cst. Smyth with unnecessary information during and after his interview.

These deficiencies, however, did not bring into doubt the correctness of the RCMP decision not to lay charges based on the circumstances of this case.

Ancillary Questions:

The Inquiry had to examine and decide upon other questions for an appropriate clearing of the air and education of all concerned. Here are the answers to some of these secondary issues:

- (1) While one-person patrols are generally the norm in this Province, after observing the anti-government sign erected by Mr. Dunphy and hearing the description of his volatile personality provided by Richard (Dick) and Debbie Dunphy, Cst. Smyth's discretionary decision to proceed with a solo visit may have been an error of judgment. However, I have not been shown that his decision failed to meet reasonable policing standards. Cst. Smyth's discretionary decision cannot be judged with an inappropriate reliance on hindsight and it was within the reasonable options open to him.
- (2) Cst. Smyth was not in the Dunphy residence with lawful authority because he had not provided Donald Dunphy sufficient information regarding his rank and unit assignment so as to make Mr. Dunphy's consent to enter voluntary and informed.
- (3) Cst. Smyth exhibited an error of judgment when he failed to keep his eyes upon Mr. Dunphy, particularly upon his hands.
- (4) This was not a case of 'suicide by cop.' Mr. Dunphy had reasons to live, including a supportive relationship with his daughter and friends, a positive outlook on the future, and the anticipation of a higher income and home improvements.
- (5) The evidence does not support the conclusion that the rifle was moved after the shooting and before the scene was photographed.
- (6) Mr. Dunphy's broken eye glasses did not indicate a struggle, since photographs taken by the forensics unit established that significant damage was done to the glasses after the residence had been released by investigators. Moreover, the Chief Medical Examiner found no evidence of cuts, scratches or abrasions to support the suggestion of a struggle.
- (7) Shooting to wound is not practical when an officer is confronted with a firearm. The RNC, like other police forces in Canada, teaches officers in use of force training to fire two shots at the centre mass or torso and one more to the head, after proper assessment, and when that level of force is proportionate, necessary, and reasonable. This approach, particularly the timing of shots and period of assessment between shots, should be

- reviewed by the RNC to ensure it encourages proper restraint and is consistent with best practices in Canada.
- (8) Despite troublesome inconsistencies, discrepancies in his testimony, and inadequate disclosure, Cst. Smyth's version of events was supported by the forensic evidence, was refuted by nothing, and generally was presented in a spontaneous and consistent fashion in five oral statements, a written case summary, two re-enactments, a pre-hearing interview, and six days of examination in hearings, all of which leads me to the conclusion that his version of events is generally credible.
 - (9) The Independent Observer acted beyond his mandate in considering himself an 'independent investigator' and speculating, without a proper factual foundation, as to what had occurred.

Unanswered Questions:

Cst. Smyth's claim of a justified shooting in self-defence was established on a balance of probabilities and the RCMP, while committing certain errors in its investigation, properly decided no charges should be laid. One question which remains unanswered is what motivated Donald Dunphy to move from being a participant in a cordial conversation to an agitated state in which he pointed a rifle at the police officer and left no opportunity for de-escalation. Unfortunately, this question remains unanswered after considering all interviews, hearings, witnesses, and exhibits.

Meghan Dunphy has submitted that her father's death was "unnecessary and preventable".⁴ In trying to resolve this issue, I have considered Cst. Smyth's training, and his adherence to it, in depth. As discussed in Chapter 4, Cst. Smyth must not be tested against the standards applied elsewhere today regarding use of force and de-escalation. His conduct must be measured against the training he had received before April 5, 2015, and not by what we now know about the best practices. In Chapter 10, Finding 5, I find that Cst. Smyth did not follow his training in some respects, most seriously by failing to keep his eyes on Mr. Dunphy's hands, which would telegraph a threat. In Chapter 7, I find that the training Cst. Smyth received in crisis intervention and de-escalation (CID) was inadequate and Cst. Smyth cannot be criticized for not following training he did not receive.

⁴ Final Submission of Meghan Dunphy, April 7, 2017 at p 4.

Ultimately, whether stricter adherence to the training he received, or better training in CID techniques could have made a difference in this case is a matter of speculation. It is impossible to know how events would have unfolded if Cst. Smyth had kept a better eye on Mr. Dunphy's hands, positioned himself closer to the door, or engaged with Mr. Dunphy using the latest CID techniques. I cannot judge Cst. Smyth with speculation or inappropriate hindsight. However, it is appropriate to consider whether best practices in the use of force and de-escalation might have avoided the necessity for lethal force. While hindsight is unfair in assessing past conduct, it is essential in formulating recommendations.⁵ If Mr. Dunphy's death leads to the review and updating of the RNC approach to CID it will mean his death has not been merely a senseless occurrence. By ensuring that every reasonable step is taken by police officers to avoid lethal force through application of appropriate de-escalation techniques, this Province will have a better chance of avoiding future deaths by police.

⁵ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc, 2009) at p 362.

PHASE I

CHAPTER 1: THE TWEET AND THE SHOOTING

On Easter Sunday, April 5, 2015, Donald Dunphy was fatally shot by RNC officer Cst. Joseph Smyth. Cst. Smyth submitted the shooting was in self-defence and fully justified since Mr. Dunphy had pointed a .22 calibre rifle at him and he feared for his life.

Cst. Smyth was at Mr. Dunphy's residence because of a tweet noticed on Good Friday, April 3, by one of the then-Premier's Office staff, Donna Ivey.⁶

This tweet was the last in a thread of six. It responded to a tweet from a member of the House of Assembly (MHA) and Minister of Child, Youth and Family Services, Sandy Collins, which read:

Sandy Collins @Sandy Collins
Traveled with @PremierOfNL in his car today...guess what CD was playing?
@ShermanDowney The Sun in Your Eyes. #ListenLocal

Mr. Dunphy's entire thread of tweets read:

Donahue2DonDunphy
@SandyRCollins @PremierOfNL
@Sherman Downey is that why u can't c problems of seniors & injured workers, the sun is in your eyes, put
put on sun glasses & take out the ear plugs u might c & hear ppl crying for help, but why
but why would u care after putting in hard time getting that poor mans pension, I hope
I hope there is a God, I think I c him work on two garbage MHAs who laughed at poor ppl
he got them before they got to enjoy the pension they didn't deserve, I won't mention

⁶ A tweet is a short 140-character message enabled by the Twitter online social networking service.

won't mention names this time, 2 prick dead MHAs might have good family members I may hurt⁷

Ms. Ivey had instructions to pass on to a member of the Protective Security Unit (PSU) any social media communications or other information of a threatening nature received in the office, no matter how insignificant it might appear. The PSU, then consisting of Cst. Smyth and one RCMP officer, was mandated to provide close protection services for the Premier and other dignitaries and to gather intelligence on persons and groups that could potentially cause direct or indirect harm to the Premier, his staff or other elected officials.

Ms. Ivey forwarded the tweet to Cst. Smyth, who was on duty in the PSU that weekend. He made certain inquiries on Saturday, including a call to Thomas Mahoney of WorkplaceNL, after discovering that Mr. Dunphy was a frequent user of Twitter to criticize the way he believed government had for over 30 years been unfairly treating him on a workers' compensation claim. Mr. Mahoney, Director of Security at WorkplaceNL, assisted Cst. Smyth to establish an address for Mr. Dunphy at Mitchell's Brook, near Mount Carmel, and confirmed that he regarded Mr. Dunphy as a low risk for violence.

Cst. Smyth decided to visit Mr. Dunphy at his residence the next day, as a step in proactive policing, which Cst. Smyth says was routinely done in these circumstances, to attempt to "build a rapport" with Mr. Dunphy and establish the nature of the threat and risk, if any, posed by him.⁸

Some have questioned why a member of the RNC would visit a home in an area of RCMP jurisdiction (which is the case with Mitchell's Brook), and ss. 3(1)(d) of my Terms of Reference requires me to address it. The answer is straightforward. Subsection 8(2) of the *Royal Newfoundland Constabulary Act, 1992*⁹ provides that a police officer has authority to act throughout the Province. The RNC therefore has jurisdiction over the whole Province (as does the RCMP), which is divided into areas for funding and administrative purposes. Each force is primarily responsible for policing in its area. When RNC officers enter an RCMP policed area for investigative purposes, or vice versa, usually they notify the other force as a matter of courtesy. They are not required to do so by law.¹⁰

⁷ See Appendix 41: Exhibit P-0009 – Tweets.

⁸ Transcript of Evidence of Cst. Joseph Smyth, January 23, 2017 at pp 18-19.

⁹ *Royal Newfoundland Constabulary Act, 1992*, SNL 1992, c R-17.

¹⁰ Final Submission of the RNC, April 7, 2017 at p 2.

Cst. Smyth's request for a search of various databases while in transit to Mitchell's Brook, including PROS (Police Reporting and Occurrence System), ICAN (Integrated Constabulary Automated Network), ACIIS (Automated Criminal Intelligence Information System), CFRO (Canadian Firearms Registry Online) and CPIC (Canadian Police Information Centre), did not reveal any record of Mr. Dunphy having a registered weapon or being violent.¹¹ Results of the CPIC search, which included a caution for violence, were not passed on to Cst. Smyth; this is discussed further in Chapter 8.

Cst. Smyth was made aware, however, that Mr. Dunphy had been charged some years previously with uttering threats and placed under a peace bond in a property dispute with his sister-in-law and next door neighbour, Debbie Dunphy. This information would have raised a red flag regarding a potential for violence.

Mr. Dunphy had also been convicted of production and possession of marijuana in 2001 and given a seven-month conditional sentence. In 2015 he held a licence to produce and possess medical marijuana.

Cst. Smyth called an RCMP officer at the Holyrood detachment on his way to Mitchell's Brook. This officer offered to accompany him on the visit to Mr. Dunphy. Cst. Smyth had concluded that Mr. Dunphy was low on the risk assessment scale and declined the offer. Cst. Smyth testified that he believed he had a better chance to establish the sought-for rapport if he was at the Dunphy residence in plain clothes, without a uniformed officer.

When Cst. Smyth arrived at Mitchell's Brook, he knocked on Mr. Dunphy's door and window with no response. He could see the poor condition of the residence from the window. He tried to call Mr. Dunphy by cell phone but did not have service. Cst. Smyth then visited a residence neighbouring Mr. Dunphy, which he discovered was occupied by Dick and Debbie Dunphy, Mr. Dunphy's estranged brother and sister-in-law. They confirmed they did not know whether Mr. Dunphy had a firearm in his house and had not visited him in the previous 10 years. They told Cst. Smyth that Mr. Dunphy, although disgruntled and at times angry, was not violent. Debbie Dunphy did say that Mr. Dunphy made her uneasy and even afraid at times due to what she described as irrational behaviour.

Meanwhile, Mr. Dunphy had returned from an Easter brunch with his daughter and her partner. When Cst. Smyth saw a vehicle in Mr. Dunphy's driveway, he returned to the residence and again knocked on the door. Mr. Dunphy appeared and, according to

¹¹ See Appendix 42: Database Systems Utilized by the RNC.

Cst. Smyth, invited him to enter after Cst. Smyth had identified himself and shown his RNC identity badge.

Cst. Smyth said that he and Mr. Dunphy conversed for 10 or 15 minutes without any problem but that, suddenly, for no apparent reason, Mr. Dunphy began to rant and froth at the mouth and accused him, amongst other things, of being a “fucking puppet” and “an arm of government.”¹²

Several times Mr. Dunphy had invited Cst. Smyth to sit down in the living room. Cst. Smyth declined because of the dirty conditions in the residence, although he did not say this to Mr. Dunphy. Instead, he leaned against the mantle of a fireplace. Mr. Dunphy was seated in an armchair on the other side of the room, next to the door. At one point Cst. Smyth noticed a stick beside Mr. Dunphy’s chair and asked about it. Mr. Dunphy said it was to protect himself. Cst. Smyth said that was not a problem so long as it stayed where it was.

Cst. Smyth had been looking around at the deplorable state of the residence and expressing concern. He suspected that Mr. Dunphy’s change in demeanour might have been the result of his being insulted by this. Cst. Smyth says he looked down at the folder he held in his hand and took, or pretended to take, notes in hopes of de-escalating the encounter. Next, in the periphery of his vision, Cst. Smyth says he saw Mr. Dunphy raise a long firearm from the side of the armchair and point it at him. Cst. Smyth testified he instinctively raised his left hand in a stop motion, said “no, no, no”, reached for his Sig Sauer automatic pistol with his right hand, and ran out of the living room, while firing four shots at Mr. Dunphy. Three of the four shots hit him – one in the chest and two in the head. Any one of these was fatal. Cst. Smyth testified he fired four shots because he perceived that Mr. Dunphy was continuing to track him with the rifle right up to the time of the fourth shot to Mr. Dunphy’s head. Because Cst. Smyth had gone further into the room than Mr. Dunphy, the police officer had to run closer to Mr. Dunphy in order to escape from the room. The first shot fired would have been from less than ten feet while the last would have been from approximately three feet.

When RCMP officers arrived following a call from Cst. Smyth, they found Mr. Dunphy dead in his chair with the .22 calibre rifle leaning against a blue storage tub in front of him and pointed back in his direction. The officers left Cst. Smyth at the scene for approximately an hour and 15 minutes before taking him to the Holyrood detachment. During that period, Cst. Smyth was largely left free to move about the area in front of

¹² Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 98.

Mr. Dunphy's home. Once at the detachment, Cst. Smyth was given a private room to meet with RNC members. The RCMP investigators readily agreed to Cst. Smyth delaying giving a statement until the next day. They testified that studies have shown that greater accuracy of memory follows when time passes to allow an officer to recover from the trauma of a shooting. However, RCMP officers confirm that they normally would request a non-police officer to provide a statement immediately.

CHAPTER 2: DONALD DUNPHY, THE MAN

In her final submission, Meghan Dunphy gave a detailed account of her father's life.¹³ I have borrowed from it heavily in this chapter.

History and character

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

Mr. Dunphy married Louise Bennett. The couple had a baby boy, but the baby died when he was just a day old.¹⁴ Their daughter Meghan was born in 1988. Meghan's mother, a diabetic, suffered an aortic aneurysm and tragically died at their home in 1991, leaving Mr. Dunphy to raise three-year-old Meghan on his own with the help of extended family who lived nearby.¹⁵

Mr. Dunphy loved his daughter deeply, and she was acutely aware of this fact. His desire as a single father to give her a better life was described in detail by Ms. Dunphy in her testimony. The importance of this relationship to Mr. Dunphy is evident in his selection of his Twitter profile picture of him and a young Meghan in her First Communion dress.¹⁶ The photographs of a vacant child's bedroom, used for storage by 2015, with the seascape painted wall murals, stand out in bright contrast to the rest of the home.¹⁷

Mr. Dunphy had other loves as well. He loved animals passionately, particularly cats, and was well known for the care he gave both his own house pets and feral cats around his home. Mr. Dunphy loved hockey and was known to be a good hockey player in his day, before his injuries. Mr. Dunphy was also caring of his father and Ms. Dunphy gave testimony about how she and her father moved into her grandfather's residence to care for him in his last days.

¹³ Final Submission of Meghan Dunphy, April 7, 2017 at pp 5-12.

¹⁴ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at pp 9, 14.

¹⁵ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 11.

¹⁶ Exhibit P-0007 at p 2.

¹⁷ Exhibit P-0010, photo 086.

As an adult, Ms. Dunphy regularly accompanied her father to the doctor and on errands. She cut his hair, made him cold plates, and washed his clothes. He regularly stayed at her house and cared for her cat. They shared many similar characteristics. Mr. Dunphy would tease his daughter, tried to “press her buttons” and made her laugh. The two spoke several times each day. Mr. Dunphy taught his daughter some critical life lessons: to always stand up for herself, and to never allow anyone to intimidate her.

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

Other witnesses provided information about Donald Dunphy. Rita Farrell described him as a friend known to her for over ten years who was kind-hearted, helpful and trustworthy.¹⁸ She relied on him to act as a caretaker for her summer home during the winter months and, when she was in Mitchell’s Brook, she regularly visited with meals for Mr. Dunphy. She visited him in hospital in St. John’s when he was admitted. He, in turn, visited with her family in Flatrock. Colin Dinn described a close friendship with Mr. Dunphy whom he described as a proud man of good humour.¹⁹ Mr. Dunphy’s family doctor, Dr. McGarry, also testified to his character stating that in his encounters with Mr. Dunphy he was appropriate, well-mannered, and easy to deal with. Dr. McGarry commented that his wife who scheduled his appointments would get Mr. Dunphy in the very next day, a privilege not extended to many.²⁰

¹⁸ Transcript of Evidence of Rita Farrell, January 27, 2017 at pp 62-64.

¹⁹ Transcript of Evidence of Colin Dinn, January 11, 2017 at pp 106-107.

²⁰ Transcript of Evidence of Dr. Thomas McGarry, February 1, 2017 at p 30.

Twitter account

Mr. Dunphy used @Sculpen as his Twitter handle and Donahue2DonDunphy as his user name. At the time of his death (or soon thereafter), he had 1199 followers and followed 1139.²¹ Exhibit P-0008 contains 299 pages of his tweets and retweets from the last week of his life (some are repeated due to the format). Mr. Dunphy tweeted about a broad range of issues. He frequently tweeted with people across Canada about national and international politics and injured workers' rights. Mr. Dunphy's tweets were also (at times) local in focus. He doled out sharp-tongued criticism of provincial politicians. Mr. Dunphy tweeted critically about then-Deputy Premier Steve Kent.²² Also he tweeted about church and government cover-ups of sexual abuse. He blamed government for the deaths of seniors and injured workers due to poverty and hunger.²³ On March 29, 2015, he tweeted repeatedly about allegations of criminal activity and corruption in the provincial government, including an alleged cover-up of sexual harassment at Confederation Building.²⁴ Mr. Dunphy used the hashtags #nlpoli and #cdnpoli with his politically-related tweets to ensure that anyone who followed the hashtags would see them. Mr. Dunphy was a vocal advocate for the causes he believed in and, in addition to his Twitter activities, he was a regular caller to open line shows.

Past dealings with police

Mr. Dunphy used marijuana frequently to ease his chronic pain and had done so for many years. He had a criminal record from 2001 for marijuana cultivation and production.²⁵ He later received a medical marijuana licence which enabled him to grow marijuana plants at home legally. In 2004 he was charged with uttering threats against Debbie Dunphy, his sister-in-law and neighbour, but that charge was withdrawn and a peace bond ordered in 2005.²⁶ Ms. Dunphy described her father as a person who did not show disrespect for the police.²⁷ She recalled a time when her father was on house arrest for a marijuana offence and they saw the involved police officer at the supermarket. She testified that her father greeted the officer and exchanged pleasantries with him.²⁸ Ms. Dunphy stated that, although she could believe her father might be argumentative with a police officer, she did not believe that he would take any

²¹ Exhibit P-0008 at p 1.

²² Exhibit P-0008 at pp 209, 280.

²³ Exhibit P-0008 at p 292.

²⁴ Exhibit P-0008 at pp 195, 267.

²⁵ Exhibit P-0659.

²⁶ Exhibit P-0659.

²⁷ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 62.

²⁸ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 62.

action that would result in a risk to his life.²⁹ She also testified that, based upon her knowledge of her father and her prior observations of him interacting with police, she believed he would be cooperative, answer all questions and, if asked, produce the firearm which was in his home.³⁰

Mr. Dunphy's last known personal encounter with police prior to April 5, 2015, was on March 30, 2012, when Cpl. Lee Lush pulled over his vehicle and arrested him in relation to marijuana offences. Mr. Dunphy produced his medical marijuana licence and was released without charge. Cpl. Lush testified that Mr. Dunphy was co-operative and appropriate in his dealings with him.³¹

Life as an injured worker

Mr. Dunphy's life was so significantly impacted by his workplace injuries that, in many respects, he became defined by them. On his Twitter feed, Mr. Dunphy identified himself as a "crucified injured worker."³² Having struggled for many years as a single parent and having suffered a series of financial problems, including two bankruptcies, Mr. Dunphy blamed WorkplaceNL for not providing adequate support.

Mr. Dunphy's home was in severe disrepair. One of the front steps had been replaced with an old tire, the roof was leaking and had collapsed in a few areas, and flooring and windows needed to be replaced. The house was also very cluttered and messy with garbage on the floor and cat food and litter underfoot. Whether it was because of the attached 'cat room' that was home to several feral cats or because of the cats who wandered freely about the house, many witnesses testified to an overpowering odour of cat urine and faeces.

Mr. Dunphy's inability to keep his home clean and repaired was directly related to his injuries, the pain and discomfort of which regularly made household chores difficult or impossible, and his low income, the majority of which was provided by WorkplaceNL.

The history of Mr. Dunphy's treatment by WorkplaceNL is not part of my mandate. It was referred to the Office of the Citizens' Representative and on March 10, 2017, the Report of the Representative found that Mr. Dunphy had been treated fairly and had received all to which he was entitled. The Report further recognized that Mr. Dunphy

²⁹ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at pp 103, 134.

³⁰ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at pp 63-64.

³¹ Transcript of Evidence of Cpl. Lee Lush, January 27, 2017 at p 45.

³² Exhibit P-0008 at p 1.

might have benefitted from access to social work and psychological services. It noted that Mr. Dunphy “was adversely affected by a system that pays only a percentage of pre-injury earnings,” and can put injured workers close to or below the poverty line.³³

“A person in crisis”?

The Iacobucci Report defines “a person in crisis” as:

... a member of the public whose behaviour brings them into contact with police either because of an apparent need for urgent care within the mental health system, or because they are otherwise experiencing a mental or emotional crisis involving behaviour that is sufficiently erratic, threatening or dangerous that the police are called in order to protect the person or those around them. The term “person in crisis” includes those who are mentally ill as well as people who would be described by police as “emotionally disturbed.”³⁴

Based on information he had from Debbie Dunphy, and prior to meeting Mr. Dunphy, Cst. Smyth had concluded that Mr. Dunphy was “a troubled man” with “some degree of mental illness.”³⁵ On the latter point, Cst. Smyth was not correct as there is no evidence that Mr. Dunphy was suffering mental illness. He was, however, a man experiencing hard financial times and a housing crisis. He was frustrated by what he regarded as poor treatment by WorkplaceNL and, despite aggressive lobbying on his own behalf, he was unable to get the assistance he sought. Mr. Dunphy’s very poor living conditions, his urgent need for assistance with his home, and his high level of exasperation with WorkplaceNL, were sufficient to categorize him as a “person in crisis.”

Meghan Dunphy

I want to make specific mention of Meghan Dunphy and the role she played in this Inquiry. Meghan Dunphy is a daughter of whom any father would be proud. She has managed the tragic circumstances of her father’s death with dignity and determination. Her response is perhaps made more admirable by her youth, her being an only child, and her having already lost her mother when she was just a toddler. From the day of

³³ Office of the Citizen’s Representative, Newfoundland and Labrador, *Report on the History and Treatment of Donald Dunphy by WorkplaceNL*, Citizen’s Representative File #485CF16 (10 March 2017) at p 40.

³⁴ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis*, (Toronto: Toronto Police Services, 2014), Executive Summary at p 4.

³⁵ Exhibit P-0121 at p 76; Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 84.

her father's death, and onward throughout the Inquiry process, Ms. Dunphy has steadfastly pushed for answers.

No doubt Ms. Dunphy's strength of character is in large part attributable to her father. Part of this may be nature; Ms. Dunphy acknowledges that she and her father shared personality traits. But nurture no doubt played its role. Despite being a single parent with limited resources and reoccurring health problems, Mr. Dunphy raised his daughter with love and attention. As Ms. Dunphy testified, "[h]e was a really good father. I didn't want for anything, and whatever I needed, he was there."³⁶ Throughout her childhood and early adulthood, her father was there for her. Throughout this Inquiry, she was there for him.

³⁶ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 14.

CHAPTER 3: MANDATE AND APPROACH

Mandate of the Inquiry

The Inquiry, in accordance with my Terms of Reference, examined the circumstances surrounding Mr. Dunphy's death and the subsequent police investigation to determine:

- (1) Whether deficiencies in the policies, procedures, manuals, or practices of the RNC, particularly in the use of force and the monitoring and investigation of potential threats communicated by social media, contributed to Mr. Dunphy's death;
- (2) Whether Mr. Dunphy's mental or emotional state contributed to his death and, if so, whether Cst. Smyth responded appropriately to a vulnerable person in crisis, particularly in terms of actions to de-escalate the encounter;
- (3) Whether amendments are required to the policies, procedures or manuals of the RNC or the Office of the Premier relating to the security of the Premier and Cabinet Ministers, the monitoring and response to social media, or communications by the RNC with the public following serious incidents and during active investigations;
- (4) Whether Mr. Dunphy's use of social media had any role in the circumstances of his death; and
- (5) Whether there were any material deficiencies in the investigation into Mr. Dunphy's death.

The Inquiry considered specifically how lethal police encounters with members of the public might be avoided in the future, while allowing police to properly perform their role of preserving public order.

Significant features

Significant features of the incident reviewed included a claim of self-defence by Cst. Smyth; the absence of living eyewitnesses other than Cst. Smyth; and the involvement of social media in that the encounter was instigated by a tweet from

Mr. Dunphy, which was critical of government officials and which Cst. Smyth had decided should be investigated by a home visit.

For more than 20 years, Mr. Dunphy had been publicly complaining about what he saw as unfair treatment on a workers' compensation claim. He had disseminated more than 20,000 tweets over Twitter in the previous two or three years, many of them critical of government. He had erected a sign on his home warning "political people" they were not welcome.³⁷ His living conditions were very poor. His house was dirty and dilapidated. He shared it with more than 30 cats, although most were normally outside. He tended to throw his beverage containers and other garbage on the floor. Experienced police officers described an overpowering odour of cat faeces and urine in and around the home, to the extent that one officer had to use a respirator. Several officers testified the living conditions were amongst the worst they had ever seen.

Mr. Dunphy had never been diagnosed with a mental illness and his daughter, Meghan Dunphy, strongly objected to his being labelled as mentally ill. She pointed out he was in the process of renovating his house, with materials already purchased, and his medical problems resulting from the workplace injury prevented him from doing much housekeeping. Ms. Dunphy acknowledged that her father was in crisis with respect to his housing and finances and could be argumentative and confrontational. However, she stated he was never violent. This was largely corroborated by other witnesses. The only evidence of Mr. Dunphy previously acting aggressively came from Mr. Dunphy's brother and sister-in-law, who were estranged from him, and, to a limited extent, from another neighbour.³⁸ In assessing the credibility of Cst. Smyth on a preliminary basis, I concluded that the evidence presented required that I not ignore the possibility of Mr. Dunphy's quick temper having been a factor in events leading to his death. Also, the evidence led me to review police training in the de-escalation of encounters with people in crisis. Little turns on whether Mr. Dunphy should be classified as suffering from a specific mental illness or emotional disturbance.

Approach to the Inquiry

On September 13, 2016, the RCMP concluded their investigation of Mr. Dunphy's death with the decision that no charges would be laid. Following my appointment as Commissioner on September 23, 2016, I appointed two lawyers, Sandra Chaytor,

³⁷ The text on the sign was: "Warning this is a workers compensation poverty house since 1984. Enter at own risk Political people not welcome unless your [sic] going fix WHSCC".

³⁸ Rochelle Nolan testified to an encounter she had with Mr. Dunphy during which they were both very upset.

Q.C.³⁹ and Kate O'Brien, as Commission co-counsel and Diane Blackmore as Chief Administrative Officer.

The Commission issued Summonses to Produce for relevant documents. All parties cooperated and provided relevant documents in their possession, including the two police forces involved, the RCMP and the RNC. In total, over 100,000 pages of documents were disclosed. As soon as I was satisfied that there would be no negative impact on the RCMP's investigation of new evidence that came to light shortly after the Inquiry was called, I publicly released the most significant reports that had already been completed in relation to the investigation.

A public request for individuals to apply for standing at the Inquiry resulted in nine applications and, following a hearing, the following six were granted full standing:

- (1) Meghan Dunphy;
- (2) Cst. Joseph Smyth;
- (3) The Royal Newfoundland Constabulary;
- (4) The Royal Canadian Mounted Police;
- (5) The Royal Newfoundland Constabulary Association; and
- (6) former Premier Paul Davis.

A seventh, The Don Dunphy Community Coalition, was granted limited standing at Phases I and II.⁴⁰ An eighth applicant, the Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador, received limited standing, at Phase II only.⁴¹ The ninth application by Andrew Abbass did not result in standing but Mr. Abbass was considered as a possible witness.⁴² Mr. Abbass claimed he had an encounter with police in Corner Brook because of comments he had made on Twitter, which resulted in his detention in hospital under the ***Mental Health Care and Treatment Act***⁴³ for several days. A decision of our Court of Appeal on a *habeas corpus* application by Mr. Abbass came down during the Inquiry.⁴⁴

On November 8, 2016, following input from the parties with standing, I decided that the Inquiry would proceed in two phases. Phase I would be a fact-finding phase focused on

³⁹ Now Justice Chaytor since her appointment on May 12, 2017, to the Trial Division of the Supreme Court of Newfoundland and Labrador.

⁴⁰ See Appendix 10: Decision on Application for Standing of the Don Dunphy Community Coalition.

⁴¹ See Appendix 11: Decision on Application for Standing and Funding of Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador.

⁴² See Appendix 9: Decision on Application for Standing of Andrew Abbass.

⁴³ *Mental Health Care and Treatment Act*, SNL 2006, c M-9.1.

⁴⁴ *Abbas v Western Health Care Corp*, 2017 NLCA 24, 277 ACWS (3d) 602. For an explanation of *habeas corpus*, see Footnote 461 below.

the circumstances leading up to and surrounding the death of Donald Dunphy and Phase II would be a policy phase.⁴⁵

Commission counsel then identified and interviewed potential witnesses and recorded their proposed testimony. Following the interviews, Commission counsel selected the witnesses they intended to call to give evidence at the Phase I public hearings. Interview transcripts for these witnesses were produced and provided to counsel for parties with standing.

The Commission retained three expert witnesses to assist in determining the best practices in police investigative techniques and in use of force training, including interaction with individuals either emotionally disturbed, or vulnerable and in crisis. The parties had the opportunity to apply to have further witnesses called. Two such applications were successful, resulting in two further experts giving evidence; one in the field of clinical forensic psychology, with a special focus on threat assessment, a field also known as threat management, violence risk assessment, and violence risk management; and the other in threat assessment, risk assessment, personal risk assessment, and dignitary protection.

Phase I hearings commenced on January 9, 2017. With the exception of one in camera application, Phase I hearings were open to the public and simultaneously webcast. During 39 sitting days through March 10, 974 public exhibits and 43 confidential exhibits were entered into evidence, including the final investigative report of the RCMP which investigated the shooting; the report of the Alberta Serious Incident Response Team (ASIRT), which reviewed the RCMP investigation; the report of Retired Justice David Riche, the RCMP's independent observer; the report of the Saskatoon Police Service (SPS), which conducted an internal investigation at the request of the RNC, and various expert opinion reports. All public exhibits and transcripts of all testimony were uploaded to the Commission's website (www.ciddd.ca) for access by the public. A complete list of exhibits can be found at Appendix 29.

I heard from 56 witnesses including Donald Dunphy's family, friends and neighbours; Cst. Joseph Smyth, the subject officer who was at the time Acting Sergeant in charge of the Protective Services Unit (PSU); members of the RCMP, including the investigative team of the Major Crimes Unit (MCU); the Chief Medical Examiner, Dr. Simon Avis; members of the RNC including those who visited with Cst. Smyth on April 5; former Premier Paul Davis and members of his staff; various experts in areas such as police use of force, de-escalation techniques, risk and threat assessments, ballistics and 3D

⁴⁵ See Appendix 16: Decision on Phases.

modelling; as well as the Director of ASIRT and a former investigator with the Ontario Special Investigations Unit (SIU), who explained the two main police oversight models used in Canada. With one brief exception, Phase I hearings were open to the public and simultaneously webcast.

The following reports were of particular assistance:

- (1) Inquiry report of Judge Donald S. Luther, *Report of Inquiries into the Sudden Deaths of Norman Edward Reid and Darryl Branden Power* (St. John's: Queen's Printer, 2003) (the "Luther Report")
- (2) Inquiry report of Thomas Braidwood, Q.C., Commission of Inquiry on the Death of Robert Dziekanski, *Why? The Robert Dziekanski Tragedy* (Vancouver: 2010) (the "Braidwood Report")
- (3) Review report of Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis*, (Toronto: Toronto Police Services, 2014) (the "Iacobucci Report")
- (4) Investigation report of Paul Dubé, *A Matter of Life and Death* (Toronto: Ombudsman Ontario, 2016) (the "Dubé Report")
- (5) Review report of Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) (the "Tulloch Report")
- (6) Observer report of Fannie Lafontaine, *Independent Civilian Observer's Report, Evaluation of the integrity and impartiality of SPVM's investigations of allegations of criminal acts by SQ police officers against Indigenous women in Val-d'Or and elsewhere* (Quebec City: 2016) (the "Lafontaine Report")

Finally, on March 9, 2017, the second-last day of the Inquiry hearings, the Commission held Phase II of the Inquiry which took the form of a 'Town Hall Meeting' and was also webcast. In advance of Phase II, we posted a number of papers online on the policy topics we would be exploring, including one prepared by the Ad Hoc Coalition for Civil Liberties. Members of the public could submit questions for presenters, either online or in person, on the following topics:

- (1) Investigation of Officer-Involved Serious Incidents in Newfoundland and Labrador

- (2) Police Communications to the Public Following Serious Incidents and During Active Investigations
- (3) Use of Force Training for Police, including De-escalation Techniques for Dealing with People in Crisis
- (4) Protecting Freedom of Expression in an Age of Social Media

Presenters at Phase II included the RNC Chief of Police, the second-highest ranking officer of the RCMP in Newfoundland and Labrador, and experts on police investigations, communications, use of force, and social media.

CHAPTER 4: RELEVANT LEGAL PRINCIPLES

The role of a Public Inquiry

Two of the main purposes of the public inquiry in Canadian law are to uncover “the truth” and to help “restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.”⁴⁶

I also note the comments of Professor Ratushny on the basic function of a commission of inquiry:

A commission of inquiry has no authority to decide legal rights or obligations; the fact-finding function of a commissioner has an intrinsic value quite apart from that of serving as the foundation for determining rights or obligations. The public is entitled to know why its supply of drinking water became dangerous, causing illness and death in the community. It wants to know why a mine explosion occurred that killed workers in the community. It must know how and why our criminal justice system could convict and imprison someone for a heinous crime that he did not commit.⁴⁷

In the present case, the public is entitled to know what happened on April 5, 2015, which led to the death of Mr. Dunphy.

It is important to keep in mind the main distinction between a public inquiry and a criminal trial. The public inquiry is an inquisitorial process that is not bound by the normal rules of evidence. Its primary goals are to seek the truth and restore public confidence. A criminal trial is an adversarial process where a person accused of a criminal offence is protected by the presumption of innocence and the requirement that the Crown prove its case beyond a reasonable doubt. In a criminal trial the rules of evidence are applied and the trial judge plays a different role than a commissioner in an inquiry.

Other key differences between a criminal trial and a public inquiry are:

- (1) The Crown represents the state interest in a criminal trial whereas in a public inquiry the affected people and organizations, and community groups can be provided with counsel who cross-examine witnesses and present evidence;

⁴⁶ *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, at para 62.

⁴⁷ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc, 2009) at 162.

- (2) Crown counsel in a criminal trial performs more of an advocacy role than commission counsel in a public inquiry, who play an investigative role in the gathering and presenting evidence;
- (3) Unlike in a criminal trial, the person who is the subject of the inquiry is a compellable witness and he or she can be compelled to provide evidence, for example, phone records, banking records, and written notes, without the necessity of a warrant;
- (4) In a public inquiry there are few limitations on examination and cross-examination of the person who is the subject of the inquiry other than those the principle of fairness dictates; and
- (5) In a criminal trial an accused person is protected by the *Charter* whereas in a public inquiry the guiding principle is that of fairness, with guidance for the commissioner from principles of efficiency, openness, transparency, and thoroughness.⁴⁸

Findings of misconduct and systemic failings

The ***Public Inquiries Act***,⁴⁹ and my Terms of Reference establish the jurisdiction of the Commission. Section 4 of my Terms of Reference states:

The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.⁵⁰

In adhering to the direction of s. 4, lines may be blurred at times, as pointed out by Professor Ratushny:

It is important to emphasize that commissions of inquiry have no authority to make decisions, apart from fact finding. They simply investigate and report. Their reports usually include recommendations but these recommendations are not binding and governments may simply choose to ignore them. Commissions may not make findings of criminal responsibility or civil liability. Provided they do not go that far,

⁴⁸ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc, 2009) at 157-158, 267-269.

⁴⁹ *Public Inquiries Act*, SNL 2006, c P-38.1.

⁵⁰ See Appendix 2: Gazetted Order in Council 2016-205 Establishing the Commission and Terms of Reference.

they may reach conclusions about whether the conduct of an individual was improper. They may not impose any sanctions for such improper conduct.⁵¹

However, a finding of misconduct by a commission in itself may be a serious consequence for the individual affected. It could reflect badly on the individual's personal and professional reputation, with corresponding adverse consequences. The nature of the inquiry process discussed above means that the public is likely to accept commission findings and opinions as authentic. That is why commissions must conduct their inquiries according to law and observe the principle of fairness, even though they do not make legally binding decisions.⁵²

Counsel for Cst. Smyth properly makes the point that in cases such as the present a commissioner must keep in mind that underlying problems should be addressed, while identifying individual mistakes or wrongdoing. He notes the comments of Justice Archie Campbell, from the Bernardo Investigation Review:

It is often the case that systemic failures, as opposed to individual mistakes, are the real cause of public disasters and the most appropriate focus of public inquiries. The public identification of individual mistakes or wrongdoing, while important, does not necessarily address the underlying problem. And unless the underlying problem is addressed, the same mistakes or wrongdoing will likely occur again if the system that permitted them is not fixed.

It is a mistake for a Royal Commissioner or public inquiry to focus exclusively on the search for scapegoats when the failure is really an institutional failure in the sense of a lack of appropriate systems, a lack of reasonable resources, a flawed institutional culture, or a breakdown in the machinery of accountability. It is just too easy to say it's the fault of Constable X or Detective Sergeant Y and then to think that you have solved the problem or answered the real question remitted to you. If human error or unprofessional conduct is found, there is, of course, an obligation to say so. But these problems do not go away simply because individuals have been implicated. These problems only go away when people change their systems, their attitudes, and the way that they do business. The issues are best dealt with by encouraging people to go down a path where they can change the things that went wrong. In Bernardo, that path turned out to be a path of systemic change based on communication, co-operation, training, co-ordination, and more effective use of forensic science. That is what we tried to do in our recommendations.⁵³

⁵¹ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc, 2009) at p 27.

⁵² *Canada (Attorney General) v Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 34.

⁵³ Justice Archie Campbell, "The Bernardo Investigation Review" in Allan Manson & David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise*, (Toronto: Irwin Law Inc, 2003) 381 at 399-400.

I have also considered the points made by counsel for Cst. Smyth on the human tendency to want someone to be held accountable and the concepts of blaming and shaming discussed by Professor A. Wayne MacKay and Monica McQueen in the same text.⁵⁴

The appropriate standard of conduct

In determining the appropriateness of Cst. Smyth's behavior, I must evaluate it in the context of the standard operational in assessing the conduct of police officers at the time of the incident and not a standard developed by hindsight.

In the Mulroneys-Schreiber Inquiry, Justice Jeffrey Oliphant made a ruling on standards of conduct:

As a judge, I apply an objective standard on a regular basis to assist me in determining issues that come before me. I see no reason why I ought not to employ an objective standard in determining the appropriateness or otherwise of what Mr. Mulroneys did or did not do, relative to his business and financial dealings with Mr. Schreiber and his disclosing and reporting of these dealings and payments.

As Commissioner Iacobucci pointed out in his report, that objective standard must be one that was operative at the time the dealings and payments in question occurred, and not a standard developed by hindsight.⁵⁵

I agree with this statement and find it applicable to Cst. Smyth in the present case. Cst. Smyth must not be tested against the standards applied elsewhere today regarding the use of force and de-escalation. His conduct must be measured against the training he had received before April 5, 2015.

Applicable standard of proof

Professor Ratushny addresses the standard of proof to be applied by commissioners:

⁵⁴ A. Wayne Mackay & Monica G. McQueen, "Public Inquiries and the Legality of Blaming: Truth, Justice, and the Canadian Way" in Allan Manson & David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise*, (Toronto: Irwin Law Inc, 2003) 250 at 250-251.

⁵⁵ Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroneys, *Report*, (Ottawa: Public Works and Government Services Canada, 2010) at Appendix 9-1: Ruling on Standards of Conduct (25 February 2009) at paras 58-59.

[A] commissioner may take the initiative to go where the evidence leads and pursue new lines of investigation. There is no legal onus of proof on the parties to a commission of inquiry and no standard of proof by which evidence must be evaluated.

This gives the commissioner freedom to report her findings on the basis of whatever standard she considers most appropriate. Commissioner O'Connor reached various conclusions with a range of qualifications from "probability" to "remote possibilities". Reporting on "remote possibilities" still may help to shed light on what happened without determinative conclusions.

These observations do not apply when the findings reflect adversely on an individual. Such findings must be made in accordance with the principle of fairness. Where adverse findings potentially affect professional reputations, the standard of proof in a civil case should be applied. This is the standard of proof on a balance of probabilities. The evidence must be clear, convincing, and cogent and must be scrutinized with care, taking into account the seriousness of the potential findings.

This civil standard should be appropriate to withstand scrutiny under the principle of fairness on judicial review.⁵⁶

I agree that, prior to making any adverse findings of fact against individuals involved in this Inquiry, I must be satisfied to the same standard as in a civil case, which is on a balance of probabilities. This applies also in the assessment of credibility. See the often quoted remarks of Justice O'Halloran in *Faryna v Chorny*⁵⁷ at paragraph 10:

The credibility of an interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. **The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.**

[Emphasis added.]

Obviously, in performing this task of assessing credibility, a commissioner, like a trial judge, must apply common sense, common human experience and logic. It is useful here to consider the general approach to the assessment of evidence, which may be found in the instructions given jurors in civil and criminal trials. Jurors are told that, as

⁵⁶ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc, 2009) at p 383.

⁵⁷ *Faryna v Chorny*, [1951] BCJ No 152 (BCCA).

triers-of-fact, it is up to them to decide how much or how little of a witness's testimony they will believe or rely on, applying common sense. They may believe some, none, or all of the evidence given by a witness. There is no magic formula for deciding how much or how little to believe or accept or how much to rely on particular evidence in deciding the case.

In the list of questions suggested for assessing evidence, two in particular are significant for this Inquiry. Jurors are asked to consider first, whether a witness has deliberately lied under oath and, second, whether a witness's testimony has been internally inconsistent or inconsistent with evidence given by other witnesses. Jurors are told that when a witness lies under oath, this may well taint the entire testimony of a witness. Similarly, while minor inconsistencies may not diminish the credibility of a witness, a series of inconsistencies may become quite significant in influencing whether the trier-of-fact accepts the evidence. The totality of the inconsistencies must be considered in order to assess whether a witness's evidence is reliable. We must ask whether inconsistencies have been explained and whether the explanation makes sense.⁵⁸

In *FH v McDougall*,⁵⁹ at paragraph 40, Justice Rothstein referred to the balance of probabilities as follows:

... there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof...

Justice Rothstein continued at paragraph 49:

In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

I have applied this approach in writing my Report and, prior to accepting a version of events that might adversely affect an individual, I have asked whether there is clear, convincing, and cogent evidence establishing that it is more likely than not that the

⁵⁸ See David Watts, *Watt's Manual of Criminal Jury Instructions*, 2d ed (Scarborough, ON: Carswell, 2015); "Model Jury Instructions" online: National Judicial Institute <<https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en>>.

⁵⁹ *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41.

adverse version is the true one. In Chapter 10, Finding 16, I discuss matters relating specifically to the credibility of Cst. Smyth.

Assessment of circumstantial evidence

As in civil or criminal trials, the weight to be accorded circumstantial evidence depends on the strength of the inference that can be drawn from it. In *The Law of Evidence in Canada*, Sopinka, Lederman and Bryant state:

A fact in issue cannot always be provided by direct evidence. A witness cannot always be called to provide the facts from personal observation, nor can a document always be introduced which directly establishes the fact. The facts in issue must, in many cases, be established by proof of other facts. As many courts have noted, criminals are not likely to commit their crimes within the sight of witnesses and it would be a great blow to the administration of the criminal justice system if such evidence was not admitted. If sufficient other facts are proved, the court may “from the circumstances” infer that the fact in issue exists or does not exist. In such a case, proof is said to be circumstantial.⁶⁰

They further state:

Each piece of evidence need not alone lead to the conclusion sought to be proved. Pieces of evidence, each by itself insufficient, may, however, when combined, justify the inference that the fact exists.⁶¹

Inference versus speculation

It is accepted that, in drawing an inference, a trial judge must rely on facts established by the evidence. See the comments of Lord Wright at pages 169-70 in ***Caswell v Powell Duffryn Associated Collieries Ltd.***,⁶² which are often cited as authority for this long-standing principle:

The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought

⁶⁰ Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed (Toronto: LexisNexis, 2014) at pp 69-70.

⁶¹ Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed (Toronto: LexisNexis, 2014) at pp 72-73.

⁶² *Caswell v Powell Duffryn Associated Collieries Ltd*, [1940] AC 152 (UKHL).

to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

How facts are determined

It is important to keep in mind the process of determining facts as stated by Professor Ratushny:

A commissioner does not merely “find” facts. All of the facts must be assessed individually and collectively, including their interrelationship. The commissioner must analyse the primary facts and then draw conclusions about what happened, how it happened, and why it happened. These conclusions and the reasons for each of them, as articulated in the commissioner’s report, then become a part of the public record, available for all to see.⁶³

This is the approach I have sought to follow in this Inquiry.

⁶³ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc, 2009) at 163.

CHAPTER 5: THE DIFFERENT PERSPECTIVES OF THE OFFICER AND THE CITIZEN

Several recent reports in Canada have examined police use of force. The Iacobucci Report specifically examined police encounters with people in crisis. Like the present Inquiry, it was set up to examine a specific fatality from a police shooting, after 18-year-old Sammy Yatim, who was alone on a streetcar holding a small knife, had been shot and killed by a Toronto police officer. The Dubé Report, arising from the same incident, investigated the direction provided by the Ontario Ministry of Community Safety and Correctional Services to Ontario's police services for de-escalation of conflict situations. The Braidwood Report, arising from a death after police use of a Taser, also emphasized de-escalation. The Tulloch Report reviewed the operation of Ontario's three civilian police oversight bodies.

We can learn much in this Province from those four reports. We must remain aware, however, that this Inquiry into the death of Mr. Dunphy must differ somewhat in approach. In the Yatim case, there were eyewitnesses and, therefore, more agreement regarding the immediate circumstances and how the fatality occurred. In fact, there were YouTube videos of the event which sparked interest around the world. Also, in Mr. Yatim's case, there was agreement that, at the time of the shooting, he was a person in crisis, while the significance of Mr. Dunphy's emotional and mental state has been a matter of debate. In the incident reviewed by Justice Braidwood, there were also eyewitnesses and a video. The Tulloch review, while set up after the SIU cleared police of any wrongdoing in the shooting death of a forty-five-year-old man with mental health issues, was mandated to review the civilian police oversight bodies in Ontario and did not specifically examine the circumstances of the death. With these differences in mind, however, I believe I may obtain a degree of guidance from these recent reports.

The perspective of the police officer

First, on the matter of perspective, Justice Iacobucci properly noted the danger of after-the-fact reviews of police shootings being unrealistic:

Encounters in which police use lethal force against a person in crisis often take place in the space of seconds, in a rush of emotion, adrenaline and fear. Those who review such encounters after the fact, on the other hand, have the benefit of time, information, detachment and hindsight.⁶⁴

⁶⁴ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Services, 2014) at p 59.

Justice Iacobucci, therefore, sought to place himself in the shoes of the police officer and the person in crisis, “in the highly charged moment of a potentially violent encounter.” He noted:

... most front line police officers within the TPS (Toronto Police Service) have a genuine desire to fulfill their mandate of serving and protecting the community, and a genuine desire to avoid causing harm. They have a strong sense of duty. Certainly no officer begins his or her daily shift wanting to cause serious injury or death, or wanting to be involved in a dangerous encounter. If they can avoid causing harm, police officers would like to do so.⁶⁵

I believe the members of the RNC also generally have a genuine desire to avoid causing harm.

The Iacobucci Report also described the dangers of police work in terms applicable to the RNC in this Province:

Front line police officers have one of the most challenging jobs that society has to offer. They are demanded to perform difficult and unpleasant tasks that most citizens are unwilling or unable to carry out themselves. These tasks often involve risking their lives in order to control and apprehend people who are violent or otherwise dangerous—including not only violent criminals, but also people in various forms of crisis who are not criminals but who may, knowingly or not, be a threat to themselves or others. The job of the front line officer is one of considerable risk. Officers regularly have to balance their duty to confront danger (with often very limited information about the nature of the danger) against the personal risks to themselves—a very challenging task that few others in society are required to undertake in the same way or to the same extent.⁶⁶

The Iacobucci Report stressed that the incidence of lethal encounters between police and people in crisis could be reduced by ensuring police are provided with the best available information about people in crisis and their likely reactions to police behaviours. Police may learn how best to control people in crisis without the need for force through training that teaches officers to assess the relative risk posed by a person in crisis and to peacefully resolve potentially violent encounters.

⁶⁵ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Services, 2014) at p 60.

⁶⁶ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Services, 2014) at p 60 para 13.

Other significant aspects of the perspective of front line officers noted in the Iacobucci Report are:

- (1) How police organizations place a high value on personal toughness and self-reliance while regularly exposing officers to “scenes of despair, pain, tragedy, and horror”, which may affect the mental health of officers or at the very least lead to some degree of emotional detachment;
- (2) How the paramilitary command structure of police forces, with its focus on legal compliance, leads to police officers becoming “accustomed to dealing with certain types of dangerous situations through a system of command, physical confrontation (if necessary), enforced compliance and negative sanctions for non-compliance”, which can be counterproductive with persons in crisis;
- (3) How regular exposures to threats and potential threats can lead police officers to experience an understandable fear for their own safety; and
- (4) How society sends contradictory messages about police encounters with people in crisis and may vilify police officers who have been involved in the death of a person in crisis, even if it was an error-free exercise of self-defence.⁶⁷

The perspective of the person in crisis

Turning to the perspective of a person in crisis, the Iacobucci Report notes that this person needs help. At the same time, the Report describes how problems arise. First, an imminent and dangerous situation may require either containment of the person or immediate use of force to subdue. The focus here must be on learning how to prevent the crisis of encounter from occurring in the first place (say, by better mental health systems) or on methods and means of containing or subduing without lethal force (tactics and equipment are relevant here). Second, problems may arise when there is not the same level of imminent and serious danger, but the police do not de-escalate successfully. Here, in the failed encounter, the person in crisis needs empathy, patience, guidance, and help. The person is often afraid and the crisis may diminish if they receive reassurance by a slower, more empathetic, approach. The Luther Inquiry, which reviewed two deaths caused by police shootings in this Province, showed how

⁶⁷ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Services, 2014) at p 61-61.

police may be placed in a difficult situation, when disengagement from an individual with a knife, for example, may lead to danger to the public.

In conducting my review, I have endeavored to consider the perspectives of both Cst. Smyth and Mr. Dunphy. In assessing the events of April 5, 2015, it is necessary to consider how Mr. Dunphy may have felt and reacted to a police officer encroaching on the sanctity of his home on Easter Sunday to raise concerns over his use of Twitter and his living conditions. It is also necessary to consider Cst. Smyth's position, including his lack of training in de-escalation and encounters with people in crisis and his urgent need to respond swiftly to protect his own life when Mr. Dunphy raised the rifle.

CHAPTER 6: SECTION 25 OF THE *CRIMINAL CODE*: JUSTIFICATION FOR THE USE OF FORCE

Deaths and serious injuries caused by police officers are in a unique legal category by virtue of s. 25 of the ***Criminal Code***.⁶⁸ It authorizes police officers, who are trained and authorized to carry weapons, to use proportionate, necessary and reasonable force in the line of duty. Subsections 25(1) and 25(3) provide:

25 (1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[...]

- (3) Subject to subsections (4) and (5), a person is not justified for the purposes 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 does not grant unlimited authority for police to harm people in the course of their duties. The Supreme Court of Canada in ***R v Nasogaluak***,⁶⁹ at paragraph 32, noted:

While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness.

Courts protect against the illegitimate use of force but police actions are not measured by a standard of perfection. Judges recognize that police officers engage in dangerous

⁶⁸ *Criminal Code*, RSC 1985, c C-46.

⁶⁹ *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206.

and demanding work and often must react quickly to emergencies. Police conduct is assessed in light of these circumstances.

CHAPTER 7: RNC TRAINING IN THE USE OF FORCE

Relevant history of the RNC

The RNC has a long and honourable history as the provincial police service of Newfoundland and Labrador. It can trace its roots back to 1729, with the appointment of the first police constables. In 1844, Timothy Mitchell was seconded from the Royal Irish Constabulary and appointed Inspector General of the force, supporting the RNC's claim to be the oldest civil police force in North America.⁷⁰

The RNC's history has not been without its darker moments. On October 16, 2000, Daryll Power was fatally shot by an RNC officer in Corner Brook. Mr. Power's death was investigated and was one of the two police-caused deaths examined by a public inquiry led by Commissioner Judge Donald S. Luther starting in 2001. The RNC officer was not found to be at fault, as Mr. Power's death was determined to be by 'victim precipitated homicide', commonly known as 'suicide by cop'. The Luther Inquiry did excellent work and the Luther Report, released in 2003, contains very important recommendations, particularly with respect to the treatment, care and policing of people with mental illness.

To its credit, the RNC implemented all recommendations of the Luther Report pertaining to it and as a result, significantly increased its officer training on issues of mental health. Cadets now receive six and a half days of training directly related to mental health issues. There is little in terms of ongoing or refresher training for members, however, and, as will be discussed further in this chapter, little on de-escalation techniques.⁷¹

Towards a focus on de-escalation

The RNC's use of force training must be evaluated in the context of the current movement towards greater emphasis on crisis intervention and de-escalation (CID) in use of force training. The Commission retained two experts to provide opinion evidence in this area, Sgt. Michael Massine and Dr. Terry Coleman.

Sgt. Massine is the Police Academy Use of Force Coordinator at the Justice Institute of British Columbia. In that position, he is responsible for curriculum development and delivery of the Standardized Use of Force Instructor Course, Fundamentals of Police Instruction. He also acts as liaison for the Justice Institute with the Government of British Columbia in relation to the creation of use of force standards under that

⁷⁰ www.rnc.gov.nl.ca.

⁷¹ Final Submission of the RNC, April 7, 2017 at Tabs 4, 6.

province's *Police Act*. He is the chair of the British Columbia Use of Force Community of Practice, a panel of 12 use of force coordinators from the province's municipal police agencies with a mandate to research best practices in officer safety training and develop provincial training standards. Sgt. Massine presented to the Braidwood Commission, including providing an explanation of the National Use of Force Model (NUFM) and its associated framework, and since 2010 has worked with the BC Ministry of Public Safety and Solicitor General to develop provincial standard training courses, including in CID techniques, which were mandated following the recommendations of the Braidwood Report.

Sgt. Massine has also had extensive hands-on experience in the use of force throughout his career. He has been shot at, had firearms pointed at him, and been threatened with other weapons. He has been in situations that have required the use of all force options on the NUFM up to and including in one incident, use of force (non-shooting) that factored into the death of a subject. Sgt. Massine gave expert evidence on the use of force, including crisis intervention and de-escalation training as well as curriculum development, design and delivery as it relates to officer safety.⁷²

Dr. Coleman has a Ph.D. in Police Studies and considerable practical experience in policing. He was a member of the Calgary Police Service for 27 years, during which time he established the Crisis Negotiation Team to help resolve situations without the need for the use of force. He was also the Crisis Negotiation Commander at a scene where a person, who was upset with the handling of his workers' compensation claim, fired a shotgun at officers and held staff for several hours. From 1997-2007, he served as Chief of Police of Moose Jaw Police Service, during which time he:

- (1) Re-wrote policies and procedures regarding officer safety;
- (2) Provided training and education for police officers in Crisis Negotiation to maximize not only their safety but public safety; and
- (3) Reviewed use of force incidents and addressed any shortcomings in the handling of these incidents.

Dr. Coleman has written, published and presented extensively on police interactions with persons with mental illness, including de-escalation strategies to be employed by police. Dr. Coleman noted that these strategies are relevant to all encounters and not just those involving persons with mental illness. Dr. Coleman provided assistance to

⁷² See Appendix 34: Ruling 4.

Justice Iacobucci in the review he conducted for the Toronto Police Service which resulted in the Iacobucci Report.⁷³ I accepted Dr. Coleman to be qualified to give opinion evidence regarding appropriate de-escalation strategies and measures to be employed by police to ensure officer safety in situations such as that encountered by Cst. Smyth in his interaction with Mr. Dunphy.⁷⁴

Both Sgt. Massine and Dr. Coleman shared the opinion that the RNC's current use of force training program is lacking with respect to the component relating to de-escalation strategies. Not to be too critical of the RNC, the emphasis on de-escalation appears to be a relatively new approach for police agencies across the country. As previously noted, there have been several reports and studies in recent years in Canada which have examined the issue of the sufficiency of de-escalation training and education of police officers, including the Braidwood Report, the Iacobucci Report and the Dubé Report.

The Braidwood Commission of Inquiry arose from the interaction of police with a passenger at the Vancouver airport in 2007 that resulted in the death of the passenger after the use by the officers of conducted energy weapons (Tasers). Recommendations from that inquiry, which were published in the Braidwood Report, included implementation of crisis intervention training for police officers. Commissioner Braidwood also recommended that when officers deal with emotionally disturbed people they be required to use de-escalation and crisis intervention techniques before deploying conducted energy weapons, unless they are satisfied, on reasonable grounds, that such techniques will not be effective in eliminating the risk of bodily harm.⁷⁵

As a result of the Braidwood Report, British Columbia implemented a mandatory Crisis Intervention and De-Escalation (CID) education program and training model for all operational police officers in that province. It is also compulsory that officers complete a CID refresher training course every three years.

The Iacobucci Report resulted from Justice Iacobucci's independent review of the use of lethal force by the Toronto Police Service (TPS) with a particular focus on police

⁷³ Terry Coleman & Dorothy Cotton, *TEMPO: Police Interactions – A report towards improving interactions between police and people living with mental health problems* (2014), online: Mental Health Commission of Canada <<http://www.mentalhealthcommission.ca/English/document/36596/tempo-police-interactions-report-towards-improving-interactions-between-police-and-pe>>.

⁷⁴ See Appendix 34: Ruling 4.

⁷⁵ Commission of Inquiry on the Death of Robert Dziekanski, *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia* (Victoria: 2009) at p 17.

encounters with “persons in crisis.”⁷⁶ The Report’s recommendations emphasized the importance of a shift in culture so that officers are well trained to consider de-escalation strategies before more traditional use of force techniques. For example, Justice Iacobucci recommended that the TPS place more emphasis in its recruit training curricula on such areas as:

- Communication and De-escalation: highlighting communication and de-escalation as the most important and commonly used skills of the police officer, and stressing the need to adjust communication styles when a person does not understand or cannot comply with instructions;
- Subject Safety: recognizing the value of the life of a person in crisis and the importance of protecting the subject’s safety as well as that of the officer and other members of the public;
- Use of Force: stressing that the National Use of Force Model (NUFM) is a code of conduct that carries:
 - (i) a goal of not using lethal force; and
 - (ii) a philosophy of using as little non-lethal force as possible;

and that the NUFM is not meant to be used as a justification for the use of any force;

- Firearm Avoidance: implementing dynamic scenario training in which a recruit does not draw a firearm, as a means of emphasizing the non-lethal means of stabilizing a situation and reducing the potential for over-reliance on lethal force;
- Fear: including discussions of officers’ fear responses during debriefings of practical scenarios that required de-escalation and communication techniques to defuse a crisis situation;
- Experience and Feedback: incorporating mental health and crisis situations into a larger number of practical scenarios to provide recruits

⁷⁶ “persons in crisis” was defined in the Iacobucci Report as those whose behaviour brings them in contact with the police either because of an apparent need for urgent care within the mental health system, or because they are otherwise experiencing a mental or emotional crisis involving behaviour that is sufficiently erratic, threatening or dangerous that the police are called in order to protect the person or those around them.

with more exposure to, and feedback on, techniques for resolving such situations; and

- Culture: laying the foundation for the culture the TPS expects its officers to promote and embody, and preparing recruits to resist the aspects of the existing culture that do not further TPS goals and values with respect to interactions with people in crisis.⁷⁷

The Iacobucci Report recognized the importance of keeping training current through annual re-qualification in the areas of crisis communication and negotiation and de-escalation. It also recommended consideration of whether officers would benefit from additional tools to assist them in responding to crisis calls, such as a quick-reference checklist for dealing with people in crisis to provide officers with a reminder of issues to consider in such situations.⁷⁸

The Dubé Report was written by the Ontario Ombudsman in 2016 concerning his systemic investigation into the direction provided to police by the Ontario Ministry of Community Safety and Correctional Services for de-escalating conflict situations. Mr. Dubé recommended the development and implementation of regulations on de-escalation. These would require officers to use communication and de-escalation techniques in all situations before considering force options, whenever feasible from both a tactical and a safety perspective. He also recommended that a new use of force model be instituted that clearly identifies de-escalation options, rather than solely use of force options, and that annual use of force requalification training be expanded to include the same amount of time devoted to de-escalation techniques as is spent on use of force strategies.

Several Canadian police agencies and academies, including the Justice Institute of BC, the Atlantic Police Academy, the Toronto Police Service College and the RCMP's Pacific Training Centre in Chilliwack, BC have modified their curricula to include dedicated education and training for the development and application of de-escalation skills.⁷⁹

On the matter of training police officers to properly show restraint in the use of force, in addition to Sgt. Massine and Dr. Coleman, the Inquiry heard from Cpl. Wayne

⁷⁷ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Services, 2014) at p 153-154.

⁷⁸ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Services, 2014) at p 18.

⁷⁹ Exhibit P-0773 at p 50.

Knapman, an RCMP subject matter expert in the use of force. The expert witnesses were in basic agreement on the importance of de-escalation training and explained how training in de-escalation techniques plays a significant role in ensuring that encounters with persons in crisis are resolved without the need to resort to lethal force.

A review of National Use of Force Model (NUFM) and Crisis Intervention and De-Escalation (CID) Model

The RNC's use of force training employs the framework of the NUFM to guide officers in the use of force while carrying out their duties. NUFM was developed with the input of academics and leading police trainers in Canada, including one of the RNC's current deputy chiefs, and was adopted by the RNC in 2001.⁸⁰ Figure 1 below shows the NUFM and is widely used in the instruction of use of force for officers throughout the country:

⁸⁰ Final Submission of the RNC, April 7, 2017 at Tab 5, p 3.

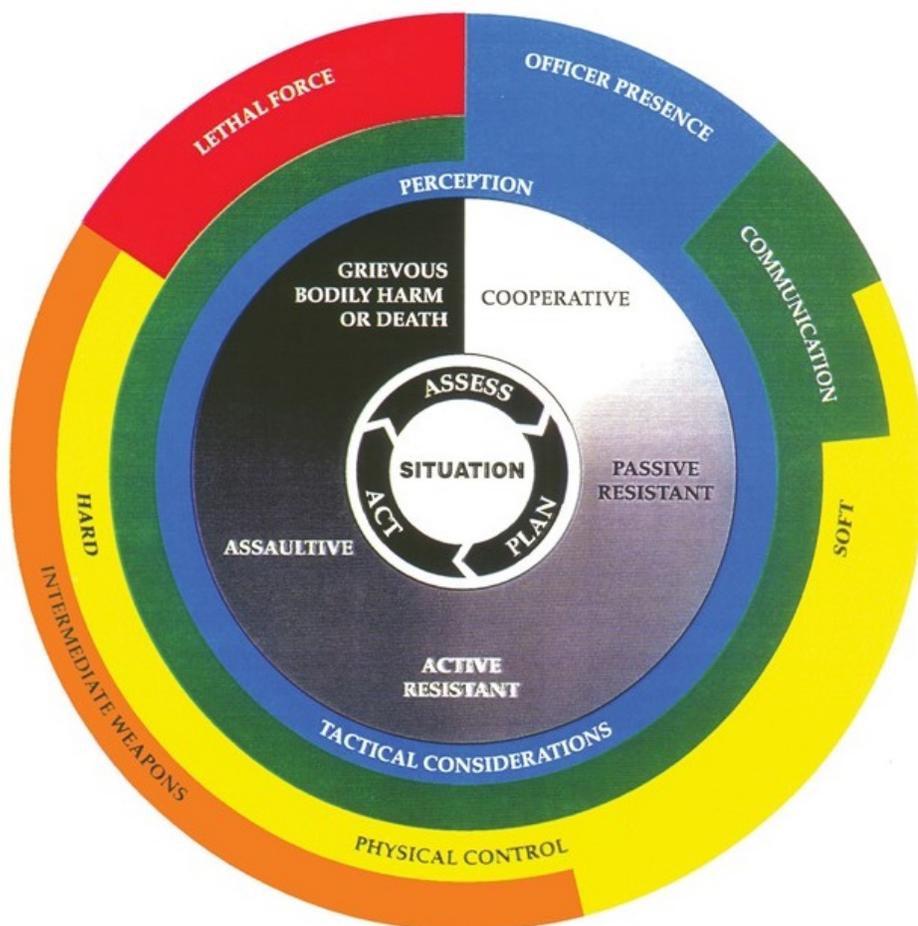


Figure 1: National use of Force Model (NUFM)

Sgt. Massine provided a useful review of NUFM as representing:

...the process by which an officer assesses plans and responds to situations that threaten public and officer safety. The assessment process begins in the centre of the model with the Situation confronting the officer. From there, the assessment process moves outward and addresses the Subject Behaviour and the officer's Perceptions and Tactical Considerations. Based on the officer's assessment of the conditions represented by these inner circles, the officer selects from the use of force Response Options contained within the model's outer circle. After the officer chooses a response option s/he must continue to Assess, Plan and Act to determine if his or her actions are appropriate and/or effective or if a new strategy should be selected. The whole process should be seen as dynamic and constantly evolving until the Situation is brought under control.⁸¹

⁸¹ Exhibit P-0773 at p 30.

As mentioned above, following recommendations from the Braidwood Report, British Columbia developed a mandatory police training course for all front-line police officers on CID and mandatory refresher training every three years. Figure 2 is a depiction of the BC CID Model:

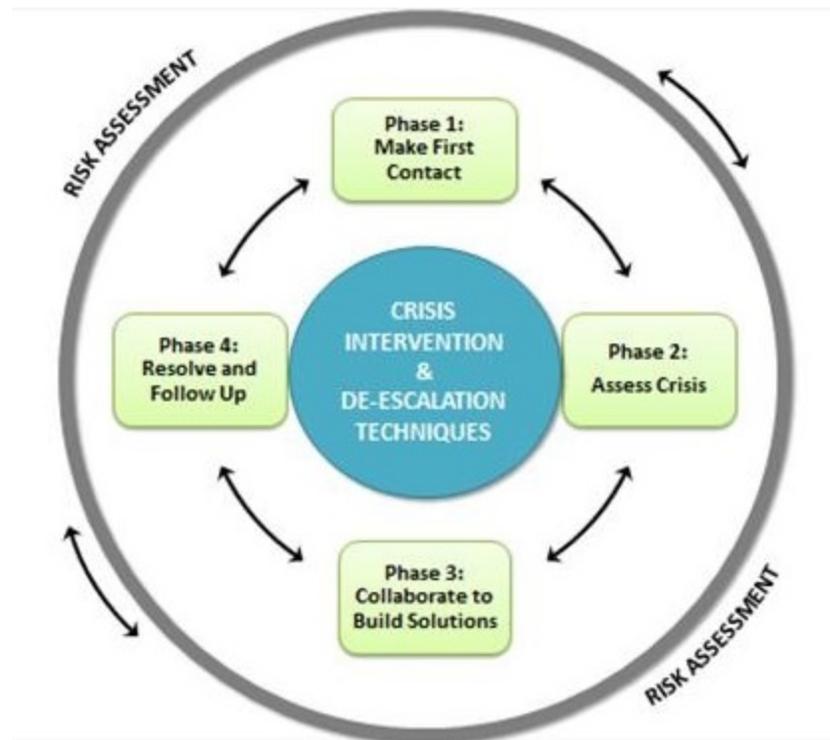


Figure 2: BC Crisis Intervention De-Escalation (CID) Model

Sgt. Massine provided the following overview of the BC CID training:

- The course is designed to ensure that all officers have an understanding of the types of communication skills that are most likely to assist in de-escalating a crisis, including situations involving mental health crisis. Police and non-police mental health experts were used in the course development process;
- The centrepiece of the training is a four-step de-escalation model that includes a set of well-established verbal and non-verbal techniques that are designed by experts to de-escalate crises;
- The training course was designed to promote respectful, compassionate and non-violent interactions between police and persons in crisis; and

- The overarching goal of the CID program is to ensure that CID techniques become a central aspect of police use of force training.⁸²

In 2014 the NUFM and the BC CID models were combined, as shown in Figure 3, to establish the basis for all police use of force training in British Columbia.

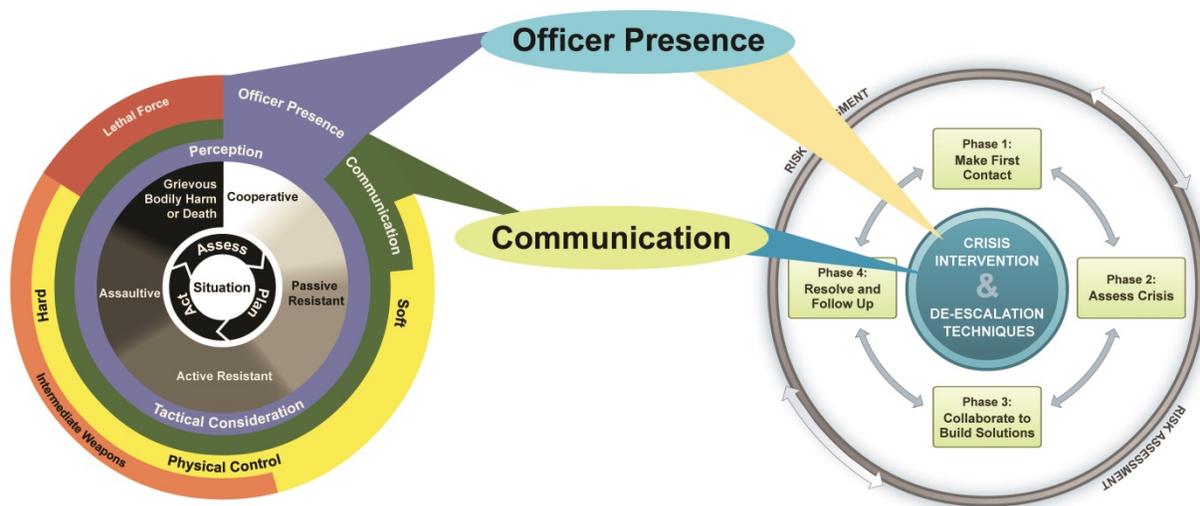


Figure 3: Combined NUFM and BC CID Models

A member of the public who followed this Inquiry on a regular basis provided input during Phase II on his impression of the combined model, which I find to be an interesting and useful metaphor to explain how the two models work together. He suggested that it be thought of as a bicycle. He wrote:

The NUFM becomes the wheel that delivers power. The CID wheel does the steering. The officer moves the process forward by engaging communications or pedalling.

Creating a use of force framework depicted as a bicycle would make the methodology easier to explain to the public and present the material in a less threatening manner than something that looks similar to a bullseye or target.⁸³

Sgt. Massine was struck by this analysis. During the Phase II public session, he commented:

⁸² Exhibit P-0773 at p 31.

⁸³ Email of Andrew Abbass, March 9, 2017.

[During] my 30 years of policing, I've taught the National Use of Force Framework and Model the entire time. I've never once thought of it as a bull's eye or a target; I now do. And I hope the [combined model] graphic, and incidentally that came out of the work in British Columbia, can change that.⁸⁴

It is time that our Province likewise moves away from a model that emphasizes use of force to an approach that includes and embraces crisis intervention and de-escalation training.

RNC use of force training: current state

The RNC has a voluminous Use of Force Training Manual comprised of approximately 370 pages and used for training officers. I note, however, that only a short section of the Use of Force Manual is devoted to “de-escalation” and that is as one of “seven tactical principles” identified:

What can the officer do to lessen the danger? The officer's primary concern in any confrontation is the safety of the public and him or her-self. The danger level of a situation can “escalate” beyond your control. At this point, the officer should ask themselves the question “Am I in danger, am I in control? What can I do to lessen the danger to myself and those around me”? The officer can use various strategies to achieve this, whether it is through verbalization, tactical repositioning, and a call for back up or the use of specialty units. The continuous assessment of the threat level throughout the situation will determine which strategy will effectively de-escalate the danger to the officer and those around him or her.⁸⁵

Sgt. Massine was of the opinion that this section is insufficient. In his report, he writes:

[L]ess than one page is briefly devoted to verbal communication and de-escalation as a means of reducing or eliminating the necessity for any level of force. This is not in sufficient detail to adequately message the criticality of communication that includes active listening, as well as talking when necessary, to defuse a situation.⁸⁶

Reference to de-escalation as a tactical option is also mentioned, albeit briefly, in the RNC's procedure and policy regarding use of force. General Order #312 dated December 20, 2012, was in effect at the time of this incident and s. 1.6 reads:

⁸⁴ Transcript of Evidence of Sgt. Michael Massine, March 9, 2017 at p 33.

⁸⁵ Exhibit P-0624 at p 18.

⁸⁶ Exhibit P-0773 at p 45.

Force options may be used simultaneously, for instance, combining verbal commands with use of chemical irritant. The officer must exercise proper use of force decision making, which means the use of reasonable force, including proper tactics, and de-escalation techniques.⁸⁷

The RNC's current use of force training is comprised of four modules:

Module 1: Firearms Training;

Module 2: Review of Control Tactics (eg. handcuffing, baton, pepper spray);

Module 3: A refresher course in Rapid Entry Active Criminal Threat (REACT); and

Module 4: PowerPoint material provided to members on various use of force topics.

Each year RNC officers must complete retraining in Module 1 and one of the other three modules. Modules 2, 3 and 4 rotate on an annual basis such that each of these modules are completed every third year. Module 4 is self-taught: officers receive an email with the material and are expected to reply indicating that they reviewed it. There is no other oversight or evaluation to confirm that the material was understood nor are officers provided with any instruction in conjunction with the material.

To complete Module 1 (Firearms Training) operational officers attend at the shooting range and complete three mandated courses of fire. Sgt. William James is an instructor in use of force for the RNC and in charge of its Use of Force Unit. He oversees annual requalification for firearms training and, in fact, oversaw Cst. Smyth's 2014 requalification as well as his re-qualification on April 9, 2015, following Mr. Dunphy's death.⁸⁸ Sgt. James described the first course of fire as an "instinctive" course. More detail is set out below. The second course of fire is comprised of a series of shooting exercises with timed events. For example, officers are expected to shoot at a target with their dominant hand and then their other hand, and to shoot from different positions and at varying distances. The third course of fire is a shotgun course.

⁸⁷ Exhibit P-0033; The procedure and policy has been revised since this incident, see Exhibit P-0034, for the policy dated August 30, 2016.

⁸⁸ Cst. Smyth was not required to do a recertification on April 9, 2015, but chose to do so because he was issued a new firearm. Sgt. James was satisfied that Cst. Smyth was in an appropriate state of mind and well-being to do the recertification that day.

The first course of fire is the most germane to the circumstances giving rise to this Inquiry. During his testimony, Sgt. James described what officers are trained to do in this course of fire. He stated that RNC officers are taught to shoot two rounds at the target's centre mass; if time permits, to reassess the situation, and if the threat is still perceived, to shoot at the target's head.⁸⁹ Officers are taught to shoot until the threat is eliminated. Sgt. James said the purpose of the shot to the head is a "failsafe" shot.⁹⁰ Officers are taught to shoot to kill, not to injure.

Officers pass the annual requalification for Module 1 if they hit the target the required number of times. There are no other assessment criteria. For example, officers are not penalized for failing to reassess after the second shot. How long an officer is expected to reassess after shooting is left to the individual officer's discretion based upon his or her perception at the time.

Sgt. Massine was critical of how Module 1 is presented. He described it as being more about qualification and less about training. While Sgt. James, or another instructor, is present to oversee the officer's requalification, there is no classroom component or educational piece to this aspect of the training. In essence, as described, Module 1 appears to be simply firing drills or target practice.

In the training materials for Module 3 (REACT), Sgt. Massine took issue with some of the language used. For example, terms such as "bad guy" and "perp" are used to identify the subject of the interaction. This type of language stigmatizes the citizen and, potentially, dehumanizes him or her. When officers must apply their training in the field, they should not bring with them preconceptions of the citizen as being "bad" or a "perp" as this may create an implicit bias and lead them to be less empathetic and less able to successfully communicate with the person and de-escalate the situation. Sgt. Massine recommended the use of more neutral terms such as "subject" or "subject of complaint" instead.

Sgt. Massine also had concern with the use of the term "double tap" in the training materials. Sgt. Massine explained "double tap" to mean two rounds in rapid succession to the centre of mass of the subject. The shots are so fast in succession that they sound like one round. He indicated that this practice was discontinued by other police agencies some years ago because concerns were raised that firing two rounds in rapid succession does not allow any period for assessment between the rounds. He stated that the term "dedicated pairs" or "controlled pairs" replaced "double tap". The philosophy behind those more recent terms is to encourage restraint; the officer is

⁸⁹ Transcript of Evidence of Sgt. William James, February 22, 2017 at pp 32-34.

⁹⁰ Transcript of Evidence of Sgt. William James, February 22, 2017 at p 38.

trained to slow down the two shots to allow for a brief period of assessment between the first and second round, if practical. The effectiveness of the first shot is assessed to determine whether it is necessary to fire a second time. Sgt. James did not address this change in terminology or its intended shift in philosophy.⁹¹ This issue is more than semantics. The following is an excerpt from Sgt. Massine's evidence on this point:

It's especially important today in the level of scrutiny applied to police response and then when you take it back, we would call it like a psychological autopsy where you take it back to the training that the members received. That if you're firing more than one round, it is incumbent upon a police officer or whatever – take the firearm out of the equation, multiple uses of force, there has to be an assessment.

So you're looking for subject behaviour, when you determine in the moment what the subject behaviour is, what an appropriate response is in that very split second and then you apply your use of force. Whatever the chosen use of force is, the response option, there has to be a conscious assessment in the moment of whether or not there's a change in the behaviour. The change could be a positive change, meaning the subject stops the threatening behaviour towards the officer or another person under our care and control which is any member of society.

And once you've done that assessment you have to be able to react and, again, in that moment, as to whether or not you need to repeat your use of force or now begin your de-escalation as the officer transitioning to lower levels of force, maybe engaging more in crisis intervention and de-escalation techniques at the time through dialogue and making sure that we're not going one step beyond them as required.

So if you're speaking in terms of specifically double tap, my experience with the term double tap in related to firearms training is that two rounds were fired in every instance as we have in the instinctive course of fire. And the whole premise of double tap is that two rounds sound like one. So it's fast, it's just bang-bang, as fast as you can pull the trigger.

The argument is – back in the day was that is there truly an assessment with those two rounds? And there can't be. It's impossible if you're firing instinctively to fire two rounds in every case. So that's where the term controlled pairs or dedicated pairs came in where it's more of a sequence of firing of bang, bang, so that that momentary pause within the two rounds enables officers to assess whether or not that first round has had the desired result of stopping that lethal force or that grievous bodily harm or death behaviour from the subject.

⁹¹ Transcript of Evidence of Sgt. William James, February 22, 2017 at p 51.

And I know when you look at it with a layman's eyes you would say, well, is that even possible in the heat of the moment to do? As a trainer, as an experienced operator on many levels, that's what we strive to do in training."⁹²

I accept Sgt. Massine's expert opinion evidence and that of Dr. Coleman on the need for better training by the RNC. I am also satisfied that the current RNC use of force training should be updated to include greater emphasis on crisis intervention and de-escalation, to remove stigmatizing terms such as "bad guy" and "perp" and to transition to updated terminology and training for instinctive shooting.

I also accept the opinions of Dr. Coleman and Sgt. Massine that rather than standing over Mr. Dunphy with his head down, proper training in de-escalation would have led Cst. Smyth to sit, watch, and actively listen, and this might have resulted in resolution of the encounter without lethal force. My recommendations on training are provided in Chapter 12.

Use of force reports

In January of 2012, the Auditor General of Newfoundland and Labrador's Annual Report included a review of the RNC's Use of Force Reporting Policy and Use of Force Review Board.⁹³ At that time, the Auditor General found that the RNC could not demonstrate that use of force reports were being reviewed as required by RNC policy, and raised concern that the RNC may be missing opportunities to identify inappropriate uses of force. The Auditor General recommended that all use of force reports be reviewed and signed by firearms and use of force instructors and other officials as required to ensure compliance with policy.

The RNC did not provide the Commission with the Auditor General's report nor advise us of its existence. A member of the public drew the document to the Commission's attention after high ranking RNC officers testified as to the current practice with respect to use of force reports.

The use of force report completed by Cst. Smyth after the shooting was not reviewed by the RNC's training section or use of force instructors.⁹⁴ It was also not signed by Cst. Smyth's supervisor in the PSU. Although Commission counsel were not aware of the Auditor General's report during the pre-hearing interviews, in questioning senior

⁹² Transcript of Evidence of Sgt. Michael Massine, March 8, 2017 at pp 48-49.

⁹³ Exhibit P-0809.

⁹⁴ Exhibit P-0496.

RNC officials during those interviews, it became apparent that, although use of force reports were being collected, only those in which remedial training was recommended were being reviewed by the RNC's Use of Force Review Board, and little was being done to analyse the data being collected on the forms. The RNC, to their credit, began acting to make improvements immediately. By the time Deputy Chief Singleton testified before the Inquiry, he reported that as of early February 2017, the RNC had updated its use of force forms to ensure that they are reviewed and dated by appropriate supervisors. Furthermore, the RNC had implemented a new process to have the Use of Force Unit analyse the data collected.⁹⁵ These are steps in the right direction. To identify problematic trends in use of force or deficiencies in training, it is necessary that the data collected be analysed and correlated.

Recommendation 20: The RNC should continue its recently adopted practice of reviewing all reported incidents of use of force, not only those where remedial training has been recommended, and should ensure use of force data is regularly analysed to identify problematic trends or potential deficiencies in training. The RNC should be provided with adequate resources for this.

⁹⁵ Transcript of Evidence of D/Chief Abe Singleton, February 16, 2017 at pp 111-114.

CHAPTER 8: THREAT ASSESSMENT AND PROACTIVE POLICING**‘Risk’ and ‘Threat’ terminology**

During the Inquiry there was much discussion of the difference between risk assessment and threat assessment. Some expert witnesses, for example Dr. Terry Coleman, used ‘risk’ assessment for the process a police officer follows to ensure his or her personal safety.

Sgt. Patrick Lenehan, an expert called by the RNC, defined ‘risk’ assessment as the initial process that an investigator conducts to determine if there are enough risk factors to warrant a full ‘threat’ assessment to determine if a person has a propensity for targeted violence toward another individual. This use of ‘risk’ assessment does not involve the officer’s personal safety. Dr. Stephen Hart, an expert called by Cst. Smyth, noted that the terms ‘threat’ assessment and ‘violence risk’ assessment are often used interchangeably.

I have concluded nothing much turns on this. However, to avoid confusion, I will reserve ‘risk assessment’ to refer to the process engaged in by police officers to ensure their personal safety and ‘threat assessment’ to refer to the process in proactive policing of assessing the likelihood of a person or group posing a threat in the future to third parties, including dignitaries protected by the PSU.

Threat assessment and proactive policing

Confusion arose in a debate over whether the tweet was a ‘threat’ warranting follow-up. In Chapter 10, Finding 2, I explain why I believe Mr. Dunphy’s tweet did not contain an express or implied threat. However, because of the violent thoughts revealed by the tweet and previous ones by Mr. Dunphy and because of the “intimidating or fear-inducing utterances” used (in the words of Dr. Stephen Hart, a clinical forensic psychologist), I conclude that it was reasonable for Cst. Smyth to investigate whether Mr. Dunphy posed a future threat to the Premier or government officials. Social media and other commentators appeared to believe that police follow-up was not warranted unless an express or implied threat could be found in the tweet itself. I do not accept that proposition. In certain cases, such as the present, it is not unreasonable for police to proceed with a threat assessment, even where the initiating behaviour might not in itself constitute a threat. The aim is to proactively determine whether a person or group might be planning a move towards “the pathway to violence” and stop them before their plan is executed.

I heard much testimony on the topic of ‘proactive policing,’ which is perhaps best explained by contrasting it with ‘criminal investigations.’ Criminal investigations were explained by Dr. Hart as follows:

In the context of criminal investigations, the primary concern is to determine whether an offence has occurred and, if so, to gather sufficient evidence to clear that offence through arrest, charge, or conviction. The possibility that violence may occur during criminal investigations is a secondary concern, and one that arises in a minority of cases.⁹⁶

Criminal investigations focus on past offences and are reactive. Proactive policing, on the other hand, focuses on the future and aims to deter and prevent crime from happening. The protection of public officials is an example of proactive policing. Dr. Hart described it as follows:

Here, the primary concern is to determine whether there exists some potential for violence against public officials and, if so, to develop plans to mitigate that risk. The possibility that an offence may have occurred in the past is a secondary concern, and one that arises in a minority of cases. Put simply, protection of public officials focuses on the future; their ultimate success is judged in terms of prevention of violence against public officials, not on the clearance rate for offences that may have been committed.⁹⁷

The protection of public officials is only one example of proactive policing; law enforcement officials practice proactive policing to prevent terrorism attacks, to keep the peace at public events, and in many other ways. It is a regular and important aspect of policing, and the police should not be unduly constrained in their ability to collect and analyse information.

This is not to say that there should not be any limits on police activity. For example, there is merit to the suggestion that there should be limits upon the practice of police attending at personal residences to evaluate whether someone poses a threat but who has not, to that point, made a threat or otherwise committed an offence. The decision to make a home visit to Mr. Dunphy was at the discretion of Cst. Smyth, who was acting without protocol and without supervision. In the threat assessment literature, this is described as “unstructured professional judgment”. As noted by Dr. Hart in his testimony, this format relies heavily on the individual intuition and experience of the officer. Without a documented decision-making process, it may be difficult to trace how

⁹⁶ Exhibit P-0794 at p 5.

⁹⁷ Exhibit P-0794 at p 5.

decisions regarding risk are made, leaving such threat assessments open to criticism that they are unreliable and unaccountable.⁹⁸

Some control may be exercised by requiring someone in Cst. Smyth's position to get clearance from a senior officer before opening a file or attending at someone's home. I discuss this idea further in Chapter 13, where I recommend that the PSU be reorganized and have greater supervision. There is also merit in the standardization of the threat assessment process. This could be achieved by putting in place structured professional judgment guidelines or using a structured professional judgment tool.⁹⁹ I recognize that I must not attempt to impose on the RNC an overly restrictive policy. I accept that law enforcement policy should be general and flexible because, as pointed out by the RNC in its final submission, it is impossible to anticipate with precision all of the various situations that officers may face which may involve the need to make a life and death decision on a moment's notice. Officers need discretion to suitably respond to prevailing circumstances and in evolving situations. For this reason and because I was not provided with sufficient evidence to suggest exactly how the threat assessment process should be improved, my recommendations should remain somewhat general in this area.

Recommendation 6: The RNC should develop a protocol for when home visits are to occur in proactive policing, identifying the factors to be considered and how supervision and oversight by senior officers is to occur.

Recommendation 7: The RNC should undertake a review to determine and institute best practices for conducting threat assessments in proactive policing to ensure standardization of the process and application of appropriate criteria or protocols.

Risk assessment and background checks

Whether they are engaged in criminal investigations or in proactive policing, officers must always take care of their personal safety. The importance of officer safety is recognized in the NUFM which has as one of its six basic underlying principles that "police officer safety is essential to public safety."

Some of the steps that officers take as part of a threat assessment may be the same steps that they need to take as part of their personal risk assessment. Background

⁹⁸ Transcript of Evidence of Dr. Stephen Hart, March 7, 2017 at p 125.

⁹⁹ Transcript of Evidence of Dr. Stephen Hart, March 7, 2017 at pp 125-126.

checks are one example. According to Sgt. Lenehan, the expert called by the RNC, officers should conduct police database searches to determine the subject's background as known to police in the initial stages of a threat assessment.¹⁰⁰ As he notes:

Police database searches will reveal if the subject has any previous police involvement, any history involving violence, weapons offences, threats, assaults, affiliations involved with criminal organizations, any safety flags such as hating of police, contagious disease carrier, diagnosed or suspected mental illness, etc.¹⁰¹

This same information is obviously important in the officer's assessment of his or her own personal risk. Cst. Smyth conducted background checks prior to visiting Mr. Dunphy both as part of his threat assessment and his personal risk assessment. While en route to Mr. Dunphy's residence, Cst. Smyth called the RNC Communications Centre and requested from the RNC "10-code" system various searches pertaining to Mr. Dunphy, including a 10-27, 10-28, 10-29, and a CFRO (firearms check). He spoke with Communications Technician, Mark Oram. In response to the 10-27 (Motor Registration Division Check) query, Mr. Oram provided Cst. Smyth with information pertaining to the motor vehicle registered in Mr. Dunphy's name (a Honda) as well as its licence plate number. He advised Cst. Smyth that, with respect to the CFRO search, Mr. Dunphy was "not on file" as having any registered weapons. With respect to the 10-29, Mr. Oram advised Cst. Smyth that Mr. Dunphy was "not on file".¹⁰² Based on these results, Cst. Smyth assessed his personal risk assessment as being low.

The issue with the 10-29 check and whether all relevant information was given to Cst. Smyth is discussed in the next section. Cst. Smyth's risk assessment and his decision to proceed to Mr. Dunphy's house alone is discussed further in Chapter 10, Finding 5. Independent of the facts of this case, the importance of police officer risk assessments must be emphasized as officer safety must be a high priority.

Recommendation 15: The RNC should educate and train all RNC officers in personal risk assessment during basic training and all serving police officers in the next three years.

¹⁰⁰ Sgt. Lenehan uses the term 'risk assessment' but in accordance with the definitions I have adopted in section 8.1, he is referring to the early stages of a 'threat assessment'.

¹⁰¹ Exhibit P-0784 at p 7.

¹⁰² Exhibit P-0136 at p 8.

Problem with the 10-29 check

See Appendix 43 for more detail on this section.

During the course of the Inquiry, an issue arose as to whether Cst. Smyth had been given all the information that was available regarding Mr. Dunphy as a result of the background checks he requested. In follow-up to questioning during her pre-interview hearing, Kim Harding, RNC Director of Information Services, obtained the archived Canadian Police Information Centre (CPIC) messages received by Mr. Oram with respect to Mr. Dunphy in response to Cst. Smyth's requests. Ms. Harding testified at the Inquiry and provided a report of her findings.¹⁰³ She discovered that there was additional information which had not been passed along to Cst. Smyth by Mr. Oram, as Mr. Oram had not accessed the Criminal Name Index (CNI) information that was produced through the CPIC query. Had he done so, he would have learned that (1) there was a fingerprint number (FPS) on file for Mr. Dunphy (which usually indicates a criminal record); (2) Mr. Dunphy's file had a 'caution V' flag (which indicates violence); and (3) that a CR (criminal record) Query was recommended. The following was also noted: "file opened 2001-05-23; Last entry 2005-01 of: Violence, Drugs".¹⁰⁴

Cst. Smyth testified that he understood a 10-29 would include a full CPIC check and expected it to include any active court orders, criminal convictions, or cautions, including cautions for violence, drugs or weapons. This has been his understanding throughout his career. He did not expect to have to specifically request this information.¹⁰⁵

Mr. Oram, on the other hand, testified that, if an officer requested a 10-29, it was his practice to provide only the current information and not the information contained in the CNI, unless the officer specifically requested this information. Mr. Oram takes a very literal interpretation as to what is asked of him and stated that he did not see it as his place to question an officer.

Counsel for the RNC subjected Mr. Oram to a rather protracted cross-examination on this issue, presumably to establish that Mr. Oram was in error. This was not so apparent to me and I make no finding in this regard. Two lists were provided to the Commission by the RNC which contained definitions of 10-codes. The definition for a 10-29 was not the same on both. One simply noted a 10-29 code to be "Background checks"¹⁰⁶ while the other noted a 10-29 to mean: "Records CK, Person-Vehicle Property – Boats &

¹⁰³ Exhibit P-0390.

¹⁰⁴ See Appendix 43; Cst. Adrian Cox of the RCMP, who had also communicated with Cst. Smyth prior to his attendance at Mr. Dunphy's house, had information available to him and did not provide it to Cst. Smyth.

¹⁰⁵ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 45.

¹⁰⁶ Exhibit P-0215 at p 2.

Motors CNI-CRS File.”¹⁰⁷ At the end of the day, there is ambiguity as to what is required to be provided in response to a 10-29 request.

If Cst. Smyth had been told Mr. Dunphy was flagged for violence would he have visited alone?

The evidence on this point is reviewed in detail in Appendix 43. In short, Cst. Smyth stated in his evidence that if he had known about the ‘caution V’ violence flag, it would have changed how he went about his visit with Mr. Dunphy in that he would have felt obligated to take another officer. He would not have necessarily assumed that the violence flag related to the uttering threats charge, which had been withdrawn.¹⁰⁸ I accept that, if Cst. Smyth had known about the violence caution on Mr. Dunphy’s file, it would have at least caused him to re-think his strategy of visiting Mr. Dunphy alone.

RNC internal review and an attempt to fix the problem

The RNC advised of two steps it took in response to learning of the 10-29 issue that emerged: it launched an internal review, and management sent an email to communications technicians in an attempt to clarify what is required in response to a 10-29 request. Details of these steps are included in Appendix 43. In summary, the communication to the technicians that was intended to offer clarity was, at best, confusing. In its final written submission, the RNC stated that it was in the process of confirming and ensuring that all communications personnel were familiar with the 10-codes.

<p>Recommendation 13: The RNC should ensure that all communications personnel are familiar with the call codes (10-codes) and that their training is appropriately documented.</p>

Training and quality control

RNC communications technicians do not undergo an orientation process nor do they have formal training at the beginning of their employment. They learn their job duties,

¹⁰⁷ Exhibit P-0704.

¹⁰⁸ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at pp 52-54.

including how to respond to requests for information such as a 10-29 code query, by job shadowing other communication technicians during their probation period.

The RNC has recognized that more needs to be done in the way of training and have now undertaken efforts to create an orientation package for new hires. Insp. Barry Constantine testified as to these recent efforts. The plan is to include an orientation session and a presentation from Human Resources outlining expectations and an explanation of procedures. This will be followed by training on current practices and procedures. The current intention is to provide two days' annual training and continuing development for current staff.¹⁰⁹

Currently, the RNC does not have a technical or a policy and procedure manual for the Communications Centre, but has indicated an intention to create both pending sufficient resources. There were also issues identified during the Inquiry as to records of training that Mr. Oram had received. The RNC has acknowledged it does not keep adequate records of staff training and has stated a commitment to improvements in this area.

RNC communications technicians undergo quarterly audits of their work. The evidence adduced was that each employee has four checks per quarter. Mr. Oram has been in his job since 2009, which means that up to December 2016 (when this issue was uncovered through the Inquiry process), Mr. Oram's work would have been audited on over 100 occasions. Mr. Oram testified that responding to 10-29 requests is a frequent, daily function for him. He stated that he has been consistent throughout his career in his practice in not providing CNI information unless specifically requested. The RNC's position is that this is an incorrect interpretation of what is expected of a 10-29 request. Yet this issue had not been detected by the RNC audit process. I will leave this issue to the RNC and the bargaining unit to address.

Recommendation 14: The RNC should proceed with its plan to develop a technical and a policy and procedure manual with respect to the communications centre and call code requests as soon as resources are available.

¹⁰⁹ Transcript of Evidence of Insp. Barry Constantine, February 21, 2017 at p 105.

CHAPTER 9: THE ROLE OF SOCIAL MEDIA**Mr. Dunphy's use of social media**

Subsection 3(1)(i) of my Terms of Reference requires that I “inquire whether Mr. Dunphy’s use of social media had any role in the circumstances of his death.” As previously noted, the chain of events culminating in the shooting began with a tweet on the Twitter social media platform, which raised concern in the Premier’s Office and was passed on to the PSU for investigation. There are unique features of social media which *might* have played a role in the present case.

First, the meaning of Mr. Dunphy’s tweet might have been misconstrued by Cst. Smyth. Interpreting social media interactions is recognized as being challenging for a number of reasons. One is ‘context collapse’, a feature of online communications where messages intended for a limited audience become misconstrued for a wider audience once original context is lost. The point has also been made that, in the absence of the physical cues which frame face-to-face interaction, messages may be interpreted incorrectly.¹¹⁰

A second, but related, feature of social media which might have played a role is the amenability of social media platforms to monitoring. While some social media platforms are more amenable to monitoring than others because of default privacy settings and historical data availability, platforms such as Twitter, which can retain an extensive history of a user’s tweets and make them publicly accessible, create a rich source for police surveillance.

Finally, a third aspect of social media which might have had an impact relates to the speed and wide dissemination of social media communications.

Having examined the evidence in this matter, I find that Mr. Dunphy’s use of social media did play some role in the circumstances of his death. Cst. Smyth testified that he read the full chain of tweets and that he did not see them as a threat but felt they warranted further investigation. As part of that investigation, Cst. Smyth conducted a review of Mr. Dunphy’s Twitter feed over the previous year. He found long-standing, unresolved grievances with government and with WorkplaceNL, tweets containing ‘disconcerting comments’ directed towards elected officials and tweets suggestive of suicidal and violent ideation.¹¹¹ Although Cst. Smyth testified that he determined there

¹¹⁰ Alexandra Mateescu et al, “Social Media Surveillance and Law Enforcement” (Paper delivered at the Data & Civil Rights conference, 27 October 2015), at p 6 [unpublished].

¹¹¹ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 18; Transcript of Evidence of Cst. Joseph Smyth, January 25, 2017 at p 11.

was no immediate concern that Mr. Dunphy would cause harm to himself or others, he concluded that he needed to do further investigation, including speaking personally to Mr. Dunphy.¹¹²

Without hearing from Mr. Dunphy as to the intent or meaning of his tweets, it is impossible to determine if there was any element of ‘context collapse’ at play. However, we do know that the availability of Mr. Dunphy’s Twitter history for Cst. Smyth’s review played a role in Cst. Smyth’s decision to visit Mr. Dunphy on April 5. Had Mr. Dunphy written the series of six tweets in a letter to the Premier or spoken them out loud on an open line show, even if his comments were forwarded to Cst. Smyth for investigation, without the evidence of ‘suicidal and violent ideation’ found in Mr. Dunphy’s Twitter history, Cst. Smyth may have decided that a home visit was not warranted.

With respect to the speed and wide dissemination of social media communications, I do not find that these aspects played a role in the circumstances of the present case. Cst. Smyth was not responding urgently to something which he considered to be an imminent threat. Nor is there any evidence that he responded because he was concerned about the broad reach of the message. Mr. Dunphy’s tweets in reply to Sandy Collins were not a call for group action nor were they likely to incite other like-minded individuals to act out violently or unlawfully, and there is no evidence that Cst. Smyth considered the situation otherwise. The speed of communication by social media probably is a factor to consider when the RNC is developing a plan for communication with the public during an investigation, but was not a factor in the circumstances of Mr. Dunphy’s death.

Social media policies, protocols or manuals

Subsection 3(1)(h)(ii) of my Terms of Reference requires that I inquire into the relevant policies, protocols or manuals in force at the relevant time in both the Office of the Premier and the RNC relating to the monitoring and response to social media. Having done so, I have determined that there were very limited policies, protocols or manuals in place and what was there played no direct role in Mr. Dunphy’s death.

The only policy in place at the Premier’s Office was one applicable to all Government of Newfoundland and Labrador employees, which was maintained and updated by the Communications Branch of Executive Council.¹¹³ The policy and its accompanying

¹¹² Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at pp 9-10; Transcript of Evidence of Cst. Joseph Smyth, January 24, 2017 at pp 18-19.

¹¹³ Exhibit P-0069.

guidelines required that government social media sites be monitored to block and ensure the timely removal of abusive, hateful, or defamatory submissions and to have a process to deal with feedback, both positive and negative. The policy did not address when or how social media communications should be forwarded to the police for investigation. The government policy played no role in Mr. Dunphy's case because Ms. Ivey was clear in her testimony that she forwarded the 'tweet of concern' to Cst. Smyth because he had previously provided her with instructions that, should anything of concern come to her attention, she should forward it to the PSU for follow-up. She was following the guidance of the PSU, not a governmental or Premier's Office policy or protocol. The issue of 'context collapse' is not particularly relevant to Ms. Ivey's situation either as her testimony was also clear and unequivocal that she did not see it as her role to interpret the tweet. She considered the language to be "so strong" as to raise enough concern to warrant passing the information along to Cst. Smyth.¹¹⁴ She left interpretation and context to him. Cst. Smyth confirmed Ms. Ivey's testimony.

The RNC had no policy, protocols or manuals that addressed the monitoring of and response to social media.¹¹⁵ Cst. Smyth was left to his own discretion as to how he reviewed and used social media in conducting his threat assessment of Mr. Dunphy. Cst. Smyth's evidence is that he reviewed approximately one year's worth of Mr. Dunphy's Twitter feed.

It its final submission the RNC confirmed that, like other law enforcement agencies, it has started to use social media to obtain information, especially for tactical purposes such as gathering information and intelligence about threats, violence, protests, or isolated criminal activity. It has also recently sent members from its Intelligence and Organized Crime Section on specialized training courses related to police use of the Internet and social media. I was not advised as to whether the force was working on developing policies, protocols or manuals in relation to its social media use.

The instructions which Cst. Smyth had orally conveyed to Ms. Ivey should be set out in writing for the guidance of employees in the future.

Recommendation 17: The RNC should set out in writing in the appropriate manual the instruction for government employees to pass on to the RNC any communication which raises a security concern, without attempting to definitively interpret the communication.

¹¹⁴ Transcript of Evidence of Donna Ivey, January 9, 2017 at p 173.

¹¹⁵ Transcript of Evidence of Chief William Janes, February 28, 2017 at p 49.

CHAPTER 10: QUESTIONS ARISING AND FINDINGS OF FACT

Ms. Dunphy submits that her father's death was unnecessary and preventable. She believes Cst. Smyth made a mistake and mistook the stick her father used as protection for a gun. She points to evidence she believes raises legitimate concerns about Cst. Smyth's credibility and the veracity of his version of what took place in the encounter. She submits that the RCMP investigation was neither thorough nor objective and could have missed other evidence that may have existed at the time "to point towards any other plausible theory of the event." In addressing these submissions and those of other counsel, and my Terms of Reference, I have found it useful to consider certain questions arising and make certain findings of fact.

Finding 1: Did the Premier or the Premier's Office direct Cst. Smyth to visit Mr. Dunphy?

Donna Ivey was Special Assistant, Communications for then-Premier Paul Davis. Her duties included monitoring social media, and acting as media liaison. Her instructions were to forward to the PSU for their review and follow-up any matters of concern which might come to her attention. On Good Friday, April 3, 2015, she saw Mr. Dunphy's tweet and forwarded it to Cst. Smyth. The evidence establishes that she had no responsibility for interpreting the tweet. To pass it along, it was enough that she was concerned by the strong language used. It was up to the members of the PSU to evaluate its meaning.

In his testimony, Cst. Smyth confirmed that at no time did he receive instructions or direction from Ms. Ivey, or anybody else in the Premier's Office, or elsewhere, to investigate, question or attend at the home of Mr. Dunphy. Cst. Smyth, as Acting Sergeant in charge of the PSU, decided without direction to attend at the home.

Because of considerable criticism of Ms. Ivey in the media, I stated during the hearing that, in fairness to her, I should indicate I found that her actions in passing along the tweet to the PSU were in keeping with her employment responsibilities and pursuant to the specific direction and instruction provided to her by members of the PSU. She did nothing wrong.

The primary investigator, RCMP Cpl. Steven Burke, confirmed that there was no evidence to indicate that then-Premier Davis: (1) knew Mr. Dunphy before April 5, 2015; (2) was aware of the tweets before that date; (3) had any involvement either in the assessment or interpretation of the tweets; or (4) had any involvement in either directing

Cst. Smyth to investigate the tweets or to attend at the home of Mr. Dunphy. Cpl. Burke also confirmed that he had no evidence to lead him to believe that either then-Premier Davis or his Chief of Staff Joe Browne had any information relevant to the investigation.

Conclusion on Premier's Office

I accept Cpl. Burke's testimony and I find that there is absolutely no evidence to support the allegation that the Premier's Office directed Cst. Smyth to attend at Mr. Dunphy's home or that Cst. Smyth was politically motivated in going there.

In accordance with my Terms of Reference, I address in Chapters 13 and 14 the security of the Premier and Cabinet Ministers and the monitoring of and response to social media.

Finding 2: Was the tweet a threat?

Relevant background information

On April 3, 2015, then-Minister Sandy Collins, while travelling in a vehicle with then-Premier Paul Davis, was listening to music by local musician Sherman Downey, and sent the following tweet:

Traveled with @PremierOfNL in his car today... guess what CD was playing?
@ShermanDowney The Sun in Your Eyes. #ListenLocal.

Donald Dunphy responded by posting a thread of six tweets, the last of which read:

@SandyCollins @PremierOfNL @ShermanDowney won't mention names this time,
2 prick dead MHAs might have good family members I may hurt #nlpoli

As noted, these tweets caught the attention of Donna Ivey, a special assistant in communications with the Premier's Office at the time. She sent an email containing the last tweet in the thread to the members of the PSU (Cst. Smyth and Sgt. Doug Noel), copying Joe Browne, then-Chief of Staff for the Premier's Office.¹¹⁶ The subject of the email was "Tweet of Concern" and it was sent on April 3, 2015, at 10:21 am. Ms. Ivey had previously been instructed by Cst. Smyth to forward anything of concern to the PSU for follow-up.

As a stand-alone statement, the last tweet may appear more worrisome in terms of any potentially malicious intent. However, when read in context, it is apparent that Mr. Dunphy was not intending any harm to anyone. Rather, it is clear that he did not want to reveal the names of the deceased former MHAs whom he was referencing in his tweets, out of concern that it could hurt the feelings of their living family members. In context, and read in order, Mr. Dunphy's tweeted response to Mr. Collins may be interpreted as follows:

- (1) Is that why you can't see problems of seniors and injured workers, the sun is in your eyes
- (2) Put on sun glasses and take out the ear plugs you might see and hear people crying for help

¹¹⁶ Exhibit P-0074.

- (3) But why would you care after putting in hard time getting that poor man's MHA pension
- (4) I hope there is a God, I think I see him work on two garbage MHAs who laughed at poor people
- (5) He got them before they got to enjoy the pension they didn't deserve
- (6) I won't mention names this time, 2 prick dead MHAs might have good family members I may hurt.¹¹⁷

Cst. Smyth responded to Ms. Ivey's email within 15 minutes and inquired of the context of the tweet. She replied that Mr. Dunphy was an injured worker who had been tweeting to the Premier's account for a while and that he had posted this comment along with several others.¹¹⁸ The fact that Ms. Ivey did not provide the full series of tweets is of no practical significance because Cst. Smyth testified that when he was following up on the matter the next day, he reviewed approximately one year of Mr. Dunphy's tweets, which would have included the entire thread. In fact, he printed the thread of six tweets and these were found on the pages contained in a yellow file folder he had with him at Mr. Dunphy's residence.

There is some confusion in the evidence as presented as to whether Cst. Smyth believed these tweets constituted a threat or not. During the Inquiry, Cst. Smyth testified that he had read the tweets in context and in order, and did not believe the message constituted a threat. In an email to Mark Quinn of CBC on September 13, 2016, Cst. Smyth wrote, "At no point did I or members of the RNC interpret any of Mr. Dunphy's social media commentary as threats."¹¹⁹ He stated that, if he had determined there was a threat, he would have considered an arrest, and brought a uniformed officer with him to visit Mr. Dunphy. Instead, Cst. Smyth contended he was conducting a threat assessment to determine if Mr. Dunphy could pose any future threat to the Premier or government officials. From his Twitter history, he could see that Mr. Dunphy had an unresolved grievance with the government's workers' compensation system, and some of his messaging was disconcerting.

While Cst. Smyth repeatedly stated in his testimony that he did not consider the tweets to be threats, several people with whom Cst. Smyth communicated before and after the

¹¹⁷ See Appendix 41: Exhibit P-0009 - Tweets.

¹¹⁸ Exhibit P-0076.

¹¹⁹ Exhibit P-0204; Cst. Smyth acknowledged in his evidence that this was 'hyperbole' as no other member of the RNC had interpreted the tweets at the time.

shooting on April 5, 2015, including other police officers, recorded that Cst. Smyth told them he was investigating a threat. Cst. Adrian Cox, the Holyrood RCMP officer who spoke with Cst. Smyth before he visited Mr. Dunphy and who was also first on the scene to speak with him after the shooting, recorded in his notes that Cst. Smyth told him that “he was going to the residence of Donald Dunphy ... as he had to speak to him about threats that he had made against the Premier.”¹²⁰ Cpl. Trevor O’Keefe similarly recorded that Cst. Cox had advised him that he had spoken to Cst. Smyth and that “he was going to speak with Don Dunphy...regarding threats to the Premier over Twitter.”¹²¹ Cst. X¹²² who drove Cst. Smyth from the scene on April 5, 2015, recorded: “Smyth then stated that he was part of the Close Protective unit. He said that was what brought him there as there were threats on social media.”¹²³ When asked whether he had at any point in time told anyone he was investigating threats, Cst. Smyth replied:

That is probably language I would use as a means of simplifying what it is we’re doing, but I don’t recall telling people specifically. I was generally careful not to confuse the situation, but also not to over complicate it.¹²⁴

He also suggested that the officers may have inferred that is what he was doing based on him stating that he was conducting a threat assessment.

Tom Mahoney of WorkplaceNL also understood from his communication with Cst. Smyth that he was following up on threats to government officials and their families. In his statement given to the RCMP shortly after the incident, Mr. Mahoney stated:

they became aware of a ... tweet that threatened generally some government officials and their families, he didn’t tell me what the tweet was, he just sort of described it in that very general way so I’m I was not aware of the nature of the threat but he did say he was investigating a threat that was made.¹²⁵

Cst. Smyth’s own words in a BlackBerry Message (BBM) conversation with his friend, Trevor¹²⁶ on April 4, 2015, the day before he visited Mr. Dunphy, were: “got to go deal with some lunatic threatening the premier etc.”¹²⁷

¹²⁰ Exhibit P-0175.

¹²¹ Exhibit P-0174.

¹²² This RCMP officer testified by teleconference link at the public hearings and was only identified as “Cst. X”.

¹²³ Exhibit P-0173.

¹²⁴ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 33.

¹²⁵ Exhibit P-0081 at p 24.

¹²⁶ Trevor was not identified with a surname before the Inquiry.

¹²⁷ Exhibit P-0774 at p 2.

In Cst. Smyth's first statement to the RCMP on April 6, 2015, he stated that the tweet was ambiguous and there were "certainly no criminal threats by any stretch" but, in light of Mr. Dunphy's previous social media history and commentary around issues with the government and particularly workers' compensation, there was enough to meet the "test" for a full "threat assessment" on Mr. Dunphy to determine if there was a credible risk of his carrying out an act of targeted violence.¹²⁸

Cst. Smyth stated that, while he did not view the tweet as "a threat", he decided to err on the side of caution. He testified that he had been influenced in his approach by a five day course he took in 2012 entitled "Managing Targeted Violence", taught by instructors at the Judicial Institute of British Columbia. He said that in his assessment process he considered whether Mr. Dunphy held a grievance and whether there was evidence of a violent ideology and that the following specific observations about the content of the Twitter feed led him to conduct a home visit:

- (1) There were past tweets directed at government which indicated a long-standing unresolved grievance;
- (2) Mr. Dunphy had at one point stated that WorkplaceNL had killed his wife; and
- (3) There were references to indicate that Mr. Dunphy might be at the end of his rope with a lack of inhibitors in his life.¹²⁹

Conclusion on tweet as threat

Accepting this testimony, I am satisfied that Cst. Smyth, like any reasonable person, did not consider the last tweet in the thread to be a threat.

Threat or not: did Mr. Dunphy's Twitter messaging warrant police attention?

Regardless of whether Cst. Smyth interpreted the tweets as threatening, experts on threat assessment called to give evidence agreed that Mr. Dunphy's Twitter messaging was of such a nature that it did warrant follow-up by Cst. Smyth. Cst. Smyth clearly stated that, while he was conducting a threat assessment, it was still in the early stages

¹²⁸ Exhibit P-0119.

¹²⁹ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at pp 9, 32.

and up to the point of having reviewed the Twitter account and deciding to visit Mr. Dunphy, he did not have any specific concern that Mr. Dunphy was “on a pathway to commit an act of violence.”¹³⁰

Dr. Stephen Hart, a forensic psychologist and expert on threat assessment, went further than Cst. Smyth in his characterization of Mr. Dunphy’s Twitter communications. In his opinion, Mr. Dunphy’s tweets indicated that Mr. Dunphy was experiencing violent thoughts and the tweets were recklessly or deliberately intimidating or fear-inducing utterances, and therefore there were reasonable grounds to believe that Mr. Dunphy posed a risk of violence towards public officials.¹³¹

Sgt. Patrick Lenehan, of the Ontario Provincial Police Justice Officials Protection & Investigations Section (JOPIS) which conducts similar threat assessments as the PSU, was also of the opinion that Mr. Dunphy’s tweets required an interview to help ascertain whether Mr. Dunphy posed a threat. Dr. Terry Coleman, an expert on personal risk assessment retained by the Commission, agreed that even when reading the complete thread of tweets, it was ambiguous and worthy of investigation.¹³²

Tom Mahoney has a background in risk assessment and was responsible for corporate security at WorkplaceNL, including identifying potential threats to the staff. Although WorkplaceNL had been monitoring Mr. Dunphy’s Twitter account for a period of time, nothing of concern had been brought to Mr. Mahoney’s attention from February 2015 up to the time of Mr. Dunphy’s death in April. An internal email from WorkplaceNL personnel on February 23, 2015, described Mr. Dunphy’s social media messaging:

This person is very general in his comments, even though he sometimes uses WHSCC staff names. He is not making any direct threats, but he certainly is opinionated in his comments. There is actually a response to one of his comments stating he is being “defamatory”. I do not think the police will act on the comments made today, but they were personal against one of our Managers.¹³³

Mr. Dunphy had previously tweeted that he hoped “all WHSCC die”. Mr. Mahoney did not perceive this as a threat and explained to his staff the difference between a person hoping something happens as opposed to stating he or she would do something to make it happen.

¹³⁰ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 25.

¹³¹ Exhibit P-0794 at p 6.

¹³² Exhibit P-0773 at p 7.

¹³³ Exhibit P-0087.

Conclusion on whether tweet warranted investigation?

I am satisfied that Mr. Dunphy's tweet did not contain a direct or implied threat. Nevertheless, police officers have lawful authority to investigate any communications which indicate that the sender may pose a threat to elected officials or others because of the tone or language used. As such, I am satisfied that it was reasonable for Cst. Smyth to investigate further to determine if Mr. Dunphy may have posed a future threat to government officials. As discussed in Chapter 10, Finding 4, this type of 'threat assessment' will be restricted by the 'sanctity of the dwelling house' principle.

Finding 3: Should Cst. Smyth have made a home visit alone?

Counsel for the RNC provided a brief summary of the history of one person patrols in this Province:

While 2 officer patrols or response units may be the best practice and the ideal situation, the RNC has managed for over 25 years (since 1991-1992) using one-officer patrols in most instances. The history leading to the practice of one-officer patrols is that in 1992-1993 the government threatened lay-offs if the RNCA did not agree with one person patrols, so the RNCA reluctantly agreed to this. The RNC does not take the position that the current practice of one person patrols must change, as Chief Janes testified, current RNC staffing is “just enough”.¹³⁴

The RNC does not take the position that the current practice of one-officer patrols must change. The Royal Newfoundland Constabulary Association (RNCA) would like to see a review of staffing needs and the hiring of additional officers to meet it.

Conclusion

In this Province, one-officer patrols are the norm, but depending on the circumstances there may be additional officers deployed. I believe moving from the status quo on this issue is a matter for collective bargaining. Cst. Smyth is not to be faulted for following accepted RNC practice. I deal further under Finding 5 with whether Cst. Smyth should have reconsidered his initial decision to visit alone once he had obtained further information that should have raised his assessment of his personal risk.

Recommendation 25: Any issue regarding one officer patrols should be left for resolution in collective bargaining.

¹³⁴ Final Submission of the RNC, April 7, 2017 at p 4.

Finding 4: Was Cst. Smyth in Donald Dunphy's home with lawful authority?

Relevant background information

When he went to visit Mr. Dunphy in Mitchell's Brook, Cst. Smyth was dressed in plain clothes and in an unmarked police vehicle. Cst. Smyth was concerned that Mr. Dunphy would take a uniform or marked vehicle as "a symbol of authority" and refuse to speak with him or let him into the home.¹³⁵

Cst. Smyth did not believe that Mr. Dunphy had committed any crime and he had no grounds for arrest. His visit was for the purpose of gathering more information for a 'threat assessment' as part of proactive policing. Threat assessments are discussed in more detail in Chapter 8. If there had been a "definitive threat", Cst. Smyth said he then would have had to consider the possibility of an arrest, in which case he would have taken a uniformed officer.¹³⁶

When Cst. Smyth first arrived at the Dunphy residence he noticed a sign on the exterior of the home which stated, "Warning this is a workers compensation poverty house since 1984. Enter at own risk. Political people not welcome unless your [sic] going fix WHSCC". Cst. Smyth ignored the sign because he did not consider himself a "political person."¹³⁷ He walked around the side and front of the house. He looked in the window and observed the living room area. He also knocked on the front living room window but received no response.

Cst. Smyth returned to his vehicle and considered his next step. He decided to visit Mr. Dunphy's neighbours, who turned out to be Mr. Dunphy's estranged brother and sister-in-law. After speaking with Dick and Debbie Dunphy, Cst. Smyth returned to the Donald Dunphy property. He again knocked on the living room window and looked through it. There was no immediate response, so Cst. Smyth started back toward his vehicle. As he was walking, he heard the screen door open. He turned and saw Mr. Dunphy standing in the doorway, so he walked back toward him.

As he approached, Cst. Smyth took out his RNC identification card and badge and showed them to Mr. Dunphy. Cst. Smyth asked if he was Don Dunphy, identified himself as "Joe Smyth with the RNC", and then asked if he could talk to Mr. Dunphy and if he could enter the house. Cst. Smyth says that Mr. Dunphy replied "yes, no problem."¹³⁸

¹³⁵ Transcript of Evidence of Cst. Joseph Smyth, January 23, 2017 at pp 56, 58.

¹³⁶ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 37.

¹³⁷ Transcript of Evidence of Cst. Joseph Smyth, January 23, 2017 at p 74.

¹³⁸ Transcript of Evidence of Cst. Joseph Smyth, January 23, 2017 at pp 97-98.

Cst. Smyth did not tell Mr. Dunphy that he was a member of the PSU. He said he did not see the relevance and “didn’t want him necessarily to tie me to politics.”¹³⁹ Cst. Smyth entered the house upon receiving Mr. Dunphy’s invitation to do so. They initially stood in the hallway for two or three minutes and conversed there.

Mr. Dunphy then invited him into the living room. Initially, they had a cordial conversation mostly consisting of small talk. They also spoke about Mr. Dunphy’s living conditions and his workplace injury. Mr. Dunphy then asked why the RNC would be in RCMP territory and Cst. Smyth says he told him “exactly why” he was there, namely, “following up on some comments that Mr. Dunphy had made on Twitter.”¹⁴⁰

Cst. Smyth recalls that Mr. Dunphy “just kind of laughed at first”, but, once they got into discussing social media, approximately five to seven minutes after Cst. Smyth arrived, Mr. Dunphy got agitated and started calling Cst. Smyth “a fucking puppet” and “an arm of the government” and asking things like, “who sent you here anyway”.¹⁴¹

Cst. Smyth states that Mr. Dunphy never expressly asked him to leave the residence or indicated this through gestures.¹⁴² He did not perceive Mr. Dunphy’s agitation or any of his comments as an indication that he wanted Cst. Smyth to leave.

Applicable law: licence to knock

Charter protection of privacy of the home

Section 8 of the *Canadian Charter of Rights and Freedoms* provides that everyone has the right to be secure against unreasonable search or seizure. This provision protects individuals from “unjustified state intrusion” on their reasonable expectations of privacy by guarding them against “unreasonable searches.”¹⁴³ Police conduct interfering with a reasonable expectation of privacy is said to constitute a “search” within the meaning of s. 8 of the *Charter*.¹⁴⁴

Although it is well established that s. 8 protects “people, not places”, the sanctity of a private dwelling and the high expectation of privacy to which its occupant is entitled

¹³⁹ Transcript of Evidence of Cst. Joseph Smyth, January 23, 2017 at p 98.

¹⁴⁰ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 104.

¹⁴¹ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 106.

¹⁴² Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at pp 118-119.

¹⁴³ *R v Hape*, 2007 SCC 26, at para 166, [2007] 2 SCR 292; *R v Alkins*, 2007 ONCA 264, at para 44, 85 OR (3d) 161.

¹⁴⁴ *R v Law*, 2002 SCC 10, at para 15, [2002] 1 SCR 227.

have long been accepted by the law.¹⁴⁵ The law also recognizes territorial privacy interests in the land or property on which a private home is situated. In this regard, the courts have observed that “a reasonable, indeed a strong, expectation of privacy” exists in people’s “approaches to their homes.”¹⁴⁶ The majority of cases which consider whether a police officer had lawful authority to approach and enter a private home are decided in the context of alleged s. 8 violations. As noted by Justice Sopinka in *R v Feeney*,¹⁴⁷ “the legal status of the privacy of the home was significantly increased in importance with the advent of the *Charter*.”

Implied licence to knock

Notwithstanding the accepted ‘sanctity’ of the dwelling house, the law has developed to hold that there exists an implied licence (or ‘invitation’) to any member of the public, including a police officer on legitimate business, to come onto private property, approach the residence and knock on the door. This implied licence extends to anyone who has a lawful reason to speak to the occupant. It is intended to facilitate convenient communication between the public and the occupant.¹⁴⁸

The ‘waiver’ of privacy rights embodied in the implied invitation extends no further than is required to effect its purpose, that is, permitting ‘convenient communication’; only those activities that are reasonably associated with such communication are authorized. Where the conduct of the police (or any person) goes beyond that, then the implied ‘conditions’ of the licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder.¹⁴⁹

The purpose of their approach determines whether the police conducted themselves within the implied licence. The implied right to approach and knock does not turn into a breach of s. 8 simply because the intent of the police is to pursue investigative questioning. However, the implied licence does not extend to police who attend at a private residence for the purpose of collecting incriminating evidence. Police in this situation are engaged in a “search of the occupant’s home” and must comply with s. 8 standards.¹⁵⁰

¹⁴⁵ *Hunter v Southam Inc*, [1984] 2 SCR 145 at 159.

¹⁴⁶ *R v MacDonald*, 2014 SCC 3 at para 26, [2014] 1 SCR 37.

¹⁴⁷ *R v Feeney*, [1997] 2 SCR 13.

¹⁴⁸ *R v Le*, 2014 ONSC 2033 at para 69, [2014] OJ No 1515.

¹⁴⁹ *R v Renouf*, 2013 SKPC 34 at para 24, 413 Sask R 226.

¹⁵⁰ *R v LeClaire*, 2005 NSCA 165, 208 CCC (3d) 559.

In *R v Evans*,¹⁵¹ police officers had approached the door of the accused's home to knock with the intention of sniffing for marijuana when he opened the door. Justice Sopinka, writing for the majority, found that this activity exceeded the implied licence and therefore constituted an unauthorized (unlawful) entry by police onto private residential property. At paragraph 3, Justice LaForest, in his concurring judgment, stated:

the sanctity of the home has constituted a bulwark against the intrusion of state agents for hundreds of years [and] ... our society simply cannot accept police wandering about or “sniffing” around our homes.¹⁵²

The implied licence to knock may be rebutted by the occupier of the dwelling through a clear expression of intent. Two examples of rebuttal measures given in *Evans* were by installing a locked gate at the entrance to the property and by “posting signs to that effect.”¹⁵³ Once an implied licence is revoked by the occupier, the person who entered upon the property pursuant to this implied licence is obliged to leave with reasonable dispatch. Anyone who does not leave becomes a trespasser.¹⁵⁴ Cases discussing rebuttal of the implied licence usually refer to an express notice being posted on the property itself, although there are few examples to illustrate what kind of language would be required to effectively withdraw the implied licence and no clear threshold has been delineated in this respect. In *R v Sheppard*,¹⁵⁵ the implied licence was rebutted where no explicit signage was present but the defendant and her family had gone to “great and obvious lengths” to preserve their privacy on their entire property with a front gate and security system.

With respect to whether it is lawful for an officer to look into the window of a home while approaching under the authority of the implied licence, this depends on where the window is located and the officer's purpose for looking in it. In *R v Laurin*,¹⁵⁶ Justice Morden found that police officers who went to the side of an apartment building and placed their faces within two inches of a window to have a “good look” were engaged in a search and had infringed on the occupant's reasonable expectation of privacy. Intention seems to be the determinative element in the window knocking and peering cases. Knocking on a window to draw the attention of the occupant *without* any ulterior motive, such as looking for incriminating evidence, is unlikely to be treated as an unreasonable search.

¹⁵¹ *R v Evans*, [1996] 1 SCR 8.

¹⁵² *R v Evans*, [1996] 1 SCR 8 at para 3.

¹⁵³ *R v Evans*, [1996] 1 SCR 8 at paras 13, 42.

¹⁵⁴ *R v Le*, 2014 ONSC 2033 at para 69, [2014] OJ No 1515.

¹⁵⁵ *R v Sheppard*, 2015 ONCJ 164, [2015] OJ No 704.

¹⁵⁶ *R v Laurin*, [1997] OJ No 905 (ONCA).

Conclusion on licence to knock

When Cst. Smyth first entered onto Mr. Dunphy's property, he did so under the reasonable assumption that his approach to the home to communicate with Mr. Dunphy was permitted by the implied licence to knock. I do not believe that the language of the sign, in the circumstances, communicated a revocation of the licence. Cst. Smyth's PSU role did not transform him into a 'political' person. He remained a police officer. Accepting that his purpose in attending at the Dunphy residence was not to conduct a search or make an arrest, then his approach to the home to speak with Mr. Dunphy did not exceed the implied licence described in the **Evans** sense. Cst. Smyth was conducting legitimate police business which entitled him to knock on Mr. Dunphy's door.

Applicable law: consent to enter

The implied licence ends at the door. It does not permit entry into the residence. Although police may enter a residence without a warrant in certain defined circumstances, typically of an exigent or extraordinary nature, the only avenue for Cst. Smyth to have lawfully entered the Dunphy home on the date in question was with a valid consent from Mr. Dunphy.

To be valid, consent must be both voluntary and informed. In **R v Wills**,¹⁵⁷ the Ontario Court of Appeal, at paragraph 69, enunciated the principles that will determine whether a person has consented to what would otherwise be an unauthorized search:

- (i) there was a consent, express or implied;
- (ii) the giver of the consent had the authority to give the consent in question;
- (iii) the consent was voluntary in the sense that that word is used in *Goldman, supra*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

¹⁵⁷ *R v Wills*, [1992] OJ No 294 (ONCA).

- (vi) the giver of the consent was aware of the potential consequences of giving the consent.

In *R v Borden*¹⁵⁸ where the Supreme Court of Canada approved this approach from *Wills*, Justice Iacobucci stated at paragraph 34:

In order for a waiver of the right to be secure against an unreasonable seizure to be effective, **the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right.** A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. [Emphasis added.]

In other words, knowledge of the various options and an appreciation of the potential consequences of the choice are essential for the making of a valid and effective choice to consent. For this reason, an individual's mental state, as well as police behaviour in taking advantage of vulnerability in this respect, can come into play in assessing the voluntariness and validity of consent. In *R v Brown*,¹⁵⁹ Justice Easton rejected the validity of an accused's wife's consent to search the couple's home, under circumstances where "Mrs. Brown was never given a clear indication that she could withhold consent and insist that a search warrant be obtained", and where the accused husband had expressly refused to sign the consent form. He summarized the key facts as follows at paragraph 50:

Was there here then a genuine consent? **In assessing whether the consent was consciously, freely and voluntarily given, it is important to objectively view what was going on at the time that this consent was obtained.** Here the residence was, to all intents and purposes, filled with either police officers or military personnel. Mrs. Brown's husband had just been arrested for trafficking in drugs; Mrs. Brown's young children were surrounding her looking for comfort and attention; the police had discovered that they were in the residence with an invalid search warrant and Mr. Brown had just refused to sign a consent to search. [Emphasis added.]

Justice Easton described this as "direct or indirect inducement and if not intimidation, certainly manipulation of an extremely vulnerable individual under considerable personal stress". He considered it "most unlikely" that any consent obtained in this manner had been "consciously, freely and voluntarily given".

¹⁵⁸ *R v Borden*, [1994] 3 SCR 145.

¹⁵⁹ *R v Brown*, [1997] 158 Nfld & PEIR 254 (NLSCTD).

Even without the added vulnerability element, an otherwise valid express waiver of an individual's privacy rights will be undermined if it is based on inaccurate or misleading information. In *R v O'Connor*,¹⁶⁰ the accused's consent to the search of his truck was reviewed by the Ontario Court of Appeal. The police, who had no grounds for an arrest or a search warrant, persuaded the accused to consent in part by telling him that they "could apply for a warrant". The court held that the police, having raised the subject of getting a warrant without admitting that they had no grounds to do so at that point, "likely misled the appellant about the consequences of refusing to give his consent" and that he therefore gave a consent "not made on the basis of proper information".¹⁶¹

In *R v Nguyen*,¹⁶² police officers had attended at the home of a woman who they suspected was the subject of an arrest warrant. Her identity and address came to their attention after she was involved in a car accident, through no fault of her own, the day before. She and her husband both spoke very limited English. The officers went to her residence and waved down her husband when they saw him approaching the home. They recognized that he would think they were there to speak to his wife about the car accident. They relied on the fact that he "motioned with his hand" for them to follow him into the home as "consent" to enter. While in the house, the officers found marijuana and arrested both occupants. The trial judge held that the officers had no lawful authority to be in the home because the husband's acquiescence to their entry and search of the residence had not been an "informed consent", stating at paragraph 56:

An implied invitation to enter may be negated where the police enter "without the express or reasonably assumed consent of the occupant": *R v Petri*, supra, at p. 564. **To the extent that the evidence can be interpreted as Van Nguyen inviting the constables into the residence, it is far from apparent that he made an informed and voluntary choice to do so based on what he was told.** To the extent he understood Const. Lesiuk's request to speak to his wife, Mr. Nguyen, with limited fluency with English, would naturally link the police attendance to speaking to his wife about the motor vehicle accident of the day before in which she was an uncharged, innocent party. This is precisely what Const. Lesiuk wanted. In other words, Van Nguyen had no opportunity to weigh in any decision to admit the officers that they had an interest in arresting his spouse. While perhaps not exactly a ruse to secure entry, **the material non-disclosure of the true purpose of the police attendance tends very significantly to negate the existence of a valid consent to enter the dwelling. A police trick to gain entry through not disclosing the real purpose for wishing to enter a dwelling negates valid consent:** *R. v Adams* (2001), 157 C.C.C. (3d) 220 (Ont. C.A.) at pp. 223-4. In other words, "informed

¹⁶⁰ *R v O'Connor*, [2002] 62 OR (3d) 263 (ONCA).

¹⁶¹ *R v O'Connor*, [2002] 62 OR (3d) 263, at para 70 (ONCA).

¹⁶² *R v Nguyen*, [2006] OJ No 4393 (ONSC).

consent” to entry requires announcement by the police of the true nature of their business, i.e. to make an arrest: *R. v G.(M.C.)*, supra, at para. 13-4; *R. v LeClair* (2006), 208 C.C.C. (3d) 559 (N.S.C.A.) at para. 35. [Emphasis added.]

Taylor v London (City) Police Services¹⁶³ was a civil action for damages arising from negligent investigation, false imprisonment, negligent operation of a vehicle and breach of the plaintiff’s s. 8 *Charter* rights by police. The police had attended at the plaintiff’s home to speak with him about his girlfriend, who alleged that he had beaten her, but did not tell the plaintiff this before he invited them into his home. Once inside, an officer informed the plaintiff that he was present to arrest him for assault. Up until that point, the plaintiff had thought that they were there to investigate damage to his motor vehicle. The judgment states, in relevant part, commencing at paragraph 60:

A valid consent requires an informational component in order to truly be an informed consent. In other words, the consenting party must be aware of:

- (i) the nature of the police conduct to which consent relates;
- (ii) the right to refuse entry to the police; and
- (iii) the potential consequences for allowing entry.

A valid consent must also be voluntary and not the product of oppression or other conduct that impedes the homeowner’s choice of whether to permit or deny the police entry into the home in the absence of a warrant.

It is important to keep in mind the dynamics of a police-homeowner interaction and the fact that many people are uncomfortable and not on even footing with the police in these situations.

It is clear on the evidence before me that the plaintiff invited the officers into his home with express words to that effect.

What is equally clear on the accepted evidence is that the plaintiff did not understand the effect or potential consequences for permitting the officers to enter his home at that time.

He did not know that the police had the requisite grounds to believe he assaulted Sharon Penney **nor did he know that they were present to effect his arrest for this offence when he invited them into his residence. He believed that their attendance at his home, until advised otherwise once the officers were inside, was to potentially investigate damage to his motor vehicle.**

¹⁶³ *Taylor v London (City) Police Services*, 2016 ONSC 5839, [2016] 275 ACWS (3d) 535.

Upon becoming aware of why the police were in attendance, he immediately and repeatedly expressed to them, in clear and unambiguous language, the need for them to leave his residence in the absence of a warrant for his arrest.

[...]

Although there is no evidence before me of any trickery on the part of the officers, I find that they made a mistake by not clearly and plainly telling the plaintiff that they were in attendance at his residence to effect his arrest for an assault on Sharon Penney. Their failure to do so before the plaintiff declined their invitation to step outside (and invited them inside) constitutes a clear and unequivocal breach of the plaintiff's s. 8 *Charter* rights to be free from unreasonable search and seizure. [Emphasis added.]

As with the cases dealing with implied licence, the purpose of the police visit is relevant to the determination of whether a s. 8 violation has occurred. Most of the cases above take place in the context of an arrest. This distinction was discussed in ***R v Petri***,¹⁶⁴ where the police had attended at a home for the purpose of talking to the occupant. The occupant opened the door and then backed up into the home while they spoke, allowing the police to move into the house and onto the interior landing. There was no discussion of rights or the purpose of their visit. Their conversation led directly to the occupant's arrest after he showed signs of intoxication and admitted to drunk driving upon being asked. The trial judge's finding that Mr. Petri's s. 8 rights had been infringed because the police had relied on his implicit consent to enter the residence without warrant and arrest him was overturned on appeal. Justice Kroft began his analysis of the *Charter* issue by observing the following at paragraph 5:

I begin my substantive comments by emphasizing the limited amount of information that the two officers had when they first arrived at the address of the registered owner. They had no description whatsoever of the person who had been driving the truck; did not know if the house was the driver's home; and had no idea whether the erratic driver was the truck owner, a family member or an unrelated third person. Furthermore, they had no way of knowing if the driver was even in the house and did not know anything about his state of sobriety. They were in fact just beginning the investigation of a reported offence.

Justice Kroft was satisfied that the police had approached the home in the normal course of their work "out of a legitimate desire to communicate with its occupant (if any), and not for the purpose of securing evidence against the accused". At that stage, the officers had no way of knowing the identity of the erratic driver or whether alcohol was

¹⁶⁴ *R v Petri*, 2003 MBCA 1, [2003] MJ No 1.

involved and were not exceeding the implied licence when they approached the door and knocked. Justice Kroft was also of the view that the police did not infringe Mr. Petri's rights by relying on his implicit consent to come into his home without a warrant and that Mr. Petri did not withdraw his consent in the course of their interaction. In the result, the Manitoba Court of Appeal set aside the acquittal and ordered a new trial.

As discussed in *Petri*, a valid consent to allow a police officer to be present in a dwelling house can be revoked by a person with authority to do so at any time.¹⁶⁵

Conclusion on voluntary and informed consent

Cst. Smyth was not within any of the exceptions to the 'sanctity of the home' principle when he entered the Dunphy residence: there was no 'hot pursuit'; there was no purpose relating to prevention of serious injury or protecting life and safety; there was no warrant to arrest or to search; and there were no 'exigent circumstances', such as imminent bodily harm or death or loss of evidence. The lawfulness of Cst. Smyth's presence in the Dunphy residence was entirely dependent upon his ability to obtain a valid consent from Mr. Dunphy.

Given that he was not attending to conduct a search or make an arrest, Cst. Smyth was not necessarily obligated prior to entering to make a formal statement to inform Mr. Dunphy that he was entitled to refuse entry to his home or to state the consequences of allowing a police officer into his home. Furthermore, Mr. Dunphy likely knew that he had no obligation to allow Cst. Smyth entry and recognized that the consequences of doing so could include arrest if there was evidence of illegal activity in plain view. According to Meghan Dunphy's testimony, if Mr. Dunphy did not want to let Cst. Smyth enter his house, he would not have done so.

The aspect of the interaction which brings the lawfulness of Cst. Smyth's entry into the Dunphy home seriously into question is the fact that Cst. Smyth deliberately withheld information about the nature of his visit and his role in the PSU prior to gaining entry to the home. Although an express consent was obtained from Mr. Dunphy, it was not an informed consent capable of waiving the constitutional rights afforded under s. 8 of the *Charter*. A valid consent must be voluntary and not the product of conduct that impedes the homeowner's choice of whether to permit or deny police entry into the home. Cst. Smyth did just that when he sought to minimize the likelihood that Mr. Dunphy

¹⁶⁵ See *R v Thomas*, [1991] NJ No 152 (NLCA), aff'd [1993] 1 SCR 835.

would exercise his constitutional rights by intentionally concealing information which he felt might result in Mr. Dunphy's refusal to allow Cst. Smyth into the home to speak with him.

As a result of Cst. Smyth's conduct, Mr. Dunphy was not given an adequate informational basis upon which to relinquish his right to privacy and Cst. Smyth's entry into the Dunphy residence was unlawful, and was a *prima facie* unreasonable search which violated Mr. Dunphy's s. 8 *Charter* rights.

Furthermore, Cst. Smyth not only waited until after Mr. Dunphy invited him into the home to disclose his purpose in being there, he engaged in casual conversation in the front hallway and then in the living room, with the calculated intention of disarming Mr. Dunphy before getting into "a full and frank discussion" regarding his social media posts.¹⁶⁶ As a higher expectation of privacy would apply to the living room than the hallway, Cst. Smyth's ongoing failure to notify Mr. Dunphy of his purpose for attending at the home throughout this period arguably exacerbated the violation of his rights. Mr. Dunphy had to ask why an RNC officer would be in RCMP territory before Cst. Smyth actually disclosed this information, and even then he apparently did not acknowledge his specific position on the security detail for the Premier.

As noted in Cst. Smyth's Reply Submission dated April 24, 2017, Ms. Dunphy did testify that Mr. Dunphy would have allowed an RNC officer into the house, even one with the PSU, although she indicated that he "probably might have asked a few more questions as to why he was there" before doing so. This may be accurate, but the reality is that Mr. Dunphy was *not* given the opportunity to ask those questions at a time when such opportunity (a) ought to have been afforded to him, and (b) could have made a difference to the outcome. Had Cst. Smyth been forthright about his unit assignment and the nature of his visit before gaining entry to the home, then Mr. Dunphy might have gotten 'agitated' or 'confrontational' while he still had the option to respond by closing the door. Instead, Mr. Dunphy learned the relevant information while he was seated in his living room chair, with a police officer standing over him and looking around his home. If we believe that Mr. Dunphy was upset enough to aim a rifle at Cst. Smyth in that context, then it is only reasonable to accept that he may have reacted to the same information by exercising his right not to allow Cst. Smyth into the house, had he known all the facts at the appropriate time.

The question of whether Cst. Smyth remained unlawfully in the home immediately before the shooting occurred is more complicated. It was open to Mr. Dunphy to revoke

¹⁶⁶ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 25.

the consent that he initially provided (or to clarify his lack of consent) upon learning that Cst. Smyth was investigating his social media postings. However Cst. Smyth denies that Mr. Dunphy ever told him to leave, gestured at him to leave, or said anything which could be interpreted as suggesting that he wanted Cst. Smyth to leave his house. Based only on Cst. Smyth's evidence, it is impossible to determine whether Mr. Dunphy said anything during the interaction that ought to have been interpreted as 'making known' that his cooperation was being withdrawn, although it is certainly arguable based on the description given.

If the consent was not a valid one to begin with, however, then the question is not whether there was a revocation but whether there was a valid consent granted *after* Mr. Dunphy was more fully informed. Although he apparently did not object expressly to Cst. Smyth's continued presence in his home, I would not characterize Mr. Dunphy's acquiescence as a valid consent. Mr. Dunphy's mental and emotional state, their respective physical positions and the nature of the interaction by that point all would have made it difficult for him to form a free and voluntary informed consent to the ongoing waiver of his privacy rights.

Concluding that Cst. Smyth was present in Mr. Dunphy's home, without lawful authority, is not to say that Mr. Dunphy acted appropriately. In the circumstances, Mr. Dunphy should have asked Cst. Smyth to leave. Mr. Dunphy was not entitled to point a firearm at Cst. Smyth to get him out of the house and Cst. Smyth was fully justified in defending himself as he did.

Neither should my conclusions here be taken as a finding that Cst. Smyth knowingly acted in breach of the *Charter*. The problem is most likely a systemic one that needs to be addressed by better training. The RNC should clarify the approach its officers are expected to take when seeking consent to enter a person's home. Their objective must be to obtain consent which is voluntary and fully informed. Withholding information to build rapport and improve the officer's chances of being admitted to a residence, such as in the circumstances here, amounts to a trick to gain entry and negates valid consent.¹⁶⁷ Rapport building cannot trump *Charter* rights.

I agree with Ms. Dunphy that Cst. Smyth did not obtain a valid consent to enter her father's home as it was not a fully informed consent. Protecting the sanctity of the home by ensuring strict observation of the consent requirements is an appropriate check to place on the discretionary exercise of police power and will properly constrain the

¹⁶⁷ See *R v Nguyen*, [2006] OJ No 4393; *R v Adams*, [2001] OJ No 3240 (ONCA); *R v G (MC)*, 2001 MBCA 178, 160 Man R (2d); *R v LeClaire*, 2005 NSCA 165, [2005] NSJ No 547.

practice of police home visits to investigate matters where no crime has been committed.

Recommendation 3: The RNC should take measures to ensure that police officers engaged in threat assessments scrupulously observe the *Charter* requirement to protect the sanctity of the home; entry into private residences without a warrant should be only with the voluntary and informed consent of the home owner, following identification, including rank and unit assignment.

Commentary: Donald Dunphy did not provide informed consent because he had not been told Cst. Smyth was with the PSU.

Finding 5: Did Cst. Smyth act unprofessionally or exhibit errors of judgment?

Although Cst. Smyth acted with appropriate force when threatened with a rifle, in the period leading up to that moment and in the days and weeks following, he made errors of judgment and failed to comply with certain aspects of his training.

Personal risk assessment and the decision to visit alone

As discussed in Chapter 8, police officers working in the field must continuously engage in 'risk assessment' to ensure their own personal safety. As part of this process, Cst. Smyth conducted background checks on Mr. Dunphy from which he learned that Mr. Dunphy had no outstanding court orders or warrants and had no registered firearms. Although the evidence is not definitive, it is also most likely that Cst. Smyth knew that Mr. Dunphy had a dated criminal record for possession and production of marijuana and a more recent medical marijuana licence. He likely also knew that Mr. Dunphy had been previously charged with uttering threats, but that the charge had been withdrawn and a peace bond entered instead.

Based on the information he had, Cst. Smyth assessed the risk to his personal safety in conducting a home visit as low and he decided to visit Mr. Dunphy alone. I have already found in Finding 3 that solo visits were authorized by RNC policy and are the norm in this Province for low-risk situations. I find no fault with Cst. Smyth's initial assessment that the risk to his personal safety was low nor with his decision to attend alone. However, he may have made an error in judgment by not reconsidering that decision once he obtained further information from his first visit to Mr. Dunphy's house and from Dick and Debbie Dunphy.

When Cst. Smyth arrived in Mitchell's Brook, he made an initial visit to Mr. Dunphy's house. Although Mr. Dunphy was not at home, Cst. Smyth had the opportunity to view the very poor condition of the house and property, the security cameras, and the sign advising visitors to enter at their own risk and political people that they were not welcome. Cst. Smyth then met Mr. Dunphy's brother and sister-in-law. He learned that Mr. Dunphy had been estranged from them for ten years, that he had not abided by the conditions of a peace bond he had been placed under, and that he made Debbie Dunphy "uneasy."¹⁶⁸ In Cst. Smyth's own words, at this point he had concerns that he was dealing with a person "with some level of mental illness."¹⁶⁹ He also knew, having

¹⁶⁸ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 85.

¹⁶⁹ Exhibit P-0121 at p 76; Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 84.

tried to call Mr. Dunphy from the nearby roadside without success, that cell phone coverage in the area was spotty which means that, if something did go wrong, he may have been unable to call for help.

'Risk assessments' do not happen at a moment in time. Officers must constantly reassess their assessment as circumstances change and new information comes to light. The decisions officers make are often judgment calls, which will be affected by both the known facts and by the officer's particular circumstances at the time. Judgment calls are difficult to assess fairly in hindsight. While the day might have unfolded differently had Cst. Smyth chosen otherwise, absent improper reliance on hindsight, I cannot find that his discretionary decision to proceed with a solo visit, even after having the further information, was a clear error.

Cst. Smyth did not notify the RNC Communications Centre prior to entering Mr. Dunphy's home. This type of notification is referred to as 'booking out'. Failing to book out with the Communications Centre has been suggested as another error by Cst. Smyth. The evidence I received establishes that the practice of the RNC has been to only require booking out by front-line operators in high risk situations. While perhaps the RNC should review this practice, Cst. Smyth should not be found to have erred when he followed existing policy.

I also want to note here the evidence about Cst. Smyth's '10-29' check and Mr. Dunphy's having been flagged with a 'caution V' for violence in the CPIC system. The 10-29 search and the need for the RNC to clarify and update their training has already been discussed in Chapter 8. For the purpose of this section, it is important to acknowledge that Cst. Smyth was not told about the violence flag when he requested a 10-29 search and that Cst. Smyth stated in his evidence that if he had known about the violence flag, it would have changed how he went about his visit with Mr. Dunphy in that he would have felt obligated to take another officer. He would not have necessarily assumed that the violence flag related to the uttering threats charge which had been withdrawn.¹⁷⁰ I accept that if Cst. Smyth had known about the violence caution on Mr. Dunphy's file, it would have at least caused him to re-think his strategy of visiting Mr. Dunphy alone.

¹⁷⁰ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 52-54.

Conclusion on decision to visit alone

Cst. Smyth's initial decision to make a solo visit was consistent with RNC policy and appropriate given his assessment of low risk. His discretionary decision to continue with a solo visit after having obtained information that should have increased his personal risk assessment may have been an error of judgment, but I have not been shown that it failed to meet reasonable policing standards. I find this to be an area where reasonable police officers may differ, as they have.¹⁷¹ Cst. Smyth's decision must be considered from his perspective on that day and without inappropriate reliance on hindsight. His choice to proceed alone should not be judged with the knowledge of the tragedy that unfolded subsequently.

Application of his use of force training inside the home

I find that Cst. Smyth, once inside Mr. Dunphy's home, made errors in judgment that added to his personal risk. However, some of Cst. Smyth's actions, about which I heard considerable evidence and submissions, I do not find to be in error. For example, when Cst. Smyth first entered Mr. Dunphy's home, there was a lot for him to observe and absorb as the house was very cluttered. I do not fault Cst. Smyth for immediately failing to observe any particular item, for example the stick or the box cutter. Neither do I fault Cst. Smyth for failing to follow the latest de-escalation methods or best practices. Cst. Smyth had not had the benefit of specific training on crisis intervention and de-escalation. What he had received in basic training and a one day course on mental health issues with respect to de-escalation and dealing with persons in crisis was very limited. While the day may have unfolded differently had Cst. Smyth accepted Mr. Dunphy's offer to sit on the couch or refrained from telling Mr. Dunphy to "calm down" or advising him that he "had concerns", I cannot judge Cst. Smyth's actions on the basis of today's best practices.

With respect to the errors I do find Cst. Smyth to have made, the most significant of these were his failure to stay vigilant and keep his eyes on Mr. Dunphy's hands. As addressed in Chapter 7, the RNC Use of Force Training Manual teaches seven tactical principles with respect to the use of force including, recognizing threat cues, the "one plus one rule" and de-escalation.¹⁷² The Use of Force Training Manual also has a section on "Tactical Errors to Avoid", which includes locating with a safe exit and failing

¹⁷¹ Compare Exhibit P-0773 at p 38; Exhibit P-0784 at pp 8-9; and Transcript of Evidence of Cpl. Wayne Knapman, March 2, 2017 at p 114.

¹⁷² Exhibit P-0624.

to watch the hands of a subject. Maintaining eye contact with a subject, listening attentively, and keeping your own hands free are also important tactics.

The following is the section on “Threat Cues” contained in the RNC Use of Force Manual:

Threat cues are best defined as perceptions, either audible or visual, of a particular situation that **SHOULD** raise the officer’s level of awareness and prepare him/her for any escalating confrontation that may occur. Looking for and reacting to the perceivable threat cues is a critical function of continual risk assessment. Some examples include, the subject conspicuously ignoring the officer, any exaggerated movements, ceasing all movement, and the thousand-yard stare. These are indications the subject is trying to formulate a plan in the officer’s presence and not do what the officer instructs him/her to do. Threat cues may also be present throughout the environment the officer is working in. Tattoos, insignias, visible weapons and weapons of opportunity are also good examples.

HANDS, HANDS, HANDS. Look for, demand to see, and watch the **hands**. They will deliver the threat or at the very least, telegraph the threat is about to be delivered.¹⁷³

RNC officers are also trained to be continually assessing and scanning the environment for additional threat cues. While the “one plus one rule” specifically states that when one weapon or possible assailant is observed, an officer should assume there is another one that he or she cannot see, the essence of the rule is that an officer should remain vigilant.

Cst. Smyth acknowledges that very shortly before the rifle was produced he looked down at the file folder he was carrying, either writing or pretending to write, in an attempt to de-escalate the situation. He did not keep his eyes on Mr. Dunphy’s hands even when it became apparent that Mr. Dunphy was becoming increasingly agitated. Additionally, he maintained his position in the living room away from the exit, with Mr. Dunphy and at least one weapon, the stick, in between. During this period, Cst. Smyth described Mr. Dunphy as frothing at the mouth, squirming in his chair in an agitated state, and cursing at him, which Cst. Smyth recognized as threat cues.

¹⁷³ Exhibit P-0624 at p 16.

Conclusion on application of his use of force training inside the home

Had Cst. Smyth followed his training with respect to the “one plus one rule”, the presence of the stick, which Mr. Dunphy told him was kept for protection, should have increased his vigilance. I find that Cst. Smyth’s efforts to de-escalate the situation by looking down, not keeping eye contact with Mr. Dunphy, and failing to follow the **“HANDS, HANDS, HANDS”** rule, did not comply with his training. I also find that the totality of all of the threat cues should have caused Cst. Smyth to re-assess his plan as to whether he should continue his visit with Mr. Dunphy, or at the very least, to reconsider his positioning in the room. Again, however, this is a matter which should be left to the discretion of the police officer on the scene. Experts differed as to the reasonableness of his decision.¹⁷⁴ I should not second-guess Cst. Smyth on the basis of hindsight.

Also, I cannot determine what the result would have been if Cst. Smyth had better adhered to his training. It is impossible to know whether Mr. Dunphy would have raised the rifle if Cst. Smyth was watching him more closely or if Cst. Smyth had moved towards the door. It is possible that Mr. Dunphy would have persisted in his plan and the result would have been the same. I review in Finding 6 Cst. Smyth’s opportunity to de-escalate once the rifle was produced.

Inappropriate communications following the incident

On April 10, 2015, Cst. Smyth wrote an email expressing his frustration with public opinion and with speculation about the shooting that was then circulating on social and other media. The email is a prime example of the ‘us versus them’ aspect of police culture. Cst. Smyth viewed the general public as being confused or ignorant about how policing works. His email seems to be, in part, an expression of his frustration with this and, in part, an effort to educate about proactive policing and security for elected officials. The email portrayed Mr. Dunphy as a man in crisis who Cst. Smyth was simply “too late” to help.

Cst. Smyth has acknowledged that he exercised bad judgment by sending this email, although he emphasizes that the document was not meant to be made public. Cst. Smyth sent the email internally to all members of the RNC, both civilian and police, and externally to former members of the RNC and to members of the RCMP. Having

¹⁷⁴ Compare Exhibit P-0773 at pp 12-13 and Transcript of Evidence of Cpl. Wayne Knapman, March 2, 2017 at pp 123-124.

distributed it to such a wide audience, including people who were not subject to the obligation of secrecy imposed by s. 60 of the *Royal Newfoundland Constabulary Act, 1992*,¹⁷⁵ I find that Cst. Smyth ought reasonably to have known that the risk of a leak was high and that the content of the email was inappropriate during an active investigation.

The subsequent conversation that Cst. Smyth had with David Cochrane of the CBC, who published the email after it was leaked to him, was also inappropriate and showed bad judgment by Cst. Smyth. Although Cst. Smyth testified that it was Mr. Cochrane who reached out to him to apologize for the email being made public, the evidence is that Cst. Smyth was actively seeking Mr. Cochrane's cell phone number to thank Mr. Cochrane for how he handled the situation just prior to Mr. Cochrane's call. We do not have an exact record of what was said on that call but Cst. Smyth should not have been in contact with Mr. Cochrane in relation to the email on April 10.

Perhaps more seriously, Cst. Smyth also communicated privately with the media about witnesses. On April 6, 2015, before he gave his statement to the RCMP, and before he knew whether Dick Dunphy had been interviewed by investigators, Cst. Smyth communicated with James McLeod of The Telegram, advising him to speak with Dick Dunphy.¹⁷⁶ Presumably this was because Cst. Smyth had heard, through Cst. Warren Sullivan, that Dick Dunphy was speaking supportively of Cst. Smyth. Cst. Smyth also attempted to indirectly communicate with Fred Hutton of VOXM, through Sgt. Tim Buckle, asking Sgt. Buckle to tell Fred Hutton to speak to Dick Dunphy.¹⁷⁷ Sgt. Buckle responded that he would, although he testified before the Inquiry that he never did. Again, this was inappropriate behaviour by Cst. Smyth.

Although not as serious as the above improper communications, following the shooting Cst. Smyth should not have responded to the query from Heather MacLean, the then-Premier's Director of Communications, about whether Mr. Dunphy had a criminal record. Nor should he have disclosed to an acquaintance on April 6, that the "RCMP confirmed that he (Mr. Dunphy) had a round in the chamber."¹⁷⁸

¹⁷⁵ *Royal Newfoundland Constabulary Act*, SNL 1992, c R-17.

¹⁷⁶ Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 77.

¹⁷⁷ Exhibit P-0500 at p 6.

¹⁷⁸ Exhibit P-0133 at p 7.

Conclusion on inappropriate communications

At the time of these communications, the matter was under investigation by the RCMP and Cst. Smyth was not working with the PSU. He should have kept all aspects of the matter confidential except as required by his duties or for the benefit of the investigation.

Other failures of judgment

There are other instances where Cst. Smyth failed to show good professional judgment. First, Cst. Smyth did a poor job of documenting the steps he took in conducting his threat assessment of Mr. Dunphy. For example:

- (1) At the point of visiting Mr. Dunphy he had had discussions with Donna Ivey, Ralph Tucker, Tom Mahoney, Debbie Dunphy, Dick Dunphy, and Cst. Adrian Cox but had not made notes. A written record of the details and timing of these conversations could have been of assistance to the RCMP investigation and the fact-finding process of the Inquiry.
- (2) He had parked on the side of the road and attempted to call Mr. Dunphy six times prior to the visit. He did not make any notation of these calls or the time parked on the side of the road.
- (3) He made no notation as to whether he carried out an ICAN search in Donald Dunphy's name or of the results of any such search and no record of this search exists in the RNC system.

Cst. Smyth has testified that his plan was to record his notes after his meeting with Mr. Dunphy and that because of the tragic turn of events, he did not get that opportunity.¹⁷⁹ The nature of police work is that there is always a risk of a tragic or unexpected turn of events and the best record of police work is contemporaneous notes. While contemporaneous is not always possible, notes should be taken as soon as reasonably possible after events. Better record keeping would have assisted the RCMP investigators and the Inquiry process in reconstructing events.

Recommendation 22: The RNC should ensure that its note-taking policy is enforced to require all officers to maintain active notebooks.

¹⁷⁹ Transcript of Evidence of Cst. Joseph Smyth, January 24, 2017 at p 94.

Cst. Smyth also failed to exercise good judgment when he sought input from Sgt. Tim Buckle, who was a friend as well as a colleague, on his notes of the incident. This issue is reviewed in detail under Finding 16. It was clear from the evidence of the many police officers who testified at the Inquiry that it is widely accepted and proper professional practice that police officers not consult with others in making their incident notes other than perhaps to confirm a time or other particular objective detail.

It is also troubling that, prior to providing his cell phone to the RCMP, Cst. Smyth deleted information from it that was relevant to the matter. Although Cst. Smyth testified that he understood deleted information could be retrieved by the RCMP, this is not always the case.¹⁸⁰ Cpl. Kent Luther, an RCMP officer, who was tasked with extracting data from Cst. Smyth's cell phone wrote a report that was entered into evidence.¹⁸¹ Cpl. Luther's report indicates that when he was first advised a BBM conversation was not included in his extraction report of the cell phone data, he told the RCMP's counsel that if the messages had been deleted by Cst. Smyth prior to his delivering his cell phone to the RCMP it is possible that the forensic software may not have been able to retrieve them. Although, as it turned out, this was not the reason the BBMs were not initially extracted, at least one email and attachment, relating to Cst. Smyth's circulation of his notes to Sgt. Buckle, could not be retrieved by investigators.

Conclusion on other failures of judgment

Cst. Smyth failed to conduct himself professionally in failing to keep proper notes.

Cst. Smyth did not exercise good professional judgment when he deleted information relevant to the investigation from his cell phone.

Cst. Smyth also exercised poor professional judgment when he sought input from Sgt. Buckle on his notes of the incident prior to filing them with the RNC or providing them to the RCMP. As an experienced officer, Cst. Smyth knew or ought to have known that this was not appropriate, regardless of whether or not he accepted Sgt. Buckle's suggestions.

¹⁸⁰ Transcript of Evidence of Cst. Joseph Smyth, March 6, 2017 at p 14.

¹⁸¹ Exhibit P-0799.

Finding 6: Did Cst. Smyth have time to de-escalate once the rifle was pointed?

Cst. Smyth estimated that no more than two or two and a half seconds passed from the time he first observed the rifle out of his peripheral vision until he had fired four rounds and exited the room.¹⁸² Dr. Terry Coleman gave expert evidence at the Inquiry about appropriate de-escalation strategies and measures to be taken to ensure officer safety. In the report he co-authored with Sgt. Michael Massine, a use of force expert with the BC Justice Institute, he wrote, “Once Mr. Dunphy produced his rifle, it would be challenging for a person not well versed and confident in de-escalation to try that approach.”¹⁸³ In his testimony at the Inquiry, Dr. Coleman stated that, while it was possible for an officer faced with a gun pointed at him or her to de-escalate the situation, he did not disagree with the actions taken by Cst. Smyth in the situation he faced.¹⁸⁴

The two use of force experts who testified at the Inquiry, Sgt. Massine and Cpl. Wayne Knapman, both agreed that Cst. Smyth’s use of lethal force was reasonable and warranted once the rifle was produced and pointed at him.

Cpl. Knapman, who prepared a report as part of the RCMP’s investigation, wrote:

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 behaviour and his use of lethal force was necessary to protect his life.¹⁸⁵

In his report, Cpl. Knapman also referred to the situation “rapidly deteriorating” once the firearm was produced:

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.¹⁸⁶

¹⁸² Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 30.

¹⁸³ Exhibit P-0773 at p 62.

¹⁸⁴ Transcript of Evidence of Dr. Coleman, March 8, 2017 at p 62.

¹⁸⁵ Exhibit P-0744.

¹⁸⁶ Exhibit P-0744.

In his testimony, Cpl. Knapman noted that Mr. Dunphy's behaviour had escalated to the most extreme point on the NUFM scale at which an officer fears grievous bodily harm or death.¹⁸⁷

Similarly, Sgt. Massine was of the opinion that Cst. Smyth responded appropriately with lethal force "when the presence of the firearm became known, and more importantly, was pointed at him."¹⁸⁸ Cst. Smyth testified about what was going through his mind when he became a target:

I'm very much thinking at this stage you're going to be shot. This is really—this is going to hurt and what I distinctively remember is almost feeling and getting ready for that impact, and I drew my firearm.¹⁸⁹

Sgt. Massine described Cst. Smyth's words in which he said he was bracing for the impact of the round from Mr. Dunphy's rifle, as a "powerful statement."

I agree that this aspect of Cst. Smyth's evidence compellingly portrayed the critical situation in which he found himself. I am also reminded of the importance of considering this moment from the perspective of Cst. Smyth as opposed to analysing the situation with the benefit of hindsight. This notion of perspective is discussed in Chapter 5 and was well articulated in the Iacobucci Report:

Encounters in which police use lethal force against a person in crisis often take place in the space of seconds, in a rush of emotion, adrenaline, and fear. Those who review such encounters after the fact, on the other hand, have the benefit of time, information, detachment, and hindsight. It is critically important not to ignore this fundamental difference in perspective. I have therefore sought, as best I can, to understand what it is like to be the police officer, or to be the person in crisis, in the highly charged moment of a potentially violent encounter. Without that perspective, one cannot fully appreciate what causes fatal encounters, or be well situated to try to prevent them.¹⁹⁰

Conclusion on time for de-escalation

When all the evidence is considered, I find that, once the rifle was produced and pointed, Cst. Smyth did not have an opportunity to de-escalate the situation. Police

¹⁸⁷ Transcript of Evidence of Cpl. Wayne Knapman, March 2, 2017 at p 122.

¹⁸⁸ Transcript of Evidence of Sgt. Michael Massine, March 8, 2017 at p 64.

¹⁸⁹ Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 5.

¹⁹⁰ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Services, 2014) at p 59.

officers faced with such circumstances cannot be held to a standard that would expect more from them than reasonable actions aimed at defending themselves or others. As discussed in Chapter 6, s. 25 of the ***Criminal Code*** permits police officers to use lethal force when it is necessary, reasonable and proportionate in the circumstances. Based on the expert evidence presented, I find that test has been met by Cst. Smyth.

Finding 7: Timing, place, cause and manner of death?

Pursuant to ss. 3(1)(a) of my Terms of Reference, I have been mandated to inquire into the circumstances surrounding the death of Mr. Dunphy, including:

- (i) the time and place of death;
- (ii) the cause of death; and
- (iii) the manner of death.

(i) Time and place of death

Mr. Dunphy died on April 5, 2015, in his residence in Mitchell's Brook. The Chief Medical Examiner, Dr. Simon Avis, was unable to state the time of death. Included in Dr. Avis' file was a "Scene Report" stating that death occurred at 2:25 pm and that the 'witness' to that information was Cst. Smyth.¹⁹¹ I accept Cst. Smyth's time in the Scene Report as probably being the best estimate of the time death took place.

(ii) Cause of death

The cause of Mr. Dunphy's death was a gunshot wound. Four shots were fired, one missed, two hit Mr. Dunphy's head, and one hit his torso. Dr. Avis was unable to determine which shot was first or which shot was last. He was also unable to determine which one of the three shots killed Mr. Dunphy. It was his opinion, however, that all three shots inflicted lethal injury. I accept Dr. Avis' testimony.

(iii) Manner of death

Dr. Avis reported that the manner of Mr. Dunphy's death was homicide. Dr. Avis noted that, from a medical perspective, homicide is where an individual's death occurs as a result of the actions of another individual. He could make no finding as to whether the homicide was culpable or blameworthy. A finding of culpability depends on whether the

¹⁹¹ Exhibit P-0738 at p 22.

shooting by Cst. Smyth was justified under s. 25 of the **Criminal Code**. I deal with justification for the use of lethal force in Chapters 6 and 10 (Finding 6).

Conclusion on time, place and manner of death

Little dispute arises regarding the time, place or cause of death and I agree with Dr. Avis on all points. As for the manner of death, it was nonculpable homicide by Cst. Smyth, as explained in Finding 6.

Finding 8: Was this a case of ‘suicide by cop’?

In a case of a fatal police shooting where it is alleged that the victim pulled a weapon on the subject officer without apparent provocation, it is appropriate to consider the possibility that the victim deliberately behaved in a threatening manner with the intent to provoke a lethal response from the officer. Formally, this is known as ‘victim precipitated homicide;’ colloquially, it is known as ‘suicide by cop.’ I will therefore examine Mr. Dunphy’s circumstances through this lens.

Mr. Dunphy’s relationship with his daughter and friends

The evidence is consistent that Mr. Dunphy enjoyed a close relationship with his daughter, Meghan Dunphy, who testified that she saw her father regularly. She usually visited his house on Saturdays and he would regularly stop by her house if he was passing by. They ran errands together and would accompany each other on visits to their family doctor, Dr. McGarry. Additionally, Ms. Dunphy testified that she spoke to her father by phone multiple times each day. She described their relationship as “very close”. Ms. Dunphy’s testimony in this regard was corroborated by several other witnesses, including, Billy Corcoran, Rita Farrell, and Dr. Thomas McGarry.

In addition to his relationship with his daughter, Mr. Dunphy had friends. Mr. Dinn and Ms. Farrell both testified to their friendship with Mr. Dunphy and their regular visits to his home. I also heard evidence of other friendships including those with Thomas Hearn and Dominic Farrell.

Planning for the future

There was also uncontroverted evidence that Mr. Dunphy was planning for the future. He had purchased shingles, gum, and nails to redo his leaking roof, and laminate flooring to redo his floors. He had also been given some windows by Mr. and Ms. Farrell. These building materials were stored, waiting for the snow to melt so that the exterior work could be completed before the new floor was laid.

Ms. Dunphy testified that, when her father turned 60, he was going to receive an additional \$600 per month in income from a survivor’s benefit. Although she did not know all the details, she described him as being “very excited” about getting the extra income. She also testified that her father had \$7,500 - \$8,000 in a pension fund that he planned to withdraw at either age 60 or 65. Again, although she did not know all of the

details, her father had told her about the money and that he was planning to use it to do further repairs on his house.¹⁹²

Upon his death, Ms. Dunphy testified that her father had a full stock of groceries and had even cooked a turkey the day before. When she last saw her father, only an hour or so before his death, he was in good spirits, having just enjoyed an Easter brunch with his family.

Mr. Dunphy's health

Dr. McGarry, Mr. Dunphy's family physician since November 2009, testified as to Mr. Dunphy's physical and mental health. Dr. McGarry testified that Mr. Dunphy did not have any mental health issues such as depression, anxiety, or panic disorder.¹⁹³ He did not drink alcohol. His toxicology report showed a THC level consistent with medical marijuana use.

A recent CT scan had revealed a lesion in Mr. Dunphy's kidney which Dr. McGarry was investigating further. Although the post-mortem autopsy revealed this was, in fact, cancer, there is no evidence that Mr. Dunphy knew this or was anxious about the further tests. Dr. McGarry testified that the last time he saw Mr. Dunphy was to let him know that he was booking an MRI to investigate the lesion, but he would not have used the word "cancer". Dr. McGarry considered the investigation as routine, and does not recall Mr. Dunphy being anxious or concerned about it. Dr. McGarry further testified that the prognosis for such cancers is good.¹⁹⁴

I also heard evidence from Meghan Dunphy and Colin Dinn that there had been recent improvements in Mr. Dunphy's health and that he was feeling better than he had in some time.

Conclusion on 'Suicide by Cop'

Having considered the evidence, I am satisfied that this was not a situation of 'suicide by cop.' Despite his poor living conditions and the chronic pain of his injuries, Mr. Dunphy had good friends, a loving relationship with his daughter, and a positive outlook on the future. In short, he had reasons to live.

¹⁹² Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 39.

¹⁹³ Transcript of Evidence of Dr. Thomas McGarry, February 1, 2017 at p 21.

¹⁹⁴ Transcript of Evidence of Dr. Thomas McGarry, February 1, 2017 at p 29-31.

Finding 9: Was the 'stick theory' corroborated?

During her testimony, I asked Meghan Dunphy what she believes happened. She submits it is reasonable to infer that Mr. Dunphy would have viewed Cst. Smyth's admonitions about the tweets as an unjustifiable intimidation tactic and this would have caused her father to grab his stick in order to get Cst. Smyth out of the residence.¹⁹⁵ She testified:

Yeah. So he could have staged the scene quickly and then left the house. You know, if Dad had picked up the stick and he thought it was a gun, you know, and then he shot him and then afterwards realized, oh my God, like this is a stick, I'm going to go to jail, I'm going to lose my life, you know, everything I have, because a man picked up a stick and I accidentally thought it was a gun. You know, that would be a reason to stage the scene.¹⁹⁶

This possible version of events merits careful evaluation of the evidence in relation to the stick. I note that while I heard evidence that Mr. Dunphy had a temper and that he could be confrontational, there was nothing in his previous history to suggest that he had ever acted violently.

Size of the stick

Following the shooting, the wooden stick was found on the floor, to the left hand side of Mr. Dunphy's chair, partially in the archway leading from the living room.¹⁹⁷

The stick measured 101 cm (39.7 inches) in length, and had a diameter of 4.5 cm (1.8 inches).¹⁹⁸ The measurements of the stick are similar to those of the .22 calibre rifle that was found to the left front of Mr. Dunphy's chair lodged against a blue storage tub and pointed with its barrel pointing down and towards Mr. Dunphy, as already described. The rifle measured 39.5 inches in length. Both were primarily brown.

¹⁹⁵ Final Submission of Meghan Dunphy, April 7, 2017 at p 27.

¹⁹⁶ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 128.

¹⁹⁷ Exhibit P-0010, photo 119.

¹⁹⁸ Exhibit P-0803.

Location of the stick and rifle

Ms. Dunphy testified that her father kept the stick in the area between his stereo and his chair, either against the wall or on the floor. The stereo was to the right-hand side of the chair. The stick had duct tape on one end of it (presumably to make a hand grip) and her father had previously told her he kept it in case anyone ever broke in to try and steal his marijuana. Ms. Dunphy understood that he kept it in case he ever needed to defend himself. She had never seen the stick in the area in which it was found after the shooting.

Ms. Dunphy had also seen a rifle in her father's home on one occasion. Although she could not be certain that the rifle found in his house after the shooting was the same one, she assumed it was, as it looked similar.¹⁹⁹ She had seen the rifle behind the couch in his living room in late January or early February 2015, when she was cleaning up her father's house while he was in hospital.²⁰⁰ The rifle was lying flat on the floor behind the couch and was not visible until she moved the couch for sweeping. Ms. Dunphy did not recall speaking to her father about the rifle after she found it, but she may have talked to him about it years previously when Mr. Dunphy brought it over from his father's house, after his father passed away. Ms. Dunphy does not know if the gun was loaded when she found it and she testified that, prior to her father's death, she had never seen any bullets in her father's house.²⁰¹

Ms. Dunphy's testimony as to the usual storage place of the stick and the purpose for which Mr. Dunphy said he kept it was corroborated by Colin Dinn and Rita Farrell. Neither had ever seen a gun in the home.

When shown a picture of the .22 calibre rifle in evidence, Mr. Dick Dunphy (Donald's brother) identified it as either the gun his father had owned or one just like it. Mr. Dick Dunphy testified that the last he knew of the .22 calibre rifle, it was in Donald Dunphy's possession.

Cst. Smyth's evidence

Cst. Smyth has consistently stated that Mr. Dunphy pointed a rifle at him. He has also been consistent in maintaining that, although he would have had to walk past it as he

¹⁹⁹ Exhibit P-0010, photo 097.

²⁰⁰ Exhibit P-0010, photo 042.

²⁰¹ After the shooting, Ms. Dunphy found an unspent .22 calibre bullet in the living room. It had not been seized by the RCMP.

entered, he did not see the stick immediately upon entering the room. At some point during his conversation with Mr. Dunphy he saw it on the floor to the left of the chair. He then told Mr. Dunphy it was fine if it stayed where it was or words to that effect.²⁰²

In his statement of April 6, 2015, Cst. Smyth admitted that his first impression was that the object being raised by Mr. Dunphy was a stick, but that he quickly determined it was a gun:

It was all peripheral and... he was doing lots of moving around so... I guess his moving wasn't drawing my attention. It wasn't until I saw and I think I even might have thought like – my first – maybe like a broom stick or something... you know like that was – you know what your peripheral vision is like. You just get kind of shapes and – but as soon as my eyes moved that little bit it was – gun – it was no question.²⁰³

The Independent Observer, Justice David Riche, noted that in one instance in the April 6 statement, Cst. Smyth used the word “couch” to describe where the rifle had come from. I do not find this to be significant. Cst. Smyth used the word “chair” in the same statement several times in relation to the rifle’s location and when asked about his use of the word “couch” in a later interview, he clarified that he misspoke and was referring to the “chair”.

In his testimony at the Inquiry, Cst. Smyth denied the stick theory and any suggestion that he had staged the scene:

MS. CHAYTOR: During your time in Mr. Dunphy’s house did you ever see the rifle behind the couch?

CST. SMYTH: No.

MS. CHAYTOR: Did you see the rifle anywhere prior to the shooting? And prior to Mr. Dunphy picking it up, did you see it anywhere else in the house?

CST. SMYTH: No.

MS. CHAYTOR: Constable Smyth—and we’ll get to this evidence as to what happens after the shooting but I understand you did somewhat of a clearing of the

²⁰² There is a minor discrepancy in the testimony here. S/Sgt. Mike Adams testified that when he met with Cst. Smyth at the RCMP Holyrood detachment a couple of hours after the shooting, Cst. Smyth stated there was a bat/stick on the chair Mr. Dunphy was sitting in. This is not consistent with Smyth’s evidence as to the location of the stick before the shooting. S/Sgt. Adams did not make notes at the time.

²⁰³ Exhibit P-0119 at p 34.

house, albeit perhaps not a full clearing, but you did do a clearing of the house after the shooting. Is that correct?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. Did you find the rifle after the shooting and place it where it ultimately ends up?

CST. SMYTH: No.

MS. CHAYTOR: So any suggestion that you staged the scene I would like you to have an opportunity to speak to that.

CST. SMYTH: It's to me, I guess, just a, an outlandish theory. I, I can't imagine how you can have that theory and be able to reasonably fill in all the other components of it, but people are going to have their theories.

I know what happened. What I'm saying happened is what happened.

When I first saw that gun, it was in his hands. It eventually dropped from his hands and it dropped onto the floor and it was leaned up against something. I never moved it; I never touched it.²⁰⁴

Forensic evidence

As no fingerprints or DNA were retrieved from the gun or the stick, there is no forensic evidence to support or refute either version of events.²⁰⁵

Legal test

I have already stated that the applicable standard of proof for a finding of misconduct is a balance of probabilities. That is, prior to accepting a version of events that is different than that put forth by Cst. Smyth, the only eyewitness, I must be satisfied on clear, convincing, and cogent evidence that it is more likely than not that the alternative version of events occurred.

²⁰⁴ Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 14-15.

²⁰⁵ See Chapter 10, Finding 13, regarding forensic testing of the rifle, stick and bullets.

While I may draw reasonable inferences from facts that are established, I must not speculate. As noted in Chapter 4, in ***Caswell v Powell Duffryn Associated Collieries Ltd***,²⁰⁶ Lord Wright wrote at pages 169-70:

The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

Conclusion on 'Stick Theory'

Having reviewed the evidence, I am not persuaded by the stick theory. It remains nothing more than speculation which is insufficient to convince me, on a balance of probabilities, that it is more likely than the version of events provided by Cst. Smyth. If Cst. Smyth had mistaken the stick for a rifle and responded with lethal force in error, how did the .22 calibre rifle come to be located in front of Mr. Dunphy? None of the possible explanations offered are supported by evidence. While it is *possible* that Cst. Smyth was lucky enough to find the rifle behind the couch after he shot Mr. Dunphy and was trying to stage the scene, this is pure speculation as there are no facts from which to infer it. While it is also *possible* Mr. Dunphy had previously produced the rifle to Cst. Smyth at his request, again, this is conjecture. Had Mr. Dunphy presented the rifle to Cst. Smyth during the course of their meeting, it is logical that, as a trained RNC officer, Cst. Smyth would have taken the rifle and immediately secured it. In staging the scene, Cst. Smyth would then have had to place or leave a bullet in the chamber, choose to keep the bolt action open (for no logical reason), and then place the rifle pointing at Mr. Dunphy (also for no logical reason).

Counsel for Ms. Dunphy suggested that Cst. Smyth might have asked Mr. Dunphy whether he had a firearm in the house and that Mr. Dunphy might have indicated to Cst. Smyth where the rifle lay behind the couch. If that had occurred, it is reasonable to infer that Cst. Smyth would have gone to the rifle to secure it. It is not reasonable to believe that Cst. Smyth knowingly would have left the rifle behind the couch. Also, Mr. Dunphy died seated in his chair. There is no evidence that he stood up to retrieve the rifle.

²⁰⁶ *Caswell v Powell Duffryn Associated Collieries Ltd*, [1940] AC 152 (UKHL).

While I acknowledge that such a violent act as pointing a gun at someone was not in keeping with Mr. Dunphy's reputation, on the other hand, under or behind the couch in the living room was an odd place to keep a loaded rifle. One would think that if Mr. Dunphy had never intended to use the rifle he would have kept it unloaded in one of the many dressers in the house where Ms. Dunphy said he stored considerable relics of the past.

Finding 10: Was the rifle moved after the shooting?

Following the shooting, Mr. Dunphy's rifle was depicted in photographs taken by RCMP officers as being to the left front of Mr. Dunphy's body, lodged against a blue storage tub and pointed with its barrel downward and facing Mr. Dunphy. The barrel of the rifle lay on Mr. Dunphy's left foot. As there was contradictory evidence presented regarding the position of the rifle, careful examination of this issue is warranted.

Cst. Adrian Cox, RCMP

Cst. Adrian Cox was the first responder on the scene, arriving at 2:55 pm. He testified that, within minutes of arrival, he looked into the living room window and saw what appeared to be the barrel of a rifle on the floor pointing back towards Mr. Dunphy's left leg. Cst. Cox, accompanied by Cpl. Trevor O'Keefe, was the first to enter the residence. Cst. Cox prepared two Supplementary Occurrence Reports both dated April 5, 2015, with a report time of 4:36 pm.²⁰⁷ They were entered into evidence as Exhibits P-0175 and P-0376. P-0376 contains more information than P-0175. The shorter version of the report (P-0175), was faxed to Dr. Avis' office at 11:29 am, April 6, 2015. Evidence was adduced that the longer version (P-0376) was printed by Cpl. Steve Burke at 3:20 pm, April 6, 2015. In his evidence, Cst. Cox agreed it would be reasonable to conclude that he had added the additional detail to P-0376 sometime on April 6, 2015, between 11:29 am and 3:20 pm. Cst. Cox testified that it was unusual to have two copies of a Supplementary Occurrence Report and he did not specifically recall adding to the report or the circumstances leading to two versions of the report. He offered the possible explanation that, if the Chief Medical Officer was awaiting information, he would have sent the report with the information it contained at that time and he may have continued to work on the report adding additional information as he recalled more details.

In the shorter version of the report, Cst. Cox made no mention of the rifle in either referencing what he observed when he looked in the window or in terms of what he saw when he entered the house. In the longer version, he added the following sections:

Cst. COX could also see the barrel of what appeared to be a rifle pointing down and back toward DUNPHY's left leg as he sat in the chair. All that was visible was the end of the barrel of the rifle and it appeared to be dark in colour.

²⁰⁷ Exhibits P-0175, P-0376.

Cst. COX noted that to the left of DUNPHY's chair there was a blue coloured Rubbermaid tub on the floor and the rifle was half resting on the side of it and the barrel was pointing down toward the floor to the left of DUNPHY's chair. The rifle was constructed of a brown and what appeared to be wooden stock with a brown barrel. Cst. COX took note that the rifle was a bolt action rifle and it appeared that the bolt on the rifle was open as it rested on the Rubbermaid tub and floor. No members moved or touched the rifle and the rifle was left in the exact position that it was found and undisturbed.

Please note that Cst. COX observed Paramedic LINEHAN as she checked DUNPHY for vital signs and while doing so at no time did any part of her person come into contact with the rifle only with DUNPHY.²⁰⁸

Cst. Cox was confident that the detail in the longer report in terms of the position of the rifle was accurate and that, at the time he recorded this information, it was based solely on his recollection of the scene. He had not seen any photographs. He also denied being instructed by anyone to add this information.

Cpl. Trevor O'Keefe, RCMP

Cpl. O'Keefe was not as clear as Cst. Cox in his recollection of the position of the rifle. In his Supplementary Occurrence Report he recorded "A long gun was on the floor at his feet".²⁰⁹ In his evidence, Cpl. O'Keefe stated that he thought the gun was on the floor but could not recall exactly where it was other than to say it was in front of Mr. Dunphy. He could not specifically recall it being lodged against the blue storage tub. It should be noted that Cpl. O'Keefe did not take detailed notes and this shortcoming was noted by ASIRT in its review.

Nancy Linehan, Paramedic

Ms. Linehan is a paramedic with Don Gibbons Ambulance Service. She attended at the scene with her co-worker, Kevin Bishop, emergency medical responder. Ms. Linehan assessed Mr. Dunphy and pronounced him dead. She had a distinct recollection of having to step over the rifle to assess Mr. Dunphy and testified that it was on the floor by his chair either up against the chair itself or Mr. Dunphy's foot. When shown photographs of the rifle lodged against the blue storage tub, Ms. Linehan stated that she

²⁰⁸ Exhibit P-0376 at pp 2-3.

²⁰⁹ Exhibit P-0228.

did not recall the rifle in that position. She felt that she would not have had to step over the rifle if it was in the position shown in the photographs. Ms. Linehan did not recall the blue storage tub or the portable heater that was evident in the photographs near where she would have stood. She also testified that she recalled Mr. Dunphy's hands being in a different position than that depicted in the photographs.²¹⁰

Kevin Bishop, Emergency Medical Responder

Mr. Bishop did not enter the living room. He stood in the archway. He recalled seeing the rifle and noted it to be very old in appearance. According to Mr. Bishop, the rifle was positioned with the stock on the floor and the barrel leaning against the chair or Mr. Dunphy's foot. The barrel was elevated four to six inches off the floor. He recalled Ms. Linehan stepping over the rifle to check on Mr. Dunphy and the rifle being between her legs. He was adamant that the blue storage tub was not present and that the rifle was not in the position shown in the RCMP photographs.

Mr. Bishop did not have a clear recall with respect to other items in the house. He did not recall the portable heater nor did he recall Mr. Dunphy's stick (even though it would have been in close proximity to where he stood in the archway). He also was not clear on what Mr. Dunphy was wearing at the time and believed that the table in front of Mr. Dunphy was further away from his chair than depicted in the photographs. Similar to Ms. Linehan, he believed Mr. Dunphy's hands to be in a different position than that shown in the RCMP photographs.

Cst. Joseph Smyth

Within minutes of the shooting, Cst. Smyth called the RCMP to report the incident. In that call he described the rifle as being "on the ground."²¹¹ This was his first utterance as to the resting position of the rifle. On the morning of April 6, 2015, Cst. Smyth drafted a General Occurrence Case Summary for the RNC file. In that report, he wrote that upon re-entering the living room after the shooting, "I observed the long barrel rifle on the floor in front of Dunphy who was seated in the chair."²¹² In his first Statement to the RCMP later that day, Cst. Smyth stated the rifle was on the floor.²¹³ During the hearing, the video of the re-enactment which took place on April 10, 2015, was shown in its

²¹⁰ Transcript of Evidence of Nancy Linehan, February 3, 2017 at pp 17-18, 49.

²¹¹ Exhibit P-0125.

²¹² Exhibit P-0092.

²¹³ Exhibit P-0119 at p 16.

entirety. Cst. Smyth can be seen in the video entering the living room of Mr. Dunphy's residence and querying the resting position of the rifle. The blue storage tub is seen in the video. Cst. Smyth states during the re-enactment that the rifle was leaning up against something but the storage tub did not "resonate" with him.²¹⁴ In a subsequent statement given on September 5, 2015, to the RCMP, Cst. Smyth again refers to the rifle as being on the ground.²¹⁵

In his testimony, Cst. Smyth stated that he recalled the rifle being lodged against a container but the specific blue storage tub shown in the photographs did not seem familiar to him. He said, "I have the same recollection now as I did then, that it was on the floor leaning against a container. For some reason that particular container doesn't necessarily fill that void."²¹⁶ He stated that, while the rifle was lodged against something, he would still describe it as being on the floor.

Sgt. Dion Foote, RCMP

Sgt. Dion Foote arrived at Mr. Dunphy's residence shortly before 7:00 pm, April 5, 2015. He was tasked with guarding Mr. Dunphy's body while awaiting the arrival of the Forensic Identification Services (FIS) team. Sgt. Foote took photographs of the scene as he found it upon arrival. The rifle is depicted in three of those photographs with the stock leaning against the blue storage tub and the barrel pointed back towards Mr. Dunphy.²¹⁷ In his Supplementary Occurrence Report of that date, Sgt. Foote recorded, "There was a shot gun on the floor in front of the deceased's left foot with the barrel touching the floor and the handle leaning on a plastic storage tub."²¹⁸ He testified that the photographs accurately depicted how he found the scene upon his arrival and that he did not touch or move anything while in the house. Sgt. Foote remained on the scene, in the archway to the living room, until the FIS team arrived.

Sgt. Christopher Saunders and Cpl. Kelly Lee, RCMP

The FIS officers, Sgt. Saunders and Cpl. Lee, arrived at the scene at 8:40 pm, April 5, 2015. Sgt. Saunders took most of the photographs that were entered into evidence and Cpl. Lee took a video of the scene. The photographs and the video depict the rifle with

²¹⁴ Exhibit P-0329.

²¹⁵ Exhibit P-0217.

²¹⁶ Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 53.

²¹⁷ Exhibits C-0010, C-0011 and C-0012.

²¹⁸ Exhibit P-0235.

the stock leaning against the blue storage tub and the barrel on the floor pointing towards Mr. Dunphy. In his Identification Occurrence Report, Sgt. Saunders wrote, "There was a .22 calibre single shot long gun on the floor in front and to the left of the deceased with the barrel resting on the floor between his feet. The stock was pointing away from him and leaning on a blue plastic tote box."²¹⁹

Conclusion on rifle location

Based on the preponderance of evidence, I am satisfied that the resting position of the rifle was as depicted in the RCMP photographs following the shooting. While I believe Ms. Linehan and Mr. Bishop to be genuine in their belief that the rifle was in a different position, human memory is not without its frailties. It is noteworthy that, according to the Scene Log kept by Cst. Cox, Ms. Linehan and Mr. Bishop were only in the house for three minutes. During this time, their focus would have been on completing the assessment of Mr. Dunphy. They would have had limited time to observe the scene. This probably explains why they could not recall other items in the living room such as the portable heater. Mr. Bishop also did not recall the stick which would have been lying close to where he was standing.

In reaching this conclusion I note that neither Mr. Bishop nor Ms. Linehan made any notes of what they observed at the time. It was more than a year later that they were first asked details of the position of the rifle. On the other hand, Cst. Cox prepared detailed notes of his recollection of events, including the position of the rifle, within 24 hours. What he recorded is consistent with the position shown in the photographs. There was no evidence that the rifle had been moved and, frankly, there would have been no logical reason for the RCMP officers to move the rifle as they are trained to preserve the scene.

²¹⁹ Exhibit P-0537.

Finding 11: Did the broken glasses indicate a struggle?

I heard considerable evidence related to Mr. Dunphy's reading glasses. That evidence can be organized by time: prior to the shooting; during the processing of the scene by the RCMP; and when Ms. Dunphy discovered the glasses on April 14, 2015.

Prior to the shooting

The evidence is consistent that Mr. Dunphy wore glasses primarily for reading and that he only had one pair. The evidence of his last use of them is on April 5, 2015. Billy Corcoran, Meghan Dunphy's boyfriend testified that he recalled Mr. Dunphy had taken his glasses out of his inside pocket and put them on to read his cell phone at his and Ms. Dunphy's house, when Mr. Dunphy stopped by for a short visit before returning home after brunch.

While the glasses thus had to be wearable on that date, the evidence is that the glasses were not in perfect condition. Mr. Corcoran did not specifically recall if there was tape on the glasses but he noted that it would not have been uncommon for them to have tape on them. In a written statement to the RCMP, Ms. Dunphy described them as being "in rough shape" and at times having "some sort of tape holding them together until [Mr. Dunphy] had time to fix them properly."²²⁰

Based on the above, I am satisfied that, prior to his interaction with Cst. Smyth, Mr. Dunphy's glasses were in a damaged but wearable condition.

During the processing of the scene

The glasses were not seized by the RCMP during its processing of the scene nor were they specifically photographed. The glasses were found on the small end table immediately in front of Mr. Dunphy's chair and they are visible in several photographs.²²¹ The placement of the glasses on the table suggests that, most likely, they were used by Mr. Dunphy at some point after his return home that day.

When the photographs are enlarged and focused in on the glasses, they are shown as damaged but most likely wearable. While I acknowledge that one of the nose pads is

²²⁰ Exhibit P-0038.

²²¹ Exhibit P-0010, photos 38, 45, 46; Exhibit C-0001, photos 44, 96.

missing from the glasses, this does not make the glasses unwearable, particularly for short periods of time. There is no evidence that the nose pad was attached to the glasses prior to Mr. Dunphy meeting Cst. Smyth, and it is possible that it had fallen off some time before, or even earlier that day.

Ms. Dunphy's discovery of the glasses on April 14

The scene was released by the RCMP on April 7, 2015. Following its release, the scene was not guarded and there is no reliable record of when anyone entered the house, or for what purpose. We have evidence that the RCMP returned with Cst. Smyth and others on April 8 and 10 to perform re-enactments. In the days that followed, we know that Ms. Dunphy cleaned and cleared the house.

On April 14, while doing some cleaning, Ms. Dunphy discovered her father's glasses on the end table in front of his chair. They were damaged and described by Ms. Dunphy as being in an unwearable condition.²²² Ms. Dunphy had the foresight to photograph the glasses *in situ* and her photographs were entered into evidence.²²³

The question arose: were the damaged glasses evidence of a struggle between Mr. Dunphy and Cst. Smyth?

Conclusion on the glasses

I have reviewed carefully the photographs taken by Ms. Dunphy and compared them with those taken by the RCMP. I conclude that:

- (1) The glasses were not in the same position on the table when they were found on April 14 as they were in when they were found by the RCMP on April 5. They thus had to have been moved by something or someone in the intervening period; and
- (2) The glasses were more damaged when they were found on April 14 than they were when they were found by the RCMP on April 5. For example, one of the arms of the glasses is far more bent and one of the lenses is not fully in the frames in the photos of April 14. In the condition that they

²²² Exhibit P-0038.

²²³ Exhibits P-0061, P-0062, P-0063.

were found by Ms. Dunphy, I am satisfied that they were most likely unwearable, even for a short period of time.

The additional damage to the glasses took place sometime between April 10 to 14, after the scene was released by the RCMP, and cannot be taken as evidence of a struggle between Mr. Dunphy and Cst. Smyth on April 5.

I also am satisfied that the damage to the glasses as noted in the photographs of April 5 is not evidence of a struggle between Mr. Dunphy and Cst. Smyth, as there is ample evidence that Mr. Dunphy's glasses were regularly in rough condition. There is no evidence to support a conclusion that the damage to the glasses as found on April 5 resulted from a struggle. I note that Dr. Avis testified at the Inquiry that there were no bruises, cuts, lacerations, or scratches to Mr. Dunphy's facial area, which would indicate a struggle and suggest damage caused by glasses.

The damaged condition of Mr. Dunphy's glasses does not support the finding of a struggle between him and Cst. Smyth.

Finding 12: Should Cst. Smyth have been expected to shoot to wound?

Subsection 3(1)(g) of my Terms of Reference requires that I inquire into whether the relevant use of force protocols were properly adhered to in the circumstances of Mr. Dunphy's death. During the Inquiry a number of people contacted the Commission office to ask why police officers were not required to shoot to wound, rather than to kill, if in fact they had no choice for self-defence but to employ a firearm.

Police officers are not trained to shoot to wound and I have not been presented with any evidence to indicate this should be changed. If police officers are threatened with grievous bodily harm or death and reasonably believe lethal force by them is necessary, reasonable and proportionate in the circumstances, they are trained to fire two shots at the torso (the centre mass) and, after a very brief period of assessment, if that's possible, another at the head. RNC use of force instructor Sgt. William James testified that RNC officers are taught to continue shooting until the threat has been removed.

On the evidence before me I must conclude that it would be unreasonable to expect police officers to attempt to shoot a subject in the arm or the leg as though in a 'Western' movie, when they are experiencing the full adrenaline rush of being targeted themselves. This change from current practice would expose police officers to unacceptable risk of death or grievous bodily harm.

During his encounter with Mr. Dunphy, Cst. Smyth discharged his firearm four times. His evidence was that he drew his firearm and shot twice to the body but Mr. Dunphy did not drop the rifle and continued to track him with it. He then fired a head shot but testified that he did not know if it struck Mr. Dunphy. While this resulted in a significant wound to Mr. Dunphy's head, I am satisfied that, under the circumstances and given the brief period of time that unfolded, it is plausible that Cst. Smyth would not have realized this shot had hit Mr. Dunphy. Cst. Smyth continued to perceive the rifle tracking him and fired the second shot to the head as he was exiting the living room. He testified that the second head shot was the only one that he knew had connected. One of the first three shots missed, although the evidence is not clear as to which one. The other two struck Mr. Dunphy in the torso and the head. All four shots were fired within seconds as Cst. Smyth was attempting to exit the room.

Cst. Smyth's perception that Mr. Dunphy was still able to move and hold the rifle after having been struck by the first two shots was supported by the evidence of the Chief Medical Examiner, Dr. Simon Avis. He testified that even though Mr. Dunphy had sustained an extensive injury to the frontal part of the brain, it would have been possible for him to move. Likewise, Mr. Dunphy would have been capable of movement after the shot to the torso as, even though this shot perforated a lung and the aorta, death would

have not been instantaneous. Dr. Avis stated that after either the first head shot or the torso shot, Mr. Dunphy would have been capable of movement and still could be a potential threat. Dr. Avis also was of the opinion that, while it was less likely, it was still possible that Mr. Dunphy could have been able to move and continue to point the firearm after having been hit by both of those shots.²²⁴

The use of force experts who testified at the inquiry, Sgt. Massine and Cpl. Knapman, both agreed that once Mr. Dunphy produced and pointed the rifle at Cst. Smyth, his response with lethal force was appropriate and reasonable. Their evidence is reviewed under Finding 6.

Conclusion

I find that Cst. Smyth's response with lethal force and shooting four rounds was consistent with his use of force training. Police officers are not trained to shoot to wound.

²²⁴ Transcript of Evidence of Dr. Simon Avis, February 27, 2017 at p 94.

Finding 13: Should the rifle, stick or bullet have been tested for fingerprints or DNA?

The investigation into Mr. Dunphy's death was carried out by the Major Crimes Unit (MCU) of the RCMP following major case management principles. Cpl. Kelly Lee, one of the two RCMP FIS members assigned to assist the MCU in this case, was qualified at the Inquiry hearings to give expert evidence on forensic scene examination.

Fingerprint examination

Early in the investigation, Cpl. Lee examined the .22 calibre rifle for fingerprints using a cyanoacrylate process, sometimes referred to as 'super glue fuming', which is the most sensitive method of finding fingerprints available in this Province. Although another method, vacuum metal deposition, is available at RCMP laboratories in Ottawa, Cpl. Lee testified that, for an object such as a rifle, vacuum metal deposition would not necessarily be the method of choice and she would not have considered sending the rifle away for such testing in this case.²²⁵ Cpl. Lee was unable to find any fingerprints on the rifle. The result did not surprise her because the rifle was in such poor condition that she considered it "extremely unlikely" that it would be possible to deposit a fingerprint on any of its surfaces.²²⁶

Cpl. Lee was not asked to test any other exhibits for fingerprints during the initial investigation.²²⁷ She testified that the MCU investigative team usually requests the fingerprint testing that they want, and in this case she was not asked to test anything other than the rifle.²²⁸ The stick and the bullet found in Mr. Dunphy's rifle were also seized and fingerprint testing of these items might have provided evidence as to the events of April 5, 2015. The presence or absence of Cst. Smyth's fingerprints on either item would have been probative evidence, undermining or supporting his version of events. Cst. Smyth stated that he had never touched the stick or the bullet and, if his fingerprints were found on either object, his credibility would be greatly undermined.

Cpl. Steve Burke, the primary investigator with the MCU, testified that fingerprint testing on the stick had not been considered.²²⁹ He was less certain with respect to the bullet,

²²⁵ Transcript of Evidence of Cpl. Kelly Lee, February 21, 2017 at p 80.

²²⁶ Transcript of Evidence of Cpl. Kelly Lee, February 21, 2017 at pp 80, 88.

²²⁷ During the course of the Inquiry, an anonymous letter was sent to Meghan Dunphy's lawyer. The letter was given to the RCMP and Cpl. Lee tested it for fingerprints. None were found.

²²⁸ Transcript of Evidence of Cpl. Kelly Lee, February 21, 2017 at p 81.

²²⁹ Transcript of Evidence of Cpl. Steve Burke, February 8, 2017 at p 6.

testifying that he “thought that might have been tested for fingerprints”, but he could not be sure.²³⁰ As noted, the evidence is that the bullet was not tested.

While I consider this to be an oversight by the MCU investigative team, the failure to test the stick and bullet for fingerprints most likely did not affect the result of the investigation. Although Cpl. Lee had not been requested to test either item, when asked at Inquiry hearings, she testified that she did not consider either object to be a likely candidate for successful fingerprinting. Cpl. Lee testified that the stick would have been a “very poor object for fingerprinting” because its surfaces were worn and dirty and the bullet would have been an “extremely poor candidate” because of its small size. Even if fingerprints could be lifted, Cpl. Lee considered that it would be highly unlikely to get anything more than a couple of ridges which would be insufficient for identification or comparison purposes.²³¹

DNA examination

None of the exhibits was tested for DNA. This appears to have been a result of poor communication between the MCU investigative team and the FIS team concerning the rifle. On September 23, 2015, having received and reviewed a Laboratory Report completed by the RCMP Forensic Science and Identification Services section in Ottawa, Cpl. Burke emailed Greg Williams, an RCMP forensic specialist in Ottawa, to ask if it was too late to have the rifle tested for DNA.²³² Mr. Williams replied that it was too late, as the rifle had been extensively handled by the firearms section which had test fired it.²³³ Cpl. Burke then learned that, in accordance with usual RCMP procedures, DNA testing should have been done locally by the FIS team during the fingerprints assessment.²³⁴ Cpl. Lee testified that she did not consider swabbing the rifle for DNA but that DNA swabbing would normally only be done after discussion with the MCU investigative team, and in this case it was not discussed.²³⁵ In his testimony, Cpl. Burke acknowledged that he should have requested DNA testing and took responsibility for it not being done.²³⁶

It is not clear whether DNA testing would have produced helpful results. Cpl. Burke testified that, based on a telephone conversation he had with a Sgt. Mike Merritt, a

²³⁰ Transcript of Evidence of Cpl. Steve Burke, February 8, 2017 at p 6.

²³¹ Transcript of Evidence of Cpl. Kelly Lee, February 21, 2017 at p 82; see also Transcript of Evidence of Sgt. Christopher Saunders, February 13, 2017 at p 92.

²³² Exhibit P-0320.

²³³ Exhibit P-0321.

²³⁴ Transcript of Evidence of Cpl. Steve Burke, February 8, 2017 at p 10.

²³⁵ Transcript of Evidence of Cpl. Kelly Lee, February 21, 2017 at p 81.

²³⁶ Transcript of Evidence of Cpl. Steve Burke, February 8, 2017 at p 11.

forensic strategist with the RCMP laboratory in Ottawa, touch DNA testing might have produced results but not if the object had been handled only once or twice by an individual.²³⁷ I make no finding as to the accuracy of this statement as I did not hear from Sgt. Merritt directly and touch DNA is an area in which I would require expert opinion before making a finding.²³⁸ In doing their review, ASIRT specifically asked if the rifle had been DNA tested and Ms. Hughson, the executive director of ASIRT, considered that the failure to DNA test was a deficiency in the RCMP's investigation.²³⁹

Conclusion on fingerprinting and DNA testing

I am satisfied that the failure to at least consider testing the stick or bullet for fingerprints or DNA and the failure to request DNA swabbing of the rifle in a timely manner were deficiencies of the investigation. Had the MCU investigative team been more suspicious of Cst. Smyth's version of events, as they should have been early in the investigation, they would likely have at least considered more rigorous forensic testing, as addressed under Finding 15 concerning deficiencies in the investigation.

²³⁷ Transcript of Evidence of Cpl. Steve Burke, February 8, 2017 at pp 11-12; see also Exhibit P-0323.

²³⁸ Sgt. Christopher Saunders did provide some evidence on touch DNA but it is not sufficient for me to make a finding. See Transcript of Evidence of Sgt. Christopher Saunders, February 13, 2017 at pp 129-130.

²³⁹ Transcript of Evidence of Susan Hughson, Q.C., March 6, 2017 at pp 138-139.

Finding 14: Was there an appearance of preferential treatment?

The appearances problem

The RCMP addressed “perceived bias” in its final submission. The RCMP submitted that “much of the basis for the accusation of bias arises from an erroneous perception or belief, especially on the part of the public and the media, that Cst. Smyth should have been treated in the same way as any civilian who had just shot and killed someone, even in self-defence” and that “this idea is misguided, and ignores the unique situation Cst. Smyth was in when compared to an ordinary citizen.”²⁴⁰

I agree that a criminal investigation under s. 25 of the **Criminal Code** has unique aspects and considerations. However, the RCMP’s submission that Cst. Smyth’s treatment was just “different” and not “preferential” does not adequately recognize what the Supreme Court of Canada has identified as the ‘appearances problem’.

In **Wood v Schaffer**,²⁴¹ the Supreme Court of Canada considered whether, under the SIU’s legislative scheme in Ontario, a police officer who witnessed or participated in an incident under investigation by the SIU is entitled to speak with a lawyer *before* preparing his or her notes concerning the incident. The majority of the court determined the answer to be “no” because consultations with counsel during the note-making stage are antithetical to the very purpose of the legislative scheme and so must be rejected. The comments in **Wood** with respect to Ontario’s SIU legislation are relevant here. Writing for the majority, Justice Moldaver stated at paragraphs 49-52:

The legislative scheme is designed to foster public confidence by specifically combating the problem of appearances that flowed from the old system of “police investigating police”. The problem under that system, of course, was that it created the unavoidable *appearance* that officers were “protecting their own” at the expense of impartial investigations. The legislature deemed this appearance unacceptable and created the SIU to guard against it by placing investigations of the police in the hands of civilians.

The difficulty with allowing officers to fully consult with counsel at the note-making stage is that it creates an “appearances problem” similar to the one that the SIU was created to overcome. A reasonable member of the public would naturally question whether counsel’s assistance at the note-making stage is sought by officers to help them fulfill their duties as police officers, or if it is instead sought, in their self-interest, to protect themselves and their colleagues from the potential liability of an adverse

²⁴⁰ Final Submission of the RCMP, April 7, 2017 at pp 5-6.

²⁴¹ *Wood v Schaffer*, 2013 SCC 71, [2013] 3 SCR 1053.

SIU investigation. Given that solicitor-client privilege attaches to these discussions, the public's unease is unanswerable.

[...]

It seems fitting to recall here that Sir Robert Peel, the father of modern policing, is credited with having said that “the police are the public and . . . the public are the police” (C. Reith, *The Blind Eye of History: a study of the origins of the present Police era* (1975), at p. 163). The wisdom of this statement lies in its recognition that public trust in the police is, and always must be, of paramount concern.

Different treatment that is either required by, or a consequence of, the unique nature of s. 25 investigations is acceptable, treatment that can reasonably be perceived as being preferential is not. Public trust must be the paramount concern and elements of Cst. Smyth's treatment by the RCMP undermined that trust. It does not matter if the special treatment does not adversely affect the outcome of the investigation or detract from its thoroughness or rigour. The appearances problem is not a matter of ‘no harm, no foul’: the harm is in the appearance, not the result.

‘Us’ and ‘Them’

In his interview of Cst. Smyth on April 6, 2015, Sgt. Monty Henstridge empathized with Cst. Smyth stating “The general public doesn't understand the kind of pressure that we're under, I don't think, and – and they never will.”²⁴² The ‘us versus them’ aspect of police culture is well recognized in the literature. On the positive side, it recognizes values such as supportiveness, teamwork and loyalty which play an important role in enabling officers to do a difficult and often emotionally taxing job. However, the ‘us versus them’ phenomenon is most often cited for its negative aspects. It has been held responsible for impeding the equality of women on police forces,²⁴³ contributing to the stigmatization of those with mental health problems,²⁴⁴ and undermining public confidence in police investigations of police.²⁴⁵ While it is important that police officers bond as a team, it should not be at the expense of public trust. The mere suggestion of two sides or two standards, one for ‘us’ and one for ‘them’, undermines public confidence.

²⁴² Exhibit P-0019 at p 70.

²⁴³ Lesley J. Bikos, *I Took the Blue Pill: The Effect of the Hegemonic Masculine Police Culture on Canadian Policewomen's Identities* (2016) [unpublished, archived at University of Western Ontario Libraries].

²⁴⁴ Paul Dubé, *A Matter of Life and Death* (Toronto: Ombudsman Ontario, 2016).

²⁴⁵ Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017); David MacAlister, “Overcoming Barriers: Changing Our Approach to Police-Involved Deaths” in David MacAlister, ed, *Police Involved Deaths: The Need for Reform* (Vancouver: BC Civil Liberties Association, 2012) 216.

Cst. Smyth at the scene

The RCMP first responders arrived at the scene in Mitchell's Brook at 2:55 pm. Cst. Smyth was not taken from the scene by Cst. X until 4:10 pm. During the intervening one hour and 15 minutes, Cst. Smyth was largely left free to move about the area, outside the police tape. He was not always simply roaming as he spent time sitting in both Cst. Cox's and Cpl. O'Keefe's police vehicles.²⁴⁶ He did not re-enter the house or his own vehicle. While I acknowledge that the RCMP first responders had no reasonable and probable grounds to arrest Cst. Smyth, they should have requested that he remain inside a police vehicle until they could escort him back to the detachment. In his testimony, Cpl. O'Keefe acknowledged that, in hindsight, he should have asked Cst. Smyth to remain in a police vehicle.²⁴⁷ There is no evidence to suggest that Cst. Smyth would not have readily complied. Having him walking around the scene, in front of members of the public and Mr. Dunphy's family, added to the perception of special treatment.

RNC meeting at the RCMP detachment in Holyrood

The RCMP provided a private meeting room for RNC members, S/Sgt. Mike Adams, S/Sgt. Reg Tilley, Cst. Warren Sullivan and Cst. Scott Harris, to meet with Cst. Smyth at the Holyrood detachment offices on April 5, 2015. Cpl. Steve Burke agreed on examination that he had never seen a person who was being investigated for a serious criminal matter being provided with a meeting room to meet with people, other than legal counsel, at an RCMP detachment or at RCMP headquarters. While he did not consider this preferential treatment, he acknowledged that other people could see it that way.²⁴⁸

I agree with Cpl. Burke's assessment of how others might perceive this issue. The unique aspects of a s. 25 **Criminal Code** investigation do not require that a subject officer be afforded this type of accommodation. This treatment is not just "different", it is "preferential" and it should not have happened. It does not matter if providing the meeting room had no effect on the investigation—although, as discussed below, it might have—the problem is the appearance.

²⁴⁶ See eg. Transcript of Evidence of Cpl. Trevor O'Keefe, February 7, 2017 at pp 70-71.

²⁴⁷ Transcript of Evidence of Cpl. Trevor O'Keefe, January 26, 2017 at pp 46-47.

²⁴⁸ Transcript of Evidence of Cpl. Steve Burke, February 7, 2017 at pp 70-71.

Delay in interview

The RCMP investigative team intended to interview Cst. Smyth at the Holyrood detachment on April 5, 2015.²⁴⁹ At the suggestion of Cst. Warren Sullivan, the then-RNCA president, Cst. Smyth asked to delay his interview until the next day. Cst. Sullivan said he was aware of research that showed recall was stronger and more accurate the following day.²⁵⁰ Although Cpl. Burke, the primary investigator was not aware of such research at the time, Sgt. Henstridge, who was also on the MCU investigative team, had heard similar information in relation to critical stress debriefings of police officers and he agreed to Cst. Smyth's request without making any attempt to persuade Cst. Smyth to give a statement that day.²⁵¹ Cst. Smyth was permitted approximately 24 hours before giving a statement to the RCMP. The RCMP did not request that Cst. Smyth refrain from discussing events with other people prior to giving his statement.

Several police officers testified that they were aware of authoritative articles which recommend the practice of waiting from 24 to 72 hours before taking a statement from police officers who have been involved in a shooting or other traumatic event. In practice, however, police investigators routinely pursue immediate questioning of potential civilian suspects following a serious incident, based on the conventional wisdom that this produces the most accurate and truthful statement and minimizes the opportunity to fabricate a story.²⁵² The same logic is not always applied where the subject is a fellow officer. While a civilian will often face intense questioning throughout the first 24 to 48 hours after a fatal incident, officers are often protected, or even precluded, from giving *any* statement during the same period.²⁵³

Law enforcement agencies and police unions have defended the use of a 'cooling off' or waiting period by citing research which indicates that the psychological trauma associated with critical incidents may, in the immediate aftermath of the event, create perception and memory distortions.²⁵⁴ This has been referred to as 'critical stress amnesia'. The RNC training manual explains critical stress amnesia as follows:

²⁴⁹ Transcript of Evidence of Cpl. Steve Burke, February 7, 2017 at p 71.

²⁵⁰ Exhibit P-0359.

²⁵¹ Transcript of Evidence of Sgt. Monty Henstridge, February 23, 2017 at pp 120-121.

²⁵² See eg. Transcript of Evidence of Cpl. Steve Burke, February 7, 2017 at pp 72-73; Exhibit P-0070 at pp 41-44.

²⁵³ Jeffrey J. Noble & Geoffrey P. Alpert, *Criminal Interrogations of Police Officers After Use of Force Incidents* (2013) online: The Federal Bureau of Investigation <<https://leb.fbi.gov/2013/september/criminal-interrogations-of-police-officers-after-use-of-force-incidents>>.

²⁵⁴ Alexis Artwohl, "Perception and Memory Distortion During Officer-Involved Shootings" (2005) FBI Law Enforcement Bulletin at pp 18-24.

Critical Stress Amnesia can be defined as the physiological basis and the implications of memory loss during extreme survival stress situations. Officers who encounter an extremely stressful situation will consistently exhibit difficulty in transferring information into long term memory. Particular memory-related phenomenon in traumatic situations include:

1. During the actual incident there is usually a “sensory overload” combined with a “fixation” on some particular aspect of the critical incident, often to the exclusion of all else.
2. Immediately after the incident, “post-incident amnesia” will often result in a failure to remember the majority of the information observed in the incident.
3. After a healthy night’s sleep there is usually a “memory recovery” which will result in the remembering of the majority of what occurred, and this memory is probably the most “pure.”
4. Within 72 hours the final and most complete form of memory will occur, but it will be at least partially “reconstructed” (and therefore somewhat “contaminated”) after the inevitable process of integrating available information from all other sources (media).²⁵⁵

Although studies do exist to support the above-noted points, I have not been provided any objective, evidence-based consensus identifying a reason why police officers would experience these issues on any greater level than an ordinary civilian involved in a traumatic event, such as a fatal shooting. It should be noted that most of the literature produced for the Inquiry on perceptual distortions during officer-involved shootings, and advocating for a delay in requiring statements in response to this, has been written by former police officers, police psychologists or other professionals with close ties to law enforcement.²⁵⁶

Additionally, there are no universally recognized ‘best practices’ on the timing of officer interviews or interrogations. Some examples are as follows:

- (1) The Police Assessment Resource Center, a non-profit police oversight and consulting organization, suggests that investigators interview

²⁵⁵ Exhibit P-0430.

²⁵⁶ See Marek Novy, “Cognitive Distortions during Law Enforcement Shooting” (2012) 54 *Activitas Nervosa Superior* 60 at 61.

personnel who participated in or witnessed an officer-involved shooting *no later than a few hours after the incident.*²⁵⁷

- (2) The International Association of Chiefs of Police (IACP) suggests in one publication that, wherever feasible, officers be given time to recover—from a few hours to several days—prior to any detailed interrogation or being asked to provide ‘a full formal statement’. *At least one night’s sleep* is considered ‘beneficial’ prior to being interviewed.²⁵⁸
- (3) Another IACP publication states:

The IACP Police Psychological Services Section recommends delaying personal interviews *from 48 to 72 hours* in order to provide the officer with sufficient recovery time to help enhance recall. This interval is particularly recommended for officers directly involved in a shooting, but it may also be necessary for officers who witnessed the incident but did not discharge their firearms.²⁵⁹ [Emphasis added.]

- (4) The Force Science Institute advocates that officers who have been involved in shootings or other high-intensity events should be allowed a recovery period of *at least 48 hours* before being interviewed in depth about the incident by internal affairs or criminal investigators.²⁶⁰
- (5) Vancouver Police Department officers are not expected to give a statement until *five days post-incident* on the basis that “studies have shown that the optimal time to give a statement is within 36 hours (or three sleep cycles) of the incident occurring.”²⁶¹

Before investigative bodies adopt a policy that provides a cooling-off period for police officers, there should be a greater consensus in the scientific community that there are principled and objective reasons for the approach. Moreover, if a policy is going to

²⁵⁷ “Administrative Investigations of Police Shootings and Other Critical Incidents: Officer Statements and Use of Force Reports” (2008) 6 AELE Mo L J 201 online: AELE <<http://www.aele.org/law/2008FPJUN/2008-6MLJ201.pdf>>.

²⁵⁸ *Officer Involved Shootings Investigative Protocols: A Guide for Law Enforcement Leaders*, online: International Association of Chiefs of Police <http://www.theiacp.org/portals/0/documents/pdfs/ois_ip_trifold_web.pdf>.

²⁵⁹ *Officer-Involved Shootings: A Guide for Law Enforcement Leaders* (Washington, DC: Office of Community Oriented Policing Services, 2016) online: International Association of Chiefs of Police <http://www.theiacp.org/portals/0/documents/pdfs/e051602754_Officer_Involved_v8.pdf>.

²⁶⁰ “Force Science Institute details reasons for delaying interviews with OIS survivors” (28 April 2017), online: PoliceOne <<https://www.policeone.com/officer-shootings/articles/7119236-Force-Science-Institute-details-reasons-for-delaying-interviews-with-OIS-survivors/>>.

²⁶¹ *R v Millington*, 2015 BCSC 1426, [2015] BCWLD 6472.

distinguish between the treatment of police officers and civilians, then there should be principled and objective reasons for the distinction.

Even if a ‘cooling off’ period is adopted, it may be appropriate to take measures to safeguard against some of the risks of a delayed statement, such as getting a brief initial account immediately, or requesting that the subject not discuss events with others prior to giving a full statement.

Conclusion on ‘critical stress amnesia’

From the studies brought to my attention noted here, I am not satisfied that any objective, evidence-based consensus exists which identifies a reason why police officers would experience ‘critical stress amnesia’ at a greater level than an ordinary civilian involved in a traumatic event, such as a fatal shooting. Nor have I been shown any universally recognized ‘best practice’ for the timing of officer interviews. Practices range from a few hours after the incident up to five days later.

More research is needed on ‘sensory overload’, ‘perceptual distortion’, and ‘memory recovery’ before reliable conclusions may be drawn as to the value of a ‘cooling off’ period. This is still an area of controversy and debate, particularly on the issue of whether law enforcement officers should be treated differently than civilians. No psychological basis has been put forward to justify this. Instead, reasons for this approach have been entirely policy-based and relate to the ‘special’ or ‘unique’ status of law enforcement personnel, who are authorized to use force in situations where civilians may not be so justified. (See the discussion of s. 25 of the ***Criminal Code*** in Chapter 6.)

At present, police officers in this jurisdiction seek to obtain statements from civilians as soon as practicable, whether they be ‘subject’ witnesses whose conduct appears to have caused the incident being investigated or just ‘involved’ witnesses whose conduct is not in question. This practice is based upon the theory that memories fade over time or may be contaminated by exposure to the views of others. The rationale is that the earlier a statement is provided, the more accurate and transparent the statement is likely to be.

The Supreme Court of Canada in ***Wood*** accepted the view of the Honourable R.E. Salhany expressed in the Taman Inquiry (2008), regarding the role and importance of notes at paragraph 65:

[Note-making] is an integral part of a successful investigation and prosecution of an accused. ...**The preparation of accurate, detailed and comprehensive notes as**

soon as possible after an event has been investigated is the duty and responsibility of a competent investigator. [Emphasis added by Justice Moldaver.]

The court also held that the Ontario Provincial Police (OPP) practice of permitting officers to fully consult with counsel at the note-making stage created an “appearances problem” similar to the one the SIU was created to overcome. The appearances problem is discussed above, but the following quote from the court at paragraph 50 is worth repeating here:

A reasonable member of the public would naturally question whether counsel’s assistance at the note-making stage is sought by officers to help them fulfill their duties as police officers, or if it is instead sought, in their self-interest, to protect themselves and their colleagues from the potential liability of an adverse SIU investigation.

Justice Moldaver expressed concern that permitting consultation with counsel on note-making “creates a real risk that the *focus* of an officer’s notes will shift away from his or her *public duty* under s. 9, i.e. making accurate, detailed, and comprehensive notes, and move toward his or her *private interest*, i.e. justifying what has taken place—the net effect being a failure to comply with the requirements of the s. 9 duty.”²⁶² [Emphasis added by Justice Moldaver.]

I read the policy reasons for permitting delay of a police officer’s statement, discussed above, as being concerned more with the officer’s private interest in justifying what has taken place than with the public duty of making accurate, detailed and comprehensive notes. I am not convinced that police officers normally should be granted a cooling-off period before they are requested to provide a statement. As noted in **Wood**, notes are intended to simply record events in a straightforward fashion, rather than be a “lawyer enhanced” justification for what has occurred.²⁶³ The court, did, however accept that officers who have been involved in a traumatic incident may well be entitled to speak to doctors, mental health professionals, or uninvolved senior police officers before they write their notes and pointed out that, in the Ontario legislation, the Chief of Police could allow officers additional time to complete their notes.²⁶⁴

In the present case, Cst. Smyth was cooperative and prepared to make a statement until persuaded by representatives of the RNCA to delay until the next day. I note that investigators had no grounds to arrest Cst. Smyth or to force him to provide a

²⁶² *Wood v Schaffer*, 2013 SCC 71, [2013] 3 SCR 1053 at para 72.

²⁶³ *Wood v Schaffer*, 2013 SCC 71, [2013] 3 SCR 1053 at para 80.

²⁶⁴ *Wood v Schaffer*, 2013 SCC 71, [2013] 3 SCR 1053 at para 86.

statement, other than what would be included in the notes required of him as a police officer, which he would have to complete (as he did) within a reasonable time. These comments on the delayed statement are for the benefit of those in the general public who might not be aware of the debate in this area.

Too friendly an interview

It is important that investigating officers build rapport with the subjects of their interviews. Gareth Jones, an expert in investigations of serious incidents involving police officers, was retained by the Commission to review the RCMP investigation. In the report he prepared for the Commission, Mr. Jones wrote that if an interviewee does not like the interviewer, or feels that he or she is not empathetic, the interviewee will likely react by “clamming up.”²⁶⁵ But as Mr. Jones noted, there is a difference between being appropriately empathetic and inappropriately supportive.²⁶⁶

The first interview of Cst. Smyth was conducted by Cpl. Steve Burke and Sgt. Monty Henstridge on April 6, 2015. Both Cpl. Burke and Sgt. Henstridge acknowledged in their testimony before the Inquiry that some of the statements they made to Cst. Smyth during that interview were inappropriate. Many of these statements went well beyond what was required to build rapport with Cst. Smyth and some of them gave an impression that the investigators had already reached their conclusion. For example, Cst. Smyth was told “you saved your life” and “I don’t think you need to second guess anything that happened in that room.”²⁶⁷ Sgt. Henstridge acknowledged that the enormous empathy he felt for Cst. Smyth may have clouded his judgment during the interview.²⁶⁸ Even S/Sgt. Kent Osmond, who monitored the interview by video from a nearby room, told Cpl. Burke and Sgt. Henstridge after the interview that he felt it had been too friendly, although he did not note this in the investigative file.²⁶⁹ Similarly, ASIRT raised this as a concern in its report noting that “being too informal or 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.”²⁷⁰

Cpl. Burke and Sgt. Henstridge were both seasoned officers with considerable experience conducting interviews. Yet their experience and professionalism was not enough to overcome their natural tendency to overly empathize with a fellow officer who

²⁶⁵ Exhibit P-0770 at p 46.

²⁶⁶ Exhibit P-0770 at p 46.

²⁶⁷ Exhibit P-0119 at pp 59, 67.

²⁶⁸ Transcript of Evidence of Sgt. Monty Henstridge, February 23, 2017 at p 137, February 24, 2017 at p 4.

²⁶⁹ Transcript of Evidence of S/Sgt. Kent Osmond, February 20, 2017 at pp 80, 157.

²⁷⁰ Exhibit P-0004 at p 4.

had been through a traumatic event. If police are to investigate police, they need to acknowledge this human propensity and implement safeguards against any actual or perceived bias.

Giving Cst. Smyth too much information

In addition to being overly friendly with Cst. Smyth during the interview of April 6, 2015, Cpl. Burke and Sgt. Henstridge permitted themselves to become the interviewees. Towards the end of the interview, Cst. Smyth began asking the questions and, in response, Cpl. Burke and Sgt. Henstridge provided him with far more information than they should have. For example, they told him “you’re the only witness,”²⁷¹ there was nothing captured by the security cameras,²⁷² his statement compared with what they knew was “pretty accurate,”²⁷³ and that Mr. Dunphy smoked a lot of pot and had been “busted before.”²⁷⁴

While investigators may selectively release information to the subject of the investigation, they should only do so for a legitimate investigative purpose—for example, if giving information is likely to lead the investigators to more evidence. Any sharing of information beyond this can impact the integrity of the investigation. If investigators lose control of the information and how it is disseminated, they lose the ability to use it strategically. As well, investigative information may consciously or unconsciously impact witness accounts or discourage witnesses from coming forward.²⁷⁵ Both Cpl. Burke and Sgt. Henstridge acknowledged that too much information was given to Cst. Smyth. Again, it is likely the strength of the bond these experienced officers felt towards a fellow officer that caused them to make such mistakes.

Calls of support

During the RCMP investigation, RCMP members made inappropriate contact with Cst. Smyth.

²⁷¹ Exhibit P-0119 at p 61.

²⁷² Exhibit P-0119 at p 61.

²⁷³ Exhibit P-0119 at p 56.

²⁷⁴ Exhibit P-0119 at p 64.

²⁷⁵ For a discussion on this point see Mr. Gareth Jones’ report, Exhibit P-0770 at pp 13, 53.

On April 10, 2015, Cpl. O’Keefe called Cst. Smyth to offer support. Cpl. O’Keefe testified:

It was, you know, I guess a very difficult incident for everybody involved. I was working that night and, you know, I guess everything was playing on my mind. And I wanted to call and just, you know, see how he was doing is the bottom line.²⁷⁶

Cpl. O’Keefe testified that he told Cst. Smyth that he wasn’t calling “as a police officer.”²⁷⁷ Of course, Cpl. O’Keefe was a police officer and a member of the investigating force. When questioned by Commission counsel, Cpl. O’Keefe was candid that he called because he empathized with Cst. Smyth and that he would not have done so had Cst. Smyth been an ordinary citizen and not a police officer. When the call came to the attention of his superiors, Cpl. O’Keefe was asked to make notes of the call for the file, but he was not reprimanded or told he acted inappropriately.²⁷⁸ In hindsight, Cpl. O’Keefe recognized this call was a mistake.

Sgt. Doug Noel also had inappropriate communication with Cst. Smyth. Sgt. Noel was the other member of the two-person PSU and so he worked regularly and closely with Cst. Smyth. Just prior to the shooting and immediately following it, Sgt. Noel communicated with Cst. Smyth by BBM. Sgt. Noel provided those BBMs to the MCU investigative team.²⁷⁹ Over the next few days, however, he had communications with Cst. Smyth that he did not provide to investigators. Some of these, in particular some BBMs, did not come to light until they were uncovered during the Inquiry process.²⁸⁰ These BBMs revealed that Sgt. Noel communicated to Cst. Smyth about:

- (1) The work of the PSU post April 5, 2015, when Cst. Smyth was no longer assigned to that unit;²⁸¹
- (2) Premier Davis’ reactions and responses to the events of April 5, 2015;²⁸²
- (3) The RCMP’s processing or potential processing of the PSU vehicle that Cst. Smyth had driven to Mitchell’s Brook on the day of the shooting;²⁸³ and

²⁷⁶ Transcript of Evidence of Cpt. Trevor O’Keefe, January 26, 2017 at p 61.

²⁷⁷ Transcript of Evidence of Cpl. Trevor O’Keefe, January 26, 2017 at p 62.

²⁷⁸ Transcript of Evidence of Cpl. Trevor O’Keefe, January 26, 2017 at pp 65-66.

²⁷⁹ Exhibit P-0297.

²⁸⁰ Exhibit P-0440.

²⁸¹ Exhibit P-0440 at pp 10-11, 13-21.

²⁸² Exhibit P-0440 at pp 9-13, 19.

²⁸³ Exhibit P-0440 at pp 9-10.

- (4) Feedback that RCMP members in Holyrood had received from the community and Mr. Dunphy's brother, including the quote "whatever happened in that house was Don's fault."²⁸⁴

When questioned about these communications, Sgt. Noel did not consider them to be inappropriate or to have any bearing on the investigation.²⁸⁵ However, the question is not whether the communications affected the investigation. The question is, how do these communications appear to the public?

I am satisfied that reasonable members of the public would consider the communications from Cpl. O'Keefe and Sgt. Noel to be preferential treatment afforded Cst. Smyth because he was a fellow police officer. It does not matter that neither Cpl. O'Keefe nor Sgt. Noel was part of the investigative team. The public does not draw such a fine distinction. I believe the same would be true if the officers had no connection with the incident, although the facts are that they both did: Cpl. O'Keefe was a first responder and Sgt. Noel was interviewed by the investigative team because of his involvement with the PSU and Cst. Smyth.

To avoid the appearance of bias or lack of impartiality, members of the investigative body should not communicate with the subject officer other than as part of the investigation. The subject officer will have other emotional and professional supports. While individual officers may consider this to be a cold or insensitive approach, public confidence in the investigation is paramount and must trump those other concerns.

Additionally, all communications with the subject officer should be recorded in the investigative file. The investigation must be transparent, which requires it to be scrupulously documented. As noted above, much of Sgt. Noel's communications with Cst. Smyth was not recorded in the file and Cpl. O'Keefe's call was not recorded until a few weeks later when he was instructed to record it by his superiors. Even Cpl. Burke, the lead MCU investigator, acknowledged that not all his communications with Cst. Smyth were recorded in the file.²⁸⁶ While I do not infer that there was anything improper in the unrecorded communications, the importance of transparency and accountability cannot be overstated. All communications with Cst. Smyth should have been recorded.

²⁸⁴ Exhibit P-0440 at p 18.

²⁸⁵ See eg. Transcript of Evidence of Sgt. Doug Noel, February 2, 2017 at pp 117, 120, 145.

²⁸⁶ Exhibit P-0770 at p 12.

Not suspicious enough

Some of the deficiencies in the RCMP investigation, which are more thoroughly examined under Chapter 10, Finding 15, (material deficiencies) and Chapter 15 (Maintaining an Attitude of Suspicion) may also be partially attributable to preference or bias in Cst. Smyth's favour. Investigators must keep open and suspicious minds, particularly in the early stages of an investigation. Cst. Smyth's initial statements about what happened were consistent with many aspects of the scene as the first RCMP responders found it. But initial findings should not prematurely focus an investigation, and investigators should not accept the version of events offered by the only eyewitness until they have tested that version rigorously against other available evidence. There is some evidence here that the investigators lost their suspicion too early in the process. As reviewed above, two key members of the investigative team, Cpl. Burke and Sgt. Henstridge, made statements to Cst. Smyth at his interview that suggested they had already reached a conclusion on April 6, 2015. Other deficiencies in the investigation: failure to search Cst. Smyth's police vehicle, failure to seize his cell phone until 19 days after the incident, failure to consider more thorough forensic testing for fingerprints and DNA, and a failure of the MCU investigative team to work more closely with the FIS team, may have been a result of the investigators accepting Cst. Smyth's version of events too quickly.

Meghan Dunphy urges this Commission to bring in recommendations to ensure investigations of police-involved shootings are thorough and objective. I believe insisting investigators maintain an appropriately suspicious mindset as required by current RCMP and RNC policies (discussed under Chapter 10, Finding 15 and Chapter 15) is probably the single most effective method of promoting thoroughness and objectivity in investigators.

Finding 15: Were there material deficiencies in the RCMP Investigation?

What is a “material deficiency”?

Subsection 3(1)(i) of my Terms of Reference requires that I ascertain whether there were any material deficiencies in the RCMP’s investigation into Mr. Dunphy’s death.

I am not the first to review the RCMP’s investigation. At the request of the RCMP, it was reviewed by the Alberta Serious Incident Response Team (ASIRT), which issued a report of its findings on August 30, 2016. The ASIRT report was entered as an exhibit at the Inquiry and Susan Hughson, Q.C., the executive director of ASIRT, gave testimony.²⁸⁷ ASIRT concluded that the RCMP investigation was thorough, complete and conducted in a manner consistent with current investigative standards. ASIRT found no evidence to support a conclusion or, even a suspicion, of investigational bias, tunnel vision or a lack of objectivity. ASIRT identified some shortcomings in the investigation and made recommendations with respect to these but did not find that the shortcomings were serious enough to bring into question the integrity or validity of the investigation or impact the conclusions reached based on the evidence.²⁸⁸

As noted previously, Gareth Jones, an expert in police investigations of serious incidents, was retained by the Commission to review the RCMP’s investigation and write a report of his findings.²⁸⁹ Mr. Jones concluded that in many respects the investigation was conducted thoroughly and objectively, and that there was no evidence of a deliberate attempt to suppress or destroy evidence. However, Mr. Jones found that in some respects the investigative process fell short of meeting the standards expected of a thorough and objective investigation into a police shooting. In particular, he did not believe the investigation gave the appearance of being impartial in several areas. He referred to evidence that the investigators were overly empathetic to Cst. Smyth and had made up their minds about whether this was a “clean shoot” before they had gathered all of the evidence. Mr. Jones noted that these flaws do not necessarily mean that the investigators came to the wrong conclusion.²⁹⁰

The RCMP has urged me to accept that a “material deficiency” is one that can be said to have changed the outcome of the investigation, not one that might possibly have changed the outcome of a hypothetical investigation.²⁹¹ The RCMP submits that there

²⁸⁷ Exhibit P-0004.

²⁸⁸ Exhibit P-0004 at pp 3-4.

²⁸⁹ Exhibit P-0770.

²⁹⁰ Exhibit P-0770 at p 62.

²⁹¹ Final Submission of the RCMP, April 7, 2017 at p 3.

were no material deficiencies in its investigation. If I accepted the RCMP's definition, I would agree with their conclusion as there is no evidence to indicate that any of the deficiencies identified would have changed the outcome of no criminal charge being laid against Cst. Smyth. However, I find the RCMP's definition of 'material' is too restrictive. I prefer the Black's Law Dictionary definition: an item is material if it "would affect a person's decision making."²⁹²

The purpose of an investigation is not just to uncover whether there are sufficient grounds to lay a criminal charge. That is too narrow a view. A police investigation must accomplish this ultimate goal in a manner that fosters public confidence in the process and the outcome. If a deficiency would affect the public's decision as to its confidence in an investigation, it is material. The RCMP's investigation of Mr. Dunphy's death failed to meet the broader goal of fostering public confidence in many respects. In an effort to prevent the same mistakes from being made again, I review these deficiencies in this section and discuss what I consider to be their root causes.

Overcoming natural tendencies

A significant factor in avoiding deficiencies is to ensure deaths and serious incidents are treated as criminal or criminally suspicious until there is sufficient evidence to the contrary. In Finding 14, I reviewed the importance of avoiding preferential treatment, or the perception of it, for police officers involved in serious incidents. Special treatment can arise from the moment the emergency is called into the communications centre of the responding police force. In Cst. Smyth's case, Communications Centre recordings reveal that the operator who took the call gave assurances to the ambulance dispatcher that there was no safety concern because Cst. Smyth was at the scene.²⁹³ It likely did not even occur to the operator that Cst. Smyth could pose a safety risk, despite the fact that very little was known at that stage. The same recordings suggest that Cst. Cox's response time to the scene may have been faster than it otherwise would have been because "when one of your own calls, you got to go."²⁹⁴

The reactions of the Communications Centre operator and Cst. Cox are not surprising. They are human. Police force members who work together daily will naturally tend to empathize with a fellow officer and their first thoughts are likely to be ones of support, not suspicion. I am not suggesting that police forces are incapable of investigating

²⁹² *Black's Law Dictionary*, 10th ed, *sub verbo* "material": Having some logical connection with the consequential facts <material evidence> 3. Of such a nature that knowledge of the item would affect a person's decision making; significant; essential <material alteration of the document>, Cf. RELEVANT.

²⁹³ Exhibit P-0126 at p 10.

²⁹⁴ Exhibit P-0144 at p 8.

incidents involving police officers objectively, fairly, and without bias. They are capable of so acting. However, effort is needed to ensure police force members recognize and overcome natural tendencies that can lead to preferential treatment. Setting appropriate policy regarding the treatment of deaths and serious incidents is the first necessary step. The second is to ensure that the policies are clearly communicated to all members of the police force and regularly reinforced. Both RCMP and RNC policy is to treat all reportable deaths as criminal or criminally suspicious until determined otherwise. These policies and their importance are discussed further in Chapter 15.

The role of the Independent Observer

Summary of the evidence

Public concern about ‘police investigating police’ began circulating on social media almost immediately following the shooting. In response, Chief Supt. Andrew Boland²⁹⁵ decided to engage an Independent Observer with the MCU investigative team to increase public confidence.²⁹⁶ An Independent Observer had not previously been used in this Province, but Chief Supt. Boland and Supt. Pat Cahill were both aware of the RCMP using Independent Observers in other jurisdictions for investigations in First Nations communities. In those cases, the Independent Observers had been respected elders from the affected communities.

Chief Supt. Boland considered that a retired judge, someone with experience examining police investigations, would be a good choice for the position. He contacted the then-Chief Judge of the Newfoundland and Labrador Provincial Court for suggestions and one of the names he was provided was that of retired Supreme Court Justice David Riche. Chief Supt. Boland contacted Justice Riche on the morning of April 8, 2015, to ask if he would be interested in the position, and he was.

Initial arrangements happened hurriedly as Chief Supt. Boland wanted Justice Riche to attend at Cst. Smyth’s re-enactment of events in Mitchell’s Brook that afternoon. A formal contract and terms of reference were not presented to Justice Riche until two days later when Supt. Cahill met with Justice Riche to review and sign them.²⁹⁷ The terms of reference included the following:

²⁹⁵ Former Chief Supt. Andrew Boland was retired from the RCMP when he testified before the Inquiry. Despite his retirement to civilian life, I refer to him as Chief Supt. Boland in this Report.

²⁹⁶ Transcript of Evidence of Chief Supt. Andrew Boland, February 15, 2017 at p 14.

²⁹⁷ Transcript of Evidence of Supt. Pat Cahill, February 21, 2017 at p 40; Transcript of Evidence of Retired Justice David Riche, March 1, 2017 at p 30 [Justice Riche did not recall either reading the documents or Supt. Cahill reading them to him prior to his signing]; Exhibit P-0577.

The Independent Observer:

- (a) Will submit his report as and when appropriate to the Commanding Officer/delegate to ensure impartiality, fairness and transparency in the investigative process.
- (b) Will accompany the designated contact member within the RCMP to observe the investigation as directed by the lead investigator in charge of the investigation.
- (c) May monitor witness interviews with the consent of the lead investigator [...]
- (d) Will respect the confidentiality of the investigation, briefings and the identity of the witnesses and suspects.
- (e) Will not disseminate any information or documentation provided during the investigation. [...]²⁹⁸

Over the course of the investigation, the RCMP provided Justice Riche with seven or eight large binders of paper disclosure.²⁹⁹ Justice Riche attended both of Cst. Smyth's re-enactments at Mr. Dunphy's home and visited the house a third time with Cpl. Burke when he met with Meghan Dunphy and had the opportunity to ask her questions. The RCMP also arranged for Justice Riche to meet with and question the Chief Medical Examiner, Dr. Simon Avis, and one of the FIS officers, Sgt. Chris Saunders.

Although the cover letter to his terms of reference indicated that Supt. Pat Cahill would be his primary RCMP contact, in practice, Justice Riche's primary contact was Cpl. Steve Burke, and the two communicated regularly.³⁰⁰ As Justice Riche raised concerns about the investigation, Cpl. Burke did his best to respond. For example, when Justice Riche questioned why the RCMP did not find any fingerprints on the rifle, Cpl. Burke went to Cpl. Kelly Lee, the FIS team fingerprint expert who did the testing, and she provided more detail as to why fingerprints were not found.

At some point, however, Cpl. Burke became concerned that Justice Riche was overstepping the bounds of his mandate. This appears to have happened in early August of 2015, when Justice Riche asked the RCMP to re-interview Meghan Dunphy about where she last saw her father's rifle. Cpl. Burke reviewed Ms. Dunphy's previous

²⁹⁸ Exhibit P-0315.

²⁹⁹ Transcript of Evidence of Cpl. Steve Burke, February 7, 2017 at p 50.

³⁰⁰ Exhibit P-0577; Transcript of Evidence of Cpl. Steve Burke, February 7, 2017 at p 51.

statement and believed that her evidence on the point was clear: she last saw the rifle behind the couch when she was cleaning her father's home while he was in hospital, in late January or early February 2015. Cpl. Burke described his next interaction with Justice Riche in his notes:

Cpl. Burke spoke with Justice Riche and advised him of what [Ms.] Dunphy said in her statement. Justice Riche responded that this was nothing new to him and [he] was aware of the contents of her statement. Justice Riche then said that he has a theory of what happened in the residence when [Mr.] Dunphy was shot. He feels there was a confrontation between Donald Dunphy and Joe Smyth (clarified as verbal) and [Mr.] Dunphy proceeded to go behind the couch and retrieve his gun and tell Smyth to get out of this house and that was when Smyth shot him. Cpl. Burke does not feel this theory described by Justice Riche is logical of [sic: or?] in line with the known evidence of this case.³⁰¹

Cpl. Burke proceeded to describe the evidence that did not support Justice Riche's theory. Cpl. Burke brought his concerns about Justice Riche to S/Sgt. Osmond, the team commander of the MCU investigative team, and, in turn, they both brought the concern to Supt. Pat Cahill.³⁰² S/Sgt. Osmond testified that he considered this to be an issue that should be addressed by management.³⁰³ As a member of the investigative team, S/Sgt. Osmond did not feel comfortable reminding Justice Riche of his mandate or suggesting what he should or shouldn't be doing, as it could be perceived as interference. Supt. Pat Cahill asked that a meeting be arranged with Justice Riche.

Although neither Cpl. Burke nor S/Sgt. Osmond recalled the matter being discussed in front of them, Supt. Pat Cahill testified that he raised it directly with Justice Riche at a meeting on August 7, 2015:

MS. O'BRIEN: At this meeting did you review, did you raise the issue with Judge Riche of the concern that he was acting outside his mandate?

SUPT. CAHILL: Yes, I did.

MS. O'BRIEN: Okay. And what was his response?

SUPT. CAHILL: Justice Riche would, at each meeting we had – he's a bit of a storyteller, likes telling, talking about old files. And, you know, his common theme

³⁰¹ Exhibit P-0359 (Daily Log) at p 408.

³⁰² The MCU command structure for major cases is organized as a command triangle, the apex of which is the team commander. The other two corners of the triangle are the primary investigator and the file coordinator.

³⁰³ Transcript of Evidence of S/Sgt. Kent Osmond, February 20, 2017 at p 89.

was he wanted to, you know – he kept saying that he wanted to find out what happened.

MS. O'BRIEN: Okay, so you raised it and no direct response from him. Is that what you're saying?

SUPT. CAHILL: I can't remember an exact response. It would be, you know, to the point probably, yes, I know and, you know, I'm trying to get to the bottom of what happened. That would be the common response I would guess.³⁰⁴

This was not the only time the issue was raised with Justice Riche. Supt. Cahill's notes indicate he reviewed Justice Riche's mandate with him at least one other time, in a meeting on December 16, 2015, and, in his testimony, Justice Riche acknowledged that there were "a couple of times" when the RCMP told him that he should not be investigating, and even "reprimanded him" for investigating.³⁰⁵

This message did not stick with Justice Riche. While there appears to have been some confusion as to whether Justice Riche would submit his report before or after the RCMP's final report was complete, ultimately Justice Riche submitted his report on January 12, 2016, without being aware of the RCMP's final conclusions.³⁰⁶ At the request of Supt. Cahill, Cpl. Burke reviewed Justice Riche's report. Supt. Cahill forwarded the review to his superior officer, Supt. Stephanie Sachsse, under a cover letter which noted that it highlighted points within Justice Riche's report that were "concerning".³⁰⁷ Twenty-two "concerns" were listed, which, in summary, alleged that Justice Riche had wrongly:

- (1) Interpreted and made conclusions on the evidence which was "clearly outside" his mandate to record his "observations of the independence and thoroughness of the investigation";
- (2) Made conclusions or stated beliefs that were either not supported by or contradicted the evidence; and
- (3) Misstated or misinterpreted the evidence.

³⁰⁴ Transcript of Evidence of Supt. Pat Cahill, February 21, 2017 at p 45.

³⁰⁵ Exhibit P-0629; Transcript of Evidence of Retired Justice David Riche, March 1, 2017 at pp 33, 36.

³⁰⁶ Chief Supt. Andrew Boland testified that he expected Justice Riche's report would be provided after the RCMP had completed theirs but it does not appear that either he or the other officers involved had turned their minds to the order of filing: see Transcript of Evidence of Chief Supt. Andrew Boland, February 15, 2017 at p 30; Transcript of Evidence of Supt. Pat Cahill, February 21, 2017 at p 41; Transcript of Evidence of Cpl. Steve Burke February 7, 2017 at p 60; Exhibit P-0580.

³⁰⁷ Exhibit P-0437.

The RCMP did not send Justice Riche a copy of its final report and, although Supt. Pat Cahill made attempts to reach him to advise him that the RCMP's findings would be released to the public, the two did not connect in advance of the public release, likely due to the fact Justice Riche was out of the country around that time.³⁰⁸ On his return from his holiday, and prior to connecting with Supt. Cahill, Justice Riche was contacted by the media and gave several media interviews in which he discussed his role in the investigation and a number of his thoughts on what had happened between Mr. Dunphy and Cst. Smyth.³⁰⁹ When he and Supt. Cahill finally met on October 4, 2016, Supt. Cahill reminded him of the confidentiality terms of his retainer.³¹⁰ While Justice Riche originally maintained that when he gave the media interviews he believed that the RCMP had already released his report publicly, on cross-examination by counsel for Cst. Smyth, he acknowledged that this may not have been the case.³¹¹

The role of an Independent Observer

While this was the first use of an Independent Observer in Newfoundland and Labrador, Independent Observers have been, and continue to be, used in other parts of Canada to increase public confidence in the impartiality of police investigations and to increase the perception of the integrity and transparency of the process. The first use in Canada, that I am aware of, was by the Commission for Public Complaints Against the RCMP (CPC) which launched a pilot project in 2007 with the 'E' Division of the RCMP (British Columbia). The "Independent Observer Pilot Project" was aimed at addressing the public's concerns with respect to the level of objectivity and impartiality of RCMP investigations involving the conduct of RCMP members.³¹²

The pilot project appears to have been a success. In 2014, when the Civilian Review and Complaints Commission for the RCMP (CRCC) was established to effectively replace the CPC, legislative changes to the **Royal Canadian Mounted Police Act**³¹³ added provisions aimed at increasing transparency in investigations related to serious incidents involving RCMP members. When an investigation of such an incident is carried out by a police force, as opposed to a civilian oversight agency, the **Royal**

³⁰⁸ Transcript of Evidence of Supt. Pat Cahill, February 21, 2017 at p 49.

³⁰⁹ See Exhibits P-0749, P-0750, P-0754, P-0755, P-0756.

³¹⁰ Transcript of Evidence of Supt. Pat Cahill, February 21, 2017 at p 50.

³¹¹ Transcript of Evidence of Retired Justice David Riche, March 1, 2017 at pp 78, 79.

³¹² *Report Following a Public Interest Investigation into a Chair-Initiated Complaint Respecting the Death in RCMP Custody of Mr. Robert Dziekanski* (2009), online: Civilian Review and Complaints Commission for the RCMP <<https://www.crcc-ccetp.gc.ca/en/report-following-public-interest-investigation-chair-initiated-complaint-respecting-death-rcmp>>.

³¹³ *Royal Canadian Mounted Police Act*, RSC 1985, c R-1.

Canadian Mounted Police Act now authorizes the CRCC to appoint an observer to assess the impartiality of the investigation.³¹⁴

In November 2014, the Quebec government appointed an independent civilian observer, lawyer Fannie Lafontaine, to examine and evaluate the integrity and impartiality of investigations conducted by the Service de police de la Ville de Montréal into allegations of criminal acts committed by Sûreté du Québec officers in Val-d'Or against First Nations women. Ms. Fontaine's report, which includes a detailed Independent Civilian Observer Protocol, was released on November 15, 2016.³¹⁵

An Independent Observer can be an effective way of increasing public confidence in a police force's investigation of police members by adding transparency and independent monitoring of the investigation's integrity and impartiality. Given the close operational relationship of the RCMP 'B' Division and the RNC, it might have been preferable for an out-of-province body to have been appointed from the start. However, having made the decision to conduct the investigation themselves, I commend the RCMP 'B' Division for taking the initiative to appoint an Independent Observer. It was a step in the right direction.

Failed initiative

Unfortunately, the RCMP's initiative failed to reach its objective for several reasons, and chief of these was a lack of planning. Justice Riche was engaged and on the ground in Mitchell's Brook before terms of reference had been drafted for him. The terms of reference that were ultimately crafted were sparse and awkwardly worded. Although this was a new experience for this Province, the RCMP had been using independent observers for at least eight years. Rather than leave Justice Riche and the investigative team to figure out the details of the arrangement as they went along, more time and effort should have been spent by RCMP management in the initial stages to provide information and resources to assist with the execution of the plan. For example, Justice Riche could have been provided with precedents for independent observer protocols or reports, or the contact information for someone who had served as independent observer for the CPC or CRCC previously.

³¹⁴ *Royal Canadian Mounted Police Act*, RSC 1985, c R-1, s 45.83.

³¹⁵ Fannie Lafontaine, *Independent Civilian Observer's Report, Evaluation of the integrity and impartiality of SPVM's investigations of allegations of criminal acts by SQ police officers against Indigenous women in Val-d'Or and elsewhere* (Quebec City: 2016).

An Independent Observer's authority, duties, and their limits, should be clearly communicated to all members of the investigative team. A breakdown in communication may have contributed to the problems of the present case. Justice Riche's terms of reference did not contemplate that he would interview witnesses but, rather, that he could 'monitor' witness interviews with the consent of the primary investigator and the interviewee. Supt. Pat Cahill's understanding was that Justice Riche should not have been permitted to ask witnesses questions.³¹⁶ Yet, this understanding did not flow to the investigative team as Justice Riche was permitted to question two witnesses: Ms. Dunphy and Dr. Avis. The RCMP's greatest complaint with Justice Riche was that he acted as an 'investigator', not an observer. By bringing him to meet with and question witnesses, the investigative team was facilitating and, arguably, encouraging Justice Riche in an investigative role. Better communication from management about the Independent Observer's proper role might have prevented this from happening.

Regardless of whether he was encouraged in this direction by the RCMP, I am satisfied that Justice Riche exceeded his mandate. He was asked to report on the impartiality, fairness and transparency of the investigative process. He was not asked to determine what happened on April 5, 2015, and he should not have attempted to do so. The role of an Independent Observer is very different from that of a trial judge. A trial judge receives evidence about what happened, assesses that evidence, and makes findings of fact and law. An Independent Observer is not concerned with *what happened*. Rather an Independent Observer monitors and reports on the *process* of the investigation. In so far as is possible, the Independent Observer should measure the integrity and impartiality of the investigation objectively. A well-organized protocol or framework, such as that established by Ms. LaFontaine, is an effective way to ensure that the evaluation is fair, transparent and impartial.³¹⁷

I am also satisfied that Justice Riche improperly speculated in his report and in his testimony before the Inquiry. Police investigations cannot be determined by conjecture or speculation. The reasonable and probable grounds required to support an arrest, and the reasonable prospect of conviction required to support a prosecution, both require objective evidence from which the facts required to support the charge can be inferred.³¹⁸ Justice Riche acknowledged in his testimony before me that decisions must be made on the basis of evidence:

³¹⁶ Transcript of Evidence of Supt. Pat Cahill, February 21, 2017 at pp 43-44.

³¹⁷ Fannie Lafontaine, *Independent Civilian Observer's Report, Evaluation of the integrity and impartiality of SPVM's investigations of allegations of criminal acts by SQ police officers against Indigenous women in Val-d'Or and elsewhere* (Quebec City: 2016).

³¹⁸ *R v Storrey*, [1990] 1 SCR 241. See *Miazga v Kvello Estate*, 2009 SCC 51 at para 64, [2009] 3 SCR 339 [NB: Crown policy manuals set this standard, acknowledged by SCC in *Miazga*].

THE COMMISSIONER: You'd accept that we have to act on evidence.

JUSTICE RICHE: Oh, yes.

THE COMMISSIONER: Right.

MS. O'BRIEN: Okay. And –

JUSTICE RICHE: But we don't have to believe it.

THE COMMISSIONER: But you have to decide on the basis of the evidence.

JUSTICE RICHE: Grounds of probabilities.³¹⁹

Yet both in his report and in giving his testimony, Justice Riche came to conclusions that can only be described as pure speculation. For example, he stated that he thought Mr. Dunphy's body had been moved, although when I questioned him directly, he acknowledged that there was no evidence of that.³²⁰ He also stated that after they got into a "confrontation", Mr. Dunphy went for his stick and probably went after Cst. Smyth and Cst. Smyth automatically shot him. Again, he acknowledged that there was no evidence for this.³²¹ The Independent Observer should not have engaged in speculation.

Transparency and media communications

One of the primary objectives of an Independent Observer is to increase public confidence by bringing transparency to the investigative process. This requires that final reports of Independent Observers be published in some form. As transparency has to be balanced against the privilege and privacy interests of those involved, it may be necessary to redact or summarize the final report to meet both goals.

It is unfortunate that the RCMP did not communicate with Justice Riche prior to the release of its findings. It should have. He should also have been advised if and when his report would be publicly released. It was foreseeable that the media would contact him. Had the RCMP given him advance notice, and even perhaps some media relations support, he would have been better prepared. That being said, I am satisfied that Justice Riche should have known that he ought not to have given interviews to the

³¹⁹ Transcript of Evidence of Retired Justice David Riche, March 1, 2017 at p 50.

³²⁰ Transcript of Evidence of Retired Justice David Riche, March 1, 2017 at p 55.

³²¹ Transcript of Evidence of Retired Justice David Riche, March 1, 2017 at p 54.

media about his involvement in the file or his report findings without the prior authorization of the RCMP.

Conclusions on Independent Observer

An Independent Observer can be an effective method of increasing public confidence in police investigations of police. Even if a civilian oversight agency is established in this Province, there may still be a role for an Independent Observer for cases that fall outside of that agency's mandate. Although the use of an Independent Observer did not meet its objective in the investigation of Mr. Dunphy's death, there is no need to throw the baby out with the bath water.

Recommendation 29: An Independent Observer's mandate and duties should be clearly defined before the Independent Observer commences work.

Commentary: The details of the procedures and protocols that the Independent Observer and the investigating agency are to follow should be clearly articulated and communicated to all parties involved. The Independent Observer should follow a protocol that objectively measures the integrity and impartiality of the investigation.

Recommendation 30: An Independent Observer should have unrestricted access to members of the investigating force and the disclosure collected, but should not have direct contact with any potential witnesses.

Commentary: An Independent Observer is not an investigator and should not be permitted to take any investigative steps. If the Independent Observer has concerns during the investigation or suggestions that could improve the impartiality, fairness or transparency of the investigation, these should be communicated to the investigative team. The investigative team should maintain final decision-making authority over the direction of the investigation.

Recommendation 31: An Independent Observer should be subject to appropriate terms of confidentiality, but the ultimate findings of the Independent Observer should be made public, subject to any redactions or other modifications that may be needed to protect legitimate privilege or privacy interests.

Commentary: While it is not appropriate for an Independent Observer to make public statements or speak to the media other than with the advance approval of the investigative body, to maximize transparency and accountability of the process the Independent Observer's ultimate findings should be published.

RCMP failed to properly clear and secure the scene

Cst. Smyth told the RCMP first responders that he had not done a complete clearing of the Dunphy house. At 3:07 pm, just minutes after their arrival, Cpl. O'Keefe and Cst. Cox entered the home to clear it. They proceeded together in an organized manner throughout the house, checking rooms to ensure that no one else was present. As soon as Cpl. O'Keefe opened the door to the room shown on the scene map entered into evidence as the "cat room", a number of cats tried to escape.³²² He quickly shut the door because he did not want the cats to get out and contaminate the scene.³²³ The "cat room" opened up into another room, referred to on the scene map as the "addition". Having decided not to enter the room because of the cats, one might reasonably have expected Cpl. O'Keefe or Cst. Cox to travel around to the back of the house to determine if they could see into or enter the area another way. Neither did.³²⁴ The result was that a significant area of the house was not cleared when the paramedic and emergency medical responder were brought into the scene. It also appears that neither officer reported to Sgt. Foote, who was the next officer to enter the scene, that they had not checked all rooms. Sgt. Foote specifically recalled being told that the house was "fully secured."³²⁵

Because of a lack of resources and the fact that Cpl. O'Keefe did not consider there to be much risk that someone would try to enter the house from the rear, no officer was

³²² Exhibit P-0035.

³²³ Transcript of Evidence of Cpl. Trevor O'Keefe, January 26, 2017 at p 33.

³²⁴ Transcript of Evidence of Cpl. Trevor O'Keefe, January 26, 2017 at pp 33, 53; Transcript of Evidence of Cst. Adrian Cox, February 20, 2017 at p 29.

³²⁵ Transcript of Evidence of Sgt. Dion Foote, January 26, 2017 at p 113.

posted at the exterior rear of the house.³²⁶ The area behind the house was wooded and unpopulated.

As noted, Sgt. Foote was the next officer to enter the house and he did so at approximately 4:50 pm. He was not there to clear the house but rather to stand guard at the entry of the living room to keep the cats from entering. This means that there was a period of approximately one hour and thirty-five minutes that cats were able to access the living room, although there is no evidence that any evidence was disturbed. Sgt. Foote was on guard until the FIS team arrived at approximately 8:50 pm that evening. The FIS team did a complete examination of the home. No one else was found and there is no evidence to suggest that anyone else was in the house that afternoon. As such, the failure to fully clear the house did not impact on the investigation. Nor, in the circumstances of this case, is this a deficiency that has any significant impact on the public's confidence in the investigation. However, it is worth noting because, in another set of circumstances, the officers' failure to fully clear a crime scene could have serious repercussions.

Inadequate communications between MCU and FIS prior to release of the scene

Sgt. Saunders testified that normally in major crimes investigations prior to the scene being released there is a formal debriefing between the MCU investigative team and the FIS team, where any information learned by the investigative team is shared with the FIS so members can consider whether any further scene examination is necessary.³²⁷ There was no formal debriefing in this case. Cpl. Kelly Lee checked in with the MCU investigators prior to returning to the scene on April 6 but she was advised at that time that there was no new information to share.³²⁸ Cst. Smyth was not interviewed until the afternoon of April 6. After his interview, when the investigators had considerably more information about his statement of events, the investigators did not consult the FIS team or provide them with any details of his statement.³²⁹

While it is impossible to know what further scene examination might have been done had the FIS team been provided with further information, some of the information Cst. Smyth provided may have been relevant to their work. For example, Cst. Smyth testified that, at the time of the shooting, he was holding a pen, but the pen was neither recovered nor photographed. No video or photographs were taken of the exact sightline

³²⁶ Transcript of Evidence of Cpl. Trevor O'Keefe, January 26, 2017 at p 103.

³²⁷ Transcript of Evidence of Sgt. Chris Sanders, February 13, 2017 at pp 107-108.

³²⁸ Transcript of Evidence of Cpl. Kelly Lee, February 21, 2017 at p 76.

³²⁹ Transcript of Evidence of Cpl. Kelly Lee, February 21, 2017 at p 85.

from where Cst. Smyth stated he was standing to the right hand side of Mr. Dunphy's chair where he reported first seeing the rifle. Detailed measurements of the chair that may have been relevant to a consideration of the rifle's concealment were not taken. Nor was there a proper search of Cst. Smyth's vehicle, which was the first place Cst. Smyth went after he exited the house. It may also have contained GPS data. As already discussed in Finding 13, the lack of communication between the FIS and MCU officers was also likely responsible for the rifle not being tested for DNA.

That being said, there is no evidence to suggest that the poor communication resulted in evidence being missed which might reasonably have affected the investigations result. Although, I note that it is perhaps impossible to state what the impact would be of evidence that was *not* found. Even accepting that this deficiency did not affect the correctness of the ultimate decision not to lay a charge, it is a material deficiency because of its impact on public confidence. In her submission, Ms. Dunphy submits that the breakdown in communication was a result of an early attitude that the case was "open and shut." I agree that is a possible explanation.

Failure to seize Cst. Smyth's cell phone and returning it to him before investigation was finished

While Mr. Dunphy's cell phone was seized on April 5, 2015, Cst. Smyth's was not. Cpl. Burke was asked about this by Commission counsel:

MS. O'BRIEN: Did you ask Cst. Smyth if you could seize his cell phone that night?

CPL. BURKE: No.

MS. O'BRIEN: Why not?

CPL. BURKE: It didn't come up; it wasn't something that we thought of, I guess.

MS. O'BRIEN: Okay.

He ultimately consented to give it to the RCMP, but you did not receive it until April 24, which is some 19 days later. Why did you wait so long to get the cell phone?

CPL. BURKE: No reason, I can't offer an answer for that.

MS. O'BRIEN: Was it just low priority?

CPL. BURKE: No, I don't think so. Things were happening fairly quickly and it was, we're doing other investigative steps. Cell phones at that time, and it was changing all the time, the information would remain there and we're – that was, you know, to get the cell phone that night or get the cell phone two weeks later, the information on the phone wouldn't have changed, to my knowledge.³³⁰

Cst. Smyth had travelled to the United States with the cell phone in the intervening period and he had deleted a significant number of relevant BBMs, text messages and emails. At least one deleted email could not be retrieved from the phone when it was recovered.³³¹ Moreover, cell phones are easily lost or damaged so the risk of losing all the data by leaving the phone with Cst. Smyth was not insignificant. If the phone had been seized on April 5, 2015, I do not believe the outcome of the investigation would have been different. However, as discussed in Finding 14, this is another example of preferential treatment and an early lack of suspicion toward Cst. Smyth that affects public confidence. As such, I consider it a material deficiency.

Failure to collect all relevant data from Cst. Smyth's cell phone

During the Inquiry process, Commission counsel noted that BBMs that Sgt. Noel had cut and pasted into an email to the MCU investigative team were not in the extraction report of Cst. Smyth's cell phone. Commission counsel raised the issue with the RCMP. After a series of communications back and forth and some further probing by Ms. Dunphy's counsel, it came to light that, because of a software problem that caused certain BBMs to be given an incorrect time stamp, not all relevant BBMs had been retrieved from the phone by the RCMP.³³² The other BBMs were then produced.

I am satisfied that the failure to retrieve the BBMs from the phone initially was a result of a problem with the software, and not because of any malfeasance or negligence on behalf of the RCMP cell phone analyst. However, if the error was identified by Commission counsel reviewing the RCMP's file, it could have been identified by the RCMP investigators. The failure to identify it is a deficiency that suggests a lack of rigour in the investigation. While the error did not materially affect the outcome of the investigation, it does affect public confidence. To overcome the public concern that police officers will 'go easy' on a fellow officer, investigators on these types of cases need to be thorough and vigilant in their work.

³³⁰ Transcript of Evidence of Cpl. Steve Burke, February 7, 2017 at p 82.

³³¹ Transcript of Evidence of Cst. Joseph Smyth, March 6, 2017 at p 48.

³³² Exhibit P-0799.

Errors in the timeline

Another example of a lack of rigour is the report and timeline created by RCMP criminal analyst, Wanda Richards.³³³ The timeline was created at the request of the primary investigator, Cpl. Burke, to assist with the understanding of the case. To complete the timeline, Ms. Richards reviewed both Mr. Dunphy and Cst. Smyth's cell phone data, witness statements and Cst. Smyth's statements and re-enactment. Ms. Richards' work was reviewed by her supervisor and by Cpl. Burke. In fact, Ms. Richards sent drafts of the timeline to Cpl. Burke for his review prior to completion.

In their review of the RCMP's file, Commission counsel noted a number of errors in the timeline. First, according to the timeline, at 1:39 pm Cst. Smyth made "several outbound calls to Colin DINN who is a friend of DUNPHY. Last call made at 1:39 PM". This was a surprising result for a couple of reasons: first, there was no evidence that Cst. Smyth knew of Mr. Dinn's existence at the time and second, Cst. Smyth had not stated that he placed any calls in this time period. A review of Cst. Smyth's cell phone records, which were appended to Ms. Richards' report, revealed that the calls were not to Mr. Dinn, but were to three different phone numbers Cst. Smyth had associated with Mr. Dunphy. One of these was Mr. Dunphy's cell phone and that number had been called three times. The timeline error was not noted by the RCMP and Cst. Smyth was not questioned about these calls. Had this happened, the other errors in the timeline may also have been identified.

The timeline placed these calls, which occurred between 1:36 pm and 1:39 pm, after the timeline placed Cst. Smyth at Dick and Debbie Dunphy's home. The timeline recorded him arriving there at approximately 1:30 pm. Again, this was surprising, as Ms. Richards' report noted that Cst. Smyth's conversation with Mr. and Ms. Dunphy lasted about 20 to 25 minutes and neither Cst. Smyth nor either of the Dunphys had mentioned Cst. Smyth using his cell phone at their house. When Cst. Smyth was questioned about the calls by Commission counsel, he recalled making them while in an out-of-service area.³³⁴ This was corroborated by Mr. Dunphy's cell phone records, which do not have any record of the calls being received.³³⁵ Cst. Smyth also recalled that he made the calls *before* attending at Mr. and Ms. Dunphy's home.

When the two events are placed on the timeline in the correct order, other estimated-time events on the line are affected. Most significantly, the timeline showed a gap of 13 minutes and 15 seconds between the estimated time that Cst. Smyth shot Mr. Dunphy

³³³ Exhibit P-0664.

³³⁴ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 67.

³³⁵ Also appended to Exhibit P-0664.

and the known time that Cst. Smyth called the RCMP detachment at 2:27 pm. It is curious that, upon review of the timeline, the investigators did not appear to query what Cst. Smyth had been doing in the house for over 13 minutes prior to calling for assistance. Again, had they done so, it is likely the timeline errors would have been uncovered. Once the timeline is adjusted to correct these errors, the time estimate between the shooting and the call to the RCMP is significantly shorter.

Cpl. Burke testified that he paid very little attention to the timeline Ms. Richards prepared at his request, which is unfortunate.³³⁶ This leaves an impression that creation of the timeline was just a perfunctory exercise or one of “window dressing” as submitted by Ms. Dunphy, which is hardly a hallmark of a rigorous investigation.³³⁷ If greater scrutiny had been given to this work, these errors would have been recognized and it is likely that the additional information about Cst. Smyth’s calls to Mr. Dunphy and a better estimate of his time in the house would have been uncovered by the RCMP prior to the Inquiry process.

Deficiencies in interview of Cst. Smyth

The deficiencies in Cst. Smyth’s interview have been largely canvassed under Finding 14, but may be summarized as follows:

- (1) The RCMP did not press Cst. Smyth to give a statement on April 5, 2015, nor did they request that he not speak to others about events until he had given a formal statement. Even though they may have had no authority to compel a statement, had Cst. Smyth not been a fellow officer, the RCMP likely would not have acceded to a 24-hour delay so readily.
- (2) During the interview, the interviewing officers were too friendly with Cst. Smyth and gave him information about their investigation that served no investigative purpose. Both ASIRT and Mr. Jones identified these deficiencies. This preferential treatment cast a significant shadow on the impartiality of the investigators.
- (3) Cst. Smyth was not questioned vigorously or indeed at all on some points. For example, he was not asked about who he had spoken to in the period before or after the shooting, he was not asked about his own

³³⁶ Transcript of Evidence of Cpl. Steve Burke, February 9, 2017 at p 6.

³³⁷ Final Submission of Meghan Dunphy, April 7, 2017 at p 36.

mental health, or questioned in detail about his time spent in Dick and Debbie Dunphy's or Donald Dunphy's homes. In his report for the Commission, Gareth Jones noted:

According to Cpl. Burke, there appears to have been little or no planning put into the interview of [Cst. Smyth], beyond asking him a broad open-ended question to begin with. While I agree that this is a very good way to begin an interview, a thorough and objective investigator would have prepared a list of questions [sic] areas/questions that would be put to [Cst. Smyth], should he not provide a full and complete account of what happened in response to that broad opening question. This appears not to have been done in this instance. Cpl. Henstridge advised that there was no 'formal interview plan.'³³⁸ [Report footnotes omitted.]

Mr. Jones did not consider this to be consistent with best practice. ASIRT also considered that best practice is to consider and document the approach to be taken in the interview and any tactics or strategies to be used in advance.³³⁹

The appearance of bias created by the apparent preferential treatment of Cst. Smyth seriously impacts on public confidence and was a material deficiency in this investigation.

Failure of officers to take proper notes

One of the shortcomings identified by ASIRT was missing or deficient notes for officers who monitored witness statements and two of the first responding officers. As I have already noted in Chapter 10, Finding 14, most of Sgt. Noel's communications with Cst. Smyth were not recorded in the file and Cpl. O'Keefe's call to Cst. Smyth on April 10, 2015, was not recorded until a few weeks later when he was instructed to record it by his superiors. Additionally, Cpl. Burke did not record all of his communications with Cst. Smyth in the file, and S/Sgt. Osmond did not record his observation that the interview with Cst. Smyth was too friendly.³⁴⁰ Also troubling was that on April 9, 2015, three RCMP officers met with RNC Supt. Jason Sheppard for over

³³⁸ Exhibit P-0770.

³³⁹ Exhibit P-0004 at p 4.

³⁴⁰ Exhibit P-0770 at p 12; Transcript of Evidence of Sgt. Kent Osmond, February 20, 2017 at pp 79-80.

an hour and none of the RCMP officers took any notes of what was discussed other than S/Sgt. Osmond who simply recorded “overview of investigation provided to him.”³⁴¹

While the failure to record notes did not affect the outcome of the investigation, it has a serious impact on public confidence. Without sufficiently detailed notes taken at or very near the time of events, it becomes difficult to determine the truth after the fact. More than once I heard from officers that they could not recall or be sure about events that were not recorded in their notes. There is also a serious impact on the investigation’s transparency. The best way to assure the public that all dealings with Cst. Smyth and the RNC were proper and professional is to have them recorded.

Communication with Ms. Dunphy – the Family Liaison

Families affected by acts under investigation by police must deal with the stress and trauma caused by the acts themselves and with the uncertainty of the outcome while they wait for the investigation’s results. Family members of a person who has died or been seriously injured as a result of police action may be particularly affected because of a loss of trust in public authority both in relation to the incident and the investigation.

The RCMP helps support such families by designating a member of the investigative team as the ‘Family Liaison’ officer. A Family Liaison officer is not appointed in all criminal investigations nor is it a well-defined position. There is no specialized training, protocol, checklist or guidelines for the appointed officer.³⁴² Cst. John Galway, who was appointed Family Liaison for Meghan Dunphy, described his role as follows:

It’s just a point of contact for Meghan Dunphy, in this case. So in the case, she’s seen lots of police officers at the scene; there’s people from Traffic Services, ident [FIS], Major Crime, GIS. It’s just a point, I guess a familiar face that she knows, if she has any questions, she can call me. So it’s just an aid to help her, you know – if she needs to reach out to someone in the RCMP, if she has a question, I was assigned that role.³⁴³

Meghan Dunphy had a similar understanding:

MS. O’BRIEN: Did anyone explain to you what a Family Liaison officer was, or did you have any understanding at that time what role that Cst. Galway would be playing?

³⁴¹ Exhibit P-0584 at p 6; other RCMP officers at the meeting were Chief Supt. Andrew Boland and Supt. Pat Cahill.

³⁴² Transcript of Evidence of Cst. John Galway, February 1, 2017 at p 64.

³⁴³ Cst. Galway was later replaced as Family Liaison officer by Cpl. Steve Burke.

MS. M. DUNPHY: No one explained it to me, but I think it was just basically he was my point of contact for the RCMP if I needed to speak to anything, he'd be giving me updates, that sort of thing.³⁴⁴

Despite the ad hoc nature of the role, commendable efforts were made to assist Ms. Dunphy. Cst. Galway arranged for RCMP members to feed cats at Mr. Dunphy's home, found Mr. Dunphy's wallet and delivered it to Ms. Dunphy, and sought answers for Ms. Dunphy's questions.³⁴⁵ While Ms. Dunphy appreciated many of these efforts, in some respects she did not consider the Family Liaison officer or other officers she dealt with as being sensitive enough and she felt the RCMP was dismissing her and not taking her seriously.³⁴⁶ She also felt that there was not enough communication, that she had to "pry" to find things out, and that communication about important events such as press releases often came to her too late.³⁴⁷ Ms. Dunphy's complaints are not unique. Justice Tulloch recorded a similar response from families in his Report.³⁴⁸ The worthwhile benefit of the appointment of a Family Liaison is lost if the actual effect is an increase in a family's frustrations or stress.

Provision of a Family Liaison is a good idea, but there is room for improvement. First, officers (or members of civilian oversight bodies) who perform this role should be trained to deal with people experiencing grief and trauma. In the case of police-caused incidents, the Family Liaison needs to be sensitive to the particular concerns of the families with respect to the independence and integrity of the investigation. These families can be expected to be distrustful of police and concerned about preferential treatment for officers. The Family Liaison also needs to be socially and culturally sensitive so that he or she can serve a diverse community. For example, special training may be required to effectively work with aboriginal communities or new immigrant populations. The Family Liaison should also have training in mental health and addictions.

The Family Liaison should also be aware of services that are available to such families and provide them with reliable information. The investigative body cannot be expected to provide these services and it has no control over the availability or mandates of victim services or similar organization. But rather than wait for an incident to happen before gathering information, the Family Liaison should have ready access to current

³⁴⁴ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 58.

³⁴⁵ See eg. Exhibits P-0395, P-0421.

³⁴⁶ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 81; Transcript of Evidence of Meghan Dunphy, January 9, 2017 at pp 84-85.

³⁴⁷ Transcript of Evidence of Meghan Dunphy, January 9, 2017 at p 85.

³⁴⁸ Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) at p 77.

information on the resources available. For example, the Chief Medical Examiner of the Province will meet with families of the deceased to answer questions about the cause and manner of their loved one's death. That information could be provided by the investigative body to the family as part of an information package.

The investigative body should have regular and on-going proactive communication with the family. A procedure should be implemented that will ensure that information is communicated to the family in a timely manner, without compromising the investigation, and certainly before any public release of information.

Recommendation 32: A Family Liaison should be appointed in police-involved deaths to assist the family of the deceased. The Family Liaison should be trained to deal with people experiencing grief and trauma. The Family Liaison should also have training and experience to successfully work with people from diverse social and cultural backgrounds, and with families that have dealt with persons in crisis.

Weaknesses in witness interviews

Gareth Jones considered that several witness interviews were not thorough enough including the interviews with Dick Dunphy, Debbie Dunphy, Nancy Linehan (paramedic), Kevin Bishop (emergency medical responder), and a number of former members of the PSU. He also believed that first responding RCMP officers should have been interviewed.³⁴⁹

I agree with Mr. Jones in this regard. The interviews with Dick and Debbie Dunphy were focused on Donald Dunphy and his history. Very little was asked about their interactions with Cst. Smyth that afternoon or how he presented. Likewise, the interviews with Ms. Linehan and Mr. Bishop were very short and little was asked about Cst. Smyth or details of the scene inside the house. In reading these interviews, one does not get the sense that the interviewer was probing to test Cst. Smyth's account of events or collect evidence about Cst. Smyth. Cst. Smyth was not questioned about how the name Maynard got into the yellow file folder with the note "CEO", if he did not know who Maynard was. Nor was Cst. Smyth pressed to give an explanation as to how an open file folder with loose pages inside could have been dropped on the table as it was found.

³⁴⁹ Exhibit P-0770 at pp 56-61.

Again, this raises the concern of a lack of suspicious mind, or an early conclusion that Cst. Smyth's version was accurate.

I also agree with Mr. Jones that more effort should have been made to identify and interview witnesses who had contact with Cst. Smyth earlier that day or in the days shortly before. For example, Sgt. Buckle who spoke to Cst. Smyth by cell phone while Cst. Smyth was driving to Mitchell's Brook was not interviewed by the RCMP. Again, this points to a lack of scrutiny of Cst. Smyth's actions leading up to the shooting.

Not photographing Cst. Smyth or his weapon

Neither Cst. Smyth nor his sidearm was photographed at the scene and there was no ammunition count done. ASIRT considered this to be a shortcoming of the investigation, and Mr. Jones agreed. I also agree, but I do not consider this a very serious deficiency. The pistol and all ammunition were seized very early on and photographs at the time of seizure would not have revealed any additional information. Cst. Smyth's clothing was also seized and, while it would have been preferable to photograph him, there was no impact on the investigation.

Not cautioning Cst. Smyth

One of the shortcomings of the investigation identified by ASIRT was a failure to caution Cst. Smyth, or impress upon him that he was the subject of a homicide investigation, prior to taking his statement. Mr. Jones disagreed. Mr. Jones' opinion was that a caution should only be given if and when the investigators have reasonable grounds to suspect that a crime has been committed.

Whether Cst. Smyth should have been cautioned before giving his statement and whether he had an obligation to provide notes as required by RNC Policy and Procedure Manual General Order #330 raises legal questions regarding the impact of the s. 7 *Charter* right to remain silent and the ss. 11(c) *Charter* right against self-incrimination upon an officer in Cst. Smyth's position.³⁵⁰ Neither Mr. Jones nor Ms. Hughson of ASIRT were qualified to give opinion evidence on this point. This need not be addressed further here because Cst. Smyth agreed to provide statements without raising a *Charter* objection. However, I do not consider the failure to provide a caution to be a deficiency in this case.

³⁵⁰ Exhibit P-0030; s 4.6 requires an officer to complete notes before reporting off duty.

Other aspects of the investigation not considered deficiencies

A number of issues were raised either in testimony or in submissions that I have considered and do not find to be deficiencies in the investigation, as discussed below.

Cpl. O’Keefe’s purported statement that Mr. Dunphy was on the floor

The first of these arises from Ms. Dunphy’s conversations with Cpl. Trevor O’Keefe in the immediate aftermath of the shooting. Upon hearing from a friend that there were police cars at her father’s house, and a short time later, that someone may have been shot, Ms. Dunphy and Mr. Corcoran hurried to the scene in Mr. Corcoran’s car. On encountering the roadblock that had been established by the RCMP in front of Mr. Dunphy’s home, Ms. Dunphy identified herself as Mr. Dunphy’s daughter. The RCMP officer she spoke to, Cst. Kelly Downey, immediately notified Cpl. O’Keefe as he was the senior officer in charge. The evidence is that Cpl. O’Keefe had more than one conversation with Ms. Dunphy on the scene that afternoon or evening. The exact number is unclear, but most, if not all, of them took place in Mr. Corcoran’s car.

Ms. Dunphy recalls that Cpl. O’Keefe told her that her father was deceased and that his body was lying on the floor with a rifle alongside of him. Mr. Corcoran also testified to hearing Cpl. O’Keefe say the same or very similar to Ms. Dunphy. Cpl. O’Keefe, on the other hand, was adamant that he did not make that comment. He was absolutely certain and when asked by Commission counsel why he was so certain he replied:

Well, because it wasn’t fact. I had been in the house. I had seen where Mr. Dunphy was, so there’s no reason for me to say that. So I absolutely did not make those comments.³⁵¹

I am satisfied on a balance of probabilities that Cpl. O’Keefe did not tell Ms. Dunphy that her father’s body was on the floor. Having been in the house, it is unlikely that Cpl. O’Keefe would be under any misapprehension as to where Mr. Dunphy’s body was located. He was a candid witness who expressed genuine concern and empathy towards Ms. Dunphy. To the extent he believed it was appropriate to share information with Ms. Dunphy, I am satisfied he did so honestly. It was a traumatic afternoon for all involved, and especially so for Ms. Dunphy and Mr. Corcoran. It is more likely than not that they misunderstood Cpl. O’Keefe.

³⁵¹ Transcript of Evidence of Cpl. Trevor O’Keefe, January 26, 2017 at p 46.

Viewing of Mr. Dunphy's body

Ms. Dunphy wanted to see her father's body. She communicated that wish to Cpl. O'Keefe at their first meeting and she repeated the request a number of times after. Unfortunately, Ms. Dunphy did not get a proper opportunity to do so. Although she had made arrangements to see her father at the funeral home, she was unaware when she made those arrangements that, following the autopsy, her father's body was not in a suitable state for viewing. Ms. Dunphy was very upset by the circumstances and she laid the blame on the RCMP, particularly Cst. John Galway, the Family Liaison officer. While I agree that the situation was unfortunate, I do not attribute any fault to Cst. Galway.

In giving her testimony, Ms. Dunphy was under the impression that it would have been possible for her to view her father's body at the Health Science Centre prior to the autopsy and, because she did not know she could do this, she lost the opportunity to see him. I find on a balance of probabilities that Ms. Dunphy is mistaken on this issue. I am satisfied, based on the testimony of Dr. Simon Avis, Chief Medical Examiner for the Province, that his office does not have suitable facilities for families to view the bodies of their loved ones either prior to or after an autopsy. According to Cst. Galway's notes, on April 6, 2015, he communicated to Ms. Dunphy that there was no viewing room at the morgue, and she advised him that she had already made arrangements to view her father at the funeral home.³⁵²

Both Cst. Galway and Dr. Avis were under the impression that the funeral director could make Mr. Dunphy's body suitable for viewing. I did not hear evidence from the funeral director, and I make no findings as to the correctness of this view.

I accept that Ms. Dunphy could not see her father at the Chief Medical Examiner's office because of the limitations of that space and I accept that Ms. Dunphy could not see her father at the funeral home because the funeral director determined his body was not in a suitable state. As difficult as this reality was for Ms. Dunphy, it was not anyone's fault.

Although it may not have enabled her to see her father, Ms. Dunphy might have been better able to cope with the situation had she had more information sooner. If she had known earlier that her father's injuries were such that a viewing might not be possible, she may have been better prepared. I recommend that government consider preparing a small brochure as part of an information kit to distribute to bereaved families, which will explain procedures involved in the viewing of the remains.

³⁵² Exhibit P-0395.

Recommendation 33: Government should consider preparing a brochure to inform bereaved families on issues relating to viewing of remains following an autopsy.

Communications with Cst. Galway and S/Sgt. Tiller

Ms. Dunphy was also frustrated by a conversation that she had with Cst. John Galway and S/Sgt. Rod Tiller. By this time, Ms. Dunphy had been informed that her father had been shot four times. Mr. Corcoran, who was also present, expressed concern at the number of shots, suggesting that Cst. Smyth had used Mr. Dunphy for target practice. In response, Cst. Galway and S/Sgt. Tiller described training exercises that they had both participated in, where police officers use “simunition”, fake ammunition much like paint balls, in simulated training situations, and where they had not been aware of the number of shots they fired.

Ms. Dunphy was very upset by the conversation. She considered a comparison of her father’s shooting to what she characterized as a “paintball game” to be disrespectful and inappropriate. While I understand Ms. Dunphy’s reaction, I do not find any wrongdoing by the officers. I accept Cst. Galway’s testimony that they were attempting to explain to Ms. Dunphy how, even during training, police officers firing their guns under stress are often unaware of the number of shots they have fired. I am satisfied that the officers were not intending to diminish the seriousness of Mr. Dunphy’s shooting but rather were trying to assist Ms. Dunphy by giving her information about how officers are trained to shoot, which might have assisted her in understanding what had happened. As I said to Ms. Dunphy during her testimony, police officers trying to communicate more openly with family members can be in a “position of damned if you do and damned if you don’t.”

Cst. X avoiding communicating with Cst. Smyth about the incident

Cst. X drove Cst. Smyth from Mitchell’s Brook to the RCMP detachment in Holyrood. In his notes he recorded statements that Cst. Smyth made and also recorded “writer quickly diverted the conversation away from the comments and back to years of service general conversation.”³⁵³ Cst. X testified that his reason for doing this was that he didn’t have enough information about the situation or Cst. Smyth’s involvement to engage in

³⁵³ Exhibit P-0106 at p 3.

any discussion.³⁵⁴ I accept Cst. X's explanation and do not find any wrongdoing. He did not know the situation and had he questioned Cst. Smyth, or even inadvertently probed for more information, he could have unwittingly breached Cst. Smyth's *Charter* rights or complicated matters for the investigative team.

Conclusion on material deficiencies

There were material deficiencies in the RCMP investigation of Mr. Dunphy's death. While there is no evidence to suggest that these deficiencies affected the final conclusion of the investigation, that is, that no charges should be laid, a number of them had a serious effect on the public's confidence.

The root cause of the material deficiencies is likely the investigating officers' failure to treat the incident with adequate suspicion from the start. The RCMP accepted Cst. Smyth's version of events too readily and they failed to scrutinize his evidence with adequate rigour. The importance of following best investigative practices is magnified in police investigations of police, and here the RCMP failed to follow best practices in many respects. The most significant material deficiencies in the investigation are:

- (1) Inadequate communications between the MCU and the FIS teams prior to release of the scene;
- (2) Failing to seize Cst. Smyth's cell phone until April 24, 19 days after the shooting, and returning it to him prior to the completion of the investigation; and
- (3) Serious deficiencies in Cst. Smyth's interview including overly-friendly treatment and a lack of vigorous examination.

³⁵⁴ Transcript of Evidence of Cst. X, January 25, 2017 at p 139.

Finding 16: Was Cst. Smyth's version credible?

As noted earlier, because Cst. Smyth is the only living eyewitness to the shooting, his testimony must be scrutinized with particular care. In Chapter 4, I review the standard of proof to be applied in assessing credibility, which is the civil standard of balance of probabilities. In the case of Cst. Smyth, this means that prior to accepting a version of events different from that provided by him, there must be clear, convincing and cogent evidence establishing that the different version of events is the true one.

As part of this analysis, I must assess Cst. Smyth's credibility. As discussed in Chapter 4, it is helpful to consider the general approach of the courts when assessing evidence in both civil and criminal matters. This is succinctly expressed in the 'model' instructions given juries. Jurors are told that, as triers-of-fact, it is up to them to decide how much or how little of a witness's testimony they will believe or rely on, applying common sense. They may believe some, none or all of the evidence given by a witness. There is no magic formula for deciding how much or how little to believe or accept or how much to rely on it in deciding the case.

In the list of questions suggested for assessing evidence, two in particular are significant for this Inquiry. Jurors are asked to consider first, whether a witness has deliberately lied under oath and, second, whether a witness's testimony has been internally inconsistent or inconsistent with evidence given by other witnesses. Jurors are told that **when a witness lies under oath, this may well taint the entire testimony of a witness**. Similarly, while minor inconsistencies may not diminish the credibility of a witness, a series of inconsistencies may become quite significant in influencing whether the trier-of-fact accepts the evidence. The totality of the inconsistencies must be considered in order to assess whether a witness's evidence is reliable. We must ask whether inconsistencies have been explained and whether the explanation makes sense.

Inconsistencies and discrepancies in Cst. Smyth's testimony

With this in mind, I have identified a number of issues which, to a greater or lesser degree, reveal inconsistencies or discrepancies in the testimony of Cst. Smyth. I will address each of these and consider whether they have been adequately explained by Cst. Smyth and, if not, whether they alone or in combination with other inconsistencies and discrepancies, leave Cst. Smyth's credibility seriously damaged.

Cst. Smyth’s assertion that he did not consider the tweet to be a “threat”

Cst. Smyth was adamant that he did not consider Mr. Dunphy’s tweets to be a threat and he repeatedly stated so in his testimony. He contended that he was conducting a threat assessment to determine if Mr. Dunphy would pose any future threat to the Premier or government officials. In an email to Mark Quinn of CBC on September 13, 2016, he wrote, “At no point did I or members of the RNC interpret any of Mr. Dunphy’s social media commentary as threats.”³⁵⁵

This is not consistent, however, with certain of Cst. Smyth’s utterances, which were made closer in time to the shooting. For example, several people, including officers that he communicated with on April 5, 2015, both before and after the shooting, recorded in their contemporaneous notes that Cst. Smyth was investigating a “threat” or a “threat against the Premier.” I have summarized these in the discussion under Finding 2 and will not repeat them here. When asked about these recorded statements, Cst. Smyth explained that he might have used “threat” as a shorthand means of simplifying the description of his assigned task.³⁵⁶

I accept Cst. Smyth’s explanation. I do not see that his denial of seeing the tweet as a threat seriously diminishes his credibility but will consider it later in the overall assessment.

Inconsistency in how Cst. Smyth identified himself to Mr. Dunphy

Cst. Smyth made it a point to state that he did not identify himself by rank to Mr. Dunphy. He stated in these situations he tries to be more informal to build rapport.

However, in the Case Summary filed by Cst. Smyth on April 7, 2015, and drafted April 6, 2015 (his first recording of events), he wrote, “identified myself as Sgt. Joe Smyth with the RNC.”³⁵⁷

When asked about this inconsistency during his testimony, Cst. Smyth confirmed that this was an error in the Case Summary and he had not told Mr. Dunphy his rank.³⁵⁸ I accept Cst. Smyth’s explanation and consider this a minor inconsistency due to memory

³⁵⁵ Exhibit P-0204.

³⁵⁶ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 33.

³⁵⁷ Exhibit P-0092.

³⁵⁸ Transcript of Evidence of Cst. Joseph Smyth, January 23, 2017 at pp 99-102.

lapse with no impact on credibility. I discuss the issue of rank further in Chapter 10, Finding 4, regarding voluntary consent to enter Mr. Dunphy's residence.

Inconsistency in what Cst. Smyth told Mr. Dunphy about where he worked

Cst. Smyth testified that he told Mr. Dunphy that he was with the RNC but did not tell Mr. Dunphy he worked with the PSU. Cst. Kelly Downey recorded in her notes that Cst. Smyth told her that Mr. Dunphy asked him who he worked for and if he worked for the government. When she testified at the Inquiry, she confirmed that this was her recollection.³⁵⁹

When asked about this possible discrepancy during his testimony, Cst. Smyth denied saying this to Cst. Downey.³⁶⁰

I accept that Cst. Smyth told Mr. Dunphy that he was with the RNC, and that this prompted a question from Mr. Dunphy as to why an RNC officer was in that area. I also accept that Cst. Smyth did not tell Mr. Dunphy that he worked with the PSU or with government. I do not consider that the possible inconsistency raised by Cst. Downey's notes damages Cst. Smyth's credibility. I discuss the issue of unit assignment further in Chapter 10, Finding 4, regarding voluntary consent to enter Mr. Dunphy's residence.

Cst. Smyth's failure to see the rifle before Mr. Dunphy produced it

Unfortunately, because the RCMP FIS team was not supplied with Cst. Smyth's statement about where he stood in the room or where he first saw the rifle, they did not capture an image of the exact line of sight that Cst. Smyth would have had to the right hand side of Mr. Dunphy's chair. Photograph 45 appears to be the closest image that we have, although Sgt. Saunders was not certain about where he was standing when he took it or if he used any zoom.³⁶¹ This photograph shows a fairly clear view of the right side of Mr. Dunphy's chair if one is standing in front of the mantle to the left side of centre.

Cst. Smyth acknowledged in his RCMP statement of August 26, 2015, "I should have noticed it... there was no great hiding spot... I don't have a good excuse."³⁶²

³⁵⁹ Transcript of Evidence of Cst. Kelly Downey, January 30, 2017 at pp 108-109.

³⁶⁰ Transcript of Evidence of Cst. Joseph Smyth, January 23, 2017 at pp 89-90.

³⁶¹ Exhibit P-0010, photo 045; Transcript of Evidence of Sgt. Christopher Saunders, February 13, 2017 at pp 59-60.

³⁶² Exhibit P-0122 at p 5.

In his testimony before the inquiry, Cst. Smyth frankly admitted he could not explain why he had not seen the rifle if it was lying on the floor near the right hand side of Mr. Dunphy's chair. After this testimony and after the chair had been brought into the hearing room to be examined and measured, it became apparent that a side pocket on the right hand side of the chair was large enough to hold the rifle if it was placed down barrel-first, and leaning backwards. When he was recalled to give testimony, Cst. Smyth suggested this might explain why he had not seen the firearm.³⁶³ That explanation is plausible and I do not find that Cst. Smyth's failure to see the rifle earlier significantly challenges his credibility. Failure to see the rifle may also be explained by the considerable clutter in the room.

Inconsistencies in how long Cst. Smyth kept his eyes off Mr. Dunphy

Cst. Smyth's testimony regarding how long he kept his eyes off Mr. Dunphy was not consistent. Cst. Smyth originally stated he looked down and took his eyes off Mr. Dunphy for two to three seconds. He increased this at the time of his interview by Commission counsel and, by the time of the hearing (when he had become acutely aware that this was a key issue being advanced by counsel for Meghan Dunphy in the chair demonstration discussed in Ruling 1), he increased the time to up to six seconds.³⁶⁴ The inconsistency in his evidence could be considered self-serving and thus could cast doubt on his credibility.

It is also questionable whether a police officer would have kept his eyes off Mr. Dunphy for that period of time, particularly when he claims he was dealing with an agitated subject and was on heightened awareness. As discussed elsewhere in this Report, the RNC use of force training stresses the "HANDS, HANDS, HANDS" rule (that is, keep your eyes on the subject's hands because that is where a threat will come from) and the "one plus one" rule (that is, if there is one weapon such as a stick, expect another). In these circumstances, and with this training I have doubts whether Cst. Smyth would have been inattentive for more than two or three seconds.

However, when I consider the probable impact of trauma on memory and on the ability to estimate time, and consider that two or three seconds was probably long enough for the rifle to be raised, these inconsistencies by themselves do not significantly diminish Cst. Smyth's credibility.

³⁶³ Transcript of Evidence of Sgt. Christopher Saunders, February 13, 2017 at pp 59-60.

³⁶⁴ See Appendix 31: Ruling 1.

Inconsistencies in Cst. Smyth's account as to what he was doing when the rifle first appeared

Cst. Smyth's evidence as to what he was doing when the rifle first appeared was inconsistent:

- (1) RCMP statement of April 6, 2015:³⁶⁵ *I got the file folder in my hand and I'm doing this and I was saying, Don I got real concerns for you... you're a fuckin' puppet – and ah and that's when I started – **I started to write something** and was – I was stood up and I saw- like I went peripheral vision. I saw like the barrel of a rifle and... and from there everything was just so fast and so instinctive... my head hadn't come up at this point.*
- (2) RNC Narrative Hardcopy, April 7, 2015:³⁶⁶ ***I began to write on the folder** I was carrying partially in an effort to calm him as he was agitated with me looking around the room. Then out of my peripheral vision I saw the barrel of a rifle in Dunphy's hands that he seemed to pick up from his right.*
- (3) Re-enactment, April 10, 2015:³⁶⁷ *I had the folder in my hand and I started, at some point in time that I had... I got a pen in this hand and I started to look down at the folder **but I wasn't really truly looking** at it. I was just trying to stop looking around...*
- (4) Statement to Sgt. Grant Little, June 17, 2015:³⁶⁸ *I got an elbow I think on the mantel and then my file folder there, and **I'd open the folder up** and I said okay, stop looking around because this is driving this guy bananas **and I looked down at the folder but I wasn't really looking at it...***
- (5) RCMP statement of September 14, 2015:³⁶⁹ *I was stood up in the living room next to the fireplace mantle and **was looking down at a file folder.***

³⁶⁵ Exhibit P-0119 at p 14.

³⁶⁶ Exhibit P-0128 at p 3.

³⁶⁷ Exhibit P-0120 at p 11.

³⁶⁸ Exhibit P-0121 at pp 89-90.

³⁶⁹ Exhibit P-0217.

- (6) Inquiry testimony: During his evidence at the Inquiry he said the only thing he had written on the file folder were the names of the two dead MHAs. He testified he had received this information earlier in the conversation. There was an arrow on the folder between the names with some scribble marks on it. Upon seeing those marks, Cst. Smyth testified that it was possible that he was moving his pen over the arrow at the time immediately before the rifle appears.³⁷⁰

I do not find these inconsistencies seriously damage Cst. Smyth's credibility. They are likely the result of memory loss following a traumatic event. I will consider these inconsistencies in the totality of the evidence.

Cst. Smyth did not recall Mr. Dunphy saying anything as the rifle appeared

Cst. Smyth testified that he did not recall Mr. Dunphy saying anything as the rifle appeared. It seems unusual that if Mr. Dunphy was ranting and suddenly fell silent, that this would not have caught Cst. Smyth's attention and caused him to look up. I accept that this might be explainable by memory loss due to the trauma of the encounter.

Cst. Smyth's evidence on the position and orientation of the rifle after the shooting

Cst. Smyth's recollection of the position and orientation of the rifle after the shooting is not accurate. In his first communications following the shooting, he described the rifle as being on the ground or on the floor:

- (1) In the transcript of one of his first calls into the RCMP following the shooting, he stated, "he had a firearm; the firearm is on the ground here now."³⁷¹
- (2) In his April 6, 2015, statement to the RCMP, he stated, "I see the gun on the floor... in front of the chair."³⁷²
- (3) At the videotaped re-enactment on April 10, 2015, he stated that the blue storage tub did not "resonate" with him.³⁷³

³⁷⁰ Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 27-28.

³⁷¹ Exhibit P-0125.

³⁷² Exhibit P-0119 at p 16.

At the same re-enactment, Cst. Smyth was incorrect in terms of the orientation of the rifle. He stated that he was “pretty certain” the butt of the gun was on the floor and the barrel was pointed up. It was found in the opposite orientation.

It may be difficult to conceive how the rifle as depicted in the pictures would have landed that way if events unfolded as Cst. Smyth states. The question arises, however, as to why someone would *stage* the rifle the way it was found? Ms. Dunphy suggested that a person who has just killed a man, and is in a panic to stage the scene before the police arrive, might make a mistake such as placing the firearm in an orientation different from what he intended. However, this is mere speculation and I find it unlikely. The Chief Medical Examiner found nothing remarkable about the rifle orientation.

There are other examples of Cst. Smyth’s memory possibly being affected in the immediate aftermath of the shooting. For example, his report of his post-shooting activities has not been precise with respect to the time between the shooting and his call to the RCMP to report the incident. Nor has it been consistent as to the order of post-shooting events. For example, in his June 17, 2015, statement to Sgt. Grant Little of the Saskatoon Police Service (SPS), Cst. Smyth stated that he cleared the house prior to making the calls to the RCMP. He said the opposite in his testimony at the Inquiry.

Cst. Smyth frankly admitted he was not sure if he recalled correctly the position or orientation of the rifle. He had no reason to lie on these points. I regard these as memory lapses rather than attempts to deceive.

The yellow file folder was found on the coffee table with the pages inside

As discussed above, Cst. Smyth’s evidence as to what he was doing when the rifle was produced has been inconsistent. Cst. Smyth’s evidence at the Inquiry was that he saw the rifle come out in his peripheral vision as he was occupied with the file folder and was possibly scribbling on an arrow which he had previously drawn on the folder. This arrow is on the **inside** back cover of the folder, so if Cst. Smyth was writing or scribbling at the time, the folder must have been open. It is puzzling how an *open* folder, with several sheets of loose paper inside when dropped suddenly, would land closed on the coffee table, with all sheets inside.

³⁷³ Exhibit P-0120 at p 15.

The file folder's position is the one piece of physical evidence which is difficult to reconcile with Cst. Smyth's version of events. While its position on the coffee table is puzzling, it is not impossible that it landed that way. Cst. Smyth frankly admits he does not remember how the folder ended up the way it did and his memory as to how he was holding the folder just before he dropped it is unclear. The position of the yellow file folder remains puzzling but I do not see it as reflecting badly on Cst. Smyth's credibility. I will consider it with the totality of evidence.

Inconsistencies in Cst. Smyth's statements as to what he did in the immediate aftermath of shooting

Cst. Smyth's evidence as to what he did in the immediate aftermath of the shooting was inconsistent:

- (1) RCMP statement of April 6, 2015:³⁷⁴ Once he fired the fourth shot he got out of the room right away and then started "cutting the pie" (examining the room segment by segment) to come back into the room. He worried about Dick Dunphy next door and about whether he should reload his pistol. **He then called the RCMP Communications Centre before clearing the house and moving the plywood over the kitchen door.**
- (2) Sgt. Burke's notes from re-enactment, April 8, 2015:³⁷⁵ Smyth said that **once the house was cleared he called the RCMP and then the RNC.**
- (3) Re-enactment, April 10, 2015:³⁷⁶ Once he fired the fourth shot, he immediately got out of there and then started back into the room. He worried about Mr. Dunphy's brother next door and about whether there was somebody in the house and whether he should reload his gun. **He checked the hallway, came back to check on Mr. Dunphy and then called the RCMP prior to clearing house and removing plywood over the door.**
- (4) Statement to Sgt. Grant Little, June 17, 2015:³⁷⁷ Once he fired the fourth shot he got out of the room and then started cutting the pie to come back into the room. He got worried about the neighbours and about whether

³⁷⁴ Exhibit P-0119 at pp 15-17.

³⁷⁵ Exhibit P-0180 at p 4.

³⁷⁶ Exhibit P-0120 at p 16.

³⁷⁷ Exhibit P-0121 at pp 96-99.

there was anyone else in the house. **He then did a very quick clear of the house.** He got worried about someone coming over and about whether he needed to reload his gun. **He then called the RCMP.**

I find these discrepancies most likely explainable by the effect of trauma on memory.

Discrepancy in Cst. Smyth's knowledge of who "Maynard" was

In his April 6, 2015, statement to the RCMP, Cst. Smyth said that when Mr. Dunphy was speaking incoherently, he mentioned "Maynard" but that Cst. Smyth didn't understand what he was saying as he didn't know who "Maynard" was.

This is not consistent with the notes Cst. Smyth made on the inside of the file folder while speaking with Mr. Dunphy. He recorded "Ed Maynard - CEO WHSCC."

One possible explanation for this minor discrepancy is that Cst. Smyth did not know who "Maynard" was until Mr. Dunphy proceeded to tell him. I do not consider this a serious discrepancy but will consider it in the totality of the evidence.

The preparation of Cst. Smyth's notes and assistance rendered by Sgt. Buckle

During his testimony, Cst. Smyth denied having any advice or input from anyone in drafting his notes of the incident (other than legal counsel).³⁷⁸ He prepared these notes on the morning of April 6, 2015, and brought them with him to the interview with the RCMP later that day. A version of the notes also comprised the Case Summary that was placed on the RNC file on April 7, 2015 (which Cst. Smyth was obligated to file as his report following the incident).

BBMs discovered after Cst. Smyth had testified revealed that he had consulted with Sgt. Tim Buckle in drafting these notes, received input from Sgt. Buckle, and exchanged drafts of his notes with Sgt. Buckle. This happened on the morning of April 6, 2015, prior to Cst. Smyth's attendance at the RCMP to give his statement. Following the discovery of the BBMs, Cst. Smyth was recalled before the Commission and he then testified that he had not remembered his consultation with Sgt. Buckle until he saw the recently discovered BBMs. The following are the relevant portions of the BBM exchange that took place between 10:09 am and 11:09 am between Cst. Smyth and Sgt. Buckle:

³⁷⁸ Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 82.

Smyth to Buckle: **Making notes now.**

Buckle to Smyth: **Looks good... should you be more specific and say I perceived a threat of imminent death of grievous bodily harm... to quote the use of force policy?**

Smyth to Buckle: **ok. But a gun pointed at me is pretty straight forward.**

Smyth to Buckle: **Using policy in the circumstances feels a bit manufactured,**

Buckle to Smyth: **It's reflective of the training and articulation. I think it's important to state that.**

Smyth to Buckle: **ok**

Smyth to Buckle: **Read the change.**

Buckle to Smyth: **yup. that's better**³⁷⁹

This exchange suggests that on the morning of April 6, prior to meeting with the RCMP or providing his notes to the RNC or the RCMP, Cst. Smyth consulted with Sgt. Buckle about those notes and made a change to them that seemed satisfactory to Sgt. Buckle.

On February 17, 2017, after the late disclosure of the BBMs, counsel for Cst. Smyth provided the Commission with two emails from Cst. Smyth to Sgt. Buckle dated April 6, 2015, which included two versions of his notes.³⁸⁰ Neither of those emails had been provided by Cst. Smyth to the Commission in his original disclosure. He stated this was because they had been erroneously filed by him in a folder that he thought contained only solicitor-client information. The time stamps on these emails are earlier than the times on the BBM conversation above. The first email to Sgt. Buckle is 9:41 am. The second email is 10:05 am and has as subject line "re change". It was not clear from the evidence if the emails are timestamped earlier than the BBM exchange because of an incorrect timestamp or because the emails were sent before the BBMs.

The version of the notes attached to the second email is largely the same as the first except for two changes:

³⁷⁹ Exhibit P-0500 at pp 3-5; The BBM conversation took place between 12:39 pm Coordinated Universal Time (UTC) [10:09 am Newfoundland Standard Time (NST)] and 1:39 pm UTC [11:09 am NST]. NST is 2.5 hours behind UTC for the relevant dates.

³⁸⁰ Exhibit P-0788.

- (1) The word “serious” is added to the sentence: “...told him I had **serious** concerns for him.”
- (2) The following bolded wording is added: “Then out of my peripheral vision I saw the barrel of a rifle in Dunphy’s hands that he seemed to pick up from his right **and then bring the barrel to point at me. I felt an imminent threat to my life** and immediately went for my firearm and put my left hand up in a stop motion.”

Cst. Smyth sent an email to Cpl. Steve Burke on April 7, 2015, with a copy of his notes to assist the RCMP investigation.³⁸¹ He wrote, “Notes attached and are the same to what have been uploaded to the RNC Internal file.” In fact, this version of the notes is not the same as that on the RNC internal file. The version on the RNC file is the same as the version sent to Sgt. Buckle by Cst. Smyth in the first email at 9:41 am on April 6, 2015.³⁸² The version that was sent to Cpl. Steve Burke on April 7, 2015, is the same as the version sent in the second email to Sgt. Buckle. In other words, it has the changed wording including the wording that the barrel was pointed at him and he felt an imminent threat to his life. When Cst. Smyth was recalled to give evidence with respect to the BBMs he testified that he did not accept any advice given to him by Sgt. Buckle since the original version of his notes is what is contained in the RNC Case Summary. While this is true with respect to that version of the notes, it is not so with respect to what he provided the RCMP. I accept that Cst. Smyth was not aware which version was provided to the RCMP at the time of his recall testimony, and his evidence on this point was simply in error.

There is one other piece of evidence that the Commission is aware of which may have been relevant to this issue. However, that evidence no longer exists. An extract from Cst. Smyth’s cell phone records shows an email was received by him dated April 6, 2015, at 2:26 pm UTC (approximately noon NST). That email, entitled “Dunphy Notes,” was deleted from Cst. Smyth’s cell phone.³⁸³ Both the RCMP and Kevin Ripa, a computer recovery expert retained by the Commission, attempted to recover this email but were unable to do so. The sender of this email is unknown as is its content. Given its subject line, however, it would likely have been relevant.

In his evidence on recall, Cst. Smyth was asked about his original testimony which was:

³⁸¹ Exhibit P-0189.

³⁸² Exhibit P-0128.

³⁸³ Exhibit P-0588.

MS. CHAYTOR: Okay. And in terms of the drafting of those notes, did you have any advice or any input into what should go in those notes?

CST. SMYTH: No.

MS. CHAYTOR: Did you consult with anyone in drafting that document?

CST. SMYTH: I did send them to our legal counsel at their request.

MS. CHAYTOR: Okay.³⁸⁴

On recall he asserted that his answer to the question at the time of his original testimony was accurate, because he had sent his notes to legal counsel. I pointed out to Cst. Smyth that the obligation is to tell the **whole** truth and by only mentioning legal counsel the implication is that he had not consulted anyone else.³⁸⁵

While I consider the testimony of Cst. Smyth on this point to raise a serious cloud over his credibility, in fairness I must keep in mind that the conversation with Sgt. Buckle did not indicate any intention to mislead the investigation. The changes discussed were more matters of style than substance.

Cst. Smyth giving message to media to speak to Dick Dunphy

On April 6, 2015, Cst. Smyth sent a BBM to Sgt. Buckle: "Should tell Fred Hutton to talk to his brother. Lives next to the deceased." Buckle responds he will.³⁸⁶

Similarly, on April 6, 2015, before he gave his statement to the RCMP (and before he knew whether Dick Dunphy had been interviewed), Cst. Smyth messaged James McLeod (of The Telegram) advising him to speak to Dick Dunphy.³⁸⁷

In Finding 5 I found this to be inappropriate behaviour, but it also arguably speaks to Cst. Smyth's credibility. Cst. Smyth knew Dick Dunphy was estranged from his brother and that Dick and Debbie Dunphy would likely not speak favourably about Donald Dunphy. Asking the media to contact them would therefore likely result in a negative public message about Donald Dunphy. This is not consistent with his story that he was feeling empathetic towards the Dunphy family in the aftermath of the shooting. Instead it

³⁸⁴ Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 82.

³⁸⁵ Transcript of Evidence of Cst. Joseph Smyth, March 6, 2017 at p 43.

³⁸⁶ Exhibit P-0500 at p 6.

³⁸⁷ Exhibit P-0134 at pp 1-2.

shows self-interest came first. I also ask myself why the messages sent to Mr. McLeod and Sgt. Buckle were deleted from Cst. Smyth's cell phone.

These inappropriate messages and their deletion bring Cst. Smyth's credibility into question.

Failure to disclose all records and deleting potential evidence

Cst. Smyth was not completely forthcoming in his document production. He also deleted messages from his cell phone. A significant number of BBMs and email in which he had discussed matters related to the shooting were deleted before he handed his cell phone over to the RCMP on April 24, 2015. An officer with his experience should have known that these messages constituted potential evidence and should not have been tampered with. Examples of deleted messages include:

(1) **Cell phone record April 5, 2015:**

- Call to Joe Browne from the scene at 3:41 pm was deleted.
- Text messages with Cst. Brian Marshall (which based on timing also appear to be while he is at the scene) also deleted.
- Email to Donna Ivey and Joe Browne in which Cst. Smyth mistakenly stated that he was familiar with Mr. Dunphy was deleted.³⁸⁸

(2) **Extract from his phone records shows deletion of an email dated April 6, 2015, entitled "Dunphy Notes."**³⁸⁹ This could be the email from Sgt. Buckle with the changes he recommended to the notes. Whatever it was, based on its subject line it certainly would have been considered relevant to the investigation and the Inquiry's fact-finding process. This email could not be recovered.

(3) **BBMs between Cst. Smyth and Sgt. Buckle and Trevor.**³⁹⁰ These were only discovered late in the process and are discussed below. A

³⁸⁸ Exhibit P-0134 at pp 7, 9.

³⁸⁹ Exhibit P-0558.

³⁹⁰ Exhibits P-0500, P-0774.

number of the deleted messages were inappropriate or revealed a lack of professionalism.

I find these failures to disclose or preserve evidence to be matters which bring Cst. Smyth's credibility into question.

Portrayal of himself as being empathetic towards vulnerable persons

During his evidence, Cst. Smyth portrayed himself as empathetic towards vulnerable individuals and those with mental health issues. When the totality of the evidence is reviewed, this does not seem genuine. Perhaps the most telling examples of this are his comments about Mr. Dunphy and Andrew Abbass.

On April 4, 2015, during a BBM exchange with his friend, Trevor, Cst. Smyth in referencing having to visit Mr. Dunphy wrote "gotta go deal with some lunatic threatening the premier." In his evidence, he explained that this was casual talk and shorthand that he was using in the context of a conversation with a friend.

In a BBM exchange with Sgt. Buckle on April 7, 2015, Sgt. Buckle advised Cst. Smyth that Andrew Abbass had been arrested under the *Mental Health Care and Treatment Act*. Cst. Smyth replied, "Saw that! Nice." Sgt. Buckle then informed Cst. Smyth that Mr. Abbass was at the hospital and Cst. Smyth replied, "Loser".³⁹¹

On April 9, 2015, Cst. Smyth engaged in a BBM exchange with his friend, Trevor, regarding the pistol he had used in the shooting. Cst. Smyth messaged as follows:

That gun is seized but I will get it back if I want it

which I do

Worked for me the first time... So..³⁹²

It is fair to ask if he were empathetic towards Mr. Dunphy whether he would in the aftermath of the incident want anything to do with the weapon involved. However, I accept that these comments were juvenile private conversations between close friends. These remarks show a lack of professionalism but do not raise serious concerns about

³⁹¹ Exhibit P-0600.

³⁹² Exhibit P-0774 at p 17.

credibility in themselves. I will consider them, however, at the end of this section in the context of other discrepancies.

The BBM conversation between Cst. Smyth and Sgt. Buckle is worthy of further comment. Although I do not find the exchange to raise a serious concern about Cst. Smyth's credibility, it raises some concern about the RNC's culture given that two mid-career officers were engaged in such inappropriate and unprofessional banter about a man who had been detained for mental health evaluation. While I appreciate that superior officers can neither monitor nor control all conversations between members, the tone that creates a culture of compassion and respect for all citizens comes from the top. In a true culture of compassion and respect, such comments would simply not be made. I discuss the importance of police culture further in Chapter 12 with respect to improving RNC training in crisis resolution and de-escalation techniques.

Inconsistencies in Cst. Smyth's accounts of British Virgin Islands incident

Cst. Smyth was arrested, charged and ultimately convicted of a criminal offence during a visit to the British Virgin Islands in 2005. Cst. Smyth was robbed while intoxicated and, in chasing after the assailants after the robbery and in venting his frustration, he caused damage to property. Cst. Smyth's initial account of events to his RNC supervisor at the time and to a friend who was on holiday with him tended to downplay his culpable behaviour. However, on return to Newfoundland and Labrador he admitted to facts that led to internal discipline.

The Commission had access to the RNC's disciplinary file, which included witness statements from the British Virgin Islands. The witnesses described Cst. Smyth damaging more than one vehicle. During his testimony at the Inquiry, Cst. Smyth stated that the witness statements were not accurate and that the people claiming property damage were exaggerating for monetary gain. He only admitted to damaging one vehicle intentionally.³⁹³

This evidence does indicate an inclination to shade the truth to put the best face on his conduct, but this incident was roughly ten years before the shooting of Mr. Dunphy, and he was heavily intoxicated at the time of the incident. I find this incident in the British Virgin Islands says little about his credibility today.

³⁹³ Transcript of Evidence of Cst. Joseph Smyth, January 16, 2017 at p 69.

Summary of inconsistencies and discrepancies in Cst. Smyth's testimony

To summarize, there are three points which negatively impact Cst. Smyth's credibility most significantly:

- (1) The omission initially to mention Sgt. Buckle's assistance in the preparation of his notes on April 6, 2015, raises a serious cloud on Cst. Smyth's credibility which is mitigated somewhat by the suggested changes being style rather than substance;
- (2) The messages to the media (Fred Hutton and James McLeod) to contact Dick Dunphy and their deletion from Cst. Smyth's cell phone cause me concern about Cst. Smyth's credibility; and
- (3) His failure to disclose all records and deleting potential evidence from his cell phone brings Cst. Smyth's credibility into question.

In addition to these three more serious items, the following six relatively minor items must still be considered in the totality of the circumstances, for their cumulative effect, as they each have some bearing on credibility:

- (1) Inconsistencies in Cst. Smyth's statements as to whether he considered the tweet to be a "threat";
- (2) The implausibility of not seeing the rifle in a small room (although I accept that the clutter in the room and the examination of the side pocket of Mr. Dunphy's chair during the hearing provide possible reasonable explanations as to why the rifle was not seen);
- (3) The testimony regarding how long he had his eyes off Donald Dunphy before the rifle was raised (although I attribute this somewhat to difficulty in remembering and measuring time after a traumatic event);
- (4) Inconsistencies in testimony regarding what he was doing (writing on the folder or just looking down) when the rifle appeared;
- (5) The implausibility of the yellow file folder landing with notes still neatly within it if it was dropped in haste; and

- (6) Portrayal of himself during Inquiry proceedings as being empathetic toward vulnerable people when his BBMs and other messages revealed a lack of professionalism and, arguably, a non-empathetic nature.

In addition to these nine points which I believe, in varying degrees, have some negative impact upon Cst. Smyth's credibility, it is important that I consider the factors which support Cst. Smyth's testimony.

Physical evidence corroborates Cst. Smyth

My examination of what we know occurred prior to and during the shooting on April 5, 2015, leads me to conclude that Cst. Smyth's version of events has, to some extent, been significantly corroborated by the forensic and other evidence and that there is no evidence refuting his testimony, as discussed below. I agree with counsel for Cst. Smyth that corroboration flows from the following:

- (1) The comments and actions attributed to Mr. Dunphy by Cst. Smyth are confirmed by Meghan Dunphy as the sorts of behaviours she would expect from her father;
- (2) The rifle, which was last seen by Meghan Dunphy behind the couch, was found leaning against the blue storage tub. There was no evidence provided which would suggest Cst. Smyth knew of the rifle's existence before the shooting;
- (3) The evidence of Dr. Simon Avis established that there were no signs of a struggle, no abrasions, lacerations, or scratches which indicated that a struggle had occurred. Dr. Avis also confirmed that Mr. Dunphy could have continued to track Cst. Smyth with the rifle, even after being shot;
- (4) The FIS officers did not find anything in the crime scene which refuted Cst. Smyth's version of events; and
- (5) The report and testimony of Darryl Barr confirmed that the physical evidence of the shooting supports the description given by Cst. Smyth.

In this section, I will review the physical evidence of the shooting. The RCMP retained Darryl Barr, Firearms and Toolmark Examiner and the manager of the Calgary Police Service's Forensic Firearm and Toolmark Laboratory, to analyse the shooting-related

physical evidence to determine if any of that evidence either supported or refuted Cst. Smyth's account.

Mr. Barr prepared a report for the RCMP and he testified to his report at the Inquiry hearings. Mr. Barr concluded that no elements of the shooting evidence refuted Cst. Smyth's account and that the following elements supported it:

- (1) **The number of gunshots fired.** After the shooting Cst. Smyth stated that he believed he had fired four shots: two to Mr. Dunphy's centre mass and two to his head, although he felt the first of the head shots had missed.³⁹⁴ The physical evidence was that four fired cartridge cases and four fired bullets were recovered from the scene and body. Three of those cartridges and all four bullets were determined to have come from Cst. Smyth's Sig-Sauer pistol. The remaining cartridge was determined to have been cycled through the action of the Sig-Sauer but there were insufficient toolmarkings to confirm it had been fired by that pistol.³⁹⁵ Cst. Smyth's statement as to the number of shots was supported by the physical evidence.

- (2) **The location and direction of the bullet hole in the wall.** The bullet hole in the wall behind Mr. Dunphy's chair is seen in Exhibit P-0010, photographs 142 and 144 and marked hole "B". The bullet that made that hole passed through that wall, exited into the front hall, and then embedded itself in the hall wall next to the front door. The damage to the walls in the hall is seen in Exhibit P-0010, photograph 150. Hole "C" is the exit hole and hole "D" is where the bullet entered the wall next to the front door. Sgt. Saunders of the RCMP FIS team conducted a trajectory analysis for this bullet using the three holes. He did it by threading a rigid trajectory rod from "B", out through "C", and into "D". This can be seen in Exhibit P-0010, photographs 161, 164, and 165. Between "B" and "C" the bullet passed through a stud in the wall. The gyprock was cut away around hole "C" and the trajectory rod can be seen exiting the stud in Exhibit P-0010, photograph 168. By tracing a straight line back from the trajectory rod into the living room using a laser and then a string, Sgt. Saunders could define the approximate path along which the bullet travelled.³⁹⁶ This can be seen in Exhibit P-0010, photograph 162.

³⁹⁴ Exhibit P-0128 at p 3; Exhibit P-0119 at p 17.

³⁹⁵ Exhibit P-0320.

³⁹⁶ Transcript of Evidence of Sgt. Christopher Saunders, February 13, 2017 at pp 81-86; Exhibit P-0010, photo 162.

Mr. Barr reviewed Sgt. Saunders' work and considered it to be a "very thorough job."³⁹⁷ He also verified Sgt. Saunders' results using another method called the "trig-elliptical method of bullet impact angle determination" which can be done using a picture of the entry bullet hole, in this case, hole "B". Using this method, Mr. Barr verified Sgt. Saunders' trajectory line within five degrees, which Mr. Barr considered to be the acceptable margin of error for this type of analysis.

Mr. Barr compared Cst. Smyth's statements, about where he was in the room when he fired his pistol, to the trajectory analysis. The trajectory analysis supported Cst. Smyth's statements. This can best be seen in Figure 4 below which is taken from Mr. Barr's 3-dimensional modelling of the scene prepared as a supplement to his report. The yellow line is the trajectory line determined from the analysis. A figure, the approximate height of Cst. Smyth, has been placed in the scene with a gun oriented along the trajectory line. This is consistent with Cst. Smyth's re-enactment of the shooting, a still image of which is shown in Figure 5.³⁹⁸

³⁹⁷ Transcript of Evidence of Darryl Barr, March 3, 2017 at p 15.

³⁹⁸ Exhibit P-0329.



Figure 4: Image from Mr. Barr's 3D modelling of the scene, Exhibit P-0760, p 6



Figure 5: Image from video of Cst. Smyth's re-enactment, Exhibit P-0329

- (3) **The location and nature of the bullet damage in the chair.** A second bullet was recovered from inside the headrest of Mr. Dunphy's chair.³⁹⁹ The bullet only penetrated the chair shallowly, coming to a rest inside the cotton batting. Mr. Barr testified that this, along with the deformity to the bullet itself, was consistent with the bullet having hit an intermediary target prior to hitting the chair.⁴⁰⁰ The autopsy report determined that a bullet had entered Mr. Dunphy's forehead and exited on the right-hand side of his head.⁴⁰¹ As two bullets were retrieved from inside Mr. Dunphy's body, and one travelled through the living room wall, it stands to reason that the bullet that hit the chair, passed through Mr. Dunphy's head first.⁴⁰² This would mean that Mr. Dunphy's head was in the vicinity of the back of the chair when that bullet was fired, which is consistent with Cst. Smyth's statement.
- (4) **The location and direction of the gunshot wounds inflicted upon Mr. Dunphy.** The autopsy report described the directions of the wounds to Mr. Dunphy's body.⁴⁰³ If Mr. Dunphy was seated, or nearly seated, in the living room chair at the time of these gunshots, then these gunshots were fired in a southwest direction, from an area which is depicted as the large yellowish-green rectangle in Figure 6.⁴⁰⁴ Again, this is consistent with Cst. Smyth's statements about where he was in the room when the shots were fired.

³⁹⁹ See marker "A" in Exhibit P-0010, photo 142.

⁴⁰⁰ Exhibit P-0010, photo 182.

⁴⁰¹ Exhibit P-0738 at p 8.

⁴⁰² Exhibit P-0759 at p 7.

⁴⁰³ Exhibit P-0738 at p 8.

⁴⁰⁴ Exhibit P-0759 at p 7; Transcript of Evidence of Darryl Barr, March 3, 2017 at pp 45-46.



Figure 6: Image from Mr. Barr's 3D modelling of the scene, Exhibit P-0760, p 8

- (5) **The distance from which the gunshots were fired at Mr. Dunphy.** Because no projected gunshot residue pattern was detected around the area of the bullet holes in Mr. Dunphy's clothing, the RCMP Forensic Science and Identification Services Laboratory concluded that the shot to Mr. Dunphy's chest was fired from a distance greater than 76 cm.⁴⁰⁵ The 76 cm radius is shown in Figure 6 as a bluish quarter circle. This corresponds with Cst. Smyth's account, which did not put him inside that quarter circle. Also, no 'powder tattooing' was observed around the entrance wounds to Mr. Dunphy's head and body.⁴⁰⁶ Powder tattooing consists of small burn marks caused by gunpowder particles projected from a gun's muzzle. Powder tattooing generally occurs from shorter distances from between contact to several feet and, when present, can be used to estimate the distance from the muzzle to the target at the time of discharge. As no powder tattooing was observed, the distance

⁴⁰⁵ Exhibit P-0320 at p 4.

⁴⁰⁶ Exhibit P-0738 at pp 5-6.

from the muzzle to Mr. Dunphy could not be determined by this method.⁴⁰⁷

- (6) **The location of fired cartridge cases at the scene.** The fired cartridge cases were located in the northwest corner of the living room.⁴⁰⁸ According to Mr. Barr, a Sig-Sauer pistol ejects fired cartridges to the right and often, but not always, to the rear during firing. Locations of cartridge casings are not an accurate indicator of the exact position of the rifle when firing. Many variables can affect their path from ejection to final resting place, such as movement of the firearm during discharge, or interference with objects in the room such as walls and furniture. While Mr. Barr did not consider the location of the cartridges determinative, he found that “it would not be unusual for fired cartridge cases to end up in the general area of the north side of the living room” given Cst. Smyth’s account of his location when firing.⁴⁰⁹

Mr. Barr concluded that Cst. Smyth’s account was supported by elements of the physical shooting-related evidence and not refuted by any of it. Mr. Barr was careful to note that this does not mean that the physical evidence *proves* Cst. Smyth is correct. It is possible that other scenarios would also be consistent with the physical evidence.⁴¹⁰ Although his report does not provide a definitive answer, it is corroborative of Cst. Smyth’s statement.

The spontaneity and cooperation of Cst. Smyth.

I believe there are two other factors in this case which go to support Cst. Smyth’s version of events. First, I was struck by the general spontaneity of Cst. Smyth in providing details about what had occurred at Mr. Dunphy’s house. He provided six statements to police, participated in two re-enactments, gave a pre-hearing interview to Commission counsel and testified over six days at the hearing with very little hesitation and, for the most part, produced few discrepancies or inconsistencies with the statements of others. When questioned, he responded in a forthright fashion, with few pauses to collect his thoughts.

⁴⁰⁷ Exhibit P-0759 at p 8.

⁴⁰⁸ Exhibit P-0010, photo 139.

⁴⁰⁹ Exhibit P-0759 at p 9.

⁴¹⁰ Transcript of Evidence of Darryl Barr, March 3, 2017 at p 47.

The second factor, which I believe goes to support his testimony, is his willingness to cooperate with investigators and provide statements without concern about possibly prejudicing his legal position. He also voluntarily passed over his cell phone. Generally, he portrayed a picture of someone with nothing to hide. Of course, demeanour only goes so far to establish credibility. But, in fairness to Cst. Smyth, I believe I should note my impressions, which are corroborated by the physical evidence mentioned earlier.

Summary on Cst. Smyth's credibility

Having examined in detail all factors raised as relevant for the assessment of credibility, I find that nothing has been put forward which refutes Cst. Smyth's version and, as discussed above, his version is supported by the forensic evidence of the shooting itself. He has not helped himself by some of his unprofessional behaviour and comments during the investigation (which I have dealt with in Finding 5), but after considering the totality of the evidence and the cumulative effect of all inconsistencies and discrepancies, I have concluded that these do not warrant totally dismissing his version of events. None of the individual issues identified regarding credibility rise to a level of seriousness that brings into question the entire testimony of Cst. Smyth, nor do the issues when considered cumulatively. Cst. Smyth's spontaneity and cooperation over what amounts to more than two years of investigation and inquiry also support his credibility.

Even if I were to reject all of Cst. Smyth's testimony, there would be absolutely no evidence left which could establish wrongdoing by Cst. Smyth on a balance of probabilities. Considering his testimony and the corroboration provided by the forensic and other evidence, I conclude that Cst. Smyth's version of events is credible.

CHAPTER 11: CONCLUSIONS, PHASE I

I have considered applicable law and examined specific relevant evidence in arriving at individual findings of fact concerning the circumstances of Mr. Dunphy's death. I will now summarize my conclusions on Phase I.

The forensic evidence is consistent with the testimony of Cst. Smyth. The trajectory of one bullet, established by Sgt. Saunders and Mr. Barr, supports Cst. Smyth's description of how he exited the living room while shooting. Cst. Smyth frankly admitted he should have been able to see the rifle when he entered the room and moved close to the mantle. He could not explain how he missed seeing it. At the same time, he was adamant that he clearly saw the rifle when Mr. Dunphy began to raise it.

Counsel for Ms. Dunphy asked this Inquiry to conclude that Mr. Dunphy had reached for his stick and not his rifle before Cst. Smyth fired, and that Cst. Smyth had manipulated the evidence to stage a scenario involving the rifle, which was normally stored behind the couch. There are several problems with adopting this approach. First, it assumes that Cst. Smyth knew where the rifle was hidden behind the couch. Ms. Dunphy asserts that her father would have told Cst. Smyth he had the rifle and where it was, had Cst. Smyth inquired. She postulates that Mr. Dunphy told the police officer the location of the rifle before raising the stick. This is not a plausible proposition for several reasons. Had Cst. Smyth been informed of the rifle's location to his right where the couch was located, he probably would have moved immediately to his right and closer to Mr. Dunphy to secure the weapon. He probably would not have remained near the mantle. Also, it makes no sense to accept that Cst. Smyth staged the scene by leaving the stick out to the left of Mr. Dunphy on the floor while placing the rifle so that it leaned on a blue storage tub with the barrel pointed back at Mr. Dunphy and the butt towards Cst. Smyth's position. Why would Cst. Smyth not have moved the stick to a position which showed it could not have been used? Why would he not have pointed the rifle towards where he said he was located in the room?

The Independent Observer's report prepared by Justice Riche suggested that the encounter between Cst. Smyth and Mr. Dunphy was a confrontation between two angry men. Apart from the dated record of Cst. Smyth losing his temper in 2005 after being robbed in the British Virgin Islands, there is no evidence to support such an inference and I am not prepared to infer without sufficient evidence that Cst. Smyth was inclined to lose his temper so quickly. His record shows a history of good behaviour. His co-workers and superiors praised his self-control and professionalism. Mr. Dunphy, on the other hand, while generally not regarded as a violent person, had a personality which might accurately be described as volatile. He had a quick temper and I believe, of the two, would be the one most likely to have escalated the encounter.

As noted earlier, in assessing evidence generally, if triers-of-fact conclude that a witness has deliberately lied under oath, they may conclude that this taints the entire testimony of the witness. In the present case, I have identified certain inconsistencies and discrepancies, which bring into question Cst. Smyth's credibility. However, after hearing Cst. Smyth's testimony and that of the other witnesses and after reviewing the documents and other evidence filed, I cannot say that Cst. Smyth has lied so as to taint the whole of his testimony. If I reject the portions of his testimony which I previously noted were inconsistent or contained discrepancies, I am still left with a version of events from him which receives some corroboration from the forensic and other evidence.

The RCMP investigative report, in finding that no reasonable grounds existed to lay a criminal charge against Cst. Smyth concluded:

The RCMP investigation was comprehensive in nature, as outlined above. Investigators obtained many statements in order to gain understanding and insight into the event. Due to the fact that there were no independent witnesses, investigators relied heavily on forensic analysis. The combination of the work of the Chief Medical Examiner's Office, the RCMP Forensic Identification Section, RCMP Forensic Laboratory, RCMP Subject Matter Expert for Use of Force, RCMP Crime Analysis Section and an external/independent review of the shooting evidence by Bulletproof Forensic Consulting, led to no evidence that disputes the statements of Cst. Smyth.

Cst. Smyth describes discharging his weapon four times. All ammunition casings and projectiles were located. Donald Dunphy was found seated in the chair, as described by Cst. Smyth, with a long barreled gun at his feet, a gun that both his daughter and brothers admit he had in his possession. There was no evidence found that a struggle occurred at the scene. There was no evidence at the scene that casts any shadow or doubt over the version of events offered by Cst. Smyth.

It is the findings of the RCMP investigative team that Cst. Smyth was lawfully in the execution of his duties as a Peace Officer when, confronted by the threat of grievous bodily harm or death by Dunphy, he used the appropriate level of force to defend his life. There is no evidence to support any criminal charges in this matter.⁴¹¹

I agree with this conclusion. Considering the standard of proof to be applied, the corroborating evidence and the expert opinion evidence of both ASIRT and Gareth Jones, supporting the RCMP decision, I conclude that, in the absence of any significant

⁴¹¹ Exhibit P-0003 at p 35.

forensic evidence refuting his testimony, I must accept Cst. Smyth's version of events as to what occurred in Donald Dunphy's house on Easter Sunday, 2015. He shot Mr. Dunphy in self-defence because his life was in danger when Mr. Dunphy pointed a rifle at him.

A question remains as to what might be done to avoid such an unnecessary and preventable death occurring again. The three most important lessons learned from the circumstances of Mr. Dunphy's death are:

- (1) The RNC should provide better training in crisis intervention and de-escalation techniques. This is discussed further in Chapter 12.
- (2) The RNC should develop a protocol for when home visits are to occur in proactive policing, identifying the factors to be considered and how supervision and oversight by senior officers is to occur. See Chapter 8.
- (3) The RNC should take measures to ensure that police officers engaged in threat assessments scrupulously observe the *Charter* requirement to protect the sanctity of the home; entry into private residences without a warrant should be only with the voluntary and informed consent of the home owner, following identification, including rank and unit assignment. See Chapter 10, Finding 4.

PHASE II

CHAPTER 12: HOW DO WE IMPROVE TRAINING IN CRISIS RESOLUTION AND THE USE OF FORCE?

The way forward in training

In Chapter 7 (RNC Training in Use of Force), I noted the opinions provided by experts that Cst. Smyth received inadequate training in crisis intervention and de-escalation. In this chapter, I discuss how this deficiency may be corrected.

Crisis intervention and de-escalation (CID) education and training

In their report and testimony, Dr. Coleman and Sgt. Massine expressed concern that the “RNC has not re-designed and updated its learning programs to include the establishment of a strong communications foundation and a program such as the CID learning program to prepare their police personnel for successful Crisis Resolution.”⁴¹² The Royal Newfoundland Constabulary Association (RNCA) submits that it is seeking a recommendation that the RNC’s use of force training be thoroughly reviewed and updated, where necessary to conform to national and international standards, and acknowledged that Dr. Coleman and Sgt. Massine made several useful recommendations in this regard.⁴¹³

The RNC contends that, through various aspects of its programs, training is provided to cadets and officers which includes crisis intervention and de-escalation (CID). It was difficult, however, based on the evidence given and the lack of documentation surrounding the RNC’s education and training, to ascertain the degree or extent of such training. RNC use of force instructor Sgt. William James testified that de-escalation is covered in cadet training in the classroom as one of the seven tactical principles and that there is some component of de-escalation during the one week of cadet training devoted to use of force and the week of Rapid Entry Active Criminal Threat (REACT) training, discussed in Chapter 7.⁴¹⁴ It was clear, and accepted by the RNC, that it has no specialized training course devoted to CID for either cadets or as continuing training and education for current members. It was apparent that the current amount of time and

⁴¹² Exhibit P-0773 at p 62.

⁴¹³ Final Submission of the RNCA, April 7, 2017 at pp 16-17.

⁴¹⁴ Transcript of Evidence of Sgt. William James, March 1, 2017 at pp 88-89.

effort spent on this is not in keeping with the trend across the country to expand and give greater emphasis to this aspect of training.

The RNC recognizes the need to move in that direction and has undertaken efforts to review the matter. At the time of filing its final submission, the RNC was working with the Atlantic Police Academy to develop a de-escalation course for the RNC. The RNC submitted that it would require additional financial resources to implement a specific specialized training course for officers in CID.⁴¹⁵

I accept the recommendation of Dr. Coleman that CID training should be implemented **for all police officers in this Province (not just RNC officers)**. This training should be offered as a stand-alone course during basic training and all currently serving police officers should also receive this education and training with mandatory requalification **every three years**.

Recommendation 1: Crisis intervention and de-escalation (CID) training should be implemented for all police officers in this Province (not just RNC officers), with mandatory requalification every three years, and the RNC should be provided with adequate resources for this.

Commentary: With better training in de-escalation, the situation might not have escalated as it did or Cst. Smyth might have been prompted to remove himself from the residence before lethal force was required.

Instructors: well trained and qualified

Implementing a specialized CID training program will be of limited benefit if it is not delivered by instructors who are well versed in this type of training or if the instructors are entrenched in more traditional use of force training. Sgt. Massine wrote about this issue in his report where he noted that many traditional use of force instructors tend to emphasize “you will be in a fight of your life” or “you will need to survive a firefight.”⁴¹⁶ While he agreed that officer safety is very important, such instruction can have the potential to overstate the situation and leave police officers with the wrong mindset. In his experience, he noted that there can be a tendency by traditional use of force instructors to pay more attention to the technical use of force skills than to avoidance of the ultimate use of force through verbal communications or officer presence. If there is

⁴¹⁵ Final Submission of the RNC, April 7, 2017 at Tab 5, p 6.

⁴¹⁶ Exhibit P-0775, p 45.

to be a shift in culture to more emphasis on crisis resolution and de-escalation, the qualifications and attitude of the instructors will be of considerable importance.

Sgt. Massine and Dr. Coleman stressed the need to select instructors for such training based on a behavioural as well as a technical competency profile.⁴¹⁷ The RNC agreed with the idea of careful selection of instructors for crisis resolution and use of force training and submitted that behavioural criteria are presently used by the RNC in choosing its instructors.⁴¹⁸ Sgt. Massine and Dr. Coleman also recommended that police instructors, including those responsible for instructing and facilitating communication skills, de-escalation and use of force, be qualified adult educators.⁴¹⁹

At the time of filing its final submission, the RNC advised that it had recently hired a civilian Director of Training who holds a Master's degree in Adult Education. The Director of Training is responsible for ensuring that the training provided to RNC officers meets required educational standards. This is a step in the right direction but it is important to ensure that the instructors who are responsible for *delivering* the training are properly trained and educated themselves in the areas that they are teaching. In this regard, Dr. Coleman and Sgt. Massine recommended that the instructors responsible for delivery of crisis resolution education and training have first completed the Canadian Police College Crisis Negotiation education and training course as well as the related re-qualification education and training. The RNC confirmed a commitment to researching this issue further.

Recommendation 9: The RNC should ensure that instructors for use of force and CID are qualified adult educators with appropriate training.

Critical decision making

In 2016, the Police Executive Research Forum (PERF) developed a Critical Decision-Making Model, adapted from a similar model developed by the UK College of Policing, to assist officers in problem solving and decision making. A graphic of the model is included as Appendix 4 of the Coleman and Massine Report.⁴²⁰ Dr. Coleman and Sgt. Massine suggested that a modified version of the PERF model be used as an aid for problem solving and crisis resolution education and training of RNC officers. In its final submission, the RNC agreed with the recommendation to incorporate a modified

⁴¹⁷ Exhibit P-0773 at p 63.

⁴¹⁸ Final Submission of the RNC, April 7, 2017 at Tab 5, p 7.

⁴¹⁹ Exhibit P-0773 at p 63.

⁴²⁰ Exhibit P-0773 at p 76.

version of the PERF's Critical Decision-Making model into Use of Force and Crisis Resolution training for RNC officers as an aid to problem solving.

Recommendation 10: The RNC should adopt a modified version of the PERF's Critical Decision-Making model⁴²¹ for incorporation into use of force and CID education and should be provided with adequate resources for this.

Lesson plans and learning objectives

Sgt. Massine was of the opinion that the RNC Use of Force Training Manual is not in a format suitable for teaching. He recommended that the RNC Firearms and Use of Force Training Program undergo an extensive review and be revised to address the following:

The RNC Use of Force Training Manual in its current form is a use of force reference manual at best. Although the content is comprehensive, it does not adhere to best practices in police/law enforcement training documentation. There is no Course Training Standard, or Lesson Plans that describe the learning in detail. These documents should form the results of a review and overhaul.⁴²²

In its written submission, the RNCA agreed that lesson plans and documentation are an important component of use of force training. Likewise, the RNC accepted that it needed to better document its training with lesson plans and evaluations in its written submission.⁴²³ The RNC also agreed with Sgt. Massine's recommendation and stated it was committed to reviewing its use of force training content and developing standardized lesson plans and curricula with corresponding evaluations for its Use of Force Training Program. The RNC submitted that to be able to do so, it would require additional resources, specifically two full time qualified curriculum developers. The RNC also noted that it was in the process of establishing a Curriculum Advisory Board comprised of senior managers in the organization, with a mandate to work with the Director for Police Education and Training to ensure all RNC curriculum is "relevant, defensible and current".⁴²⁴

⁴²¹ "PERF'S 30 Guiding Principles on Use of Force" in *Guiding Principles on Use of Force* (Washington, DC: Police Executive Research Forum, 2016) 33.

⁴²² Exhibit P-0773 at p 64.

⁴²³ Final Submission of the RNC, April 7, 2017 at p 15.

⁴²⁴ Final Submission of the RNC, April 7, 2017 at Tab 5, p 2.

Recommendation 16: The RNC should review the means of presenting Module 4 to officers and explore whether in-class presentations might be a more effective way to teach officers the Module 4 material.⁴²⁵

Recommendation 8: The RNC should review its use of force training, including its courses of fire, and develop standardized lesson plans and curricula with corresponding evaluations. The RNC use of force training should be consistent with current national standards.

Updating terminology in training materials

The RNC's use of force training materials use outdated terminology. Some of these are discussed in Chapter 7: "double tap", "bad guy" and "perp". Sgt. Massine's recommendations for more current language are also detailed in that chapter. The RNC acknowledged that outdated language was an issue and indicated in its final submission that it would take steps to rectify this.⁴²⁶

The RNC materials also refer to a use of force "continuum."⁴²⁷ Sgt. Massine's opinion was that this wording should also be updated because "continuum" suggests that the resolution of tense situations is unidirectional and requires moving forward, when "backing off" or returning to earlier tactics might be more appropriate.

In fact, some police services are moving away from the phrase 'use of force' and using other more neutral terms, such as 'crisis resolution', to describe this aspect of officer training. The RNC is also giving this consideration. This would be in keeping with a shift to a training model which focuses on crisis intervention. The term 'use of force' presupposes that use of force is inevitable, while in 'crisis resolution', the application of police force is merely one possible means of achieving a resolution.

This is not just a matter of semantics. Words used in training and education can have an important impact on the message that is delivered and ultimately the mindset and culture that is created. In Chapter 10, Finding 14, I addressed police culture with respect to the appearance of or actual bias in police investigations of fellow police officers. Police culture is also very relevant to police dealings with persons in crisis or

⁴²⁵ See Chapter 7 for a discussion on Module 4.

⁴²⁶ Final Submission of the RNC, April 7, 2017 at Tab 5, p 4.

⁴²⁷ Exhibit P-0773 at p 45, fn 45.

experiencing mental illness. CID training includes fostering a police culture of respect and compassion. This is presently articulated in the RNC statement of values on their website.⁴²⁸ In terms of what is needed to change police culture and attitudes, I refer to a recent study of the Kirwan Institute for the Study of Race and Ethnicity, Ohio State University: “The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages.”⁴²⁹

Recommendation 11: The RNC should review and update its Use of Force Manual to use terminology that better reflects modern use of force, crisis intervention and de-escalation (CID) principles.

Scenario-based training

The RNC currently uses training scenarios. However, on his review, Sgt. Massine could not determine how these scenarios are incorporated into the training program and lesson plans. He was of the view that all scenario-based training should be assigned a context so that it was clear where it fits into the education and training program. He stated that if the scenarios are used to reinforce a specific skill that has been learned, they should form part of that lesson plan.

In its final submission, the RNC was receptive to this and stated that scenario-based training would be incorporated into the standardized lesson plans and curriculum as part of the improvements it is planning to its use of force training program.⁴³⁰

Recommendation 12: The RNC should incorporate scenario-based training into its standardized lesson plans and curricula.

The importance of communication

When one reviews the literature, reports, and studies that have been completed on this topic, a recurring common theme is the importance for proper de-escalation techniques

⁴²⁸ www.rnc.gov.nl.ca.

⁴²⁹“Understanding Implicit Bias” online: Kirwan Institute for the Study of Race and Ethnicity <<http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>>.

⁴³⁰ Final Submission of the RNC at Tab 5, p 4.

of police officers being well versed in appropriate communications strategies. Sgt. Massine was of the opinion that training in verbal and non-verbal communications should be taught by an expert in the field during basic police training and all serving officers should receive the same education and training.⁴³¹ He was also of the opinion that there should be periodic requalification in such skills. The RNC agreed that such training and requalification would be advantageous but again expressed concern that this would require additional financial resources to implement and maintain. I recommend that this important training proceed as resources permit.

Recommendation 21: The RNC should ensure that verbal and non-verbal communications are taught during basic training to create a foundation for programs such as CID. All serving police officers should receive the same training in the next three years.

The 'Memphis Model'

The Luther Inquiry, discussed in Chapter 7, examined the circumstances giving rise to the deaths of two individuals, Norman Reid and Darryl Power, as a result of use of force by police officers. The Luther Report, released in 2003, made a number of recommendations including the establishment by Regional Health Care Boards of a mobile health unit to respond to mentally ill persons in crisis, where no criminal offence is alleged. The idea was that intervention in such circumstances would be by experienced mental health care workers and that the police would only be called to assist where the workers had concern for personal safety.

When Cst. Smyth visited Mr. Dunphy he had concerns that he was dealing with a person with some level of mental illness.⁴³² Although Mr. Dunphy had never been diagnosed with mental illness, he was experiencing a crisis, at least in terms of his living conditions. In her final submission, Meghan Dunphy accepted that her father was a person in crisis, and she contended that, had the Luther Report recommendation regarding mobile health units been implemented and practiced, intervention in this case would not have been by the police but by a mental health care worker.⁴³³

⁴³¹ Exhibit P-0773 at p 63.

⁴³² Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 84; Exhibit P-0121 at p 76.

⁴³³ Final Submission of Meghan Dunphy, April 7, 2017 at p 4.

In its final submission to the Inquiry, the RNC addressed the current state of affairs with respect to responding to persons in crisis. The RNC stated that, in most instances, it is the initial contact for people experiencing a mental health crisis but expressed concern that a police response is not the most appropriate in every situation.⁴³⁴ This was echoed by an email received by the Commission from a member of the public who expressed concern that the police are being dispatched to schools to deal with situations arising from behavioural issues of developmentally delayed students.⁴³⁵

The RNC pointed out that a combined unit for crisis intervention incorporating mental health professionals and the police is in practice in areas across Canada. These combined units include police officers working alongside psychiatric nurses or social workers in attending upon persons in crisis. The RNC indicates that it is collaborating with Eastern Health on initiatives focused on improving the response to persons experiencing mental health crisis and they have studied the Mental Health Mobile Crisis Response Team model currently being used in Nova Scotia, more commonly known as the “Memphis Model”. The RNC contends this is the most effective and efficient model used throughout North America for dealing with persons experiencing a mental health crisis and describes it as follows:

The Memphis Model is an organizational and community intervention that involves changes in police department procedures as well as collaboration with mental health providers and other community stakeholders. This model is utilized in many law enforcement agencies and is considered a “Best Practice” model in law enforcement. The Memphis Model is an internationally recognized model that allows for the community demographics and its available services to shape the unit to best fit the needs and capabilities of the community. The Memphis model has a foundation in Crisis Intervention Team (CIT) training which is designed to improve officers’ ability to de-escalate and safely intervene, link individuals to mental health services, and divert them from the criminal justice system when appropriate. One of the core elements of the model is collaboration with community partners, including mental health providers.⁴³⁶

The RNC reported to the Commission that both it and Eastern Health support this concept for Newfoundland and Labrador and that they had already presented on the model to the Provincial Government’s All Party Committee on Mental Health. On March 24, 2017, that committee released its report, recommending that a mobile crisis intervention team, comprised of a nurse, social worker and a plain-clothed police officer, be established in this Province to provide first response to individuals and families

⁴³⁴ Final Submission of the RNC, April 7, 2017 at Tab 13, p 1.

⁴³⁵ Email of Brenda O’Brien, March 16, 2017.

⁴³⁶ Final Submission of the RNC, April 7, 2017 at Tab 13.

experiencing mental health crises.⁴³⁷ A collaborative approach between the police and the appropriate experts within the health care system for dealing with people in crisis would be in keeping with the Luther Report's recommendations and with systems already in place in other jurisdictions. It would safely and effectively address their needs and connect them with proper services while diverting them from the criminal justice system.

Recommendation 26: The Province should continue to pursue a collaborative approach, such as the Memphis Model, between the police and health care providers.

Body cameras

A member of the public raised a question about the utility of body cameras for police officers, particularly in situations where officers, as is common in this Province, attend calls alone. No doubt, had Cst. Smyth been equipped with a functioning body camera during his encounter with Mr. Dunphy, the camera footage would have been helpful in answering some questions that have arisen. During the Phase II 'town hall' session, Sgt. Michael Massine of the BC Institute of Justice (who is also a member of the Victoria Police Department), spoke of British Columbia's experience with body cameras. He noted that several police agencies in British Columbia, including the Victoria Police Department, have undertaken studies in the use of body cameras. The results have been impressive and body cameras have proven to be a good asset to police agencies. However, Sgt. Massine was quick to point out there are inherent difficulties, limitations, and concerns that should be borne in mind when a police service is considering investing in body cameras.

Sgt. Massine noted that body cameras, like all technology, can at times fail. It is important therefore that reliance not be placed solely on body cameras to capture evidence of encounters with police. Similarly, Sgt. Massine spoke of the limitation of the technology with respect to what it captures in terms of visual field or perspective. Sgt. Massine noted that most officers can see approximately 180 degrees in their vision. Within that range they can detect motion from the periphery and react. The camera, on the other hand, captures only what is straight ahead and not what the officer might

⁴³⁷ House of Assembly, All-Party Committee on Mental Health and Addictions, *Towards Recovery: A Vision for a Renewed Mental Health and Addictions System for Newfoundland and Labrador* (March 2017) (Chair: John Haggie).

detect outside of that direct view. This can lead to a situation where the officer perceives a threat and reacts but the camera does not capture the threat and therefore may leave the impression that the officer's response was not warranted.

A more important point stressed by Sgt. Massine is that the camera does not feel what the officer feels or experiences. Police officers are human beings, not robots, and as such may experience strong emotions and reactions when they are in perilous situations. While a camera can provide valuable evidence, it cannot record the full picture of the human element that plays into an officer's actions and responses.

The most significant issue for Sgt. Massine in any consideration of acquiring and using body cameras is the cost, not only of the acquisition of equipment but also of ongoing training, equipment maintenance, and retrieval and storage of information captured. Sgt. Massine expressed concern that investing in such technology may detract funds from other areas of police training. The adoption and use of body cameras would be an expensive initiative and police budgets, like most government funding, are currently undergoing significant scrutiny. As such, it is important for police agencies to analyse where best to spend their finite funds.

In an ideal world with infinite funding, body cameras would no doubt be a worthwhile addition to any police service's resources. For the RNC, funds and effort spent on implementing body cameras could come at the cost of other training that has been identified as being required in other sections of this Report. If body cameras are to be considered an option for the RNC, a holistic and in-depth analysis should be undertaken. While cameras could provide some evidence of police encounters and thereby potentially offer enhanced accountability and assist in restoring the public's confidence in the police, no one piece of technology will be the ultimate solution.

Recommendation 27: Before any decision is taken to implement body cameras for police officers, careful analysis should be made of the impact this might have on funding for other initiatives.

CHAPTER 13: WHAT SHOULD BE THE ROLE, MANDATE AND STRUCTURE OF THE PROTECTIVE SERVICES UNIT?

At the time of the incident, Cst. Smyth was assigned to the RNC's Protective Service Unit (PSU). He had first been assigned to the unit in 2011. By the time of his encounter with Mr. Dunphy, he was serving in a supervisory capacity as Acting Sergeant in charge. Sgt. Doug Noel of the RCMP was the only other officer assigned to the PSU at that time.

Mandate of the PSU

On April 5, 2015, the mandate of the PSU was articulated in the RNC's Policy and Procedure Manual as General Order #316, dated June 5, 2013.⁴³⁸ Section 3 of the General Order #316 stated as follows:

- 3.1 To provide close protection services for the Premier of Newfoundland and Labrador and other designated dignitaries. Specific close protection roles include bodyguard, secure transport and advance security/liaison officer.
- 3.2 To gather intelligence on persons and groups of interest, demonstrations and any other matter that could potentially cause direct or indirect harm to the Premier or the Office of the Premier or to any other elected Government Official.

The function and responsibilities of the PSU were contained in s. 4.1 and included:

conducting investigations, in conjunction with the applicable unit of the RNC Criminal Investigation Division, into people or groups who pose a potential threat to the Premier, the Office of the Premier or other elected Government Official.

The Policy and Procedure Manual chapter on the PSU was amended after the shooting on May 25, 2016.⁴³⁹ The only significant changes implemented at that time were:

- (1) Deletion of s. 2.3 which stated that all members of the Protective Services Unit must possess the knowledge, skills and abilities to perform all duties in support of the Section's mandate.

⁴³⁸ Exhibit P-0031.

⁴³⁹ Exhibit P-0032.

- (2) Deletion of the requirements that had been set out in s. 6.1 which required that members assigned to the PSU be able to pass the PARE⁴⁴⁰ test and a 2.4 km run within 12 minutes; and
- (3) Deletion of 6.2 (b) which stated that officers shall successfully complete any other training deemed pertinent to the Unit.

None of these changes affected the mandate of the PSU. Otherwise, the Policy and Procedure Manual for the PSU remained the same as it had been at the time of Mr. Dunphy's death.

History of the PSU

There has been some form of protective services for the Premier of this Province for over three decades. Prior to 2012, however, there was no official or formalized Protective Services Unit. Instead the protective service duties for government officials were carried out on an ad hoc basis and staffing was provided by the RNC as needed. This meant that the amount and type of services required varied over time depending upon the needs, concerns, circumstances and desires of different Premiers. The number of police officers assigned to the unit accordingly varied. Some Premiers were reluctant to use the service for fear it would be viewed as a political perk. Others had a greater need. For example, during Premier Kathy Dunderdale's term in office in 2013 there were four members assigned to the PSU. Cst. Smyth noted in his evidence that Premier Dunderdale was the victim of a very personal and explicit type of commentary that he felt was, at least in part, gender based.⁴⁴¹ Ms. Dunderdale was also Premier during a period of fiscal restraint and reduction in services, which Cst. Smyth stated tended to heighten security concerns.⁴⁴²

In 2012, the PSU was formalized and in 2013 the first policy and procedure General Order regarding the duties and mandate of the unit was enacted. Even with the formalization of the unit, however, it appears that some Premiers remained concerned about the potential negative public perception of using the services of the unit. For example, Cst. Smyth, Sgt. Noel and Joe Browne testified that former Premier Paul Davis was concerned about being seen with protective detail personnel. While former

⁴⁴⁰ PARE stands for Physical Abilities Requirement Evaluation and is an occupational test used to assess a person's physical ability.

⁴⁴¹ I should note that during the Inquiry, there were national news stories about the increasing number of police investigations arising out of threatening comments directed towards Alberta's Premier, Rachel Notley, which were also attributed to her gender.

⁴⁴² Transcript of Evidence of Cst. Joseph Smyth, January 25, 2017 at p 44.

Premier Davis acknowledged his reluctance to use the services of the PSU, he stated he believed it to be absolutely necessary to have appropriate measures in place for the security of the Premier of the Province.

The operation of the PSU as of April 5, 2015

At the time of Mr. Dunphy's death, the PSU, in essence, was acting autonomously from the RNC. It was physically located within the Confederation Building and kept its records at that site. According to the RNC Criminal Operations Organizational Chart the PSU reported to the Intelligence and Organized Crime Section.⁴⁴³ However, the Acting Inspector of that Unit, Joe Gullage, testified that, in practice, this was primarily only with respect to administrative issues. He did not act in a supervisory capacity over then-A/Sgt. Smyth with respect to the day-to-day operations of the PSU. A/Insp. Gullage testified that this reporting situation was unlike any other unit or area within the RNC.

There also appeared to be lack of clarity about the reporting lines of the members of the PSU. Cst. Smyth and A/Insp. Gullage spoke of a "dotted line" reporting from the PSU into the office of the Chief with respect to certain aspects of the duties. For example, Cst. Smyth testified that he would report directly to the Chief with respect to certain day-to-day functions that required his approval, such as travel outside the Province. A/Insp. Gullage testified that, while the PSU reported to him for administrative matters, its members reported to the Chief with respect to their activities. Chief Janes did not share this understanding. He stated that he had had no involvement in the day-to-day operations of the PSU, including financial, and other than to attend a preliminary meeting with the incoming Premier or to address any significant issues with respect to the structure of the unit, he did not see any reporting into his office by members of the PSU.⁴⁴⁴

Prior to 2012, when PSU duties were carried out on more of an ad hoc basis, the officers doing the work were physically located at RNC headquarters. As counsel for Ms. Dunphy correctly points out, in 2012, when the PSU was formalized and physically located in the Confederation Building, the result was the unit members were closer to those they protected but separated from their supervising officers. This likely contributed to the autonomy that developed.

What is apparent is that little, if any, oversight was given to how Cst. Smyth carried out his duties or operated the PSU at the time of this incident. In addition to the lack of

⁴⁴³ Exhibit P-0515.

⁴⁴⁴ Transcript of Evidence of Chief William Janes, February 28, 2017 at p 19.

supervision, Cst. Smyth, like every other RNC officer, had not had a job evaluation in several years and therefore had not received any formal feedback on how he was carrying out his duties. With respect to his work in relation to Mr. Dunphy, Cst. Smyth did not consult A/Insp. Gullage nor did A/Insp. Gullage have any expectation that Cst. Smyth should have done so. Cst. Smyth did not consult with any other unit of the Criminal Investigation Division for assistance in the investigation with respect to Mr. Dunphy either, notwithstanding that s. 4.1 of the PSU Policy and Procedure Manual, cited above, contemplates that investigations into persons who pose “a potential threat” to the Premier, the Office of the Premier, or other elected officials, would be conducted in conjunction with the applicable unit of the RNC’s Criminal Investigation Division.

Juxtaposed with the limited contact between the PSU members and other members of the RNC in carrying out their duties, members of the PSU had frequent and daily contact with the Premier’s Office and its staff. Sgt. Noel described his duties as “working for the Premier’s Office”; he also testified “they were our client”.⁴⁴⁵ It was clear that the members of the PSU had gotten to know Premier Davis well. This is perhaps not unexpected when working in such close proximity and in providing close protective services, which include spending significant time together and, at times, travelling outside the Province together. Arguably it can become problematic, however, when the same officers who are providing close protection services are also required, as part of their duties, to gather intelligence and investigate individuals who may be posing a potential threat to those whom they are tasked to protect. The objective lens that is necessary to bring to bear on such investigations may become blurred.

Further, the PSU was not operating by way of any formal complaint process with respect to complaints received from government officials. The Inquiry evidence of Sgt. Noel, Cst. Benoit and Cst. Smyth, three officers who had worked in the PSU, was consistent that the PSU carried out ‘proactive’ policing and that its members would follow-up on comments that may not have been threatening but were ambiguous in terms of intent. There was no prescribed process in place for conducting a threat assessment. Nor was there any protocol as to when a home visit to a person of concern may be warranted nor guidelines as to how to carry out such a visit (for example, whether one or more officers should attend; whether the meeting should be pre-arranged; whether the interview should be recorded). The decision of whether a home visit occurred and how it happened was left entirely to the discretion of the PSU member. In conducting his work with respect to Mr. Dunphy, up to the point of the shooting, Cst. Smyth had not opened a file in the RNC system with respect to the matter. In fact, other than the communications he had with Communications Centre

⁴⁴⁵ Transcript of Evidence of Sgt. Doug Noel, February 2, 2017 at p 86.

personnel, and his cell phone messages with Sgt. Noel, there was no record that Cst. Smyth was gathering information or making inquiries with respect to Mr. Dunphy.

Overall, there appeared to be a lack of formality in how Cst. Smyth carried out his duties at the PSU. This may help explain a discrepancy in the evidence as to the volume of work that Cst. Smyth felt was being carried out by the unit as compared to the results of an analysis carried out by the RNC after the shooting. In preparation for the Inquiry, A/Insp. Gullage completed an analysis of all files opened by the PSU in the ICAN system from October 2012 to April 7, 2015.⁴⁴⁶ A/Insp. Gullage spoke to the results during his testimony. The analysis showed a total of 34 files handled by the PSU in that time period. This included Mr. Dunphy's file which was opened April 7, 2015, after the shooting. The vast majority of these files (21) were generated in 2013 during Premier Dunderdale's term in office. There were six person-of-interest files opened in 2014 and two in 2015 (including Mr. Dunphy's file).

Of the total 34 files generated, on 12 occasions the person-of-interest was spoken to by a police officer, although not always by way of a home visit. This number was much lower than the estimate given by Cst. Smyth in his evidence. He estimated there were 30 home visits to a person-of-interest during his time with the PSU and most of those visits would have been done by him.⁴⁴⁷ This is more than double the number of recorded contacts of which not all were home visits. Even accounting for the fact that Cst. Smyth had been with the unit approximately a year longer than the period analysed, one would not expect such a discrepancy. A logical explanation is that the PSU operated with little formal process and not all contacts were recorded.

Current state of affairs

While the mandate of the PSU has not changed from that which was in effect in April 2015, the manner in which the PSU carries out its duties and functions underwent significant change in February 2016, largely at the instigation of the current Premier's Office.⁴⁴⁸ One of the factors in this decision was the conclusion that there was insufficient work to justify the existence of the unit.⁴⁴⁹

The first change was that the PSU was, in essence, brought back 'in house'. It now operates out of RNC Headquarters and is under the supervisory umbrella of the

⁴⁴⁶ Exhibit P-0619; See also Appendix 42: Database Systems Utilized by the RNC.

⁴⁴⁷ Transcript of Evidence of Cst. Joseph Smyth, January 25, 2017 at p 43.

⁴⁴⁸ Exhibit P-0209.

⁴⁴⁹ Transcript of Evidence of A/Insp. Joseph Gullage, February 23, 2017 at p 64.

Criminal Investigation Division, Intelligence and Organized Crime Section (CID-IOC). RNC members who had been assigned to the PSU were reassigned back to regular duties within their respective forces. Currently, no specific members are assigned to close protection of the Premier or other government officials, but are assigned when needed as secondary duties. As well, there is no longer any officer seconded from the RCMP but, from time to time, RCMP members may be approached to assist in close protection duties.

With respect to the intelligence gathering function, this is now handled by members of the CID-IOC, basically in the same manner as any other complaint received from a member of the public. A/Insp. Gullage testified that, when a complaint of potentially harassing or threatening conduct is received against a government official, he sends an officer to take a statement from the complainant to get more details of the complaint before further steps are taken. A formal complaint is now required and files are always opened.

A way forward

The RNC submitted a paper with respect to the issue of protective services for Phase II of the Inquiry. In the paper, they note that elected officials have difficult jobs and should be able to perform those jobs free of harassment, threats, or violence directed towards them or their families. The need for protective services should not be overly controversial. How those services are provided to ensure that citizens are not unduly subjected to police interference is a more difficult question to answer. At the very least, the persons carrying out protective services should be free of any potential political influence. In fact, s. 7(1)(d) of the **Royal Newfoundland Constabulary Regulations**⁴⁵⁰ under the **Royal Newfoundland Constabulary Act, 1992** prohibits members of the RNC from manifesting any political partisanship.

In preparing its paper for Phase II, the RNC conducted a review of how protective services are provided in other jurisdictions. Their review concentrated on the provinces of Ontario, Quebec, and Alberta.⁴⁵¹ Each of these provinces divides the functions of protective services into two different areas of responsibility; which are assigned to different units within the force:

- (1) Close protection services (that is, bodyguard type duties); and

⁴⁵⁰ *Royal Newfoundland Constabulary Regulations*, NLR 802/96, s 7(1)(d).

⁴⁵¹ Quebec and Ontario's Protective Service Units are staffed by members of the provincial police service while Alberta's close protection service is provided by the Sheriff's Office.

- (2) Threat assessments, intelligence gathering and investigation of potential threats to elected officials.

I agree with this division of responsibilities and recommend its adoption. It is key to avoiding the potential conflict of interest which can arise when the same officer who is providing close protection services is also carrying out intelligence gathering on individuals thought to be harassing or threatening the subject of his or her protective duties.

A/Insp. Gullage was of the opinion that the close protection services of the PSU should be the subject of legislation to avoid its use being a political issue. Sgt. Noel suggested direction by an all-party committee as an option. Joe Browne, a former Chief of Police of the RNC and Chief of Staff for Premier Davis, offered the opinion that, while a legislative mandate may not be necessary for the unit, greater formalization of the unit and its policy and a public articulation of its role would be beneficial.

These suggestions are valid insofar as their aim is to remove any perception, or reality, of politics from the operation of the protective services and to educate the public as to the role of the services provided. To ensure consistency in the provision of protective service and to avoid any perception of the service being a 'political perk' or an unnecessary expense, I recommend that close protection service be permanent and mandatory by regulation. Its mandate and operation should not be ad hoc or at the discretion of the government of the day, or persons holding office.

It is also vital that persons chosen to work in protective services be chosen strictly on the basis of their skills and abilities and without any political interference or input from government officials. It is equally important that persons chosen for this work be properly trained. Those filling the role of close protection should be trained appropriately in VIP protection while those assigned to intelligence gathering functions should be trained in formal threat and risk assessment and have an appreciation of the importance of documenting their assessments.⁴⁵²

I agree with Meghan Dunphy that the PSU was not being properly supervised in April 2015. Supervision of it apparently fell through the cracks when members of the unit moved to the Confederation Building and supervisors remained at RNC Headquarters. This has now been corrected by bringing the PSU back in house. I recommend it stay there and continue under the direct supervision of the Criminal Investigation Unit of the

⁴⁵² A discussion of threat assessment and related recommendations are found in Chapter 8.

CID-IOC, or such other unit of that division as the RNC deems appropriate. Chief Janes and the RNCA support this approach. I also recommend that the RNC's organizational chart be updated to reflect this change and that the organizational chart and reporting lines be followed in the future.

Recommendation 2: The PSU should remain in house at RNC Headquarters and continue as a permanent unit under the direct supervision of the Criminal Investigation Unit of the CID-IOC, or such other unit of that division as the RNC deems appropriate. The RNC's organizational chart should be updated to reflect this change and the organizational chart and reporting lines should be followed in the future. Investigations should commence with a formal complaint and files should always be opened.

Commentary: The PSU in April 2015 was acting without proper supervision.

Recommendation 23: Regulations should mandate that the RNC determine the level of close protection required for the Premier and other public officials. The decision should not be that of the Premier, the Premier's Office or the public official involved.

Recommendation 24: Officers performing close protection services with the PSU should not be the same ones carrying out intelligence gathering with respect to persons of interest in threats against the Premier or public officials.

CHAPTER 14: CHARTER VALUES IN THE AGE OF SOCIAL MEDIA

Subsection 3(1)(h)(ii) of my Terms of Reference requires me to inquire into policies, protocols or manuals in the Office of the Premier or the RNC relating to “the monitoring of and response to social media.” While my finding that the Office of the Premier did not direct Cst. Smyth to attend at Donald Dunphy’s home removed the issue of interference with *Charter* values from a central position in the Inquiry, in Phase II we explored the impact of monitoring social media in a session entitled “Protecting Freedom of Expression in the Age of Social Media.” A summary of some of the ideas discussed is presented here.

Freedom of expression and its limits

Section 2(b) of the *Charter* enshrines the fundamental right to “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

In *Grant v Torstar Corporation*,⁴⁵³ the Supreme Court of Canada identified the three core purposes of s. 2(b), commencing at paragraph 47:

The guarantee of free expression in s. 2 (b) of the *Charter* has three core rationales, or purposes: (1) democratic discourse; (2) truth-finding; and (3) self-fulfillment: *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976. These purposes inform the content of s. 2 (b) and assist in determining what limits on free expression can be justified under s. 1.

First and foremost, free expression is essential to the proper functioning of democratic governance. As Rand J. put it, “government by the free public opinion of an open society . . . demands the condition of a virtually unobstructed access to and diffusion of ideas”: *Switzman*, at p. 306.

Second, the free exchange of ideas is an “essential precondition of the search for truth”: *R. v Keegstra*, [1990] 3 S.C.R. 697, at p. 803, *per* McLachlin J. This rationale, sometimes known as the “marketplace of ideas”, extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.

⁴⁵³ *Grant v Torstar Corporation*, 2009 SCC 61, [2009] 3 SCR 640.

Third, free expression has intrinsic value as an aspect of self-realization for both speakers and listeners. As the majority observed in *Irwin Toy*, at p. 976, “the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.” [Emphasis added.]

The Oxford Dictionary defines social media as “websites and applications that enable users to create and share content or to participate in social networking.”⁴⁵⁴ The Oxford Dictionary defines social networking as “The use of dedicated websites and applications to interact with other users, or to find people with similar interests to one’s own.”⁴⁵⁵

Social media has the potential to enhance all three core purposes of free expression. By giving voice to minority viewpoints which may not be disseminated by mainstream forms of media, social media broadens the marketplace of ideas and gives greater self-fulfillment to those who both espouse and listen to those minority views. Its potential to enhance democratic discourse is perhaps best illustrated by its prolific use by government and political parties to disseminate information, monitor public opinion, and receive complaints and feedback from constituents. Social media creates a direct and almost immediate link between government and citizens, free from a filter or interpretation by third parties, such as conventional news media.

Freedom of expression is not an absolute right. While citizens are free to express their dissatisfaction with government, and elected politicians have to be able to withstand a high level of scrutiny, there is a limit. Elected officials and government employees have a right to personal security and individuals cannot be allowed to intimidate, threaten or harass them or their families with impunity. The police have a legitimate role to play in keeping government officials and their families safe.

The use of social media by law enforcement

Protecting government officials is just one purpose for which law enforcement agencies may legitimately use social media. As part of proactive policing, law enforcement agencies regularly gather information from social media to assist in preventing crime, for example by monitoring public gatherings or events that might pose a risk to peace. They also use social media to gather evidence for crimes already committed, for example to

⁴⁵⁴ The Oxford English Dictionary, *sub verbo* “social media”, online: The Oxford English Living Dictionaries <https://en.oxforddictionaries.com/definition/social_media>.

⁴⁵⁵ The Oxford English Dictionary, *sub verbo* “social networking” online: The Oxford English Living Dictionaries <<https://en.oxforddictionaries.com/definition/social-networking>>.

locate suspects or witnesses, or to gather evidence to support a search warrant application. Finally, law enforcement agencies use social media to communicate directly with the public, for example by providing real-time information about developing threats to public safety or by making pleas to the public for assistance.⁴⁵⁶

These legitimate uses of social media by government and law enforcement require those bodies to monitor social media. The monitoring of social media by state agencies is a form of public surveillance. To the extent that state action is or may be prompted by this monitoring, there is a risk that the right to free expression will be infringed.

Legal test for breach of the right to free expression

The Supreme Court of Canada has adopted a two-step approach to determine whether state activity has violated s. 2(b) of the *Charter*. First, the court must inquire as to whether the government activity at issue falls within the sphere of conduct protected by the guarantee of freedom of expression. A broad and inclusive approach is given to the protected sphere of free expression under this first step of the test. Second, if the activity is not excluded from the protection of s. 2(b), the court must ask whether the purpose or effect of the government action is to restrict freedom of expression. In ***Irwin Toy Ltd v Quebec (Attorney General)***,⁴⁵⁷ the Supreme Court of Canada gave the following guidance with respect to the ‘purpose test’ at paragraph 49:

If the government’s purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government’s purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described the distinction as follows (*Freedom of Expression* (1981), at pp. 59-60):

The bold line . . . between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state’s usually impermissible effort to suppress “harmful” information, ideas, or emotions and the state’s often

⁴⁵⁶ *Social Media Use in Law Enforcement* (LexisNexis Risk Solutions: 2014), online: <<https://www.lexisnexis.com/risk/downloads/whitepaper/2014-social-media-use-in-law-enforcement.pdf>>.

⁴⁵⁷ *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927.

justifiable desire to secure other interests against interference from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.⁴⁵⁸

If the state action survives the purpose test, the onus shifts to the individual to demonstrate that the effect of the impugned action is unconstitutional. If either the purpose or the effect of the government action is determined to be the restriction of expression, then there has been an infringement of s. 2(b) and an analysis under s. 1 of the *Charter* is required to determine if the infringement is justified.

The chilling effect

In the course of the Inquiry, the Newfoundland and Labrador Court of Appeal released its decision in ***Abbass v The Western Health Care Corporation***.⁴⁵⁹ Mr. Abbass is a user of Twitter who was active on that platform following Mr. Dunphy's death, expressing his viewpoints on the shooting. On April 7, 2015, members of the RNC attended at his home and detained him for an assessment under the ***Mental Health Care and Treatment Act***.⁴⁶⁰ Mr. Abbass challenged his detention. In determining that the trial court erred in refusing to hear Mr. Abbass' application for *habeas corpus*,⁴⁶¹ Chief Justice Green made the following comments at paragraphs 51-52, regarding allegations of mental illness to stifle dissent:

If anger about political events and words of defiance to authorities are dealt with as signs of mental illness, a fortiori mental illness warranting involuntary committal, then our society is in a dangerous place. Such anger and defiance are characteristic of political dissent. As the history of authoritarian societies has taught us, confinement in a mental institution is a particularly insidious way of stifling dissent, directly and through intimidation. Was this the intent of the police in this case? Did the physicians simply lend their authority to what the police asked them to do? Did they assume that a person who acts in the way Mr. Abbass did needs help and further assessment and observation, without turning their minds to the specific limited statutory criteria that would justify his deprivation of liberty? On the face of the materials before the applications judge these were possible (though, of course, not the only) interpretations of what occurred. The applications judge owed a duty to Mr. Abbass to look further into the circumstances, which to say the least appear to be extraordinary.

⁴⁵⁸ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, para 49.

⁴⁵⁹ *Abbass v The Western Healthcare Corporation*, 2017 NLCA 24, 277 ACWS (3d) 602.

⁴⁶⁰ *Mental Health Care and Treatment Act*, SNL 2006 c M-9.1.

⁴⁶¹ *Habeas corpus* is a remedy for challenging wrongful detentions. The applicant must establish that he or she was detained and, in response, the person or authority that did the detaining has the burden of establishing that the detention was lawful.

The reality is that if you are involuntarily confined, you are viewed differently; you are seen as less credible. That is not how it should be but that is how it is. As well, there is the intimidation factor. If the police can take you away once and the physicians confine you, maybe they will do so again.

There is always a risk that state surveillance of social media will have a chilling effect on citizens' rights to express themselves freely. It is a fine balance to strike and those who act on the state's behalf must be vigilant against using their power for an improper purpose. Freedom of speech involves recognizing the right to tell people what they do not want to hear. In the case of social media, it can also mean hearing things from people hiding behind a cloak of anonymity. Faceless and anonymous commentators may find it easier to abuse social media platforms than they would traditional ones. The problem is determining how to prevent abuses without chilling unduly the freedom to express opinions and 'speak truth to power'.

Conclusion on *Charter* values

With the advent of proactive policing and processes such as those involved in threat assessments, it is important to identify best practices to protect against the infringement of individual rights and freedoms in the conduct of such policing. In Chapter 8, I recommend that the RNC undertake a review to determine and institute best practices for conducting threat assessments for proactive policing to standardize the process and application of appropriate criteria or protocol. It is essential that any process, criteria or protocol consider and respect individual rights and freedoms. The right to free expression, discussed above, and the principle of the sanctity of the home, discussed in Chapter 10, Finding 4, are two *Charter* values deserving of particular emphasis. It should be self-evident that all police procedure adopted should respect *Charter* values and, if it fails to do so, it will be successfully challenged before the courts.

I will leave to the RNC to determine how best to develop a threat assessment procedure or protocol that respects the *Charter* rights of citizens. I recognize the importance of not unduly restricting the discretion of police officers who are often required to deal with unexpected developments in the course of a threat assessment or proactive policing generally. If the RNC fails to strike the appropriate balance, the courts will act to correct it.

Postscript on *Charter* values

As I finish this Report, Britain has just been struck by the terrorist attack on London Bridge, the third terrorist attack in 73 days. Commentators have pointed out that this is in a country with “some of the most powerful surveillance laws in the world, with weak judicial oversight and little criticism on privacy issues.”⁴⁶²

The debate about how to balance civil liberties and security was barely touched upon in Phase II of this Inquiry. My Terms of Reference and allotted time for preparing a report did not permit more attention to the underlying *Charter* issues. I must note, however, that my comments in this Report must be considered in the context of police dealing with persons in crisis. What may be reasonable police conduct in situations with terrorist overtones will require further analysis. I do not want to minimize the very difficult situations in which police may find themselves.

⁴⁶² Steven Erlanger, “Can Britain Really Do Much More to Tighten Security?”, *The New York Times* (5 June 2017), online: <https://www.nytimes.com/2017/06/05/world/europe/london-attack-uk-election.html?_r=0>.

CHAPTER 15: MAINTAINING AN ATTITUDE OF SUSPICION

As discussed below, if investigators too quickly abandon the attitude of suspicion required of them by RNC and RCMP policy, they may create an appearance of preferential treatment (explained in Chapter 10, Finding 14) or be led into an investigation riddled with material deficiencies (discussed under Finding 15).

Relevant RCMP and RNC policy on reportable deaths

RCMP Policy

The RCMP has two relevant policies. The first is the national policy, OM – ch. 41.3. Human Deaths:

All reportable deaths occurring within RCMP jurisdiction must be treated as suspicious and thoroughly investigated.⁴⁶³

The second is the 'B' Division policy, which applies only in this Province:

All reportable deaths will be investigated to rule out any suspicion of foul play.⁴⁶⁴

S/Sgt. Kent Osmond testified with respect to these policies. Although different wording is used, he considered the spirit of both RCMP policies to be the same and not in conflict.⁴⁶⁵

RNC Policy

RNC Policy and Procedure, General Order #293:

All reportable deaths shall be treated as criminal until determined to be otherwise by the Major Case Manager.⁴⁶⁶

⁴⁶³ Exhibit P-0546.

⁴⁶⁴ Exhibit P-0545.

⁴⁶⁵ Transcript of Evidence of S/Sgt. Kent Osmond, February 21, 2017 at p 5.

⁴⁶⁶ Exhibit P-0018 at p 1, s 2.2.

Comparison of the RNC and RCMP Policies

While the definitions of “reportable deaths” differ slightly between the two police forces, both cover any death as a result of violence, accident or suicide. Like the RNC policy, the RCMP policy does not apply to serious incidents involving police that do not result in death.

Both the RCMP and RNC policies address how reportable deaths are to be initially treated. The RNC policy requires that such deaths be initially treated as “criminal” and the RCMP policies require that they be initially treated as “suspicious”. S/Sgt. Osmond believes the two approaches are different and considers the RCMP policies to be preferable. In S/Sgt. Osmond’s opinion, approaching all sudden death investigations with the mindset that a criminal act had occurred created a risk of investigators leaving their “open mind behind.”⁴⁶⁷ I disagree with S/Sgt. Osmond. I do not see any significant difference between the two approaches. “Suspicious” under the RCMP national policy must surely mean “suspicious of a criminal act”. This is more clearly stated in ‘B’ Division policy which states “suspicion of foul play,” i.e. of criminal activity.

I agree with the policies of both forces and, for the reasons below, recommend that serious incidents involving police officers be treated as criminal investigations until determined otherwise.

Treating serious incidents as criminal or criminally suspicious from the outset

Section 25 of the ***Criminal Code***, which I discuss in Chapter 6, authorizes police officers to use force in the line of duty under certain conditions. A use of force by a police officer that results in death or serious bodily harm must be investigated to determine whether the officer complied with the strictures of s. 25. Generally, this means that investigators must determine if the officer’s use of force was necessary, reasonable and proportionate in the circumstances.⁴⁶⁸ Any investigation that requires comparing a person’s actions against a provision of the ***Criminal Code*** to determine whether a criminal offence has been committed is necessarily a *criminal* investigation. Until the investigation is complete, it is unknown whether charges will result and so the investigation must be approached with the same diligence, seriousness and suspicion as any other criminal investigation.

⁴⁶⁷ Transcript of Evidence of S/Sgt. Kent Osmond, February 21, 2017 at p 6.

⁴⁶⁸ *R v Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

Characterizing the investigation as criminal or criminally suspicious does not mean that there are not unique aspects to the investigation. Nor does it mean that there has been any criminal wrongdoing. Any death caused by another human being, which is the definition of a 'homicide', may ultimately be determined to be 'non-culpable.' Characterizing the investigation as criminal from the start reinforces the seriousness of the task and the need to use best investigative practices in dealing with witnesses and subjects, in collecting and preserving evidence, and so on. Failing to follow best practices from the beginning may ultimately result in serious problems, such as tunnel vision, wrongful convictions, *Charter* breaches, or unsuccessful prosecutions, any of which may lead to a loss of public confidence in the administration of justice.

The need to follow best investigative practices is magnified in investigations of police officers under s. 25 of the ***Criminal Code***. First, because the natural tendency of police force members to empathize with their fellow officers, to which I have already referred, must be overcome; and second, because public confidence demands it. Investigations of police officers involved in serious incidents will always be heavily scrutinized. Special or preferential treatment of officers subject to those investigations helps no one. A subject police officer deserves to have a clean, robust investigation, the outcome of which is not clouded by suspicion of cover-up or an easy ride. The public deserves the same.

As evidenced by the examples reviewed in Chapter 10, Findings 14 and 15, I find that in the present case the RCMP investigators failed to keep a suspicious mind and assumed, before full and proper investigation, that Cst. Smyth's version of events was correct. The RCMP investigators were lulled into a case of tunnel vision, where self-defence by the police officer was the focus of investigation. At the same time, acceptance of the self-defence narrative permitted the investigating officers to ease off on their testing of Cst. Smyth's credibility. Their questioning and the general tone of their dealings with Cst. Smyth became too friendly. This elevated concerns about 'police culture' and 'police investigating police' and resulted in the appearance of Cst. Smyth being treated preferentially. The RCMP attempted to overcome public concern by appointing an Independent Observer and I review their efforts in this regard in Chapter 10, Finding 15. While an Independent Observer may be a viable way to promote public confidence, the best way for investigative bodies to foster public confidence in the process and the outcome, is to treat officer-related deaths and serious incidents as criminal or criminally suspicious until there is sufficient evidence to the contrary.

Recommendation 4: The investigating officers in police-involved shootings should maintain an attitude of suspicion, and continue with a rigorous and robust investigation until the involved police officer's version of events has been completely examined and tested.

Commentary: This is current RCMP and RNC policy but was not followed in the present case.

CHAPTER 16: SHOULD WE ESTABLISH A SERIOUS INCIDENT RESPONSE TEAM (SIRT) FOR OUR PROVINCE?

A public concern about pro-police bias from ‘police investigating police’ arose early in the Donald Dunphy investigation. The problem was likely exacerbated because the investigating agency, RCMP ‘B’ Division, is the only other police force operating within the Province and regularly works together with the RNC on joint operations and other initiatives, including the PSU.

In an attempt to combat this stigma and increase public confidence in the investigative process, many jurisdictions in Canada and abroad have established independent agencies to investigate police involvement in serious incidents. Various models have been employed with varying degrees of civilian involvement and oversight. During the Inquiry, I heard evidence related to two models: the civilian-led model employed by ASIRT in Alberta, and the civilian model employed by SIU in Ontario. The key difference between these two models is that the civilian-led model (ASIRT) uses investigators who are active members of police forces on secondment to the agency, while the civilian model (SIU) uses only civilian investigators, although some of these may be retired or former police officers.

During Inquiry hearings, a number of witnesses, including RNC and RCMP officers, were asked for their opinion on the establishment of an independent civilian police oversight body in this Province and all unanimously supported it. Likewise, all parties with standing before the Inquiry supported the establishment of such a body in their written submissions. It thus appears that the initiative has substantial support, including the support of the RNC and RCMP, which is important for its ultimate success. During the course of the Inquiry, the Minister of Justice and Public Safety affirmed that the provincial government was working on creating a serious incident response team for this Province and considered it a 2017 initiative. More recently, after the release of the 2017 provincial budget, the Minister of Justice and Public Safety confirmed that the government’s first step will be to make a legislative change in the fall. As it appears that no final decision has been taken yet as to the model that will be employed, I make some comment here.

Civilian versus civilian-led models

Former police officers

The civilian model is the gold standard for maintaining public confidence. Ideally, investigators would have no current or previous affiliation with a police force and so would not even be retired police officers. Some of the perils of having an oversight body comprised primarily of former police officers have been described by Andre Marin, a former Director of Ontario's SIU:

At the time of our investigation [the Ombudsman of Ontario's 2008 systemic investigation into SIU's operation effectiveness and credibility], seven out of 12 full-time SIU investigators had come from civilian backgrounds. However, 24 of the 30 part-time investigators and 9 out of the 10 forensic investigative technicians were former police officers, as were all of the supervisors and the Executive Officer. Not only was the SIU investigative staff composed primarily of former police officers, both those officers tended to be white males in their 50s and older who had retired from policing. Given its staffing profile, the SIU was edging precariously close to perpetuating some of the stereotypes that police forces had been slowly working to dispel through equity hiring programs. The presence of so many former long-serving police officers in the SIU ranks had a significant influence on its work culture and naturally sparked public speculation about its ability to act impartially in conducting investigations of police.

We discovered that in many respects the SIU looked and acted like a police force, from its dress code to its operational procedures. We were also told by a number of SIU witnesses that in some cases former officers working at the SIU had been known to use disparaging remarks, originating from the police community, to describe civilian victims and witnesses, and to use overly friendly leading questions when interviewing police witnesses. Some former officers were very blatant about their police affiliations, and were even in the habit of wearing police watches, ties and "thin blue line" rings while carrying out their police oversight duties. Such glaring symbolic displays of police solidarity were in sharp contrast to the independent and unbiased image that the SIU should have been protecting.⁴⁶⁹

Practically, however, a civilian model that avoids hiring even former police officers is difficult to implement. Currently, all civilian oversight bodies in Canada employ former police officers as investigators. Only one of these, British Columbia's Independent

⁴⁶⁹ Andre Marin, "The Ontario Special Investigations Unit: Securing Independence and Impartiality" in David MacAlister, ed, *Police Involved Deaths: The Need for Reform* (Vancouver: BC Civil Liberties Association, 2012) 104 at 114.

Investigations Office, aims to eventually be staffed entirely by investigators who have never been police officers, although there is no set deadline to meet this goal.⁴⁷⁰

It takes significant time and resources to train homicide investigators. Susan Hughson, Q.C., executive director of ASIRT, testified before the Inquiry that ASIRT has trained only one civilian with no former law enforcement experience as an investigator since its inception in 2007. It took a period of years before the person was sufficiently trained to be placed in an investigative capacity and shortly thereafter the person left ASIRT to pursue opportunities elsewhere.

The SIU has had greater success training civilians, but the SIU investigates over 200 incidents each year with a team of approximately 70 investigators.⁴⁷¹ Civilian investigators training in Newfoundland and Labrador would not have the same opportunities to gain practical experience.

Even at the SIU, former police officers are still employed. That practice, which has withstood a number of reviews, was recently re-examined and again endorsed by the Tulloch Report. At s. 4.725 of the Report, Justice Tulloch reviews some of the advantages of former police officers as investigators:

- (1) They arrive with investigative skills and knowledge of the internal policies and procedures of the police;
- (2) They need less additional investigative training, which saves limited resources;
- (3) They are more likely to have specialized skills in areas such as witness interviewing, managing complex investigations, scene preservation and forensics;
- (4) They have an insider's understanding of police culture and informal practices; and
- (5) Police witnesses may be more forthcoming if speaking to an investigator who was a former police officer.

⁴⁷⁰ Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) at s 4.724.

⁴⁷¹ See www.siu.on.ca and Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) at s 4.722.

Justice Tulloch acknowledges the concern of many members of the public and affected families that former police officers will investigate with a pro-police bias. He also acknowledges that, based on his interviews, these concerns have some validity. His suggested solution, however, is not to exclude former police officers but rather to limit them to less than 50% of non-forensic investigators and to incorporate anti-bias measures into hiring, training, education, and evaluation. He also recommends broad recruitment:

Ideally, the oversight bodies should recruit university graduates, those possessing a high level degree in law, criminal justice, criminology, or a related social science. And they should prefer those individuals who have a demonstrated commitment to social justice. As in Manitoba, the required qualifications and experience of oversight investigators could be set out in a regulation.

The oversight bodies also should consider recruiting people with investigative experience from outside of policing, such as investigators with backgrounds in child welfare, the military, regulatory fields, and the insurance industry. Such candidates present a valuable hiring pool for the oversight bodies to draw from.⁴⁷²

It is unlikely that a civilian oversight body could be successfully implemented in Newfoundland and Labrador without the use of retired police officers. In addition to the factors discussed above, one has to consider recruitment and retention. Retired police officers with roots in the community are a likely source of candidates. They would not have to be enticed to relocate and may be more amenable to part-time positions.

Seconded police officers

As noted, the SIU does not use current police officers as investigators. Neither do the oversight bodies in Quebec or British Columbia. The other three oversight bodies in Canada (Alberta, Manitoba, and Nova Scotia) use current police officers on secondment.⁴⁷³

In her testimony, Susan Hughson, Q.C. spoke in support of ASIRT's practice:

What those members bring to our team are knowledge of those police services and the internal workings of those police services, the policies of those police services.

⁴⁷² Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) at s 4.730.

⁴⁷³ Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) at s 4.724.

They have access to the databases that those police services use so that we can access them at will. And they bring us a network, so while it can be – I know it has been criticized that there are seconded members, we find it actually works very well for us.

We do have certain practices in place to ensure that there is a level of independence. So, generally speaking, the primary investigator in any command triangle will not be from the – will not be a seconded officer from the service under investigation and in particularly sensitive ones, we may have nobody even involved. So, for example, when we were sent to the Yukon into an RCMP-sensitive investigation, no RCMP members went and responded to that particular call.

So we do try to separate and have a Government of Alberta employee or a seconded member from a different service be the primary investigator in those files. And the team commanders are both civilian employees.

[...]

So we value, in my opinion, experience, accessibility and skills over perception. And it is a perception issue and it is an absolutely understandable perception issue but, for me, the integrity of the investigation is important.

I also note that it does seem to work very well in terms of maintaining a working relationship with the police services that are we investigating. ASIRT's reputation and relationship, generally speaking, with the police services is very positive, the same cannot be said for some of the other models.⁴⁷⁴

The “other models” to which Ms. Hughson was referring are civilian models such as the SIU:

MS. O'BRIEN: When you're referring to other models would you be referring to things like the SIU in Ontario where they do not have active serving police members as investigators?

MS. HUGHSON: They don't have active serving members, the vast majority of the SIU is former law enforcement but they don't have any seconded members, but they have an adversarial relationship that makes investigations very difficult, so there is a definite break down in the relationship between the SIU and the police services that they investigate and that reflects itself in how those investigations unfold.⁴⁷⁵

⁴⁷⁴ Transcript of Evidence of Susan Hughson, Q.C., March 6, 2017 at p 114.

⁴⁷⁵ Transcript of Evidence of Susan Hughson, Q.C., March 6, 2017 at p 114.

With respect, I question whether improving an oversight body's relationship with the forces it is investigating should be viewed as a positive development and as a reason for using seconded police officers from that force. This correlation will only probably add to the perception of pro-police bias and over-identification between the investigators and the investigated. Yet I cannot deny that there is support for Ms. Hughson's position in reviews of the SIU, which include ample evidence of a lack of cooperation forthcoming from the forces under investigation.⁴⁷⁶

While one would hope that police forces themselves would see the benefit of increased public confidence which inevitably comes with their full cooperation with oversight bodies, cooperation can be promoted by legislation. Justice Tulloch has recommended that the issue be addressed in this manner:

The general requirements of the duty to cooperate with the SIU, as well as the timing of that requirement, should be set out in the legislation. In particular, the legislation should stipulate the following:

- (a) The duty to cooperate arises immediately upon SIU involvement; and
- (b) The duty to cooperate requires police to comply forthwith with directions and requests from the SIU.⁴⁷⁷

The RNCA recommends a SIRT model for this Province:

The RNCA's desire in terms of police oversight is that the Commissioner will recommend a SIRT model [civilian-led, with seconded officers] over that of the SIU [civilian, no seconded officers]. The RNCA agrees with Ms. Hughson's assessment that the skills and experience of investigators in homicide and other serious and potentially complex investigations are paramount as it could have *very grave* consequences for both subject officers and members of the public involved in serious incidents in the event an investigation is mishandled.

Newfoundland and Labrador, and *even* Atlantic Canada simply does not have the population and therefore number of serious incidents to provide the necessary

⁴⁷⁶ See eg. Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017); Gareth Jones, "The Top Ten Things Not to Do When Setting up a Police Oversight Agency" in David MacAlister, ed, *Police Involved Deaths: The Need for Reform* (Vancouver: BC Civil Liberties Association, 2012) 123; Andre Marin, "The Ontario Special Investigations Unit: Securing Independence and Impartiality" in David MacAlister, ed, *Police Involved Deaths: The Need for Reform* (Vancouver: BC Civil Liberties Association, 2012) 104.

⁴⁷⁷ Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017), s 7.343.

experience to civilian investigators *even* where those investigators are properly trained in investigative techniques.⁴⁷⁸

Arguably, the RNCA has a vested interest in promoting additional positions for its members. However, I take its point that, given the size of our Province, the pool of retired police officers may be insufficient to ensure that investigators have adequate experience and current training. Although not raised by the RNCA, there is also the issue of diversity. The RNC has made a concerted effort in the past number of years to recruit candidates from a broader range of backgrounds. Due to limited hiring by the RNC in the 1990s this more diversified group is many years away from retirement. Drawing on seconded members would enable a local oversight body to obtain access to a greater diversity of candidates more quickly.

Dedicated Newfoundland and Labrador body versus regional body

The question arises whether Newfoundland and Labrador requires its own provincial oversight body. Other jurisdictions have opted for a collaborative approach. For example, Yukon has entered a memorandum of understanding with ASIRT. Ms. Hughson provided details in her testimony:

Ms. O'BRIEN: Okay I do understand that ASIRT has a contract with the Government of Yukon and that is of interest to us. Can you briefly explain that to the Commissioner?

MS. HUGHSON: We were contacted, ASIRT was contacted by the Yukon government to come and conduct investigations into incidents in their jurisdiction that might come out. They recognized that there might be a need for it but also recognized that they wouldn't have a need for a full-time body up there. So they contracted with ASIRT, that ASIRT could be contacted when a serious injury or death occurs, or there's an allegation of a serious or sensitive nature. And there would be discussions on whether ASIRT were to respond to investigate, or conduct a review.

What resulted was a memorandum of understanding between the Yukon Government and Alberta and ASIRT. That provides for the Yukon government paying for a full-time position with ASIRT for one investigator. On the understanding – for a year – on a yearly basis – on the understanding that we will respond in appropriate cases. And knowing that when we do respond – because we've followed principles of major case management, and we are also very concerned

⁴⁷⁸ Final Submission of the RNCA, April 7, 2017 at pp 5-6.

about officer safety. We will be sending a team. So, they don't – we don't send up one investigator. We actually investigate it as we would down here.

That has been in place for a number of years. And has been well-received up there, and has been working very well. And we're continuing – we're continuing that agreement. And we offer it by way of memorandum of understanding.⁴⁷⁹

Nova Scotia is the only Atlantic province to have its own civilian oversight body currently, having established a Serious Incident Response Team in 2012 using the civilian-led model. It may be possible to build on the Nova Scotia SIRT to make it a regional oversight body or to enter a memorandum of understanding similar to the Yukon's with ASIRT. Based on news reports, I understand that Prince Edward Island already has an arrangement whereby investigations into police officers there are overseen by Nova Scotia's SIRT.

Collaboration does not have to be limited to within Atlantic Canada. As noted in its submissions, the RNC has had a memorandum of understanding with the Ontario Provincial Police (OPP) since 2002 to investigate serious incidents involving the actions of members of the RNC. Presumably, a similar arrangement with the SIU or any other Canadian civilian oversight agency is possible, although travel distances may make collaboration with western provinces less practical.

While the most obvious benefit of a regional or collaborative approach is cost savings, there are other benefits. The current population of Newfoundland and Labrador is approximately 525,000. This is significantly less than Nova Scotia, the next smallest province that has established a SIRT, which has a population of over 940,000. The number of serious incidents involving police in an area is, to some extent, proportional to its population. In the past three years outside agencies, either the OPP or another agency, have investigated 18 RNC files.

With so few files, there is a risk that a dedicated Newfoundland and Labrador oversight body would not have enough work either to keep staff productively engaged or to maintain and develop investigative skills.

To some extent this may be remedied by broadening the mandate of the oversight body, so that more cases would fall under its jurisdiction, but this is a fine balance. If the mandate is too broad, investigative requirements may exceed the specific expertise and resource capabilities of the oversight body. A broad mandate may also meet resistance from the police forces. I note that in the RNCA's submission, it cautioned against too

⁴⁷⁹ Transcript of Evidence of Susan Hughson, Q.C., March 6, 2017 at pp 118-119.

broad a mandate as that “could impair the ability of police officers to carry out their work”.⁴⁸⁰

There are advantages for Newfoundland and Labrador from having its own oversight body rather than a regional or collaborative model. A dedicated Newfoundland and Labrador solution would give the Province greater control and flexibility. Another advantage of a purely provincial solution may be faster response times. If investigators have to travel from outside the Province, the additional delay entailed may be detrimental to investigations, particularly in the winter months when weather delays can span a number of days. While I acknowledge this concern, it may not be as significant as it first appears. First, because not every serious incident with police involvement is of a type where a scene has to be secured and time is of the essence in processing it. Some serious incidents arise because of a recent complaint of past events and there is no scene or evidence that must be immediately secured or processed. Second, because most civilian oversight make some use of local police resources and this could include early containment of the scene. As noted by Susan Hughson in her testimony:

We differ from the SIU but are similar to the IIO in BC in that we depend on the home agency for things like forensic services, or ident. We also rely on some of those services for things like traffic reconstruction or firearms examination. We may send them to one of the other services in the province, but we rely on the police services for those areas of specialty.⁴⁸¹

The key distinction is that the direction and supervision of these resources is done by the civilian oversight body and not the local force itself. Modern communications are such that this type of supervision can often be done in an effective manner remotely, at least for short periods. Finally, because this problem would exist even with a dedicated provincial body, as parts of our Province are remote and isolated. A civilian oversight agency with its major resources in St. John’s could face the same challenges in reaching St. Anthony or Labrador City as an agency with its major resources in Halifax.

Recommendation 5: To avoid the appearance of preferential treatment for police officers, the Province should make arrangements for the investigation of police-involved serious incidents or deaths by a civilian-led Serious Incident Response Team (SIRT), either by participation in a regional organization or through memoranda of agreement with other provinces.

⁴⁸⁰ Final Submission of the RNCA, April 7, 2017 at p 8.

⁴⁸¹ Transcript of Evidence of Susan Hughson, Q.C., March 6, 2017 at p 116.

Requirement for adequate funding

Regardless of the model employed, the success of civilian oversight in this Province will depend on adequate funding. The Government of Newfoundland and Labrador must commit long term funding at a sufficient level to ensure that the body is sufficiently resourced.

Gareth Jones, a former investigator with the SIU, who gave expert testimony at the Inquiry in Phase I and participated in Phase II, wrote an instructive article “The Top Ten Things Not to Do When Setting up a Police Oversight Agency” about the experiences of the SIU. Mr. Jones’ fourth principle is that investigative agencies must be properly funded to succeed. As he writes, “insufficient resources lead directly to inordinate delay and botched investigations, all of which erodes credibility.”⁴⁸²

Investigation duration

In his testimony before the Inquiry, Mr. Jones elaborated on this correlation between insufficient funding and investigative delays:

In the early days of SIU because we were so grossly under resourced that investigations took a long, long time and SIU was very justifiably criticized for investigations that took a year or more.

In 1996, a new SIU director came who imposed a 30-day limit on conducting investigations. So the investigation had to be conducted and the report made within 30 days, save in – save in circumstances where for the testing of forensic evidence was so crucial that it was central to the issue being decided, criminality on the part of the officer, or there was a lack of co-operation from witnesses. But generally, in the vast majority of them, 75 or 80 per cent of cases, we turned around investigations in right about 30 days.⁴⁸³

The negative effects of a long investigation on the officer affected, the family of the deceased, and public confidence, were readily apparent in the present case. Both Cst. Smyth and Ms. Dunphy testified to their frustrations with the approximately 17-month-long investigation. Cst. Smyth, whose career was in limbo for this period testified

⁴⁸² Gareth Jones, “The Top Ten Things Not to Do When Setting up a Police Oversight Agency” in David MacAlister, ed, *Police Involved Deaths: The Need for Reform* (Vancouver: BC Civil Liberties Association, 2012) 123 at 137.

⁴⁸³ Transcript of Evidence of Gareth Jones, March 7, 2017 at p 47.

in some detail to the stresses he and his family were under. As noted by the RNCA in its brief:

[The delay] had an obvious negative impact on Cst. Smyth's psychological well-being as well as his work as a police officer. The lengthy period and lack of information also fomented conspiracy theories and negative perceptions of the process within the public sphere.⁴⁸⁴

Recommendation 34: A period of 90 days should be set as the desired maximum length of an investigation with a requirement of an interim report if the investigation proceeds beyond 45 days.

⁴⁸⁴ Final Submission of the RNCA, April 7, 2017 at p 6.

CHAPTER 17: RNC COMMUNICATIONS WITH THE PUBLIC DURING AN INVESTIGATION

Subsection 3(1)(i) of my Terms of Reference requires that I inquire into any policies, protocols or manuals governing communications by RNC members with the public or media following serious incidents and during active investigations. The facts of this case raise three aspects of communications: official communication by RNC management; unofficial communications by Cst. Smyth; and internal communication between management and members.

With respect to the official communications by RNC management, Cst. Smyth expressed frustration with what he considered to be a lack of support from management in the days and weeks following the incident. In his opinion, the RNC could have communicated with the public, without reference to the specific facts of the situation, about issues such as the RNC's use of force training, why officers do not shoot to wound, why officers make home visits on Easter Sunday, or alone, what is involved in intelligence-based proactive policing, and the role of the PSU. Cst. Smyth felt that an open and frank dialogue would not only have helped him and general officer morale, it would have given members of the public greater confidence in their police force.⁴⁸⁵

With respect to the unofficial communications, in part motivated by his frustration with management, on April 10, 2015, Cst. Smyth wrote an email to all current members of the RNC, some former members of the RNC and to two RCMP members, including Cpl. Burke, the primary investigator. That email was leaked to the media and was published in its entirety. Additionally, Cst. Smyth communicated with individual members of the media privately.

Policies and regulation

Before I consider the communications, it is appropriate to review the applicable RNC policies and protocols. The RNC Policy and Procedure Manual establishes guidelines for the release of information to the media. The policy states that it reflects a balance between the public's right to know and the individual's right to privacy, and requires the protection of police information which forms part of an investigation or which may

⁴⁸⁵ Transcript of Evidence of Cst. Joseph Smyth, January 23, 2017 at pp 26-27; Exhibit P-0207.

divulge investigative techniques.⁴⁸⁶ It also acknowledges that, from time to time, specific cases will require additional evaluation, as no policy can be developed to meet every situation. Section 8.0 of the policy provides a list of information which shall not be released to the media. It includes information that could potentially deal with RNC policy or procedure, deal with discipline of RNC employees, or interfere with an investigation. The RNC also has a policy with respect to media relations for major cases that are being investigated by the RNC. That policy would not have applied to the investigation of Mr. Dunphy's death but it recognizes that the release of information can have consequences for an on-going investigation and any subsequent prosecution.⁴⁸⁷

The importance of protecting the integrity of on-going police investigations is also recognized by the provincial **Access to Information and Protection of Privacy Act, 2015**⁴⁸⁸ and the federal **Access to Information Act**,⁴⁸⁹ both of which afford special protection to investigative information. Also, all RNC officers are governed by s. 60(1) of the **Royal Newfoundland Constabulary Act, 1992**, which requires that, with limited exceptions, they preserve secrecy in respect of all information obtained in the course of their duties and not communicate that information to another person.

Official communications by RNC management

The RNC did speak to the media following Mr. Dunphy's death. On April 6, 2015, Chief William Janes made a public statement and answered questions from the media.⁴⁹⁰ Although we did not have a recording or transcript of his statement, according to his testimony he answered all but one of the questions anticipated in his draft comments, which means that he addressed, albeit in a cursory way, the PSU, one-person patrols, and threat assessments.⁴⁹¹ On September 13, 2016, after the RCMP concluded its investigation, the RNC released a brief written statement advising that it was still awaiting the results of the internal investigation being completed by the Saskatoon Police Service (SPS). On September 21, 2016, the RNC released another statement after Justice Riche had made comments in the press, this time confirming that the SPS had verbally advised that they found no breaches of RNC policy, procedures or

⁴⁸⁶ Exhibit P-0028 (current policy, as of May 25, 2016); Exhibit P-0027 (former policy).

⁴⁸⁷ Phase II submission by RNC "Police Communications with the Public Following Serious Incidents and During Active Investigations", Appendix B.

⁴⁸⁸ *Access to Information and Protection of Privacy Act*, SNL 2015 c A-1.2.

⁴⁸⁹ *Access to Information Act*, RSC 1985, c A-1.

⁴⁹⁰ See Exhibit P-0715 for a draft of his comments.

⁴⁹¹ Transcript of Evidence of Chief William Janes, February 28, 2017 at p 53.

regulations.⁴⁹² Finally, on November 28, 2016, Chief Janes again spoke publicly confirming that no wrongdoing had been found on the part of Cst. Smyth.

In his testimony before the inquiry, Chief Janes explained that the RNC's public communication was limited because of the significant restrictions and protections in place to protect the integrity of criminal investigations. He also highlighted that this was an RCMP investigation and the RNC could not impact, or be seen as impacting, in any way, the investigation of another police agency. He also discussed the risks of releasing information which at the time of release may seem benign:

One piece of information at any time can have a significant impact on the direction and the flow of an investigation. You may say something today that seems fine and, in two weeks' time, what you said had a negative impact because of the new information that came forward.⁴⁹³

While Chief Janes acknowledged the integrity of the investigation should be balanced with the community's right to information, he stated that the integrity of the investigation must come first, because in the long run that is what is right for the community. Chief Janes' comments in this regard were echoed by Gareth Jones who spoke during Phase II of the Inquiry about public communications during an active police investigation. Mr. Jones cautioned against any release of information that could possibly affect the integrity of the investigation.

There is more than the criminal investigation to consider concerning the public release of information. Even in cases where criminal charges are not laid, serious incidents may result in internal investigations and charges. Pursuant to the RNC's regulations, the Chief of Police is the adjudicator for certain disciplinary matters and he or she may have to make decisions about whether internal charges should be laid or about the appropriate penalty for infractions. This is another reason why the Chief must be cautious in his or her public statements following a serious incident. To maintain the integrity of the internal disciplinary process, the Chief must not only be impartial, he or she must be seen to be impartial. Chief Janes testified about his obligation to remain impartial although he emphasized that this did not prevent him from ensuring that a subject officer had appropriate support for his or her own well-being. Chief Janes considered it important to maintain a separation between an investigation and the well-being of an employee.

⁴⁹² Exhibit P-0742. Note this information appears to have been incorrect as the SPS report found Cst. Smyth was not in compliance with the applicable sections of the Information Management and Technology Policy, see Exhibit P-0006. This was considered a minor breach of policy.

⁴⁹³ Transcript of Evidence of Chief William Janes, February 28, 2017 at p 58.

While I am sympathetic to Cst. Smyth's frustration with the limited communication from RNC management, I do not find any wrongdoing on its part. It is difficult to reconcile the benefits of public discourse with the need for confidentiality to protect the integrity of ongoing investigations and the internal adjudication process. That being said, there may be room for improvement. Today, more than ever, the public expects to be kept informed on a timely basis and the time for response has been shortened by the immediacy of social media communication. A failure to communicate appropriately, sufficiently or in a timely manner may erode public confidence in police forces. The Tulloch Report recommends that the SIU be permitted to make public statements during an investigation when the statement is aimed at preserving public confidence, and the benefit of preserving public confidence clearly outweighs any detriment to the integrity of the investigation.⁴⁹⁴ I recommend that the RNC adopt a similar approach and periodically assess whether preserving public confidence requires a release of information to the public.

I accept Chief Janes' and Chief Supt. Boland's explanations of the difficulty in determining how much information to release to the public, when anything released might have unexpected consequences to the investigation down the road. I recommend, however, that, in arriving at the balance between addressing the public's right to know and preserving the integrity of the investigation, police officers keep in mind the impact of speed of communication in the relatively new world of social media. In the present case, I cannot criticize the RCMP for any initial delay in getting information out to the public. The shooting occurred on April 5, 2015, and a detailed press release was issued by the RCMP on April 7. There could, however, have been better interim reporting between January and September 2016. The timing of an investigation and interim reporting is discussed in Chapter 15.

Chief Janes was frank that the RNC did not have a communications protocol in place following the shooting in Mitchell's Brook. Although a sample had been provided by the RCMP to RNC's media relations officer, Chief Janes did not see it at the time, and the RNC has not developed one of their own since.⁴⁹⁵ The impediment appears to be one of human resources. The RNC issues over 1000 press releases a year, gets five to ten media requests per day, and does two to three media interviews a week. The current media relations officer is a constable with five or six years' experience and postgraduate training in media relations and communications.⁴⁹⁶

⁴⁹⁴ Justice Michael Tulloch, *The Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) at p 136.

⁴⁹⁵ Exhibit P-0740.

⁴⁹⁶ Transcript of Evidence of Chief William Janes, February 28, 2017 at p 61.

Communications has become a specialized area and increasingly large organizations employ media relations officers who have university degrees in communications or public relations. The RNC has a need for such a person. Public communication is a critical element of modern law enforcement. It is not just about public relations or increasing public confidence by increasing transparency, police communicate with the public on matters of public safety, to advance on-going investigations, and as part of proactive policing. I am therefore recommending that the RNC have a communications officer with appropriate education or experience in communications or public relations. The RNCA supports this initiative. This is not to be taken as criticism of the current communications officer, who Chief Janes said, did the best he could under difficult circumstances.⁴⁹⁷

Recommendation 28: The RNC should have funds provided to hire a professional media relations person to assist with creating communications strategies and policies and advising RNC members with respect to communications with the public.

Recommendation 18: In determining whether to communicate with the public during investigations, the RNC should adopt a policy of periodically assessing whether a release of information is important for preserving public confidence and increasing transparency, and whether the benefit of that clearly outweighs the paramount goal of not impairing the integrity of the investigation.

Cst. Smyth's communications with the media

The details of Cst. Smyth's communications with the media have been reviewed in Chapter 10, Finding 5 (dealing with unprofessional conduct and errors of judgment). To summarize, I found that Cst. Smyth's April 10, 2015, email to current and former members of the RNC and two members of the RCMP was inappropriate and that he ought reasonably to have known that the risk it would be leaked to the media was high. I also found that his subsequent communication with David Cochrane of the CBC was inappropriate, and that it was improper of him to communicate to other members of the media that they should speak with Mr. Dunphy's brother, Dick.

⁴⁹⁷ Transcript of Evidence of Chief William Janes , February 28, 2017 at p 61.

Officers who are involved in serious incidents, either as subjects or witnesses, should not communicate with the media or public, directly or indirectly. All RNC communications should be done through official channels according to policy and procedure.

I am sympathetic to the frustration experienced by Cst. Smyth in being subjected to public criticism for things which are routine practices of the RNC, such as one-person patrols, discussed in Chapter 10, Finding 3. I accept the RNCA's submission that the process had a negative psychological effect on him and that a lack of formal communication may provide an environment where conspiracy theories and misinformation flourish and create a negative public perception of both the officer and the RNC generally.

To a large extent, the negative impact will be reduced by shortening the period taken to complete the investigation. It does appear that the investigation in this case took too long to complete. It probably would have been finished earlier if ASIRT had been retained initially to investigate and not just to review the RCMP investigation. But whatever the impact upon the officer or the force, the integrity of the investigation must come first.

Communication by management with members

The RNCA, in its very helpful final submission, discussed matters relating to the well-being of its members generally and of Cst. Smyth specifically, when it comes to addressing critical incident stress management and what colleagues should be permitted to do in minimizing the impact of a traumatic event, such as an officer-involved shooting. The RNCA suggested its representatives should be permitted to meet with officers involved and to provide support for them, considering the effects of Post-Traumatic Stress Disorder (PTSD) upon an officer's mental well-being.

The RNCA suggested that since there were no reasonable and probable grounds upon which to arrest Cst. Smyth and he was not under investigative detention, it was within Cst. Smyth's rights to simply leave the Holyrood Detachment at any time and meet with the RNC officers, who in this case, travelled from St. John's to meet with him. The legal issues raised by subject officers consulting with colleagues were not discussed in depth during the hearing or written submissions. They raise questions regarding how to balance a subject officer's *Charter* rights (to silence and against self-incrimination)

against an officer's duty to complete notes before the officer reports off shift.⁴⁹⁸ This might require consideration of the admissibility into evidence of "compelled" statements. For purposes of this Inquiry I need only note the issue here. It was discussed previously in Chapter 10, Finding 14, dealing with preferential treatment of subject officers.

The RNCA also seeks a recommendation that the RNC develop a clear policy around a subject officer's return to work after a serious incident. After a short mandatory period off work after the shooting, Cst. Smyth first returned to an operational role. A week or two later, management decided he should be non-operational. Cst. Smyth then remained in a non-operational role for the duration of the lengthy investigation. Cst. Smyth expressed legitimate concerns about his frustration with this process. While adopting measures to shorten the time it takes to complete an investigation should at least reduce the period of frustration, I agree with the RNCA that a clear policy should be developed. I leave it to the RNC to determine the details of that policy as I have not been provided with sufficient evidence nor do I have the expertise required to make a detailed recommendation.

Recommendation 19: The RNC should develop a clear policy regarding a subject officer's return to work after a serious incident.

⁴⁹⁸ Exhibit P-0030 at p 3, s 4.6.

CHAPTER 18: CONCLUSIONS, PHASE II

In Chapters 12 to 17 I discussed policy and institutional changes which relate to preventing any other death by police shooting and which should ensure that investigations of police-involved serious incidents are conducted properly. Specifically, I recommended:

- (1) Better crisis resolution and de-escalation training;
- (2) Better supervision of the PSU;
- (3) Better promotion of *Charter* values;
- (4) Better investigations by a SIRT; and
- (5) Better RNC communication with the public.

In concluding this Report, I want to reinforce my recommendations by a few brief comments from the Iacobucci Report. Justice Iacobucci emphasized the importance of highlighting communication and de-escalation in the recruit training curricula as “the most important and commonly used skills of the police officer”.⁴⁹⁹ He also noted the need to emphasize that the value of the life of a person in crisis should be recognized and protected as much as that of the police officer or other members of the public. Additionally, Justice Iacobucci reiterated what has been previously noted regarding the Use of Force Model: it is a code of conduct, which has a goal of not using lethal force, and a philosophy of using as little force as possible. The Model is not meant to be used as a justification for the use of any force.

In its final submission, the RNC accepted that there is room for improvement in its use of force training, particularly when it comes to de-escalation. However, I have some concern that this acceptance came grudgingly, stemming from what it saw as unfair criticism in the Coleman-Massine Report prepared at the Commission’s request. Justice Iacobucci saw cause to remark upon the assumption, within police forces, that only fellow police members understand the requirements of policing. He noted that this is an unfortunate attitude which “hinders self-improvement efforts and limits the receipt of valuable input from outsiders.”⁵⁰⁰

⁴⁹⁹ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis*, (Toronto: Toronto Police Services, 2014) at p 17.

⁵⁰⁰ Retired Justice Frank Iacobucci, *Police Encounters with People in Crisis*, (Toronto: Toronto Police Services, 2014) at p 124.

Whether my recommendations make a difference will depend upon whether the RNC seizes the opportunity arising from this crisis to embark upon a voyage of self-improvement. I encourage the force to embrace the modern approach to policing discussed here, which will see a greater emphasis upon de-escalation than previously. I note the RNC commitment in its statement of values to embracing change and continuing the professional development of each member through education and training.

The RNC needs to make a special effort to regain the public's trust. It must be open to change and be prepared to accept criticism as well-intentioned suggestions for self-improvement. Agreements arrived at during the Inquiry noted in the final submissions of the RNC and RNCA, regarding the need for CID training, better supervision of the PSU, and better investigations through SIRT, are good starting points. I ask the community to recognize that the RNC has a genuine desire for improvement. I ask the Province to provide the resources needed to permit the implementation of these recommendations. I believe, at the end of this process, that a much improved police force will be Donald Dunphy's legacy.

ACKNOWLEDGEMENTS

My co-counsel, Sandra Chaytor, Q.C.⁵⁰¹ and Kate O'Brien, worked extremely long hours, nights and weekends to make it possible to finish the Inquiry within the allotted time. Their dedication, careful attention to detail, close reviewing of thousands of documents, and professionalism in interviewing witnesses and presenting evidence made a daunting task bearable.

Our Chief Administrative Officer, Diane Blackmore, also available whenever needed, took empty, unfurnished space and turned it into very comfortable and efficient hearing space and offices, with the much appreciated assistance of Neil Croke of the Department of Justice and Public Safety. Diane also very capably handled the production of documents and kept our bills paid. Indispensable is the description which sums up her contribution.

When the enormity of the document management task became obvious, Ed Foran stepped in and, with Courtney Careen, and for a time Megan Rees, ensured that all exhibits were processed skillfully through TRIM (records information management system) and made ready for the hearing room. Ed also very efficiently managed the Inquiry's budgeting requirements.

Patricia Sheehan came out of retirement to give us the benefit of her many years as a Court Clerk. She mastered the intricacies of our exhibit management system in a very competent fashion and helped ensure the exhibits went in smoothly and efficiently.

Our legal team was very professionally assisted, as needed, by Allison Philpott, Gobhina Nagarajah, and Megan Taylor.

Our Audio Visual Services team of Don Brewer, Darren Churchill, Cathy Simms and Kevin McGrath kept new equipment and technology running very smoothly, while our transcriptionists of the House of Assembly competently produced the records of our proceedings with no delay.

Shannon Lewis-Simpson joined me close to the end of this process, lending her editorial skills and careful eye to the preparation of this Report.

⁵⁰¹ Now Justice Chaytor since her appointment on May 12, 2017, to the Trial Division of the Supreme Court of Newfoundland and Labrador.

I must acknowledge the professionalism of the journalists who participated in the process of informing the public on the Inquiry proceedings. They performed their task extremely well.

Finally I want to acknowledge and thank counsel for the parties, who tolerated a gruelling schedule with little complaint and who greatly contributed to the completion of the Inquiry. Their respectful approach to interaction with other counsel and witnesses is greatly appreciated and their thoughtful oral and written submissions were very helpful.

I thank all who participated. Your contribution was very much appreciated.

APPENDICES



SNL2006 CHAPTER P-38.1

PUBLIC INQUIRIES ACT, 2006

Amended:

2008 c47 s15; 2017 cP-3.01 s31

CHAPTER P-38.1**AN ACT TO REVISE THE LAW RESPECTING THE
CONDUCT OF PUBLIC INQUIRIES***(Assented to December 12, 2006)**Analysis*

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	INQUIRY
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31. RSNL1990 cP-38 Rep.

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

Short title

1. This Act may be cited as the *Public Inquiries Act, 2006*.

2006 cP-38.1 s1

Definitions

2. In this Act

- (a) "commission" means a commission of inquiry established under Part I;
- (b) "court" means the Trial Division;
- (c) "inquiry" means an inquiry conducted under Part II; and
- (d) "minister" means the minister appointed under the *Executive Council Act* to administer this Act.

2006 cP-38.1 s2

**PART I
COMMISSIONS OF INQUIRY**

Commissions of inquiry

3. (1) The Lieutenant-Governor in Council may by order establish a commission of inquiry to inquire and report on a matter that the Lieutenant-Governor in Council considers to be of public concern.

(2) Where a commission is established under subsection (1), the Lieutenant-Governor in Council shall, in the order,

- (a) appoint the members of the commission in accordance with section 21;
- (b) establish the jurisdiction of the commission by setting terms of reference for the inquiry;
- (c) designate the minister responsible for the inquiry; and

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(d) fix a date for the termination of the inquiry and for the delivery of the commission's report.

(3) Where it is in the public interest, the Lieutenant-Governor in Council may by order revise the terms of reference for the inquiry and revise the dates set for the termination of the inquiry and delivery of the commission's report.

2006 cP-38.1 s3

Reporting

4. (1) A commission shall deliver its report in writing to the minister designated by the Lieutenant-Governor in Council by the date fixed for delivery of the report under section 3.

(2) The minister referred to in subsection (1) shall release the report to the public.

2006 cP-38.1 s4

Participation at
inquiry

5. (1) A commission shall give those persons who believe they have an interest in the subject of the inquiry an opportunity to apply to participate.

(2) A commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering

- (a) whether the person's interests may be adversely affected by the findings of the commission;
- (b) whether the person's participation would further the conduct of the inquiry; and
- (c) whether the person's participation would contribute to the openness and fairness of the inquiry.

(3) A person who is permitted to participate in an inquiry may participate on his or her own behalf or be represented by counsel of his or her choice and, where an opportunity to appear before the commission is provided, may accompany and appear with his or her counsel.

(4) A commission shall not make a report against a person until the commission has given reasonable notice to the person of the charge

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of misconduct alleged against him or her and the person has been allowed full opportunity to be heard in person or by counsel.

(5) A commission may recommend that the government of the province provide funding for counsel and other expenses of a person who is permitted to participate in an inquiry.

(6) Where a commission makes a recommendation under subsection (5), the minister shall consider the recommendation and advise the person concerned of the decision of the government and the level of funding to be provided, if any.

2006 cP-38.1 s5

Public hearings

6. (1) A commission may decide whether evidence presented to the inquiry or a representation to the inquiry is to be oral or in writing.

(2) Where a commission holds an oral hearing it shall be conducted in public, but a commission may exclude the public from a hearing, or from part of it, where it decides that the public interest in holding the hearing, or a part of it, in public is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of a person to a fair trial.

2006 cP-38.1 s6

Media coverage

7. (1) A commission may arrange for the publishing or broadcast of its proceedings.

(2) A commission may by order restrict or prohibit the public reporting of its proceedings and the publishing of evidence at the inquiry where the commission decides that the public interest in reporting or publication is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of a person to a fair trial.

2006 cP-38.1 s7

Witnesses

8. (1) A person who appears before a commission to give testimony has the same immunities as a witness who appears before the court.

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(2) A person who is summoned to appear before a commission shall be paid for his or her appearance and any travel and other expenses reasonably incurred in relation to that appearance out of the Consolidated Revenue Fund in accordance with policies established by the Lieutenant-Governor in Council under section 29.

2006 cP-38.1 s8

Power to compel evidence

9. A commission may, by summons,

- (a) require a person to attend as a witness and give evidence, orally or in writing, on oath or by affirmation; and
- (b) require a person to produce to the commission or a person designated by the commission all documents, records, including documents or records maintained in electronic form, and things in his or her custody or control that may relate in any way to the subject of the inquiry.

2006 cP-38.1 s9

Power to inspect

10. (1) Where a commission believes it is reasonably necessary to the conduct of an inquiry, the commission, or a person whom the commission may authorize for the purpose, may

- (a) at reasonable times enter a premises to view or inspect the premises;
- (b) require the production of records, documents, including documents or records maintained in electronic form, or other things relating to the subject of the inquiry and may examine those records, documents or other things or remove them for the purpose of making copies of them; and
- (c) make inquiries of a person on the premises into all matters relating to the subject of the inquiry.

(2) Where a commission or a person authorized by the commission removes records, documents or other things under paragraph (1)(b), the commission or person shall give to the person from whom they were taken a receipt for them and shall immediately make copies of them where possible and return the originals to the person who was given the receipt.

2006 cP-38.1 s10

Power to search
with warrant

11. (1) Where a commission, or another person whom the commission may authorize for the purpose, is refused or denied entry onto a premises or the commission is of the opinion that entry without notice is necessary, and the commission has reasonable grounds to believe that entering and searching the premises will assist in the conduct of its inquiry, the commission may apply to the court, without giving notice to another person, for a warrant permitting the commission or a person named in the warrant to do those things referred to in section 10.

(2) A judge of the court, who is satisfied on oath or affirmation that there are reasonable grounds for believing that entering and searching the premises will assist in the conduct of an inquiry, may issue a warrant authorizing a commission or a person named in the warrant to enter the premises and search for and inspect anything that will assist in the conduct of an inquiry and to do all those things referred to in section 10.

2006 cP-38.1 s11

Evidentiary privi-
leges

12. (1) A person has the same privileges in relation to the disclosure of information and the production of records, documents or other things under this Act as the person would have in relation to the same disclosure and production in a court of law.

(2) Notwithstanding subsection (1) but subject to subsection (4), a rule of law that authorizes or requires the withholding of records, documents or other things or a refusal to disclose information, on the grounds that the disclosure would be injurious to the public interest or would violate Crown privilege, does not apply in respect of an inquiry under this Act.

(3) Notwithstanding subsection (1) but subject to subsection (4), a person shall not refuse to disclose information to a commission or a person authorized by a commission on the grounds that the disclosure is prohibited or restricted by another Act or regulation.

(4) Notwithstanding another provision of this section, subsections (2) and (3) do not apply to quality assurance information as defined in the *Patient Safety Act* in a proceeding in which evidence is or may be given before a committee of a governing body of a regulated health profession.

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2006 cP-38.1 s12; 2017 cP-3.01 s31

Application to court
for exclusion

13. (1) A person may apply to the court for an order excluding a person or a record, document or thing from the operation of subsections 12(2) and (3), and the court may, after considering the application and the submission of the commission and other interested parties, order that

- (a) the person may refuse to disclose information;
- (b) a record, document or thing may be withheld from the commission; or
- (c) the information shall be disclosed or the record, document or thing produced on conditions that the court may provide.

(2) There is no right of appeal from a decision of a judge made under this section.

2006 cP-38.1 s13

Contempt of com-
mission

14. Where a person without lawful excuse,

- (a) does not attend on being summoned under section 9 as a witness at an inquiry;
- (b) while in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation lawfully required by the commission to be taken or made, or to produce a document, record or thing in his or her custody or control lawfully required by the commission to be produced to it, or to answer a question to which the commission may lawfully require an answer;
- (c) contravenes an order of the commission under section 7 with respect to public reporting of its proceedings or the publishing of evidence; or
- (d) does any other thing that would, if the commission had been a court of law having power to commit for contempt, have been contempt of that court,

the commission may state a case to the court setting out the facts and the court may, on the application of the commission, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing a statement that may be offered in defense, punish or take steps for the punishment of that person in the same manner as if he or she had been guilty of contempt of the court.

2006 cP-38.1 s14

Request for direction

15. (1) A commission may apply to the court for direction on a question of law or on the jurisdiction of the commission.

(2) There is no right of appeal from a decision of a judge made under this section.

2006 cP-38.1 s15

PART II OTHER INQUIRIES

Order directing inquiry

16. (1) The Lieutenant-Governor in Council may order that there be an inquiry under this Part into a matter that the Lieutenant-Governor in Council considers to be of public concern.

(2) In an order made under subsection (1), the Lieutenant-Governor in Council shall direct how the inquiry is to be conducted, including

- (a) appointing one or more persons in accordance with section 21 to carry out the inquiry and submit a report;
- (b) specifying the mechanisms by which the inquiry is to be conducted, which may include
 - (i) interviews and surveys,
 - (ii) research studies,
 - (iii) inspections and investigations,
 - (iv) calling for written submissions, and

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- (v) informal or formal hearings;
- (c) designating the minister responsible for the inquiry; and
- (d) specifying the nature and scope of the report to be submitted by the person or persons appointed to conduct the inquiry.

2006 cP-38.1 s16

Reporting

17. (1) The person or persons appointed to conduct an inquiry under this Part shall deliver a report in writing to the minister designated by the Lieutenant-Governor in Council under paragraph 16(2)(c).

- (2) The minister shall release the report to the public.

2006 cP-38.1 s17

Designation of powers

18. (1) Where an inquiry is directed under section 16, the Lieutenant-Governor in Council may, by order,

- (a) direct that persons who believe they have an interest in the subject of the inquiry have a right to participate in the inquiry, and where it is so directed the person or persons appointed to conduct the inquiry have the powers of a commission under section 5 and that section applies to the inquiry, with the necessary changes;
- (b) direct whether the person or persons appointed under section 16 are to receive evidence and representations in writing or orally, and where oral hearings are held, whether subsection 6(2) applies;
- (c) direct that the person or persons appointed under section 16 may arrange for the publishing or broadcast of proceedings held by him or her or them and, where so directed, subsection 7(2) applies to the inquiry as if it was a commission of inquiry;
- (d) direct that the person or persons appointed under section 16 have the powers of a commission under section 9 to compel the production of testimony and evidence;

- (e) direct that the person or persons appointed under section 16 have the powers of a commission under section 10 to conduct inspections and, where so directed, subsection 10(2) applies as if the person or persons were commissioners;
- (f) direct that the person or persons appointed under section 16 have the power of a commission to apply for a warrant to search under section 11 and where so directed, subsection 11(2) applies as if the person or persons were commissioners; and
- (g) direct that the person or persons appointed under section 16 may apply to the court for direction under section 15 as if he or she or they were commissioners.

(2) An order made under this section shall be published in the *Gazette* and in a newspaper of general circulation in the province.

2006 cP-38.1 s18

Oral hearings

19. Where a person or persons appointed under section 16 hold oral hearings, sections 8 and 14 apply to the inquiry as if the person or persons were commissioners.

2006 cP-38.1 s19

Evidentiary privileges

20. Sections 12 and 13 apply to an inquiry held under this Part as if it was a commission of inquiry.

2006 cP-38.1 s20

PART III OTHER MATTERS

Appointment

21. (1) Members of a commission appointed under Part I or a person or persons appointed to conduct an inquiry under Part II shall be appointed on the terms and with the remuneration set by the Lieutenant-Governor in Council in the order of appointment.

(2) The Lieutenant-Governor in Council may terminate the appointment of a person under this Act if the person becomes mentally or physically incapable of performing his or her role.

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(3) A person appointed under this Act may resign by giving written notice to the Lieutenant-Governor in Council.

(4) The Lieutenant-Governor in Council may by order replace a person appointed under this Act who has resigned or whose appointment has been terminated because of incapacity.

(5) Where more than one person is appointed as a commissioner or to conduct an inquiry, the Lieutenant-Governor in Council may by order appoint one of them as chairperson.

2006 cP-38.1 s21

Commission fund-
ing

22. (1) Where a commission is established, the minister shall prepare an estimate of the expenditures required for the conduct of the inquiry in consultation with the commission.

(2) Where an amount is appropriated to defray the costs of an inquiry, the expenditures incurred by the commission in the conduct of the inquiry shall be paid out of the Consolidated Revenue Fund without further approval, except that the commission shall comply with the provisions of the *Financial Administration Act* relating to expenditures by departments and agencies of the government of the province and policies established by the Lieutenant-Governor in Council in respect of the inquiry under section 29.

(3) Where the terms of reference for the inquiry or the dates set for termination of the inquiry or delivery of the commission's report have been revised, the minister may prepare a revised estimate of expenditures and submit it for approval in the manner described in subsection (1), and subsection (2) applies to the further expenditures where the estimate is approved.

2006 cP-38.1 s22; 2008 c47 s15

Staff

23. (1) A commission or inquiry may engage the services of

(a) counsel, clerks, reporters and assistants; and

(b) other persons having special, technical or other expertise or knowledge.

(2) A commission or inquiry may authorize a person referred to in subsection (1) to inquire into a matter that is within the scope of the inquiry being conducted by the commission.

(3) A person authorized under subsection (2) has the same powers and immunities as the commission under section 24.

2006 cP-38.1 s23

Immunity

24. (1) A commission, commissioners, persons appointed to conduct an inquiry and legal counsel to a commission or inquiry engaged under section 23 have the same privileges and immunities as a judge of the court for a decision or action, or failure to act, in carrying out an inquiry under this Act.

(2) A person authorized by a commission or an inquiry to conduct an inspection or search under section 10 or 11 has the same privileges and immunity in relation to that inspection or search as the commission or inquiry.

2006 cP-38.1 s24

Protection of employees

25. An employer shall not take a discriminatory action against an employee by dismissing the employee, by deducting wages, salary or other benefits or by taking other disciplinary action against him or her because the employee has in good faith made representations as a party or has disclosed information, in oral testimony or otherwise, to a commission, to a person or persons appointed under section 16 or to staff or agents of either of them.

2006 cP-38.1 s25

Review of actions

26. A decision or action taken by a commission or by persons appointed under section 16 is final and conclusive for all purposes and

(a) shall not be challenged, reviewed, prohibited, restrained or quashed in a court; and

(b) is not subject to proceedings or process of a court, including prohibition, mandamus, injunction, declaration or certiorari.

2006 cP-38.1 s26

2006	<i>Public Inquiries Act, 2006</i>	<i>Chapter P-38.1</i>
Joint inquiries	<p>27. Where the scope of an inquiry conducted under this Act includes matters within the jurisdiction of the government of another province, or a territory or of Canada, the minister may enter into an agreement or arrangement with that government about the joint establishment of a commission or inquiry and the manner in which the inquiry is to be conducted by the joint commission or inquiry.</p>	2006 cP-38.1 s27
Preservation of records	<p>28. The Lieutenant-Governor in Council shall adopt policies and procedures for the preservation of the records of a commission or inquiry and shall ensure that confidentiality is preserved for information that is confidential or privileged.</p>	2006 cP-38.1 s28
Policies respecting remuneration and expenses	<p>29. The Lieutenant Governor in Council may, either generally for all commissions established and inquiries held under this Act, or for a particular commission or inquiry, establish policies respecting</p> <ul style="list-style-type: none"> (a) remuneration of commissioners; (b) remuneration of witnesses; (c) allowances to witnesses for travel and out of pocket expenses; (d) other expenditures for services and facilities; and (e) other administrative matters. 	2006 cP-38.1 s29
Other Acts giving powers of commissioner	<p>30. Where another Act confers upon a person or body the powers of a commission under this Act, the powers conferred on the person or body are those powers given under sections 9 and 10 unless otherwise ordered by the Lieutenant-Governor in Council.</p>	2006 cP-38.1 s30
RSNL1990 cP-38 Rep.	<p>31. The <i>Public Inquiries Act</i> is repealed.</p>	2006 cP-38.1 s31

2006

Public Inquiries Act, 2006

Chapter P-38.1

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**NEWFOUNDLAND AND LABRADOR
REGULATION 57/16**

*Commission of Inquiry Respecting the
Death of Mr. Donald Dunphy Order*
under the
Public Inquiries Act, 2006
(O.C. 2016-205)

(Filed September 23, 2016)

Under the authority of section 3 of the *Public Inquiries Act, 2006*, the Lieutenant-Governor in Council makes the following Order.

Dated at St. John's, September 23, 2016.

Bernard M. Coffey, Q.C.
Clerk of the Executive Council

ORDER

Analysis

- | | |
|--------------------------------------|--|
| 1. Short title | 4. Conclusion or recommendations limited |
| 2. Commission of inquiry established | 5. Final report |
| 3. Terms of reference | 6. Commencement |

Short title

1. This Order may be cited as the *Commission of Inquiry Respecting the Death of Mr. Donald Dunphy Order*.

Commission of inquiry established

2. There is established a commission of inquiry respecting the death of Mr. Donald Dunphy and the Honourable Leo Barry is appointed as the sole member of the commission.

*Commission of Inquiry Respecting the
Death of Mr. Donald Dunphy Order*

57/16

Terms of reference

3. (1) The commission of inquiry shall
- (a) inquire into the circumstances surrounding the death of Mr. Donald Dunphy, including
 - (i) the date, time and place of his death,
 - (ii) the cause of his death, and
 - (iii) the manner of his death;
 - (b) inquire into the reason why a Royal Newfoundland Constabulary officer attended upon Mr. Dunphy on the day of his death, including whether or not the officer was directed to do so, and if so directed, by whom and for what objective;
 - (c) ascertain what information provided the basis for the Royal Newfoundland Constabulary officer's attendance upon Mr. Dunphy on the day of his death, and the reliability, interpretation, evaluation, transmission and dissemination of that information;
 - (d) inquire into why the Royal Newfoundland Constabulary officer who attended upon Mr. Dunphy on the day of his death did so in an area of Royal Canadian Mounted Police jurisdiction, the criteria applied in reaching the decision to do so and the objective for the decision;
 - (e) inquire into the facts surrounding the command, control and implementation of any relevant police operation on the day of Mr. Dunphy's death, the actions of the Royal Newfoundland Constabulary officer during the operation and the actions of any other Royal Newfoundland Constabulary or Royal Canadian Mounted Police officers involved both before and after Mr. Dunphy's death;
 - (f) inquire into the circumstances under which the Royal Newfoundland Constabulary officer who fired the fatal shot or shots on the day of Mr. Dunphy's death came to discharge his weapon;

*Commission of Inquiry Respecting the
Death of Mr. Donald Dunphy Order*

57/16

- (g) inquire into whether the relevant use of force protocols were properly adhered to in the circumstance of Mr. Dunphy's death;
- (h) inquire into the relevant policies, protocols or manuals in force at the material time in either the Office of the Premier or the Royal Newfoundland Constabulary, including particularly any policies, protocols or manuals relating to
 - (i) the security of the Premier and Cabinet Ministers,
 - (ii) the monitoring of and response to social media, and
 - (iii) with respect to the Royal Newfoundland Constabulary, policies, protocols or manuals governing communications by members with the public or the media following serious incidents and during active investigations;
- (i) inquire whether Mr. Dunphy's use of social media had any role in the circumstances of his death;
- (j) ascertain whether there were any material deficiencies in the investigation into Mr. Dunphy's death; and
- (k) in accordance with section 4, make recommendations that the commission of inquiry considers necessary and advisable relating directly to the matters of public concern referred to in this section.

(2) The commission of inquiry, in carrying out the terms of reference referred to in subsection (1), shall consider the following:

- (a) the need to maintain public confidence in law and order;
- (b) the need to protect fundamental rights of citizens;
- (c) the powers, duties and responsibilities of police; and
- (d) the need to ensure the safety of police officers in the execution of their duties.

*Commission of Inquiry Respecting the
Death of Mr. Donald Dunphy Order*

57/16

- | | |
|---------------------------------------|---|
| Conclusion or recommendations limited | 4. The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization. |
| Final report | 5. The commission of inquiry shall terminate its work and deliver the final report to the Minister of Justice and Public Safety, who shall be the minister responsible for the commission of inquiry, before July 1, 2017. |
| Commencement | 6. This Order comes into force on September 23, 2016. |

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Justice and Public Safety

September 23, 2016

**Provincial Government Establishes Public Inquiry
into the Death of Donald Dunphy**

The Honourable Andrew Parsons, Minister of Justice and Public Safety and Attorney General, today announced the appointment of the Honourable Justice Leo Barry of the Court of Appeal as Commissioner for a Commission of Inquiry respecting the death of Mr. Donald Dunphy in accordance with Part 1 of the *Public Inquiries Act, 2006*. The Terms of Reference for the inquiry, also announced today, are provided in the backgrounder below.

“It is critical that the family of Mr. Dunphy and the citizens of our province be provided answers to the many questions that remain regarding the facts and circumstances of Mr. Dunphy’s death. The Terms of Reference have been determined in consideration of the many questions that have been raised in the public domain, in consultation with our Chief Justices and Justice Barry. I thank Justice Barry for accepting the duties of commissioner and am confident he will ensure a full and complete inquiry into this tragic incident.”
- The Honourable Andrew Parsons, Minister of Justice and Public Safety and Attorney General

Justice Leo Barry has been a judge of the Supreme Court of Newfoundland and Labrador since 1989 and on the Court of Appeal since 2007. In those 27 years he has heard many criminal and civil cases. Justice Barry will begin his work as commissioner immediately and will deliver a final report to the Minister of Justice and Public Safety before July 1, 2017.

A Commission of Inquiry under Part 1 of the *Public Inquiries Act, 2006* is given broad authority to determine its own procedures. The commission has the power to issue a summons to compel a person to attend a hearing or to produce a document. The inquiry will not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

“While the purpose of the inquiry is to examine the facts and circumstances of the death of Mr. Dunphy, there have also been questions regarding his history with Workplace NL. Following consultation with the Dunphy family’s lawyer, we are referring the history and treatment of Mr. Dunphy’s case by Workplace NL to the Office of the Citizens’ Representative for investigation.”
- Minister Parsons

It has been requested that the Office of the Citizens’ Representative begin the investigation immediately.

QUICK FACTS

- A Commission of Inquiry respecting the death of Mr. Donald Dunphy has been established in accordance with Part 1 of the *Public Inquiries Act, 2006*.
- The Honourable Justice Leo Barry of the Court of Appeal is appointed as inquiry commissioner.
- Justice Barry will begin his work immediately and will deliver a final report to the Minister of Justice and Public Safety before July 1, 2017.
- The Commission of Inquiry will inquire as to the facts and circumstances regarding the death of Mr. Dunphy.
- In addition to the establishment of a Commission of Inquiry, Minister Parsons also announced the referral of the history and treatment of Mr. Dunphy's case with Workplace NL to the Office of the Citizens' Representative for investigation.

- 30 -

Media contact:

Jacquelyn Howard

Director of Communications

Department of Justice and Public Safety

709-729-6985, 689-2624

jacquelynhoward@gov.nl.ca

BACKGROUNDER Terms of Reference

- (1) The commission of inquiry shall
 - a. inquire into the circumstances surrounding the death of Mr. Donald Dunphy, including
 - i. the date, time and place of his death,
 - ii. the cause of his death, and
 - iii. the manner of his death;
 - b. inquire into the reason why a Royal Newfoundland Constabulary officer attended upon Mr. Dunphy on the day of his death, including whether or not the officer was directed to do so, and if so directed, by whom and for what objective;
 - c. ascertain what information provided the basis for the Royal Newfoundland Constabulary officer's attendance upon Mr. Dunphy on the day of his death, and the reliability, interpretation, evaluation, transmission and dissemination of that information;
 - d. inquire into why the Royal Newfoundland Constabulary officer who attended upon Mr. Dunphy on the day of his death did so in an area of Royal Canadian Mounted Police jurisdiction, the criteria applied in reaching the decision to do so and the objective for the decision.

-
- e. inquire into the facts surrounding the command, control and implementation of any relevant police operation on the day of Mr. Dunphy's death, the actions of the Royal Newfoundland Constabulary officer during the operation and the actions of any other Royal Newfoundland Constabulary or Royal Canadian Mounted Police officers involved both before and after Mr. Dunphy's death;
 - f. inquire into the circumstances under which the Royal Newfoundland Constabulary officer who fired the fatal shot or shots on the day of Mr. Dunphy's death came to discharge his weapon;
 - g. inquire into whether the relevant use of force protocols were properly adhered to in the circumstance of Mr. Dunphy's death;
 - h. inquire into the relevant policies, protocols or manuals in force at the material time in either the Office of the Premier or the Royal Newfoundland Constabulary, including particularly any policies, protocols or manuals relating to
 - i. the security of the Premier and Cabinet Ministers,
 - ii. the monitoring of and response to social media, and
 - iii. with respect to the Royal Newfoundland Constabulary, policies, protocols or manuals governing communications by members with the public or the media following serious incidents and during active investigations;
 - i. inquire whether Mr. Dunphy's use of social media had any role in the circumstances of his death;
 - j. ascertain whether there were any material deficiencies in the investigation into Mr. Dunphy's death; and
 - k. in accordance with section 4, make recommendations that the commission of inquiry considers necessary and advisable relating directly to the matters of public concern referred to in this section.

- (2) The commission of inquiry, in carrying out the terms of reference referred to in subsection (1), shall consider the following:
- a. the need to maintain public confidence in law and order;
 - b. the need to protect fundamental rights of citizens;
 - c. the powers, duties and responsibilities of police; and
 - d. the need to ensure the safety of police officers in the execution of their duties.

The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

The commission of inquiry shall terminate its work and deliver the final report to the Minister of Justice and Public Safety, who shall be the minister responsible for the commission of inquiry, before July 1, 2017.

2016 09 23

12:15 p.m.

Justice and Public Safety
September 30, 2016

The following is being distributed at the request of the Commission of Inquiry Respecting the Death of Donald Dunphy:

Co-Counsel Appointed for Commission of Inquiry Respecting the Death of Donald Dunphy

Sandra. R. Chaytor, QC, and Kate O'Brien have been appointed as co-counsel for the Commission of Inquiry Respecting the Death of Donald Dunphy, the Honourable Justice Leo Barry, Commissioner of the Inquiry, announced today.

Ms. Chaytor was admitted to the Bar of Newfoundland and Labrador in 1989 having completed a Bachelor of Arts degree at Memorial University in 1985 and having obtained her LL.B from Osgoode Hall Law School in 1988. She was appointed Queen's Counsel in 2007, the same year she was appointed co-counsel to the Commission of Inquiry on Hormone Receptor Testing, an inquiry in Newfoundland and Labrador which investigated errors in breast cancer testing. In 2010, she was appointed a Master and Taxing Officer of the Supreme Court of Newfoundland and Labrador. Ms. Chaytor is Deputy Managing partner of the St. John's office of Cox & Palmer where her primary area of practice is litigation. She has presented cases at all levels of court within the province of Newfoundland and Labrador as well as the Supreme Court of Canada.

Ms. O'Brien was admitted to the Bar of Ontario in 2003 and the Bar of Newfoundland and Labrador in 2004 having obtained her LL.B. from the University of British Columbia in 2002. She completed a Bachelors of Engineering from Memorial University in 1996. Ms. O'Brien is a partner at the law firm of O'Brien White where she provides a range of legal services to individuals and businesses. She is an experienced litigator and has appeared at all levels of court in Newfoundland and Labrador.

The Commission of Inquiry Respecting the Death of Donald Dunphy was established by the Government of Newfoundland and Labrador on September 23, 2016, in accordance with Part 1 of the *Public Inquiries Act, 2006*. The Terms of Reference for the inquiry are as follows:

- (1) The commission of inquiry shall
 - (a) inquire into the circumstances surrounding the death of Mr. Donald Dunphy, including
 - (i) the date, time and place of his death,
 - (ii) the cause of his death, and
 - (iii) the manner of his death;

-
- (b) inquire into the reason why a Royal Newfoundland Constabulary officer attended upon Mr. Dunphy on the day of his death, including whether or not the officer was directed to do so, and if so directed, by whom and for what objective
 - (c) ascertain what information provided the basis for the Royal Newfoundland Constabulary officer's attendance upon Mr. Dunphy on the day of his death, and the reliability, interpretation, evaluation, transmission and dissemination of that information;
 - (d) inquire into why the Royal Newfoundland Constabulary officer who attended upon Mr. Dunphy on the day of his death did so in an area of Royal Canadian Mounted Police jurisdiction, the criteria applied in reaching the decision to do so and the objective for the decision;
 - (e) inquire into the facts surrounding the command, control and implementation of any relevant police operation on the day of Mr. Dunphy's death, the actions of the Royal Newfoundland Constabulary officer during the operation and the actions of any other Royal Newfoundland Constabulary or Royal Canadian Mounted Police officers involved both before and after Mr. Dunphy's death;
 - (f) inquire into the circumstances under which the Royal Newfoundland Constabulary officer who fired the fatal shot or shots on the day of Mr. Dunphy's death came to discharge his weapon;
 - (g) inquire into whether the relevant use of force protocols were properly adhered to in the circumstance of Mr. Dunphy's death;
 - (h) inquire into the relevant policies, protocols or manuals in force at the material time in either the Office of the Premier or the Royal Newfoundland Constabulary, including particularly any policies, protocols or manuals relating to
 - (i) the security of the Premier and Cabinet Ministers,
 - (ii) the monitoring of and response to social media, and
 - (iii) with respect to the Royal Newfoundland Constabulary, policies, protocols or manuals governing communications by members with the public or the media following serious incidents and during active investigations;
 - (i) inquire whether Mr. Dunphy's use of social media had any role in the circumstances of his death;
 - (j) ascertain whether there were any material deficiencies in the investigation into Mr. Dunphy's death; and
 - (k) in accordance with section 4, make recommendations that the commission of inquiry considers necessary and advisable relating directly to the matters of public concern referred to in this section.
- (2) The commission of inquiry, in carrying out the terms of reference referred to in subsection (1), shall consider the following:
- (a) the need to maintain public confidence in law and order;
 - (b) the need to protect fundamental rights of citizens;
 - (c) the powers, duties and responsibilities of police; and
 - (d) the need to ensure the safety of police officers in the execution of their duties.
-

The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

The commission of inquiry shall terminate its work and deliver the final report to the Minister of Justice and Public Safety, who shall be the minister responsible for the commission of inquiry, before July 1, 2017.

Further details will be provided in the coming weeks in relation to the commission office, as well as a Notice of Hearings for Standing and Funding.

- 30 -

Media contact:
Diane Blackmore
Chief Administrative Officer
709-729-0403 (as of October 4, 2016)
709-738-7800 (c/o Cox & Palmer)

2016 09 30

3:40 p.m.



RULES OF PROCEDURE AND PRACTICE

COMMISSION OF INQUIRY RESPECTING THE DEATH OF DONALD DUNPHY

Introduction

A Commission of Inquiry respecting the death of Donald Dunphy has been established in accordance with Part I of the *Public Inquiries Act, 2006*. Pursuant to the Terms of Reference dated September 23, 2016, the Commission shall inquire as to the facts and circumstances regarding the death of Donald Dunphy.

I. Standing and Funding

A. General

1. Pursuant to s. 5(2) of the *Public Inquiries Act, 2006*, persons or groups may be granted standing by the Commissioner, after considering:
 - (a) whether the person's interest may be adversely affected by the findings of the Commission;
 - (b) whether the person's participation would further the conduct of the Inquiry; and
 - (c) whether the person's participation would contribute to the openness and fairness of the Inquiry.
2. Commission counsel, who will assist the Commissioner throughout the Inquiry and are to ensure the orderly conduct of the Inquiry, have standing throughout the Inquiry. Commission counsel have the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all interests that bear on the public interest are brought to the Commissioner's attention.

3. In order to avoid duplication, and thereby promote time and cost efficiencies, groups of similar interest are encouraged to seek joint standing.
4. The Commissioner will determine the extent to which a party granted standing might participate.
5. The term “party” is used to convey the grant of standing and is not intended to convey notions of an adversarial proceeding.
6. Counsel representing any witness called to testify before the Commission may participate during the hearing of such evidence.

B. Applications for Standing

7. Applications for standing should be made in writing via email, facsimile, or regular mail to the Commission and provide information as to how the applicant satisfies the criteria for standing set out in Rule 1.

C. Applications for Funding

8. The Commissioner may make recommendations to the Attorney General regarding funding to parties who have been granted standing.
9. Applications for funding should be made in writing via email, facsimile, or regular mail to the Commission and should provide the following information:
 - (a) An affidavit stating whether an applicant would not otherwise be able to participate without such funding supported by relevant documentation, which may include financial information and, for organizations, financial statements, operating budgets, the number of members and membership fee structure. Applicants should also indicate whether they have contacted other groups or individuals to bring them into an amalgamated group, and the results of those contacts;
 - (b) A description of the purposes for which the funds are required, how the funds will be disbursed and how they will be accounted for;
 - (c) A statement of the extent to which the applicant will contribute its own funds and personnel to participate in the Inquiry; and

- (d) The name, address, telephone number and position of the individual who will be responsible for administering the funds, and a description of the financial controls put in place to ensure that the funds are disbursed for the purposes of the Inquiry.

II. Rules Pertinent to Hearings and Production of Evidence

A. General

10. (a) Public hearings will be convened at 425 Topsail Road, St. John's, NL, (formerly the Newfoundland School for the Deaf) or such other locations as the Commissioner designates, to address issues related to the Inquiry.
- (b) In the ordinary course, parties will participate in the public hearings by attendance in person by themselves and/or their counsel. However, in appropriate circumstances, as determined by the Commissioner, a party may be permitted to participate in the public hearings by way of videoconference or teleconference.
11. All parties and their counsel shall be deemed to undertake to adhere to these Rules, which may be amended or dispensed with by the Commission as it sees fit to ensure fairness. Any party may raise any issue of non-compliance with the Commissioner.
12. The Commissioner shall deal with a breach of these Rules as he sees fit including, but not restricted to, revoking the standing of a party or imposing restrictions on the further participation in or attendance at the hearings by any party, counsel, individual, or members of the media.
13. Insofar as it needs to gather evidence, the Commission is committed to a process of public hearings. However, applications on some aspects of its mandate may be made to proceed *in camera* in accordance with s. 6(2) of the *Public Inquiries Act, 2006*. Such applications should be made in writing at the earliest possible opportunity pursuant to the provisions of Section II (B) (vi).
14. Subject to the *Public Inquiries Act, 2006*, the conduct of and the procedure to be followed on the Inquiry is under the control and discretion of the Commissioner.
15. The Commissioner may extend or abridge any time prescribed by these Rules.

B. Evidence

(i) *General*

16. In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a party may apply to the Commissioner to lead a particular witness' evidence in chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness.
17. The Commission is entitled to receive any relevant evidence at the Inquiry which might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.
18. The Commission may admit at the Inquiry documentary evidence not given under oath or affirmation.
19. Parties are encouraged to provide to Commission counsel the names and addresses of all witnesses they believe ought to be heard within fourteen (14) days of that party having been granted standing together with a brief statement of the relevance of the witness to the Inquiry.
20. Commission counsel have discretion to refuse to call or present evidence.
21. When Commission counsel indicate that they have called the witnesses whom they intend to call in relation to a particular issue, a party may then apply to the Commissioner for leave to call a witness whom the party believe has evidence relevant to that issue. If the Commissioner is satisfied that the evidence of the witness is necessary, Commission counsel shall call the witness to testify.

(ii) *Witnesses*

22. Anyone interviewed by or on behalf of Commission counsel is entitled, but not required, to have personal counsel present for the interview to represent his or her interests. All interviews will be audio-recorded.
23. Witnesses will give their evidence at a hearing under oath or affirmation.
24. In the ordinary course, witnesses will give their evidence at a hearing in person but in appropriate circumstances, as determined by the Commissioner, a witness may be permitted to give testimony via videoconference or teleconference.
25. If special arrangements are desired by a witness in order to facilitate the comfort of the witness in testifying, a request for accommodation shall be made to the Commission sufficiently in advance of the scheduled appearance of the witness to

reasonably facilitate such a request. While the Commission will make reasonable efforts to accommodate such requests, the Commissioner retains ultimate discretion as to whether, and to what extent, such requests will be accommodated.

26. Witnesses may be interviewed by Commission counsel or called to give evidence more than once.

(iii) *Order of Examination*

27. The order of examination will be as follows:

- (a) Subject to Rule 16, Commission counsel will adduce the evidence from the witness. Except as otherwise directed by the Commissioner, Commission Counsel are entitled to adduce evidence by way of leading and non-leading questioning;
- (b) parties granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination will be determined by the parties having standing and if they are unable to reach agreement, by the Commissioner;
- (c) counsel for a witness, regardless of whether or not counsel is also representing a party, will examine last, unless he or she has adduced the evidence of that witness in chief, in which case there will be a right to re-examine the witness; and
- (d) Commission counsel will have the right to re-examine.

(iv) *Access to Evidence*

28. All evidence shall be categorized and marked P for public sittings and, if necessary, C for sittings *in camera*.
29. Prior to beginning of each day of the hearing, one hard copy of the anticipated P exhibits for that day will be available to be shared by the media.
30. A transcript and the P exhibits for each day of hearing will be posted to the Commission's website which will be fully accessible to the parties, the public and the media.
31. Only those persons authorized by the Commissioner, in writing, shall have access to C transcripts and exhibits.

(v) *Documents*

32. All relevant documents are to be produced to the Commission by any party with standing where the documents are in the possession, control or power of the party within fourteen (14) days of that party having been granted standing. Documents should be provided in paper and electronic format. The obligation to produce all relevant documentation is an ongoing and continuing one throughout the course of the Inquiry. Where a party discovers relevant documents subsequent to the initial disclosure, that party shall notify Commission counsel immediately of the existence and nature of those documents and produce the documents to the Commission within three (3) days of discovery.
33. Where a party objects to the production of any document on the grounds of privilege, the document shall be produced in its original unedited form to Commission counsel who will review and determine the validity of the privilege claim. The party and/or that party's counsel may be present during the review process. Such review by Commission counsel shall not be deemed to be a waiver of the claim to privilege. In the event the party claiming privilege disagrees with Commission counsel's determination, the Commissioner, on application, may either inspect the impugned document(s) and make a ruling or may direct the issue to be resolved by the procedure established under s. 13 of the *Public Inquiries Act, 2006*.
34. The term "documents" is intended to have a broad meaning, and includes the following: written, electronic, text, cellular or social media messaging, audiotape, videotape, digital reproductions, photographs, films, slides, maps, graphs, microfiche and any data and information recorded or stored by means of any device.
35. Originals of relevant documents are to be provided to Commission counsel upon request.
36. Counsel to parties and witnesses will be provided with documents and information, including statements of anticipated evidence, only upon giving an undertaking that all such documents or information will be used solely for the purpose of the Inquiry and, where the Commission considers it appropriate, that its disclosure will be further restricted. The Commission may require that documents provided, and all copies made, be returned to the Commission if not tendered in evidence. Counsel are entitled to provide such documents or information to their respective clients only on terms consistent with the undertakings given, and upon the clients entering into written undertakings to the same effect. These undertakings will be of no force regarding any document or information once it has become part of the public record. The Commission may, upon application, exempt from the provisions of the undertaking, any document or other information, in whole or in part.

37. Subject to any requirement to disclose by law, documents received from a party, or any other organization or individual, shall be treated as confidential by the Commission unless and until they are made part of the public record or the Commissioner otherwise declares. This does not preclude the Commission from producing a document to a proposed witness prior to the witness giving his or her testimony or as part of the investigation being conducted.
38. Subject to Rule 36, Commission counsel will endeavour to provide in advance to both the witness and to the parties with standing documents that will likely be referred to during the course of the testimony of that witness, and a brief written statement of anticipated evidence of that witness. Commission counsel will also endeavour to provide to the witness, and to any parties upon request, a copy of the audio recording of the witness' interview with Commission counsel.
39. Parties shall, at the earliest opportunity, provide to Commission counsel a copy of any documents that they intend to file as exhibits or otherwise refer to during the hearings, and in any event shall provide such documents no later than 48 hours prior to the day the document will be referred to or filed.
40. A party who believes that Commission counsel has not provided copies of relevant documents must bring this to the attention of Commission counsel at the earliest opportunity. The object of this rule is to prevent witnesses from being surprised with a relevant document that they have not had an opportunity to examine prior to their testimony. If Commission counsel decides the document is not relevant, it shall not be produced as a relevant document. This does not preclude the document from being used in cross-examination by any of the parties. Before such a document may be used for the purposes of cross-examination, a copy must be made available to all parties by counsel intending to use it not later than 48 hours prior to the testimony of that witness, subject to the discretion of the Commissioner.

(vi) *Confidentiality*

41. If the proceedings are televised, streamed through the internet, or broadcast by some other medium, applications may be made for an order that the evidence of a witness not be televised, streamed or broadcast.
42. Without limiting the application of s. 6 of the *Public Inquiries Act, 2006* the Commissioner may, in his discretion and in appropriate circumstances, exclude the public from a hearing or from part of it, where he decides that the public interest in holding the hearing, or a part of it, in public is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of a person to a fair trial.
43. Witnesses may apply to the Commissioner for measures aimed at protecting their identity for a compelling reason as determined in the sole discretion of the

Commissioner. Upon a successful application to the Commissioner the witness may be granted the status of “Confidentiality”. For the purposes of the Inquiry, Confidentiality may include the right to have their identity disclosed only by way of non-identifying initials, and, if the individual so wishes, the right to testify before the Commission in private, together with any other privacy measures which the party may request and the Commissioner, in his discretion, grants. Subject further to the discretion of the Commissioner, only the Commissioner, Commission staff and counsel, counsel for the parties with standing, counsel for the witness who has been granted confidentiality and media representatives may be present during testimony being heard in private.

44. A witness who is granted Confidentiality shall be identified in the public records, transcripts of the hearing and any reports of the Commission by non-identifying initials.
45. Media reports relating to the evidence of a witness granted Confidentiality shall avoid references that might reveal the identity of the witness. No photographic, audio, visual or other reproduction of the witness shall be made either during the witness’ testimony or upon his or her entering and leaving the site of the Inquiry.
46. Any witness who is granted Confidentiality will reveal his or her name to the Commission and counsel participating in the Inquiry in order that the Commission and counsel can prepare to question the witness. The Commission and counsel shall maintain confidentiality of the names revealed to them. Such information shall not be used for any other purpose either during or after the completion of the Commission’s mandate.
47. Any witness who is granted Confidentiality may either swear an oath or affirm to tell the truth using the non-identifying initials given for the purpose of the testimony of the witness.
48. All parties, their counsel, Commission staff and contracted service providers, and media representatives shall be deemed to undertake to adhere to the rules respecting Confidentiality.

(vii) *Section 5(4) Notices*

49. The Commission will deliver notices pursuant to s. 5(4) of the *Public Inquiries Act, 2006* after information about alleged misconduct has come to the attention of the Commission that *may* give rise to findings of misconduct. These will be delivered on a confidential basis to the persons or parties to whom they relate or to their counsel if such counsel has been identified to Commission Counsel. Supplementary notices may be delivered from time to time by the Commission as warranted by the information before it.

50. If any party believes that it is necessary to adduce documentary evidence or to call evidence to respond to allegations of possible misconduct for which a notice under s. 5(4) of the *Public Inquiries Act, 2006* has been received, then that party may apply for leave to call that evidence or may request that Commission counsel call such evidence. If relevant and responsive to issues raised in the s. 5(4) notice, leave will be given. Cross-examination in respect of such evidence shall be limited to matters adduced in evidence during the examination in chief of the witness, except with leave of the Commissioner.

C. Service

51. Documents may be served on a party by:
- i. Email or facsimile to the party's legal counsel with acknowledgement of receipt;
 - ii. Personal service or an alternative to personal service in accordance with the *Rules of the Supreme Court, 1986*;
 - iii. Any other such method as mutually agreed between Commission counsel and the party or the party's legal counsel;
 - iv. Or as otherwise directed by the Commissioner.



NOTICE OF HEARING

COMMISSION OF INQUIRY INTO THE DEATH OF DONALD DUNPHY

The Honourable Justice Leo Barry has been appointed as Commissioner of the Inquiry into the Death of Donald Dunphy. The Inquiry has been established in accordance with Part I of the *Public Inquiries Act, 2006*. Pursuant to the Terms of Reference dated September 23, 2016, the Commission shall inquire as to the facts and circumstances regarding the death of Donald Dunphy. The full text of the Commission's Terms of Reference may be found on the Commission's website or obtained by contacting the Commission. Contact information is below.

Applications by interested individuals and organizations for standing and/or funding in relation to the Inquiry will be heard commencing at 10:00 a.m. on **October 19, 2016**, at the Commission offices located at 425 Topsail Road, St. John's, Newfoundland and Labrador. **NO EVIDENCE WILL BE HEARD AT THAT TIME.**

The Commissioner shall determine which individuals and organizations have standing. The criteria for standing are set out in the *Public Inquiries Act, 2006* and the Commission's Rules of Procedure and Practice. These documents may be found on the Commission's website or obtained by contacting the Commission.

The Commissioner shall make a recommendation to the Government of Newfoundland and Labrador with respect to funding. The criteria that the Commissioner will consider in making such a recommendation are set out in the Commission's Rules of Procedure and Practice.

Applications for standing and/or funding are to be submitted to the Commission by 4:30 p.m. on **October 14, 2016**, via mail, facsimile or email.

The contact information for the Commission is:

COMMISSION OF INQUIRY INTO THE DEATH OF DONALD DUNPHY

Unit 1, 425 Topsail Road

St. John's, NL A1E 5N7

Tel: 709-729-0403

Fax: 709-729-0426

E-mail: admin@ciddd.ca

[Website: www.ciddd.ca](http://www.ciddd.ca)



Commission of Inquiry Respecting the Death of Donald Dunphy

NOTICE TO PUBLIC

The Commission of Inquiry Respecting the Death of Donald Dunphy will be hearing individuals and organizations who have applied for standing and/or funding in relation to the Inquiry.

The hearing of these applications will be heard commencing at 10:00 a.m. on **October 19, 2016**, at the Commission's hearing room located at 425 Topsail Road, St. John's (former School for the Deaf). **NO EVIDENCE WILL BE HEARD AT THIS TIME.**

The hearing is open to the public and will also be webcast via the Commission website at www.ciddd.ca.

Commissioner's Opening Remarks
Hearing of Applications for Standing and Funding
October 19, 2016

1. Introduction

Good morning. My name is Leo Barry. On September 23, 2016, I was appointed as Commissioner of the Commission of Inquiry Respecting the Death of Mr. Donald Dunphy. I am also a Justice of the Supreme Court of Newfoundland and Labrador, Court of Appeal.

This is the first public session of the Commission and I welcome those present in the Hearing Room, as well as those joining us on-line by webcast.

Before we commence hearing on the Standing and Funding applications, I want to take a few minutes to tell you what has been happening since the Commission was established and how I plan to proceed with the work of the Commission in the future.

2. Independence

In this Province, Commissions of Inquiry are established by Orders-in-Council issued under the authority of the *Public Inquires Act, 2006*. While Government makes the decision to appoint a Commission of Inquiry, the Commission is independent of Government.

I was not selected to be the Commissioner by Government. Government asked the Chief Justice of Newfoundland and Labrador to put forward the name of a Supreme Court Justice for the position. The Chief Justice put forward my name. I, in turn, selected the Commission staff. I will introduce you to them in a moment.

Independence is a founding principle for this Commission and it will continue to be a guiding principle as we do our work. I will speak more later about some of the measures we have taken to ensure our independence.

3. What a Public Inquiry Does

First, I would like to speak to you about what a Public Inquiry does. The Cameron Inquiry Report has been helpful in this regard. A Public Inquiry is an official review of events or issues of public concern or importance. Its purpose is to establish the facts and causes of an event or issue to determine what went wrong, or what went right, and then to make recommendations to the Government so as to avoid any similar errors, or to improve on responses to similar events, in the future.

The specific Terms of Reference for this Commission of Inquiry are public and can be found on our website at www.ciddd.ca. We will be inquiring into the shooting death of

Mr. Donald Dunphy by Royal Newfoundland Constabulary Officer Constable Joseph Smyth on April 5, 2015, at Mr. Dunphy's home in Mitchells Brook, St. Mary's Bay. We will be inquiring into a number of aspects of that event as are more particularly detailed in the Terms of Reference, which I encourage you to review. I want to specifically mention what this Commission will not do. Although I will make recommendations, I will not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization. However, because the fact-finding role of the Commission means that individuals or organizations may find their reputations at risk, the principle of procedural fairness requires that due process safeguards be followed by this Commission, and they will be.

4. How the Inquiry is to Proceed

The Order-in-Council which created the Commission requires that I deliver my final report to the Minister of Justice and Public Safety before July 1, 2017. As this gives an approximately nine month window, we have been moving quickly since the Commission's appointment. Key members of our team have been put in place, we have established offices here in this building at 425 Topsail Road, and Commission Counsel have begun gathering evidence and identifying potential witnesses. We have also developed Rules of Procedure and Practice, which are published on our website.

Although the exact dates of the public hearings have not been finalized, we have tentatively reserved January and February 2017. Parties with standing will be consulted as to schedule and, as our schedule is formalized, it will be posted to our website.

Our hearings will be conducted in the traditional manner of public inquiries in this Province. Witnesses will be called and, in the normal course, examined by Commission counsel and then cross-examined by parties who have standing, if they wish. Our Hearing Room will be open to the public and the hearings will be simultaneously webcast on our website. Transcripts of the proceedings and exhibits entered into evidence at the public hearings will also be posted to our website.

5. A Word about Transparency, Privacy and Consultation

As you will have noted, this will be a public affair and the Commission is dedicated to being transparent and accountable, as well as, efficient and fair. That being said, we will be inquiring into traumatic events that involved people; people with privacy interests and concerns. So while we will be making most of the information we receive public, there are times that information may be vetted or withheld so as to protect the privacy interests of those involved. This will not be done in such a way as to impede the inquiry or the parties' ability to analyze and test the evidence.

I intend to consult with parties who are granted standing before this Commission on issues that I believe may impact them. Counsel for parties who are granted standing should feel free to give their thoughts and feedback about our procedure and processes through Commission counsel. In some cases, we will seek out such input directly.

For example, Commission counsel will be carrying out pre-hearing interviews of potential witnesses. It is intended that, to the extent possible, witnesses will be provided with documentation that may be relevant to their evidence, prior to being interviewed by Commission counsel. If any of the parties or their counsel have concerns about this proposed procedure, please advise Commission counsel as soon as possible.

Similarly, I am considering releasing some documentation to the public prior to the commencement of the hearings in January. In particular: the investigative reports and findings of the Royal Canadian Mounted Police, the Royal Newfoundland Constabulary, former Justice David Riche, the Alberta Serious Incident Response Team and the Saskatoon Police Service. I request that counsel for parties who are granted standing after today's proceeding, give their feedback on this proposal either to me today or to Commission counsel as soon as possible.

Specifically with respect to privacy concerns, if at any time parties who provide evidence to the Commission have concern that some of the information they have provided may contain private or sensitive information that they believe should be vetted, I ask that they notify Commission counsel of this fact as soon as possible. All input will be considered.

6. Focusing on the Issues and Caution re Public Discussion of Evidence

The Commission's Terms of Reference are specific. To ensure a responsible spending of public funds and an efficient process, I will be insisting that our work, including the efforts of Commission counsel and the Parties with Standing, focus on the specific areas of inquiry listed in that document. For example, we will not be inquiring in detail into Mr. Dunphy's experiences with WorkplaceNL. I understand that the history and treatment of Mr. Dunphy's case by WorkplaceNL has been referred to the Office of the Citizens' Representative for investigation. I ask that all parties respect our Terms of Reference.

I also ask all parties and their counsel to remain aware that fairness may demand that certain evidence, for example, that relating to the credibility of witnesses, not be dealt with publicly until the complete context has been provided.

7. Introduction of Commission Staff

I would now like to introduce you to the Commission Staff. Shortly after I was appointed I began to assemble a team to assist in the work of the Commission.

Ms. Diane Blackmore is our Chief Administrative Officer who oversees our office and all administrative matters.

Co-counsel are Sandra Chaytor, Q.C., of the firm Cox & Palmer, and Kate O'Brien, of the firm O'Brien White. As I have already mentioned, they have begun the process of

meeting with persons who can provide us with information and gathering documentation.

You can find the contact particulars for all of our staff on the Commission's website.

8. A Few Operational Matters

Finally, I want to mention a few specific operational matters before we commence hearing the applications this morning.

Computer Systems

First, I want to advise every one of some of the measures we have taken to protect the Commission's documents and data. While we are independent of Government, Government is providing some of the infrastructure that the Commission is using, including our computer systems, server and support. These information technology supports are provided through the Office of the Chief Information Officer. To ensure that our data is secure while being stored and transmitted through the Government-owned and operated systems, the following measures have been taken:

- Electronic files for the Inquiry will be hosted on the Government file storage system, but will be placed in their own unique folder structure.
- Access to these files will be controlled and limited only to Inquiry staff members.
- Information technology support staff have access to the Inquiry's data storage area for administrative purposes (e.g. data backups), but will not access the data directly. An audit report of data and file access will be run weekly and provided to the Inquiry.
- The Inquiry will have a separate e-mail presence, hosted within the Government e-mail infrastructure but separate and apart from Government internal e-mail.

The Commission did consider installing its own server and computer system. However, the costs of doing that were very high and the security advantages were limited. We need to be mindful of how we spend public funds and, ultimately, and after much consideration, I determined that the expense was not warranted.

Media

Second, I would like to address the media. We anticipate that some members of the media will be following the work of the Commission closely and will be in attendance at many of the public hearings. It is our intention to have an area set up in the building for the media to use. So that we can consult with you on your needs for that space and on

any other matters, please consider identifying yourselves to Commission counsel following our proceedings today.

Lawyers

Finally, I expect to make most of my decisions on the standing applications and recommendations on the funding applications today. On Monday morning at 10 am, legal counsel for parties who have been granted standing are invited to a meeting with Commission counsel at the boardroom at our office. A number of operational items will be discussed, including scheduling.

Thank you for your attention. We will now turn to the Applications for Standing and Funding.

9. Standing and Funding

“Standing” means the right to participate in the inquiry. Section 5(2) of the *Public Inquiries Act, 2006* says:

(2) A commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering

- (a) whether the person's interests may be adversely affected by the findings of the commission;*
- (b) whether the person's participation would further the conduct of the inquiry; and*
- (c) whether the person's participation would contribute to the openness and fairness of the inquiry.*

It is through the participation of interested parties that the Commission is able to consider different perspectives on the information received. Today we have nine applications of people and organizations seeking standing. I will evaluate their applications based on the three factors enumerated in the *Act*.

Seven of the applications for standing also seek funding. Under the *Public Inquiries Act, 2006*, s. 5(5), I do not determine who receives funding. I may, however, for persons or organizations which have been granted standing make recommendations that funding be provided by the Government. Government may or may not accept the recommendation.



Commission of Inquiry Respecting the Death of Donald Dunphy

October 21, 2016

Mr. Andrew Abbass

Dear Mr. Abbass:

Re: Application for Standing in the Commission of Inquiry Respecting the Death of Donald Dunphy

I have now had an opportunity to further consider your Application for Standing and have decided that you will not be granted standing as you do not meet the criteria set out in Section 5(2) of the *Public Inquiries Act, 2006* SNL 2006 C. P-38.1, as amended. Section 5(2) states as follows:

- 5(2) A commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering
- (a) whether the person's interests may be adversely affected by the findings of the commission;
 - (b) whether the person's participation would further the conduct of the inquiry; and
 - (c) whether the person's participation would contribute to the openness and fairness of the inquiry.

I have concluded that you are not a person whose interests would be adversely affected by the findings of the Commission. I have also concluded that your participation would not add to the openness or fairness of the inquiry any more than any other member of the public. It is arguable that your participation may further the conduct of the inquiry but I have concluded that it is not necessary for you to be granted party status in order for this to be achieved. Rather, Commission counsel will be in touch with you to schedule an interview to obtain more information from you

with a view to determining if your evidence will be required as a witness during the hearing phase of the Commission.

I wish to thank you for your interest in the Commission's work.

Yours truly,



Leo Barry
Commissioner



Commission of Inquiry Respecting the Death of Donald Dunphy

October 21, 2016

Mr. Cletus Flaherty
Rogers Bristow Moyse
102 LeMarchant Road
St. John's NL A1E 0A5

Dear Mr. Flaherty:

Re: Your Client: The Don Dunphy Community Coalition Application for Standing

I have now had an opportunity to further consider your client's Application for Standing and have decided to grant limited standing on the basis that I am satisfied that your client's participation would further the conduct of the inquiry within the meaning of Section 5(2)(c) of the *Public Inquiries Act, 2006* SNL 2006 C. P-38.1, as amended.

In making this decision I accept your submission that your client's participation may contribute to the evidentiary basis and level of analysis of the Commission by:

1. Identifying witnesses who may not otherwise testify; and
2. Providing evidence with respect to Mr. Donald Dunphy's character.

I would caution that you avoid any unnecessary examination of witnesses or duplication of efforts of other counsel. So as to meet the purpose of its limited standing, I will expect the extent of the involvement of your client to be coordinated between yourself and Commission counsel.

Yours truly,

A handwritten signature in blue ink that reads "Leo Barry".

Leo Barry
Commissioner



Commission of Inquiry Respecting the Death of Donald Dunphy

Via Email and Regular Mail

November 8, 2016

Mr. Will Hiscock
Budden & Associates
1st Floor, 401 Empire Avenue
St. John's, NL A1E 1W6

Dear Mr. Hiscock:

RE: Your Client: Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador

I have considered your client's application for standing and funding at the Commission of Inquiry into the death of Donald Dunphy, dated October 14, 2016.

1. Proposed Role

I have also reviewed your subsequent emails, including that of October 21, 2016, where you responded to the email of October 20, 2016, from Commission Counsel suggesting that your client might have limited standing at a proposed second phase of the inquiry (apart from the fact-finding phase).

You responded that your client does not believe that the proposed limited role is sufficient, even with the suggestion that you might be permitted to have input at the fact-finding stage through suggestions made by your client to Commission Counsel for proposed questions or lines of questioning during the first phase of the inquiry.

2. Potential Contribution and Expertise

In response to my request for documentation establishing some expertise of your client in areas contemplated for inquiry, and specifically regarding the monitoring of and response to social media, you have forwarded biographies of the seven members of your coalition and explained that the organization was only formed after the Inquiry commenced, with no formal structure at the time of the application.

You submit the seven members constitute a diverse group of citizens who utilize social media and other similar forms of public communication to (a) discuss policy issues; (b) question Government actions and policies; (c) express views on matters of public interest; and (d) further civil discourse in our province.

3. Terms of Reference

In your application for standing and funding, you rely upon the Commission's Terms of Reference and in particular, 3(1)(h)ii, 3(1)(h)(iii), and 3(1)(k). You note that although your members come from differing ideology and political perspectives, they share "a common interest in ensuring that the collection and utilization of social media commentary by either the Office of the Premier or the RNC does not have a chilling effect on, or otherwise suppress, your members' rights of free opinion and expression". You say your client seeks standing "only on the isolated issue of the monitoring and response to social media and other terms of the inquiry only insofar as they relate to that issue".

4. Criteria for Standing

Section 5(1) of the *Public Inquiries Act, 2006* ("the Act") deals with participation in an inquiry. It provides:

- 5(1) a commission shall give those persons who believe they have an interest in the subject of the inquiry an opportunity to apply to participate.
- 5(2) a commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering:
 - (a) Whether the person's interests may be adversely affected by the findings of the commission;
 - (b) Whether the person's participation would further the conduct of the inquiry; and
 - (c) Whether the person's participation would contribute to the openness and fairness of the inquiry.

(a) Adverse Effect

You claim that your client's interests may be adversely affected by the findings of the Commission in that the findings may lead to a reservation on the part of [your client's members] to speak freely and openly on social media platforms for fear that the information may be collected and utilized for unlawful purposes or to retaliate against [your members] if the views they express are critical of government officials, or government policy.

(b) Further the Conduct of the Inquiry

On the second criterion of s.5(1) of the Act, you submit your client’s “participation in the matter will further the conduct of the inquiry by providing the perspective of those with a significant interest in the policies, protocols or manuals of the Office of the Premier and RNC relating to the monitoring of and response to social media”. You also refer to your client’s “perspective and personal familiarity of the activities of those who use social media in this Province to discuss political and policy matters and to attempt to use said social media to enhance and further public dialogue and debate”.

(c) Openness and Fairness of the Inquiry

On the third criterion of s.5(1) of the Act, you argue that your client’s “participation will contribute to the openness and fairness of the inquiry as well as the public’s perception that the inquiry is open and fair by providing the perspective of several prominent political and social media commentators, who are bound only by their common interest in the importance of protecting their, and the general public’s, right to free expression and opinion”. You stress that your client’s members support differing political parties and in your opinion are therefore a clearly non-partisan group seeking standing on issues with significant potential impact on politics in this Province. You note your client’s members are active users of Facebook and Twitter, “who have also authored letters to the editor, commented on political issues on television and radio, acted variously as journalists, newspaper editors, researchers, activists, organizers, and newspaper columnists”.

Among other topics you seek to address “relevant aspects of the *Canadian Charter of Rights and Freedoms*, the *Privacy Act*, RSNL 1990, c.P-22, the policies and protocols of other relevant offices both in this jurisdiction and elsewhere, and other relevant legislation and rules insofar as they may affect the public’s rights and reasonable expectations with respect to the public’s use of social media and the government’s monitoring and response to such use”.

5. Phases of the Inquiry

I have determined that the most efficient and effective method of proceeding will be to divide the Inquiry into two phases; first, a fact-finding phase and, second, a policy phase, which will involve public presentations by experts or those with particular useful knowledge or expertise, on topics relating to:

- (i) communications to the public or media by the police following serious incidents and during active investigations.
- (ii) the use of social media in promoting the public’s right to free expression and as a tool for critiquing government policy and action.

-
- (iii) the monitoring of and response to social media by Government or the Royal Newfoundland Constabulary and, specifically, the potential risk of such activities having a chilling effect on freedom of expression.
 - (iv) use of Force by police including De-escalation Techniques, particularly in dealing with persons in crisis.
 - (v) policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.

6. Decision on Standing

It is my opinion that you have made a good case for your client being permitted to participate in the Inquiry. However, for the reasons which follow, I have concluded that your client's participation should be limited to participation in the second phase with respect to the following issues:

- a. communications to the public or media by the police following serious incidents and during active investigations;
- b. the use of social media in promoting the public's right to free expression and as a tool for critiquing government policy and action;
- c. the monitoring of and response to social media by Government or the Royal Newfoundland Constabulary and, specifically, the potential risk of such activities having a chilling effect on freedom of expression; and
- d. policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.

(a) Adverse Effect

I am not persuaded that any potential adverse effect caused to your client by the findings of the Commission would be different from that sustained by any member of the general public in terms of the chilling effect on freedom of expression. It follows that your client has demonstrated no better case for standing than any other citizen of the province with respect to the criterion of Section 5(2)(a) of the *Act*.

(b) Further Conduct of Inquiry

Your client's participation might further the conduct of the inquiry by promoting its particular perspective. At the same time, I believe there is a significant risk that the very broad issues your client wishes to pursue may impair the conduct of the Inquiry by moving its focus from the

social media issues specifically arising by the circumstances surrounding Mr. Dunphy's death to the impact of social media generally.

(c) Openness and Fairness:

You have not established how full participation by your client will contribute to the openness and fairness of the Inquiry. Your emphasis upon what you see as your client's "unique and critically important perspective" ignores Rule 2 of the Commission's Rules of Procedure and Practice, which contemplates that Commission counsel will have the primary responsibility of representing the public interest, including ensuring that all issues that bear on the public interest are brought to the Commission's attention. I am satisfied Commission Counsel will be able to thoroughly explore the issues raised by your client, particularly if your client takes up the Commission's offer to consider particular lines of questioning relevant to the social media aspects of this case that your client would like posed to any witness. With regard to your submission, in your email of October 27, 2016, that "there is no other party with standing who has an obvious interest in [your client's issues] being fully canvassed as the terms of reference direct this Commission to do", I note that by Rules 1.A.2 Commission Counsel have standing throughout the Inquiry and the primary responsibility for representing the public interest and ensuring that all interests are brought to my attention.

Your client submits that limited standing, specifically, not giving it a role in the fact finding tasks of the Commission, is not sufficient. You argue that your client should be involved in the fact finding phase "to be able to thoroughly canvass the development and day to day works of the social media monitoring by both the Office of the Premier and Royal Newfoundland Constabulary". I am satisfied this canvassing can be adequately carried out by Commission Counsel. I am also satisfied that your client will have adequate opportunity to express its concerns and recommendations at the second phase of the Inquiry, if it so wishes. I have an obligation to balance costs and time constraints against what a party might contribute to the Inquiry and how the party should participate. I have concluded that full standing for your client would add unnecessary cost and delay.

SUMMARY AND DISPOSITION

1. The application of the Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador ("the Ad Hoc Coalition") for full standing at the Inquiry is denied.
2. The Ad Hoc Coalition is granted limited standing for the second phase of the Inquiry and may participate in that phase through counsel, if it so wishes, by a public presentation upon any of the following:
 - a. communications to the public or media by the police following serious incidents and during active investigations;
 - b. the use of social media in promoting the public's right to free expression and as a tool for critiquing government policy and action;

- c. the monitoring of and response to social media by Government or the Royal Newfoundland Constabulary and, specifically, the potential risk of such activities having a chilling effect on freedom of expression; and
 - d. policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.
3. The Ad Hoc Coalition shall inform the Commission by November 14, 2016 whether it wishes to participate as noted in the second phase.
4. Counsel for the Ad Hoc Coalition shall coordinate with Commission Counsel the content and manner of its presentation, the production of documentation relevant to their limited participation, and the remuneration it requests the Commission to recommend for its counsel regarding Phase 2.

Yours truly,



LEO BARRY
Commissioner



Commission of Inquiry Respecting the Death of Donald Dunphy

October 21, 2016

Mr. Robin Fowler
Assistant Deputy Minister
Department of Justice and Public Safety
4th Floor, East Block
Confederation Building
St. John's, NL

Dear Mr. Fowler:

Re: Commission of Inquiry Respecting the Death of Donald Dunphy (“the Commission”) - Funding Recommendations

On October 19, 2016, I heard Applications from interested persons and organizations for Standing and Funding at the Commission. Seven (7) parties were granted standing and I have reserved my decision with respect to a one (1) further party. Of those who were granted standing, I am recommending that five (5) parties receive funding for legal representation.

The following are my recommendations with respect to each of these parties:

- 1. Cst. Joseph Smyth** – Cst. Smyth is the police officer who shot Mr. Donald Dunphy. Full Standing was granted to Cst. Smyth. He is represented by Mr. Jerome Kennedy, Q.C. of the law firm Roebothan McKay Marshall. It is recommended that Cst. Smyth receive funding for one counsel as well as reasonable disbursements related to the work of counsel.
- 2. Ms. Meghan Dunphy:** Ms. Dunphy is the daughter of Donald Dunphy. Full standing was granted to Ms. Dunphy. Ms. Erin Breen, of the law firm Sullivan Breen King, has represented Ms. Dunphy since shortly after Mr. Dunphy's death. Ms. Breen is due to take a brief maternity leave imminently as a result of which Mr. Roberts Simmonds, Q.C., of

the same firm will be required to represent Ms. Dunphy. While I am cognizant not to incur unnecessary costs, these circumstances are unusual and in my opinion warrant special consideration. Therefore, I recommend funding for two (2) counsel for Ms. Dunphy as well as reasonable disbursements related to the work of counsel on such terms and conditions to be worked out with the government. As Ms. Dunphy will also have to drive from Holyrood to St. John's for the hearing portion of the Commission, it is recommended that her travel and related expenses also be funded.

- 3. Royal Newfoundland Constabulary (“RNC”):** Full Standing was granted to the RNC. The RNC is represented by Mr. Nick Avis, Q.C. of the law firm Browne Fitzgerald Morgan & Avis. While it was noted that the RNC have two (2) dedicated staff solicitors, affidavit evidence was presented that the workload of these individuals is such that they would not be able to take on the role of counsel to the RNC for the purpose of the Commission. Affidavit evidence also stated that the RNC has been in a deficit position for the past five (5) years and that without funding for legal counsel, the RNC would not be able to participate in the Commission. Therefore it is recommended that funding be provided to the RNC for the engagement of one external counsel and reasonable disbursements related to the work of counsel.
- 4. Mr. Paul Davis, MHA:** Mr. Davis was the Premier at the time of the death of Mr. Dunphy. Cst. Smyth was assigned to the Police Protection Detail of Mr. Davis at the time. Mr. Davis was granted full standing. Mr. Davis is represented by Mr. Tom Williams, Q.C. of the law firm O’Dea Earle. I cautioned Mr. Williams that he will need to use his best professional judgment as to whether it will be necessary for him to attend all aspects of the hearing as there are areas that will not necessarily be relevant to his client. With this caveat, I recommend that government provide funding to Mr. Davis for one counsel and reasonable disbursements related to the work of that counsel.
- 5. Royal Newfoundland Constabulary Association (“RNCA”):** The RNCA is a corporation without share capital designated under the *Royal Newfoundland Constabulary Act* (“the Act”) and recognized as the bargaining unit for officers of the RNC with a statutory duty under the *Act* to improve the working conditions of its members. Submissions were made distinguishing the interests of the RNCA from that of the RNC. The RNCA’s primary focus would be on the individual rights of officers and how any recommendation will affect those officers as they carry out their policing duties. The RNCA was granted full standing. Affidavit evidence was presented to the effect that the RNCA was in a deficit position in 2015 and, while on target to be within budget in 2016, it would not be feasible for it to fund its own legal representation at the Commission. The RNCA is represented by Mr. John Drover of the law firm Roebothan McKay and Marshall (the same firm that is representing Cst. Smyth). I am prepared to recommend that the government provide funding to the RNCA for one counsel and reasonable disbursements of counsel. I cautioned Mr. Drover, however, to be cognizant of the need to keep costs reasonable and not to duplicate efforts of Mr. Kennedy or that of counsel for the RNC.

I trust this is satisfactory for your purposes, however, should you have any questions regarding these recommendations, please let me know.

Yours truly,



Leo Barry
Commissioner

cc. Mr. Jerome Kennedy, Q.C.
Ms. Erin Breen
Nick Avis, Q.C.
Mr. Tom Williams, Q.C.
Mr. John Drover



Commission of Inquiry Respecting the Death of Donald Dunphy

Via Email

January 4, 2017

Mr. Robin Fowler
Assistant Deputy Minister
Department of Justice and Public Safety
4th Floor, East Block
Confederation Building
St. John's, NL

Dear Mr. Fowler:

Re: Funding Recommendation – Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador (“the Ad Hoc Coalition”)

On November 8, 2016 I granted limited standing for the second phase of the Inquiry to the Ad Hoc Coalition to participate in that phase through counsel, if it so desired, by way of a public presentation on any of the following issues:

- a. communications to the public or media by the police following serious incidents and during active investigations;
- b. the use of social media in promoting the public's right to free expression and as a tool for critiquing government policy and action;
- c. the monitoring of and response to social media by Government or the Royal Newfoundland Constabulary and, specifically, the potential risk of such activities having a chilling effect on freedom of expression; and
- d. policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.

By correspondence dated November 17, 2016, the Ad Hoc Coalition advised the Commission that it wished to participate in the second phase of the Inquiry by way of the limited standing granted. The Ad Hoc Coalition also sought funding to assist in its participation and estimated that 50-60 billable hours of counsel time would be reasonable depending on the amount of information to be disclosed and reviewed by counsel related to the issues in which the Ad Hoc Coalition was granted standing. It is my view that 50 billable hours for counsel should be sufficient. Therefore I am prepared to recommend that the government provide funding to the Ad Hoc Coalition for 50 billable hours of counsel time along with reasonable disbursements of counsel.

I trust this is satisfactory for your purposes, however, should you have any questions regarding this recommendation, please let me know.

Yours truly,



Leo Barry
Commissioner

cc. Mr. Will Hiscock



Commission of Inquiry Respecting the Death of Donald Dunphy

Undertaking of Counsel to the Commission of Inquiry Respecting the Death of Donald Dunphy

I undertake to the Commission of Inquiry Respecting the Death of Donald Dunphy (the Commission) that any and all documents or information which are produced to me in connection with the Commission's proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documents or information to anyone for whom I do not act and, to anyone for whom I act, only upon the individual in question giving the written undertaking annexed hereto. In the event I act for a corporation, coalition, or other organization, I will disclose such documents and information to anyone who is an employee or member of that corporation, coalition, or other organization, only upon the individual in question giving the written undertaking annexed hereto. I will provide the original of all written undertakings to the Commission.

I understand that the undertaking has no force or effect once any such document or information has become part of the public proceedings of the Commission, or to the extent that the Commission may release me from the undertaking with respect to any document or information. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry or otherwise published on the Inquiry's website.

With respect to those documents or information which remain subject to this undertaking at the end of the Inquiry, I undertake to either destroy those documents or information and provide a certificate of destruction to the Commission, or to return those documents to the Commission for destruction.

I undertake to make best efforts to collect for destruction such documents or information from anyone to whom I have disclosed any documents or information which were produced to me in connection with the Commission's proceedings. I further undertake that in the event that I am unable to collect such documents or information, I will advise Commission Counsel forthwith and provide in writing a description of the efforts undertaken as well as identify the person(s) from whom I have been unable to collect the documents or information.

Signature _____

Date _____

Witness _____

Date _____

Confidentiality Undertaking (Counsel)



Commission of Inquiry Respecting the Death of Donald Dunphy

Undertaking of Parties to the Commission of Inquiry Respecting the Death of Donald Dunphy

I undertake to the Commission of Inquiry Respecting the Death of Donald Dunphy (the Commission) that any and all documents or information which are produced to me in connection with the Commission's proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documents or information to anyone.

I understand that this undertaking will have no force or effect with respect to any document or information which becomes part of the public proceedings of the Commission, or to the extent that the Commission may release me from the undertaking with respect to any document or information. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry or otherwise published on the Inquiry's website.

With respect to those documents or information which remain subject to this undertaking at the end of the Inquiry, I further understand that such documents or information will be collected from me by the person acting as my counsel who disclosed them to me. I will not make or retain any copies.

Signature _____

Date _____

Witness _____

Date _____

Confidentiality Undertaking
(Parties with Standing)



Commission of Inquiry Respecting the Death of Donald Dunphy

Undertaking of Witness to the Commission of Inquiry Respecting the Death of Donald Dunphy

I undertake to the Commission of Inquiry Respecting the Death of Donald Dunphy (the Commission) that any and all documents or information which are produced to me in connection with the Commission's proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documents or information to anyone.

I understand that this undertaking will have no force or effect with respect to any document or information which becomes part of the public proceedings of the Commission, or to the extent that the Commission may release me from the undertaking with respect to any document or information. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry or otherwise published on the Inquiry's website.

With respect to those documents or information which remain subject to this undertaking at the end of the Inquiry, I further understand that such documents or information will be collected from me by the person acting as my counsel who disclosed them to me. I will not make or retain any copies.

Signature _____

Date _____

Witness _____

Date _____

Confidentiality Undertaking
(Witness)



Commission of Inquiry Respecting the Death of Donald Dunphy

Confidentiality Undertaking

I undertake to the Commission of Inquiry Respecting the Death of Donald Dunphy (the Commission) to keep confidential any and all of the Commission's documents or information that are not in the public domain and to which I may become privy during the course of my assignment with the Commission. I understand that keeping documents or information confidential means that I cannot disclose any such documents or information to anyone other than the Commissioner, other Commission staff, or third parties to whom the Commissioner or Commission Counsel has explicitly instructed me to disclose.

I will not use these documents or information for any purpose other than my work for the Commission. I understand that confidential information includes both written material as well as that conveyed through discussion in the course of the Commission's daily business.

At the end of my assignment with the Commission, I will not make copies of, and will return, any and all documents that are subject to this undertaking.

Name _____

Signature _____

Date _____

Witness Name _____

Witness Signature _____

Date _____

Confidentiality Undertaking
(Staff, Suppliers and other Service Providers)



Summons to Produce

(Issued under Section 9(b) of the *Public Inquiries Act, 2006*, S.N.L. 2006, c. P-38.1)

Re: Commission of Inquiry into the Death of Donald Dunphy

To:

Documents for immediate production

You are hereby required to produce to Commission counsel Sandra R. Chaytor, Q.C. and Kate O'Brien of the Commission of Inquiry into the Death of Donald Dunphy at the Commission's offices at 425 Topsail Road, St. John's, NL, on or before **October 11, 2016** the following documents:

-
-

Documents for further production

You are further required to produce to Commission counsel Sandra R. Chaytor, Q.C. and Kate O'Brien of the Commission of Inquiry into the Death of Donald Dunphy at the Commission's offices at 425 Topsail Road, St. John's, NL, as soon as possible, and in any event no later than as required by the Commission's Rules of Practice and Procedure, all other documents and anything else in the custody and control of the _____ that may relate, in any way, to the Terms of Reference of the Commission of Inquiry into the Death of Donald Dunphy, including without limitation, the following documents:

-
-

On-going production

Document production is an on-going requirement and any documents and things that may relate in any way to the Terms of Reference of the Commission of Inquiry into the Death of Donald Dunphy and that come into the custody and control of the _____ after the above-cited deadlines or are uncovered after the above-cited deadlines must be produced to Commission counsel in accordance with Rule 31 Commission’s Rules of Practice and Procedure.

“Documents”

The term “documents” is intended to have a broad meaning, and includes the following media: written, electronic, text, cellular or social mediate messaging, audiotape, videotape, digital reproductions, photographs, films, slides, maps, graphs, microfiche and any data and information stored by means of any device.

Form of production

Documents should be produced in paper and electronic format.

Dated at St. John’s, Newfoundland and Labrador,
this ___ day of _____, 2016.

Commission of Inquiry into the Death of
Donald Dunphy

Commissioner Leo Barry



Commission of Inquiry Respecting the Death of Donald Dunphy

Via Email

November 8, 2016

TO: Counsel for Parties with Standing

Nicholas Avis, Q.C., Browne Fitzgerald Morgan & Avis
 Erin Breen, Sullivan Breen King
 John Drover, Roebothan, McKay Marshall
 Cletus Flaherty, Rogers Bristow Moysé
 Mark Freeman, Justice Canada
 Jerome Kennedy, Q.C., Roebothan McKay Marshall
 Lori Rasmussen, Justice Canada
 Robert Simmonds, Q.C., Sullivan Breen King
 Thomas Williams, Q.C., O'Dea Earle

RE: Decision on Phases

At the first public sitting of the Commission on October 19, 2016, I suggested that the Inquiry might most efficiently proceed by way of two stages, or phases. The first dealing directly with the circumstances surrounding the death of Donald Dunphy, and the second dealing with a number of other matters, at that time, left to be determined.

On October 26, 2016, Commission counsel emailed counsel for the parties with standing to further particularize the two phases under consideration. Commission counsel requested your input on the proposed phases by November 1, 2016.

Thank you to those who responded. We received some helpful and considered feedback. Having considered your submissions, I write now to advise you of my decision.

The Inquiry will proceed in two phases:

Phase 1 - Fact Finding Phase

The first phase will be a fact finding phase focused on the circumstances leading up to and surrounding the death of Donald Dunphy. This phase will proceed as a public hearing, with witnesses being called, examined under oath by Commission counsel, and cross-examined by counsel for parties with standing. It is expected that this stage will also include expert evidence.

Phase 2 - Policy Phase

The second phase will be a policy phase. The word “policy” is not limiting and may include systemic issues. The following issues will be examined during this phase:

1. Communications to the public or media by the police following serious incidents and during active investigations.
2. The use of social media in promoting the public’s right to free expression and as a tool for critiquing government policy and action.
3. The monitoring of and response to social media by Government or the Royal Newfoundland Constabulary and, specifically, the potential risk of such activities having a chilling effect on freedom of expression.
4. Use of Force by police including De-escalation Techniques, particularly in dealing with persons in crisis.
5. Policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.

In particular, some concern was raised with respect to issues 2 and 3 above, which address social media. I am satisfied that the Terms of Reference, including s. 3(1)(h)(ii) and s. 3(2)(b), give me jurisdiction to examine these issues.

The issues to be explored in the second phase may be expanded upon following the conclusion of the fact finding phase. Parties with standing may make further submissions to the Commission through Commission counsel if they believe that additional issues arise during the fact finding phase that merit further consideration in the second phase.

The format of the second phase has yet to be finalized. It may include presentations by experts, paper presentations, or panel discussions. It is contemplated that there will be opportunity for Counsel for parties with standing to pose questions to presenters during the second phase. The Commission will determine the experts or presenters but parties are welcome to identify to Commission counsel for consideration any persons they believe would add value to the second phase.

Yours truly,



Leo Barry
Commissioner



Commission of Inquiry Respecting the Death of Donald Dunphy

NEWS RELEASE

Reports to be Released

At the first public hearing of the Commission of Inquiry Respecting the Death of Donald Dunphy on October 19, 2016, Commissioner Leo Barry advised that he anticipated releasing information to the public by mid-November.

The Commission now advises that tomorrow, **November 8, 2016**, the following reports will be published on its website at www.ciddd.ca:

1. RCMP Investigation Report (undated)
2. Alberta Serious Incident Response Team Report (August 30, 2016)
3. Report of the Independent Observer, the Honourable David G. Riche (January 11, 2016)
4. Saskatoon Police Service Report (September 14, 2016)
5. Decision of the Chief of Police of the Royal Newfoundland Constabulary (October 5, 2016)

Appendices referenced in the reports are not being made public at this time due to the large volume of material and the need for Commission Counsel to review all documents prior to release. It is anticipated that these documents will be released during the public hearings scheduled for early 2017.

- 30 -

Media contact:
Diane Blackmore
Chief Administrative Officer
709-729-0403

2016 11 07



Commission of Inquiry Respecting the Death of Donald Dunphy

NEWS RELEASE

New Information Results in Delay of Release of Reports and Phases of Inquiry

New Information

The Commission has received new information that has been forwarded to the RCMP. The RCMP has advised the Commission that this information requires further investigation. To avoid the possibility of tainting evidence, the RCMP has requested that the Commission delay the public release of the reports that were intended to be released today. It is hoped that this will not be a lengthy delay. Further information will be provided early next week.

Phases of the Inquiry

The Commission of Inquiry Respecting the Death of Donald Dunphy will proceed in two phases:

Phase 1 - Fact Finding Phase

The first phase will be a fact finding phase focused on the circumstances leading up to and surrounding the death of Donald Dunphy. This phase will proceed as a public hearing, with witnesses being called, examined under oath by Commission counsel, and cross-examined by counsel for parties with standing. It is expected that this stage will also include expert evidence.

Phase 2 - Policy Phase

The second phase will be a policy phase. The following issues will be examined during this phase:

1. Communications to the public or media by the police following serious incidents and during active investigations.

2. The use of social media in promoting the public's right to free expression and as a tool for critiquing government policy and action.
3. The monitoring of and response to social media by Government or the Royal Newfoundland Constabulary and, specifically, the potential risk of such activities having a chilling effect on freedom of expression.
4. Use of Force by police including De-escalation Techniques, particularly in dealing with persons in crisis.
5. Policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.

The issues to be explored in the second phase may be expanded upon following the conclusion of the fact finding phase. The format of the second phase may include presentations by experts, paper presentations, or panel discussions.

- 30 -

Media contact:
Diane Blackmore
Chief Administrative Officer
709-729-0403

2016 11 08



Commission of Inquiry Respecting the Death of Donald Dunphy

NEWS RELEASE

Update on Status of Release of Reports

On November 7, 2016, the Commission received new information that was forwarded to the RCMP. The RCMP advised the Commission that this information required further investigation. To avoid the possibility of tainting evidence, the RCMP requested the Commission to delay the public release of the key reports. These reports had already been released to the parties with standing.

Today the RCMP has advised that it will require a further 48 hours to complete interviews regarding the new information. The Commission is committed to transparency but recognizes the importance of respecting the investigative process.

The Commission expects to have a further update for the public within 48 hours.

- 30 -

Media contact:
Diane Blackmore
Chief Administrative Officer
709-729-0403

2016 11 15



Commission of Inquiry Respecting the Death of Donald Dunphy

NEWS RELEASE

Reports to be Released

At the first public hearing of the Commission of Inquiry Respecting the Death of Donald Dunphy on October 19, 2016, Commissioner Leo Barry advised that he anticipated releasing information to the public by mid-November.

The Commission intended to release five reports on November 8, 2016 but the Commission received new information that was forwarded to the RCMP. The RCMP advised that this information required further investigation. To avoid the possibility of tainting evidence, the RCMP requested that the Commission delay the public release of the reports.

The Commission has just been advised by the RCMP that their further investigation is complete. The Commission will release the reports to the public on Monday, **November 28, 2016**.

The following reports will be published on its website at www.ciddd.ca:

1. RCMP Investigation Report (undated)
2. Alberta Serious Incident Response Team Report (August 30, 2016)
3. Report of the Independent Observer, the Honourable David G. Riche (January 11, 2016)
4. Saskatoon Police Service Report (September 14, 2016)
5. Decision of the Chief of Police of the Royal Newfoundland Constabulary (October 5, 2016)

Appendices referenced in the reports are not being made public at this time due to the large volume of material and the need for Commission Counsel to review all documents prior to release. It is anticipated that these documents will be released during the public hearings scheduled for early 2017.

- 30 -

Media contact:
Diane Blackmore
Chief Administrative Officer
709-729-0403

2016 11 25



Commission of Inquiry Respecting the Death of Donald Dunphy

**Media Accreditation & Embargo
Review of Documents for Public Disclosure**

November 25, 2016

Name: _____

Organization: _____

Business Address: _____

Telephone: _____

Email: _____

I request to view an advance hard copy of the five key reports that concern the Commission of Inquiry Respecting the Death of Donald Dunphy. I agree not to disclose the contents of these documents to anyone until the documents are publically released on the Commission website (www.ciddd.ca).

Signature: _____

Email to:

dblackmore@ciddd.ca

Commission of Inquiry Respecting the Death of Donald Dunphy



Commission of Inquiry Respecting the Death of Donald Dunphy

NOTICE TO PUBLIC

The Commission of Inquiry Respecting the Death of Donald Dunphy will commence public hearings on Monday, January 9, 2017.

The Inquiry has been established in accordance with Part I of the *Public Inquiries Act, 2006*. Pursuant to the Terms of Reference dated September 23, 2016, the Commission shall inquire as to the facts and circumstances regarding the death of Donald Dunphy. The full text of the Commission's Terms of Reference may be found on the Commission's website.

The hearings will start each day at 9:00 a.m. and will be held at:

425 Topsail Road
St. John's, NL
(former School for the Deaf)

The hearings are open to the public and will also be webcast via the Commission website at www.ciddd.ca.

Commission of Inquiry Respecting the Death of Donald Dunphy		
425 Topsail Road (former School for the Deaf) St. John's, NL		
PHASE I – WITNESS SCHEDULE		
<i>Name</i>	<i>Hearing Start Date (D-M-Y)</i>	<i>Hearing End Date (D-M-Y)</i>
Opening	9-Jan-17	9-Jan-17
Meghan Dunphy	9-Jan-17	9-Jan-17
Donna Ivey	10-Jan-17	10-Jan-17
Tom Mahoney	10-Jan-17	10-Jan-17
Debbie Dunphy	Did not appear	
Richard Dunphy	11-Jan-17	11-Jan-17
Billy Corcoran	11-Jan-17	11-Jan-17
Colin Thomas Dinn	11-Jan-17	11-Jan-17
Cst. Joe Smyth	16-Jan-17	25-Jan-17
Witness X	25-Jan-17	25-Jan-17
Cpl. Trevor O'Keefe	25-Jan-17	26-Jan-17
Sgt. Dion Foote	26-Jan-17	26-Jan-17
Rochelle Nolan	27-Jan-17	27-Jan-17
Cst. Lee Lush	27-Jan-17	27-Jan-17
Rita Farrell	27-Jan-17	27-Jan-17
A/Insp. Mike Adams	30-Jan-17	30-Jan-17
Cst. Kelly Downey	30-Jan-17	30-Jan-17
Cst. Warren Sullivan	30-Jan-17	31-Jan-17

Commission of Inquiry Respecting the Death of Donald Dunphy		
425 Topsail Road (former School for the Deaf) St. John's, NL		
PHASE I - WITNESS SCHEDULE		
<i>Name</i>	<i>Hearing Start Date (D-M-Y)</i>	<i>Hearing End Date (D-M-Y)</i>
Cst. Scott Harris	31-Jan-17	31-Jan-17
Dr. Thomas McGarry	1-Feb-17	1-Feb-17
Cst. John Galway	1-Feb-17	1-Feb-17
Cst. Ed Benoit	2-Feb-17	2-Feb-17
Cpl. Doug Noel	2-Feb-17	2-Feb-17
Nancy Linehan	3-Feb-17	3-Feb-17
Kevin Bishop	3-Feb-17	3-Feb-17
S/Sgt. Reg Tilley	6-Feb-17	6-Feb-17
Kim Harding	6-Feb-17	6-Feb-17
Cpl. Steven Burke	7-Feb-17	9-Feb-17
S/Sgt. Tim Buckle	10-Feb-17	10-Feb-17
S/Sgt. Tom Townsend	13-Feb-17	13-Feb-17
Sgt. Chris Saunders	13-Feb-17	13-Feb-17
Commission Office closed due to weather	14-Feb-17	14-Feb-17
Hearings delayed due to weather	15-Feb-17	15-Feb-17
Chief Supt. Andrew Boland	15-Feb-17	16-Feb-17
D/Chief Ab Singleton	16-Feb-17	16-Feb-17
Supt. Jason Sheppard	17-Feb-17	17-Feb-17

Commission of Inquiry Respecting the Death of Donald Dunphy		
425 Topsail Road (former School for the Deaf) St. John's, NL		
PHASE I - WITNESS SCHEDULE		
Name	Hearing Start Date (D-M-Y)	Hearing End Date (D-M-Y)
Sgt. Kent Osmond	17-Feb-17	17-Feb-17
Cst. Adrian Cox	20-Feb-17	20-Feb-17
Sgt. Kent Osmond (Cont'd)	20-Feb-17	21-Feb-17
Insp. Pat Cahill	21-Feb-17	21-Feb-17
Cpl. Kelly Lee	21-Feb-17	21-Feb-17
Insp. Barry Constantine	21-Feb-17	21-Feb-17
Sgt. Bill James	22-Feb-17	22-Feb-17
Heather MacLean	22-Feb-17	22-Feb-17
Wanda Richards	23-Feb-17	23-Feb-17
Insp. Joe Gullage	23-Feb-17	23-Feb-17
Cpl. Monty Henstridge	23-Feb-17	24-Feb-17
Paul Davis	24-Feb-17	24-Feb-17
Joe Browne	27-Feb-17	27-Feb-17
Dr. Simon Avis	27-Feb-17	27-Feb-17
Chief Bill Janes	28-Feb-17	28-Feb-17
Joe Browne (Cont'd)	1-Mar-17	1-Mar-17
Justice David Riche	1-Mar-17	1-Mar-17
Sgt. Bill James (Cont'd)	1-Mar-17	1-Mar-17
Mark Oram	2-Mar-17	2-Mar-17
Cpl. Wayne Knapman	2-Mar-17	2-Mar-17

<i>Commission of Inquiry Respecting the Death of Donald Dunphy</i>		
<i>425 Topsail Road (former School for the Deaf) St. John's, NL</i>		
PHASE I – WITNESS SCHEDULE		
<i>Name</i>	<i>Hearing Start Date (D-M-Y)</i>	<i>Hearing End Date (D-M-Y)</i>
Darryl Barr	3-Mar-17	3-Mar-17
Cst. Joseph Smyth (Cont'd)	6-Mar-17	6-Mar-17
Susan Hughson	6-Mar-17	6-Mar-17
Gareth Jones	7-Mar-17	7-Mar-17
Dr. Stephen Hart	7-Mar-17	7-Mar-17
Dr. Terry Coleman & Michael Massine	8-Mar-17	8-Mar-17
Phase 2	9-Mar-17	9-Mar-17
Sgt. Patrick Lenehan	10-Mar-17	10-Mar-17



Commission of Inquiry Respecting the Death of Donald Dunphy

Summons to Witness

(Issued under Section 9(a) of the *Public Inquiries Act, 2006*, SNL 2006. c. P-38.1)

Re: Commission of Inquiry Respecting the Death of Donald Dunphy

To:

You are hereby summoned to attend before the Commission of Inquiry Respecting the Death of Donald Dunphy at 425 Topsail Road, St. John's, Newfoundland and Labrador, on _____, _____, 2017 at the hour of 9:00 a.m. in the forenoon and from time to time thereafter until the Commission of Inquiry is concluded or Commissioner Leo Barry orders.

Dated at St. John's, Newfoundland and Labrador, this ____ day of _____, 2016.

Commission of Inquiry Respecting the
Death of Donald Dunphy

Commissioner Leo Barry

Note:

A person summoned to attend as a witness before the Commission of Inquiry Respecting the Death of Donald Dunphy is entitled to be paid the same personal allowances for their attendance at the hearing as are paid for the attendance of a witness summoned to attend before the Supreme Court of Newfoundland and Labrador, Trial Division.

If you fail without lawful excuse to attend on being summoned as a witness under Section 9(a), you are liable to punishment by the Supreme Court of Newfoundland, Trial Division in the same manner as if you were found guilty of contempt of that Court.



Commission of Inquiry Respecting the Death of Donald Dunphy

MEDIA PROTOCOL

1. Media Interviews, Recording and Photography

The media may conduct interviews in the designated media interview space, room 61. If further accommodation is needed for interviews, please contact our Chief Administrative Officer.

If the media wishes to conduct interviews in the Hearing Room, we ask that you contact our Chief Administrative Officer to arrange. We need to ensure that such activity does not interfere with the hearing schedule.

We ask that the media not conduct interviews or operate recording devices in the main entrance, public overflow area or main hallways at 425 Topsail Road as this may disrupt the public's use of these areas.

The Hearing Room will be open during breaks, however, the media and the public should not approach the counsel tables, the witness area, the hearing clerk's table or the Commissioner's table.

Subject to the prohibitions with respect to Confidential Matters below, the media will be allowed to record and photograph in the Hearing Room during hearings, as long as such activity does not disrupt proceedings. If the Commissioner requests that recording or photography be stopped because of disruption, or for any other reason, it must stop immediately.

Media will be able to connect, in the Hearing Room, to a serial digital interface (HD-SDI).

A media space, room 10, will be provided. This room will have live streaming of the hearings. An analogue audio connection will be provided for audio recording of the hearing.

All media inquiries, including requests for interviews, should be made to our Chief Administrative Officer.

2. Public Exhibits

Each morning, the media will be provided with a book of public exhibits anticipated to be entered into evidence that day. The media may not broadcast or publish the public exhibits until after they have been entered into evidence during the Hearing.

3. Confidential Matters

When a request is made by Commission Co-counsel, other counsel or a witness which could result in either an *in-camera* hearing or a ban on broadcast and publication, whenever possible notice will be given to the media (along with other individuals in the Hearing Room) on the morning of the hearing in question. The notice will provide details of the request being made as well as of the procedures to be followed.

In-Camera Hearings

The media will not be allowed to report or publish **any** information (ie. evidence, name of witness, etc.) given *in-camera*.

There will be no photographs or sketching allowed before, during or after an *in-camera* hearing.

Because the broadcast audio and video will be turned off during *in-camera* sessions, the media will be requested to sit in the audience section of the Hearing Room and the use of all recording devices and cellphones will be prohibited. Cellphones must be turned off.

The transcript available to the media for viewing will be the public version, and will not include the *in-camera* portion of the hearing.

All exhibits entered during *in-camera* portions of the hearing will be categorized and marked as C exhibits. C exhibits will not be published on the website nor made available to the media.

Confidential Exhibits

Commission Co-counsel, other counsel or a witness may request that an exhibit be entered as a confidential exhibit, regardless of whether or not the exhibit is entered in an *in-camera* portion of the hearing.

The media will not be allowed to report or publish any confidential exhibit.

There will be no photographs or sketching allowed of any confidential exhibit.

Confidential exhibits will be those of a sensitive, private or confidential nature.

Confidential exhibits will be marked as C exhibits and will not be published on the website nor made available to the media.

Use of Non-identifying Initials

In circumstances where a ruling has been made that the name of an individual is not to be used, but is instead to be replaced with non-identifying initials, the media must ensure that non-identifying initials are used on all reports, broadcasts and publications with respect to the witness in question.

Non-publication of a Name and/or Testimony

In circumstances where a ruling is made that the name and/or testimony of an individual is not to be published, the media is prohibited from publishing or broadcasting same.

Until such time as the Commissioner issues his ruling on the status of “Confidentiality”, photographing or sketching of the witness will be prohibited.

If the broadcast audio and video is turned off, the media will be requested to sit in the audience section of the Hearing Room and the use of all recording devices will be prohibited. Cellphones must be turned off.

Wi-Fi Access

Wi-Fi access will be provided to Media. Contact the Chief Administration Officer to register for access.

Hearing Hours and Schedule

The hearings, except for first day January 9, 2017 at 9:00 am, will start at 9:30 am and are tentatively scheduled to conclude by 5:00 pm, except for Friday. Friday sessions will be morning only.

Lunch breaks are scheduled from 12:30 to 1:30 pm, Monday to Thursday.

The Witness Schedule is tentative and may change due to witness availability, duration of hearing, etc. Media is advised to check the Commission website, www.ciddd.ca, for changes to the Witness Schedule.

Commission Website, www.ciddd.ca

The Commission website will be uploaded daily with the video and exhibits entered into evidence. Transcripts, when available, will be uploaded to the website.

Please see the Commission’s Rules of Procedure and Practice for further information.



Commission of Inquiry Respecting the Death of Donald Dunphy

COMMISSIONER BARRY'S OPENING REMARKS

AT THE PUBLIC HEARINGS

JANUARY 9, 2017

- Good morning. Today we start the public hearings of the Commission of Inquiry Respecting the Death of Mr. Donald Dunphy. I am Leo Barry, the Commissioner.
- I welcome those present in the hearing room and those joining on-line by webcast.
- The hearings will start today and, at present, are estimated to continue until March 7. This may change as I will be attempting, as we proceed, to speed up the process but not at the cost of thoroughness. With a few exceptions, hearings will take place each week day. Hearings will be open to the public and live-streamed through our website at www.ciddd.ca. Transcripts of the public hearings will also be posted on our website.
- At my opening address at the hearing for standing and funding applications on October 19, 2016, I reviewed what a Public Inquiry does. I won't repeat myself today, but I remind you that the Terms of Reference state what is to be done by the Commission and they can be found on our website.
- Although I will make recommendations with respect to the matters covered by the Terms of Reference, the Commission does not act as a court and I will not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.
- Since October, the Commission has received, and Commission Counsel have reviewed, in excess of 2900 documents. Counsel have also conducted over 50 witness interviews. All of this activity was directed to ensuring that at this stage of the Inquiry, Commission Counsel would be in a position to present a full and balanced picture of events and to do so as efficiently as possible. Commission Counsel will call witnesses and ask them questions to elicit their testimony. After Commission Counsel has finished questioning a witness, other counsel with standing will have an opportunity to ask questions.

- The public hearings are not bound by the strict rules of evidence and procedure that are used in courts. Lawyers will have flexibility in the types of questions they ask and the lines of questioning they pursue.
- Public exhibits entered into evidence will be posted on our website. In some cases they will be redacted to remove personal or other sensitive information. During the testimony, public exhibits referenced by witnesses will be displayed on the audience monitors in the hearing rooms.
- Confidential exhibits entered into evidence will not be posted on our website or on the audience monitors. These exhibits will be those of a sensitive or confidential nature. Confidential exhibits may not be photographed or recorded in any way.
- The public hearings will commence each day at 9:30 am and finish at 5 pm. In some cases, we may run a little later than 5 pm in order to complete a witness's testimony. We will take an hour break for lunch, between 12:30 and 1:30 pm and there will be a 15 minute break each morning and afternoon at a convenient time. Break times will be strictly adhered to as we have a tight schedule.
- We will not sit on Friday afternoons. On Friday's the morning session will typically end at 1:30.
- If we have to cancel due to bad weather, we will post notice on our website.
- The hearings that we are starting today are Phase 1 of the Inquiry, referred to as the Fact Finding Phase. Phase 1 will be followed by Phase 2, referred to as the Policy Phase which we anticipate taking place in late March. We will provide more information on Phase 2 in due course.
- Please remember to silence your cell phones and respect that this is a scent free environment.
- Thank you for your attention. I now ask Commission Counsel to give an opening address.

List of Appearances for Parties with Standing for Phase I

Meghan Dunphy

Sullivan Breen King
Erin Breen
Robert Simmonds, Q.C.

Constable Joseph Smyth

Roebathan McKay Marshall
Jerome Kennedy, Q.C.

Royal Newfoundland Constabulary (RNC)

Brown Fitzgerald Morgan & Avis
Nick Avis, Q.C.

**Attorney General of Canada
Royal Canadian Mounted Police (RCMP)**

Department of Justice Canada
Lori Rasmussen
Mark Freeman

**Royal Newfoundland Constabulary
Association (RNCA)**

Roebathan McKay Marshall
John Drover

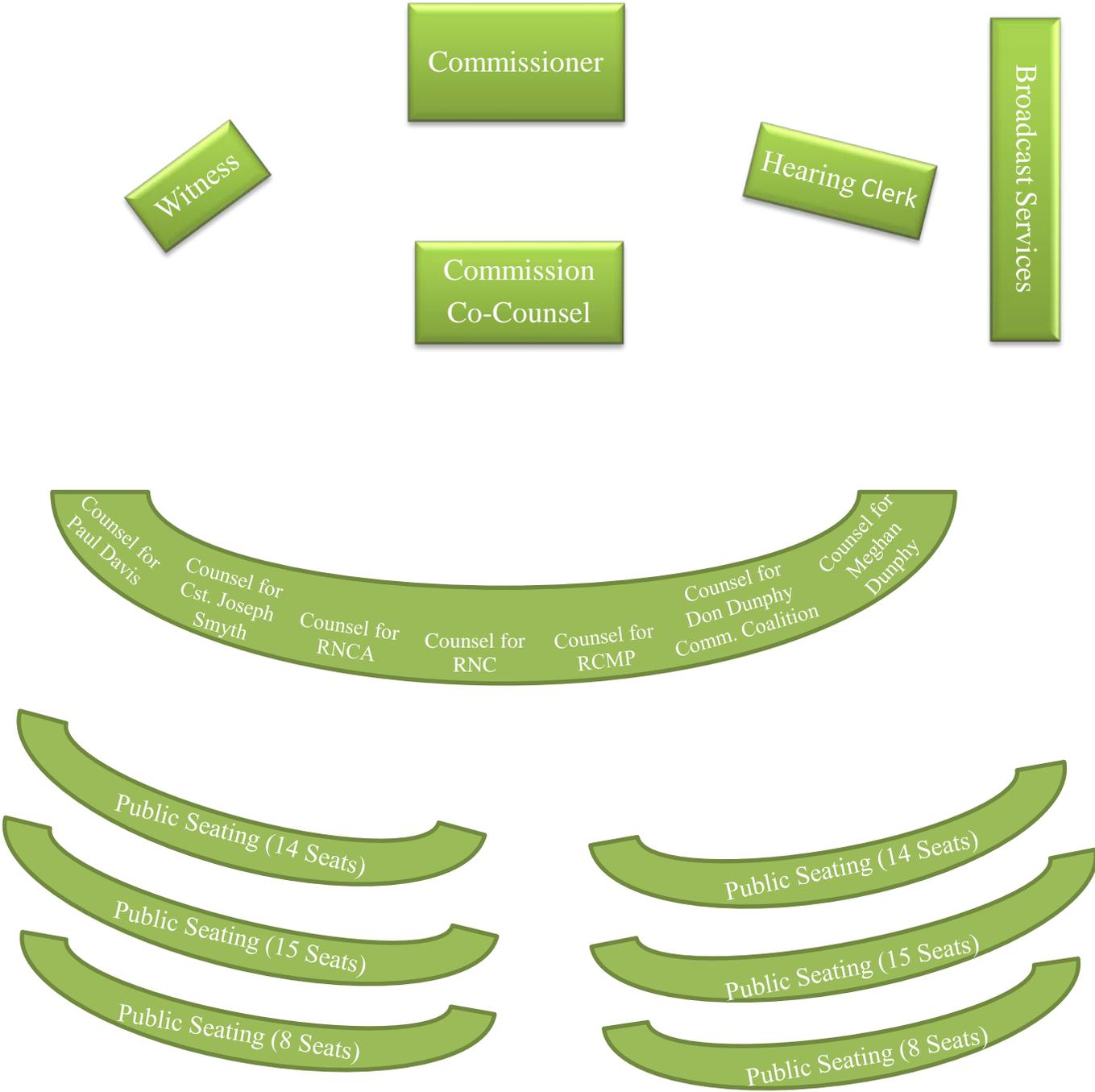
Paul Davis

O’Dea Earle
Thomas Williams, Q.C.

Don Dunphy Community Coalition

Rogers Bristow Moyse
Cletus Flaherty

Hearing Room Seating Plan – 425 Topsail Road





Commission of Inquiry Respecting the Death of Donald Dunphy

Exhibit Listing

January 9, 2017 - March 10, 2017

<i>Public Exhibit</i>	<i>In Camera Exhibit</i>	<i>Description of Exhibit</i>	<i>Date Entered into Evidence</i>	<i>Witness Entered Under</i>
	C-0001	Scene Photo Package prepared by Sgt. Chris Saunders, Forensic Identification Services, dated April 5, 2015	9-Jan-17	CIDDD
	C-0002	Personal Banking Information of Donald Dunphy	9-Jan-17	Meghan Dunphy
	C-0003	Transcribed Statement of Debbie Dunphy dated April 5, 2015	11-Jan-17	CIDDD
	C-0004	Medical Record of Debbie Dunphy	11-Jan-17	CIDDD
	C-0005	Excerpt from records received from Stella's Circle related to an incident that occurred at Emmanuel House on or about November 2007	16-Jan-17	Joseph Smyth
	C-0006	Psychological Services Report for Constable Joseph Smyth prepared by Dr. Marina Hewlett	16-Jan-17	Joseph Smyth
	C-0007	Medical Records of Donald Dunphy	26-Jan-17	Dion Foote
	C-0008	Photo 1, Scene Photograph by Cpl. Dion Foote dated April 5, 2015	26-Jan-17	Dion Foote
	C-0009	Photo 2, Scene Photograph by Cpl. Dion Foote dated April 5, 2015	26-Jan-17	Dion Foote
	C-0010	Photo 3, Scene Photograph by Cpl. Dion Foote dated April 5, 2015	26-Jan-17	Dion Foote
	C-0011	Photo 4, Scene Photograph by Cpl. Dion Foote dated April 5, 2015	26-Jan-17	Dion Foote
	C-0012	Photo 5, Scene Photograph by Cpl. Dion Foote dated April 5, 2015	26-Jan-17	Dion Foote

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
	C-0013	Patient Information and Billing of Donald Dunphy dated April 5, 2015	3-Feb-17	Nancy Linehan
	C-0014	Patient Information and Billing of Joseph Smyth dated April 5, 2015	3-Feb-17	Nancy Linehan
	C-0015	Not Used		
	C-0016	Not Used		
	C-0017	Medical Records of Donald Dunphy dated January 30, 2009, Eastern Health Operative Report	1-Feb-17	Thomas McGarry
	C-0018	Medical Records of Donald Dunphy dated August 4, 2014, Cardiac Cath Lab Patient Record	1-Feb-17	Thomas McGarry
	C-0019	Dr. Thomas McGarry Medical Records of Donald Dunphy	1-Feb-17	Thomas McGarry
	C-0020	Report - Commission of Inquiry into the Death of Donald Dunphy dated February 26, 2017 prepared by Michael Massine and Dr. Terry Coleman	8-Mar-17	Michael Massine & Dr. Terry Coleman
	C-0021	Scene Video taken by Cpl. Lee and Sgt. Saunders - Recorded on April 5-6, 2015	10-Mar-17	CIDDD
P-0001		Commission of Inquiry Respecting the Death of Donald Dunphy - Terms of Reference	9-Jan-17	CIDDD
P-0002		Commission of Inquiry Respecting the Death of Donald Dunphy - Rules of Practice and Procedure	9-Jan-17	CIDDD
P-0003		RCMP Investigative Report	9-Jan-17	CIDDD

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0004		Alberta Serious Incident Response Team Report dated August 30, 2016	9-Jan-17	CIDDD
P-0005		Report of the Independent Observer, the Honourable David G. Riche dated January 11, 2016	9-Jan-17	CIDDD
P-0006		Saskatoon Police Service Report dated September 14, 2016	9-Jan-17	CIDDD
P-0007		Decision of the Chief of Police of the Royal Newfoundland Constabulary dated October 5, 2016	9-Jan-17	CIDDD
P-0008		Pages from Donald Dunphy's Twitter Account	9-Jan-17	CIDDD
P-0009		Pages from Donald Dunphy's Twitter Account	9-Jan-17	CIDDD
P-0010		Scene Photo Package prepared by Sgt. Chris Saunders, Forensic Identification Services, dated April 5, 2015	9-Jan-17	CIDDD
P-0011		Not Used		
P-0012		Not Used		
P-0013		Not Used		
P-0014		Not Used		
P-0015		Not Used		

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0016		Not Used		
P-0017		Page 1 of Criminal Reporting Procedures - GO 323, dated December 10 2013 - RNC Policy and Procedure Manual	6-Feb-17	Kim Harding
P-0018		RNC Policy and Procedure Manual - Deaths - GO 293 - dated January 16, 2012	30-Jan-17	Mike Adams
P-0019		Not Used		
P-0020		Not Used		
P-0021		Not Used		
P-0022		Not Used		
P-0023		RNC Policy and Procedure Manual - Firearms - GO 254 - dated March 10, 2010	22-Feb-17	Bill James
P-0024		RNC Policy and Procedure Manual - Information Management and Technology - GO 322, dated December 10, 2013	6-Feb-17	Kim Harding
P-0025		Not Used		
P-0026		Not Used		
P-0027		RNC Policy and Procedure Manual - Media Relations - GO 304 - dated July 12, 2012	28-Feb-17	Bill Janes

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0028		RNC Policy and Procedure Manual - Media Relations - GO 352 - dated May 25, 2016	28-Feb-17	Bill Janes
P-0029		Not Used		
P-0030		RNC Policy and Procedure Manual dated November 28, 2014 regarding Police Notebooks	16-Jan-17	Joseph Smyth
P-0031		RNC Policy and Procedure Manual dated June 5, 2013 regarding Protective Services Unit	16-Jan-17	Joseph Smyth
P-0032		RNC Policy and Procedure Manual, GO 353 dated May 25, 2016 regarding Protective Services Unit	23-Feb-17	Joe Gullage
P-0033		RNC Policy and Procedure Manual - Use of Force - GO 312, dated December 20, 2012	22-Feb-17	Bill James
P-0034		RNC Policy and Procedure Manual - Use of Force - GO 360, dated August 30, 2016	22-Feb-17	Bill James
P-0035		Diagram of Residence of Donald Dunphy	9-Jan-17	CIDDD
P-0036		Statement of Meghan Dunphy, dated April 5, 2015	9-Jan-17	Meghan Dunphy
P-0037		Statement of Meghan Dunphy, dated April 8, 2015	9-Jan-17	Meghan Dunphy
P-0038		Statement of Meghan Dunphy, dated April 27, 2015	9-Jan-17	Meghan Dunphy
P-0039		Statement of Meghan Dunphy , dated June 11, 2015	9-Jan-17	Meghan Dunphy

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0040		Statement of Meghan Dunphy, dated November 8, 2016	9-Jan-17	Meghan Dunphy
P-0041		Correspondence dated April 8, 2015 from Erin Breen to John Galway	9-Jan-17	Meghan Dunphy
P-0042		Email dated April 14, 2015 (2:23 pm) from Steve Burke to Erin Breen and Kent Osmond regarding New Information from Meghan Dunphy	9-Jan-17	Meghan Dunphy
P-0043		Correspondence dated April 16, 2015 from Erin Breen to Honourable Darin King, Chief Superintendent Andrew Boland, Sergeant Kent Osmond, regarding RCMP investigation into the death of Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0044		Correspondence dated April 20, 2015 from Andrew Boland to Erin K. Breen regarding RCMP Investigation into the Death of Mr. Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0045		Correspondence dated April 21, 2015 from Darin King to Erin Breen regarding RCMP investigation into the death of Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0046		Correspondence dated April 29, 2015 from Tracy Hardy to Erin Breen	9-Jan-17	Meghan Dunphy
P-0047		Correspondence dated May 4, 2015 from Darin T. King to Erin Breen regarding RCMP Investigation into the Death of Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0048		Correspondence dated May 26, 2015 from Erin Breen to Tracy Hardy regarding RCMP Investigation into the Death of Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0049		Correspondence dated June 1, 2015 from Tracy Hardy to Erin Breen regarding RCMP Investigation into the Death of Mr. Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0050		Correspondence dated June 10, 2015 from Erin Breen to Tracy Hardy regarding RCMP Investigation into the Death of Donald Dunphy	9-Jan-17	Meghan Dunphy

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0051		Correspondence dated June 15, 2015 from Erin Breen to Tracy Hardy regarding RCMP Investigation into the death of Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0052		Correspondence dated June 16, 2015 from Tracey Hardy to Erin Breen regarding RCMP Investigation into the Death of Mr. Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0053		Correspondence dated June 17, 2015 from Erin Breen to Premier Paul Davis	9-Jan-17	Meghan Dunphy
P-0054		Correspondence dated June 18, 2015 from Erin Breen to Commissioner Bob Paulson regarding RCMP Investigation into the police shooting death of Donald Dunphy, Mitchell's Brook, Newfoundland & Labrador, April 5, 2015	9-Jan-17	Meghan Dunphy
P-0055		Correspondence dated June 19, 2015 from Erin Breen to Felix Collins regarding Police shooting death of Mr. Donald Dunphy, Mitchell's Brook, NL	9-Jan-17	Meghan Dunphy
P-0056		Correspondence dated June 19, 2015 from Erin Breen to The Honourable Peter MacKay regarding Police shooting death of Mr. Donald Dunphy, Mitchell's Brook, NL	9-Jan-17	Meghan Dunphy
P-0057		Correspondence dated June 24, 2015 from Bob Paulson to Erin K. Breen	9-Jan-17	Meghan Dunphy
P-0058		Correspondence dated August 4, 2015 from Felix Collins to Erin Breen regarding Police shooting death of Mr. Donald Dunphy, Mitchell's Brook, NL	9-Jan-17	Meghan Dunphy
P-0059		Correspondence dated August 10, 2015 from Paul Davis to Erin Breen regarding RCMP Investigation into the Death of Donald Dunphy	9-Jan-17	Meghan Dunphy
P-0060		Correspondence dated August 12, 2015 from Erin Breen to Felix Collins regarding Police shooting death of Mr. Don Dunphy, Mitchell's Brook, NL	9-Jan-17	Meghan Dunphy
P-0061		Photo provided by Meghan Dunphy - Glasses on table - 1	9-Jan-17	Meghan Dunphy

 <p style="text-align: center;">Commission of Inquiry Respecting the Death of Donald Dunphy</p> <p style="text-align: center;">Exhibit Listing</p> <p style="text-align: center;">January 9, 2017 - March 10, 2017</p>				
<i>Public Exhibit</i>	<i>In Camera Exhibit</i>	<i>Description of Exhibit</i>	<i>Date Entered into Evidence</i>	<i>Witness Entered Under</i>
P-0062		Photo provided by Meghan Dunphy - Glasses on table - 2	9-Jan-17	Meghan Dunphy
P-0063		Photo provided by Meghan Dunphy - Glasses on table - 3	9-Jan-17	Meghan Dunphy
P-0064		Photo provided by Meghan Dunphy - Bullet & coin	9-Jan-17	Meghan Dunphy
P-0065		Warning Sign on Residence of Donald Dunphy	9-Jan-17	CIDDD
P-0066		Excerpt from Report Reference - Paragraph 6.1.B provided by D. Barr - Bulletproof Forensic Consulting	9-Jan-17	CIDDD
P-0067		Excerpt from RCMP Daily Log	9-Jan-17	Meghan Dunphy
P-0068		Statement of Donna Ivey dated April 7, 2015	10-Jan-17	Donna Ivey
P-0069		Social Media Policy and Guidelines, Communications and Public Engagement Branch, Government of NL	10-Jan-17	Donna Ivey
P-0070		Communications Reference Manual, Communications and Public Engagement Branch, Government of NL	10-Jan-17	Donna Ivey
P-0071		Email dated January 25, 2015 (8:30 AM) from Joe Smyth to Paul Davis, Joe Browne, Catherine Evans, Heather MacLean, Donna Ivey, Darrell Hynes, Peter Morris, and Veronica Hayden; copied to Doug Noel regarding Awareness Bulletin: Threat to Canada	10-Jan-17	Donna Ivey

 <p style="text-align: center;">Commission of Inquiry Respecting the Death of Donald Dunphy</p> <p style="text-align: center;">Exhibit Listing</p> <p style="text-align: center;">January 9, 2017 - March 10, 2017</p>				
<i>Public Exhibit</i>	<i>In Camera Exhibit</i>	<i>Description of Exhibit</i>	<i>Date Entered into Evidence</i>	<i>Witness Entered Under</i>
P-0072		Email dated February 4, 2015 (1:15 PM) from Joe Smyth to Catherine Evans, Joe Browne, Donna Ivey, Veronica Hayden, Heather MacLean, and Darrell Hynes; copied to Paul Davis and Doug Noel, regarding 2015 Threat Assessment Brief and Principal Movement Recommendations	10-Jan-17	Donna Ivey
P-0073		Email dated April 3, 2015 at (10:36 AM) from Joe Smyth to Donna Ivey and Doug Noel; copied to Joe Browne regarding Tweet of Concern	10-Jan-17	Donna Ivey
P-0074		Email dated April 3, 2015 (10:21:39 AM) from Donna Ivey to Joe Smyth and Doug Noel; copied to Joe Browne regarding Tweet of Concern	10-Jan-17	Donna Ivey
P-0075		Email dated April 3, 2015 (10:34 AM) from Joe Smyth to Donna Ivey regarding Tweet of Concern	10-Jan-17	Donna Ivey
P-0076		Email dated April 3, 2015 (10:42:40 AM) from Donna Ivey to Joe Smyth, and Doug Noel; copied to Joe Browne regarding Tweet of concern	10-Jan-17	Donna Ivey
P-0077		Email dated April 3, 2015 (11:30:30 AM) from Joe Browne to Joe Smyth, Donna Ivey, and Doug Noel regarding Tweet of concern	10-Jan-17	Donna Ivey
P-0078		Email dated April 3, 2015 (11:43 AM) from Joe Smyth to Joe Browne, Donna Ivey, and Doug Noel regarding Tweet of concern	10-Jan-17	Donna Ivey
P-0079		Email dated April 4, 2015 (1:38 PM) from Joe Smyth to Joe Browne and Donna Ivey regarding Tweet of concern	10-Jan-17	Donna Ivey
P-0080		Excerpts from Joe Smyth Blackberry Extraction Report	10-Jan-17	Donna Ivey
P-0081		Statement of Tom Mahoney, dated April 9, 2015 (12:00 PM)	10-Jan-17	Tom Mahoney
P-0082		Excerpt from Statement of Cst. Joe Smyth, dated April 6, 2015	10-Jan-17	Tom Mahoney

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0083		Notebook Notes of Cpl. Monty M. Henstridge dated April 9, 2015	10-Jan-17	Tom Mahoney
P-0084		Access to Information and Protection of Privacy Act (Section 39)	10-Jan-17	Tom Mahoney
P-0085		Email dated December 12, 2014 (9:30 AM) from Carla Riggs to Tom Mahoney and Craig Noseworthy regarding twitter post	10-Jan-17	Tom Mahoney
P-0086		Email dated January 8, 2015 (12:36 PM) from Angela Connolly to Steve Kent regarding Fw: Tweet from @sculpen - Don Dunphy	10-Jan-17	Tom Mahoney
P-0087		Email dated February 23, 2015 (4:33 PM) from Shawn Pelley to Tom Mahoney and Craig Noseworthy regarding Twitter monitoring	10-Jan-17	Tom Mahoney
P-0088		Email dated April 4, 2015 (3:45 PM) from Tom Mahoney to Craig Noseworthy regarding Fw: Don Dunphy	10-Jan-17	Tom Mahoney
P-0089		Email dated April 4, 2015 (4:04 PM) from Craig Noseworthy to Tom Mahoney regarding contact information	10-Jan-17	Tom Mahoney
P-0090		Email dated April 4, 2015 (4:18:29 PM) from Tom Mahoney to Ralph Tucker, Joe Smyth copied to Leslie Galway and Helen Kavanagh regarding Don Dunphy	10-Jan-17	Tom Mahoney
P-0091		Supplementary Occurrence Report - Cpl. Monty Henstridge, report time April 6, 2015 (13:50)	10-Jan-17	Tom Mahoney
P-0092		RNC General Occurrence Hardcopy dated April 7, 2015 (12:48)	10-Jan-17	Tom Mahoney
P-0093		Supplementary Occurrence Report - Cpl. Monty Henstridge, report time April 9, 2015 (13:26)	10-Jan-17	Tom Mahoney
P-0094		Correspondence dated April 25, 2015 from Erin Breen to Tracy Hardy and Darin King re RCMP investigation into the death of Donald Dunphy	9-Jan-17	Meghan Dunphy

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0095		Statement of Richard (aka Dick) Dunphy dated April 5, 2015	11-Jan-17	Richard Dunphy
P-0096		Statement of Richard Dunphy dated September 4, 2015	11-Jan-17	Richard Dunphy
P-0097		Statement of Richard and Deborah Dunphy dated November 8, 2016	11-Jan-17	Richard Dunphy
P-0098		Supplementary Occurrence Report dated December 1, 2015	11-Jan-17	Richard Dunphy
P-0099		Cancelled Exhibit		
P-0100		Statement of Colin Dinn dated April 6, 2015	11-Jan-17	Colin Dinn
P-0101		Statement - Colin Dinn (#2)	11-Jan-17	Colin Dinn
P-0102		Statement of Colin Dinn dated November 8, 2016 (19:38)	11-Jan-17	Colin Dinn
P-0103		Excerpt from Analysts Report prepared by Wanda Richards, Criminal Intelligence	11-Jan-17	Colin Dinn
P-0104		Excerpt from Analysts Report prepared by Wanda Richards, Criminal Intelligence	11-Jan-17	Colin Dinn
P-0105		Handwritten Notes of Witness X dated April 5, 2015	25-Jan-17	Witness X
P-0106		Supplementary Occurrence Report dated April 4, 2015 of Witness X regarding Folder 003 - Scene Security	25-Jan-17	Witness X

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0107		Statement Notes of Cst. Robert Fudge dated September 1, 2016	25-Jan-17	Witness X
P-0108		Handwritten notes by unidentified author taken from Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0109		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0110		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0111		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0112		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0113		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0114		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0115		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0116		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	10-Jan-17	Tom Mahoney
P-0117		Affidavit of Service from Guy Badcock dated January 9, 2017, re Summons to Witness for Debbie Dunphy	11-Jan-17	CIDDD
P-0118		Constable Joe Smyth Curriculum Vitae	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0119		Statement of Joseph Smyth dated April 6, 2015	16-Jan-17	Joseph Smyth
P-0120		Transcript of Re-enactment between Joe Smyth and Cpl. Steve Burke dated April 10, 2015	16-Jan-17	Joseph Smyth
P-0121		Statement of Constable Joseph Smyth dated June 17, 2015	16-Jan-17	Joseph Smyth
P-0122		Statement of Constable Joe Smyth dated August 26, 2015	16-Jan-17	Joseph Smyth
P-0123		Statement of Constable Joe Smyth dated November 9, 2016	16-Jan-17	Joseph Smyth
P-0124		Transcribed Audio Recording of RCMP OCC Recording dated April 5, 2015, Audio A0044, Audio A0045, A0046 and A0047	16-Jan-17	Joseph Smyth
P-0125		Transcribed Audio Recording of RCMP OCC Recording dated April 5, 2015, Audio A0050 and A0051	16-Jan-17	Joseph Smyth
P-0126		Transcribed Audio Recording of RCMP OCC Recording dated April 5, 2015, Audio A0052, A0063 and A0064	16-Jan-17	Joseph Smyth
P-0127		Transcribed Audio Recording of RCMP OCC Recording dated April 5, 2015, Audio A0074	16-Jan-17	Joseph Smyth
P-0128		RNC Narrative Text Hardcopy - Case Summary dated April 7, 2015 (12:48) by Joe Smyth dated April 7, 2015 (12:48)	16-Jan-17	Joseph Smyth
P-0129		Excerpt from RCMP File - Appendix II - Diagram of Mr. Dunphy's residence	16-Jan-17	Joseph Smyth
P-0130		First page is an excerpt from Joe Smyth's Blackberry Extraction Report and second page is an excerpt from Analysts Report prepared by Wanda Richards, Criminal Intelligence, of Donald Dunphy's cell phone records.	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0131		Excerpts from Joe Smyth Blackberry Extraction Report	16-Jan-17	Joseph Smyth
P-0132		Excerpts from Joe Smyth's Blackberry Extraction Report	16-Jan-17	Joseph Smyth
P-0133		Excerpts from Joe Smyth's Blackberry Extraction Report	16-Jan-17	Joseph Smyth
P-0134		Excerpts from Analysts Report prepared by Wanda Richards, Criminal Intelligence	16-Jan-17	Joseph Smyth
P-0135		Email dated December 16, 2016 (10:15:43 AM) from Kim Harding to Sandra Chaytor, Wendy Zdebiak, Nick Avis copied Kate O'Brien and Diane Blackmore regarding ICAN search in name of Donald Dunphy	16-Jan-17	Joseph Smyth
P-0136		Transcript of Audio Recordings - RNC Communications Centre dated April 4-5 2015	16-Jan-17	Joseph Smyth
P-0137		CPIC Search results dated April 5, 2015 by Mark Oram	16-Jan-17	Joseph Smyth
P-0138		Offline Search Request dated April 5, 2015 provided to Supt. J Sheppard	16-Jan-17	Joseph Smyth
P-0139		Email dated April 8, 2015 (4:08 PM) from Dale Evans to Steve Burke copied to Jason Sheppard regarding RCMP PROS FILE #2015-376186-RNC Member involved in shooting	16-Jan-17	Joseph Smyth
P-0140		Database Systems Utilized by the RNC	16-Jan-17	Joseph Smyth
P-0141		PROS Persons Query on Donald Dunphy	16-Jan-17	Joseph Smyth
P-0142		Criminal Convictions conditional and absolute discharges from RCMP regarding Donald Dunphy	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0143		Email dated January 3, 2017 (12:57:55 PM) from Mark Freeman to Kate O'Brien, Sandra Chaytor and Diane Blackmore copied Lori Rasmussen regarding CIDDD - CPIC, Old Files, audit	16-Jan-17	Joseph Smyth
P-0144		Transcript of Audio Recording A0108 dated April 5, 2015	16-Jan-17	Joseph Smyth
P-0145		Personal Performance Development Plan dated May 30 , 2006 for Cst. Joe Smyth	16-Jan-17	Joseph Smyth
P-0146		Personnel Order 2013-102 dated April 8, 2013 Description of Duties	16-Jan-17	Joseph Smyth
P-0147		Correspondence dated January 7, 2013 regarding Personnel Order 2013-010	16-Jan-17	Joseph Smyth
P-0148		Correspondence dated June 4, 2013 regarding Sergeant Vacancy Personnel Order 2013-143	16-Jan-17	Joseph Smyth
P-0149		Correspondence dated May 26, 2014 from William J. Janes to A/Sergeant Joe Smyth regarding Commendation for Social Media Development	16-Jan-17	Joseph Smyth
P-0150		Life -Saving Award dated July 2015	16-Jan-17	Joseph Smyth
P-0151		Correspondence dated May 4, 2015 from Supt. Jason Sheppard to A/Supt. Pat Cahill regarding Information Request April 14, 2015	16-Jan-17	Joseph Smyth
P-0152		Employee Attendance Report dated Nov. 24, 2015	16-Jan-17	Joseph Smyth
P-0153		Training history dated April 27, 2015	16-Jan-17	Joseph Smyth
P-0154		Training history dated September 27, 2016	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0155		Email dated April 30, 2015 (10:37 AM) from Bill James to Jason Sheppard regarding Use of Force Training - Smyth	16-Jan-17	Joseph Smyth
P-0156		Correspondence dated April 27, 2015 from William James to Jason Sheppard regarding Information request - Cst. J. Smyth	16-Jan-17	Joseph Smyth
P-0157		Use of Force Training Log dated December 7, 2012	16-Jan-17	Joseph Smyth
P-0158		Use of Force Training Log dated October 28, 2013	16-Jan-17	Joseph Smyth
P-0159		Use of Force Training Log dated April 17, 2014	16-Jan-17	Joseph Smyth
P-0160		Use of Force Training Log dated April 9, 2015	16-Jan-17	Joseph Smyth
P-0161		Use of Force Report dated April 5, 2015	16-Jan-17	Joseph Smyth
P-0162		Use of Force Report dated August 14, 2007	16-Jan-17	Joseph Smyth
P-0163		Use of Force Report dated May 10, 2007	16-Jan-17	Joseph Smyth
P-0164		Use of Force Report dated March 12, 2007	16-Jan-17	Joseph Smyth
P-0165		Shift Report dated March 12, 2007	16-Jan-17	Joseph Smyth
P-0166		Breach of Policy dated April 7, 2016	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0167		Internal Complaint Report dated July 16, 2004	16-Jan-17	Joseph Smyth
P-0168		Correspondence dated May 26, 2005 from Dean Roberts (Sergeant) to Rendell Frazer regarding Joe Smyth Internal File Breach of Criminal Code	16-Jan-17	Joseph Smyth
P-0169		Correspondence dated June 29, 2005 to R.C. Deering, Chief of Police, from Sergeant Dean Roberts	16-Jan-17	Joseph Smyth
P-0170		Correspondence dated September 2, 2005 to Dave Hickey from R.C. Deering, Chief of Police, regarding Suspension without Pay	16-Jan-17	Joseph Smyth
P-0171		Correspondence dated May 28, 2005 to Sgt. M.A. Jesso from Joe Smyth regarding Internal Investigation	16-Jan-17	Joseph Smyth
P-0172		Internal Investigative Report dated May 28, 2005	16-Jan-17	Joseph Smyth
P-0173		Supplementary report dated April 10, 2015	16-Jan-17	Joseph Smyth
P-0174		Supplementary Occurrence Report of Cpl. Trevor O'Keefe dated April 5, 2015	16-Jan-17	Joseph Smyth
P-0175		Supplementary Occurrence Report of Cst. Adrian Cox dated April 5, 2015	16-Jan-17	Joseph Smyth
P-0176		Supplementary Occurrence Report of Cpl. Henstridge dated April 6, 2015	16-Jan-17	Joseph Smyth
P-0177		Supplementary Occurrence Report of Cpl. Monty Henstridge dated April 6, 2015	16-Jan-17	Joseph Smyth
P-0178		Investigation Report dated April 6, 2015 by Cpl. Kent Osmond	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0179		Supplementary Occurrence Report by Cpl. Dion Foote dated April 9, 201	16-Jan-17	Joseph Smyth
P-0180		Supplementary Occurrence Report of Cpl. Steve Burke dated April 8, 2015	16-Jan-17	Joseph Smyth
P-0181		Supplementary Occurrence Report of Cpl. Trevor O'Keefe dated April 4, 2015	16-Jan-17	Joseph Smyth
P-0182		Supplementary Occurrence Report of Cst. Kelly Downey dated April 11, 2015	16-Jan-17	Joseph Smyth
P-0183		Supplementary Occurrence Report of Cst. Mike Nippard April 22, 2015	16-Jan-17	Joseph Smyth
P-0184		Supplementary Occurrence Report of Cpl. Steve Burke dated September 15, 2015	16-Jan-17	Joseph Smyth
P-0185		Email dated April 4, 2015 (2:46 PM) from Joe Smyth to Ralph Tucker regarding Don Dunphy	16-Jan-17	Joseph Smyth
P-0186		Email dated April 4, 2015 (3:37:38 PM) from Joe Smyth to Ralph Tucker copied to Tom Mahoney, Leslie Galway and Helen Kavanagh regarding Don Dunphy	16-Jan-17	Joseph Smyth
P-0187		Email dated April 4, 2015 (4:36 PM) from Doug Noel to Jamie Zettler regarding PPU RNC member involved in shooting	16-Jan-17	Joseph Smyth
P-0188		Email dated April 7, 2015 (1:08:11 PM) from Joe Smyth to Joe Gullage, Jason Sheppard, Jim Carroll, Bill Janes, Ab Singleton regarding File 2015-17896 Don Dunphy	16-Jan-17	Joseph Smyth
P-0189		Email dated April 7, 2015 (21:41) from Joe Smyth to Steve Burke regarding Notes	16-Jan-17	Joseph Smyth
P-0190		Email dated April 9, 2015 (10:00:23 PM) from Joe Smyth to Warren Sullivan regarding Email to colleagues	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0191		Email dated April 10, 2015 (07:32 AM) from Joe Smyth to All Staff Royal Newfoundland Constabulary regarding Death of Donald Dunphy	16-Jan-17	Joseph Smyth
P-0192		Email dated April 10, 2015 (11:14:35) from Joe Smyth regarding Fatal Shooting	16-Jan-17	Joseph Smyth
P-0193		Email dated April 10, 2015 (8:47:23 AM) from Joe Smyth to Warren Sullivan regarding email to colleagues	16-Jan-17	Joseph Smyth
P-0194		Email dated April 10, 2015 (8:49 AM) from Joe Smyth to Doug Noel and Steve Burke regarding Don Dunphy Shooting	16-Jan-17	Joseph Smyth
P-0195		Email dated April 13, 2015 (10:04:08 AM) from Joe Smyth to Jason Sheppard regarding Message	16-Jan-17	Joseph Smyth
P-0196		Email dated April 21, 2015 (12:35 PM) from Joe Smyth to Steve Burke regarding BlackBerry	16-Jan-17	Joseph Smyth
P-0197		Email dated June 9, 2015 (2:36 PM) from Steve Burke to Joe Smyth regarding Interview	16-Jan-17	Joseph Smyth
P-0198		Email dated June 24, 2015 (9:41:16 AM) from Joe Smyth to Grant Little regarding Donald Dunphy	16-Jan-17	Joseph Smyth
P-0199		Email dated July 29, 2015 (3:43:45 AM) from Joe Smyth to Steve Burke regarding Checking in	16-Jan-17	Joseph Smyth
P-0200		Email dated October 27, 2015 (3:13:43 PM) from Joe Gullage to Jason Sheppard regarding Twitter	16-Jan-17	Joseph Smyth
P-0201		Email dated November 2, 2015 (4:45:01 PM) from Joe Gullage to Jason Sheppard regarding Request to be armed	16-Jan-17	Joseph Smyth
P-0202		Email dated November 17, 2015 (10:00:41 AM) from Joe Smyth to Yves Alani regarding contacts	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0203		Email dated March 18, 2016 (8:31:11 AM) from Joe Smyth to Steve Burke regarding Update of a time line from ASIRT	16-Jan-17	Joseph Smyth
P-0204		Email dated September 13, 2016 (6:26:37 PM) from Mark Quinn to Joe Smyth regarding ASIRT report	16-Jan-17	Joseph Smyth
P-0205		Email dated September 14, 2016 (11:54 AM) from Kent Osmond to Steve Burke regarding - Osmond's Notes - Meeting with Joe Smyth	16-Jan-17	Joseph Smyth
P-0206		Email dated September 21, 2016 (11:31:33 AM) from Joe Smyth to Bill James regarding Judge Riche	16-Jan-17	Joseph Smyth
P-0207		Email dated October 7, 2015 (3:54:04 PM) from Joe Smyth to Bill Janes regarding David Riche and Inquiry	16-Jan-17	Joseph Smyth
P-0208		Cancelled Exhibit		
P-0209		History of Protective Services Detail	16-Jan-17	Joseph Smyth
P-0210		Personnel Order 2015-208 Sergeant Position, Protection Services Unit dated June 23, 2015	16-Jan-17	Joseph Smyth
P-0211		Correspondence dated December 1, 2017 from Cst. L. Downtown to Inspector Gullage regarding Protective Services Unit	16-Jan-17	Joseph Smyth
P-0212		Special Projects Operational Plan dated April 07, 2013	16-Jan-17	Joseph Smyth
P-0213		Hand Drawing of scene completed by Joe Smyth dated April 6, 2015	16-Jan-17	Joseph Smyth
P-0214		Email dated July 8, 2015 (10:53 AM) from John Galway to Steve Burke regarding Dunphy Yellow Folder	16-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0215		Radio Communications - RNC Ten Codes	16-Jan-17	Joseph Smyth
P-0216		Cancelled Exhibit		
P-0217		Statement of Constable Joseph Smyth dated September 14, 2015	16-Jan-17	Joseph Smyth
P-0218		Managing Targeted Violence - Course material Submitted by Joseph Smyth	16-Jan-17	Joseph Smyth
P-0219		Protective Services Unit - Quarterly Report - 2014-01-01 to 2014-03-31 by Sergeant Joe Smyth	16-Jan-17	Joseph Smyth
P-0220		Protective Services Unit - Quarterly Report - 2013-04-01 to 2013-06-30 by Sergeant Joe Smyth	16-Jan-17	Joseph Smyth
P-0221		Cancelled Exhibit		
P-0222		Certificate of Achievement for Joe Smyth for successfully completing the Managing Targeted Violence Course and list of attendees	16-Jan-17	Joseph Smyth
P-0223		Email dated April 6, 2015 (9:11 PM) from Joe Browne to Doug Noel regarding Caution: Andrew Abbass	16-Jan-17	Joseph Smyth
P-0224		Excerpt from Donald Dunphy's Twitter Account dated December 19, 2014	16-Jan-17	Joseph Smyth
P-0225		Excerpt from email dated November 16, 2015 from Chris Saunders to D Barr re Folder 083 - Dunphy Investigation showing Sgt. Saunders' hand drawn and measurements of living room and items therein	16-Jan-17	Joseph Smyth
P-0226		Handwritten Notes dated April 5, 2015, Trevor O'Keefe	25-Jan-17	Trevor O'Keefe

 <p style="text-align: center;">Commission of Inquiry Respecting the Death of Donald Dunphy</p> <p style="text-align: center;">Exhibit Listing</p> <p style="text-align: center;">January 9, 2017 - March 10, 2017</p>				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0227		Statement dated August 31, 2016 of Trevor O'Keefe	25-Jan-17	Trevor O'Keefe
P-0228		Supplementary Occurrence Report dated April 5, 2015 of Trevor O'Keefe	25-Jan-17	Trevor O'Keefe
P-0229		Supplementary Occurrence Report dated April 10, 2015 of Trevor O'Keefe	25-Jan-17	Trevor O'Keefe
P-0230		Scene Notes from Cst. Adrian Cox	25-Jan-17	Trevor O'Keefe
P-0231		Email dated April 14, 2015 (12:51 PM) from Sgt. Kent Osmond to Rod Tiller regarding Contact with Smyth	25-Jan-17	Trevor O'Keefe
P-0232		ASIRT Report pages 8 and 9	25-Jan-17	Trevor O'Keefe
P-0233		Cancelled Exhibit		
P-0234		Notebooks notes of Cpl. Dion Foote dated April 5, 2015	26-Jan-17	Dion Foote
P-0235		Supplementary Occurrence Report dated April 5, 2015 of Cpl. Dion Foote	26-Jan-17	Dion Foote
P-0236		Handwritten notes of Cpl. Dion Foote dated April 6, 2015	26-Jan-17	Dion Foote
P-0237		Handwritten notes of Cpl. Dion Foote dated April 7, 2015	26-Jan-17	Dion Foote
P-0238		Handwritten Notes of Cpl. Dion Foote dated April 8, 2015	26-Jan-17	Dion Foote

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0239		Handwritten Notes of Cpl. Dion Foote dated April 9, 2015	26-Jan-17	Dion Foote
P-0240		Handwritten Notes of Cpl. Dion Foote dated April 15, 2015	26-Jan-17	Dion Foote
P-0241		Supplementary Occurrence Report dated April 6, 2015 of Cpl. Dion Foote regarding Folder 021 - Medical Records	26-Jan-17	Dion Foote
P-0242		Supplementary Occurrence Report dated April 9, 2015 of Cpl. Dion Foote regarding Folder 029 - Dr. Walsh - Holyrood	26-Jan-17	Dion Foote
P-0243		Supplementary Occurrence Report dated April 10, 2015 of Cpl. Dion Foote regarding folder 063 - TV Interview of Trish Dodd	26-Jan-17	Dion Foote
P-0244		Supplementary Occurrence Report dated April 13, 2015 of Cpl. Dion Foote regarding Folder 065 - Disclosure to Retired Justice Riche	26-Jan-17	Dion Foote
P-0245		Supplementary Occurrence Report dated May 1, 2015 of Cpl. Dion Foote regarding Folder 084 Analysis of Cell Phone	26-Jan-17	Dion Foote
P-0246		Supplementary Occurrence Report dated April 7, 2015 of Cpl. Dion Foote regarding Folder 030 - Dr. McGarry	26-Jan-17	Dion Foote
P-0247		Supplementary Occurrence Report dated April 8, 2015 of Cpl. Dion Foote regarding Folder 052 - Re-enactment	26-Jan-17	Dion Foote
P-0248		Handwritten Notes of Cpl. Dion Foote dated April 14- May 22, 2015	26-Jan-17	Dion Foote
P-0249		Email dated April 5, 2015 (8:26:37 PM) from Scott Haye to Joe Gullage regarding Shooting	23-Jan-17	Joseph Smyth
P-0250		Excerpt from the Criminal Code of Canada	23-Jan-17	Joseph Smyth

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0251		Excerpt from Joe Smyth's cell phone records relating to Joe Browne	27-Feb-17	Joe Browne
P-0252		Paul Davis Cell and Joe Browne's cell phone bill	22-Feb-17	Heather MacLean
P-0253		Email dated January 25, 2015 (8:30 AM) from Joe Smyth to Paul Davis, Joe Browne, Catherine Evans, Heather Maclean, Donna Hynes, Peter Morris and Veronica Hayden regarding Awareness Bulletin: Threat to Canada - Bulletin included	23-Feb-17	Joe Gullage
P-0254		Email dated April 6, 2015 (9:29 AM) from Steve Kent to Joe Smyth and Joe Browne regarding Phone Message	27-Feb-17	Joe Browne
P-0255		Email dated April 6, 2015 (7:31 PM) from Joe Browne to Paul Davis, ET AL regarding "Brutal" message	27-Feb-17	Joe Browne
P-0256		Email dated September 14, 2016 (8:22 AM) from Joe Browne to Jeff Paddock regarding Questions from Andrew Parsons in 2015	27-Feb-17	Joe Browne
P-0257		Excerpt from Joe Smyth's cell phone records	23-Jan-17	Joseph Smyth
P-0258		Email dated April 14, 2015 (11:34:57 PM) from Joe Smyth to Rodney Cannon regarding Call	23-Jan-17	Joseph Smyth
P-0259		Notebooks notes of Kelly Downey dated April 5, 2015	30-Jan-17	Kelly Downey
P-0260		Email dated April 9, 2015 (9:23:47 PM) from Joe Smyth to Tim Buckle regarding Email to friends and Colleagues	10-Feb-17	Tim Buckle
P-0261		Email dated September 28, 2016 (3:41:26 PM) from Tim Buckle to Mike Summers copied to Scott Harris, Steven Simmons, Jared Sweetapple and Nick Rumbolt regarding comments by Jerome Kennedy	10-Feb-17	Tim Buckle

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0262		Excerpt pages from extraction report of Joe Smyth's cell phone records	10-Feb-17	Tim Buckle
P-0263		Labour Management Committee Meeting, RNC Headquarters dated March 15, 2012	10-Feb-17	Tim Buckle
P-0264		Labour Management Committee Meeting, RNC Headquarters dated June 7, 2012	10-Feb-17	Tim Buckle
P-0265		Labour Management Committee Meeting, RNC Headquarters dated September 20, 2012	10-Feb-17	Tim Buckle
P-0266		Labour Management Committee Meeting, RNC Headquarters dated December 13, 2012	10-Feb-17	Tim Buckle
P-0267		Statement of Warren Sullivan dated 2015-04-07	30-Jan-17	Warren Sullivan
P-0268		Excerpt from Joe Smyth's cell phone records pertaining to Warren Sullivan	30-Jan-17	Warren Sullivan
P-0269		Supplementary report of Monty Henstridge dated April 6, 2015	30-Jan-17	Warren Sullivan
P-0270		RNCA Minutes of Executive Meeting dated April 7, 2015	30-Jan-17	Warren Sullivan
P-0271		Email dated April 7, 2015 (2:48 PM) from Heather MacLean to Paul Davis, Joe Browne, Peter Morris, Donna Ivey, Veronica Hayden and Darrell Hynes regarding FYI RCMP update this afternoon	27-Feb-17	Joe Browne
P-0272		Statement of Scott Harris dated April 10, 2015 (9:06 AM)	31-Jan-17	Scott Harris
P-0273		Supplementary Occurrence Report dated April 8, 2015 of Cst. Mike Nippard regarding Folder 047 - Statement of Scott Harris	31-Jan-17	Scott Harris

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0274		Excerpt from RCMP Daily Log	31-Jan-17	Scott Harris
P-0275		Email dated April 7, 2015 (1:00 PM) from Heather MacLean to Paul Davis, Joe Browne, Peter Morris, Donna Ivey and Veronica Hayden regarding Media VOCM - Corner Brook RNC Investigating Threatening Statements on Twitter	27-Feb-17	Joe Browne
P-0276		Email dated April 13, 2015 (11:27:02 AM) from Joe Gullage to Scott Haye copied to Jason Sheppard, Ab Singleton and Ed Benoit regarding Message	2-Feb-17	Ed Benoit
P-0277		Investigational Findings/Record Book of Mike Adams	30-Jan-17	Mike Adams
P-0278		Audio Statement of Mike Adams dated April 7, 2015	30-Jan-17	Mike Adams
P-0279		RNC, Appendix 31 - Critical Incident Stress Debriefing	30-Jan-17	Mike Adams
P-0280		Supplementary Occurrence Report of Monty Henstridge dated April 22, 2015 regarding Folder 094 - 2nd Statement of Richard Dunphy	30-Jan-17	Mike Adams
P-0281		Excerpt from RCMP Daily Log, Monty Henstridge, dated April 5, 2015 (14:28:00)	30-Jan-17	Mike Adams
P-0282		Business Card of Lee Lush	27-Jan-17	Lee Lush
P-0283		Audit Request dated April 5, 2015, of PROS Activity by Cpl. Trevor O'Keefe and Cst. Adrian Cox in relation to Mr. Donald Dunphy	25-Jan-17	Trevor O'Keefe
P-0284		Digital Recording Statement of Ed Benoit dated May 6, 2015 (3:11 PM)	2-Feb-17	Ed Benoit
P-0285		Excerpt from Joe Smyth's cell phone records relating to Ed Benoit	2-Feb-17	Ed Benoit

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
<i>Public Exhibit</i>	<i>In Camera Exhibit</i>	<i>Description of Exhibit</i>	<i>Date Entered into Evidence</i>	<i>Witness Entered Under</i>
P-0286		RNC Protective Services Unit Quarterly Report dated April 1, 2015- June 30, 2015	2-Feb-17	Ed Benoit
P-0287		RNC Protective Services Unit Quarterly Report dated July 1, 2015 - September 30, 2015	2-Feb-17	Ed Benoit
P-0288		Quarterly Report for Protective Services Unit, Quarter 4 dated October 2015 to December 2015	2-Feb-17	Ed Benoit
P-0289		RNC Criminal Intelligence Unit Threat Assessment dated April 6, 2015	2-Feb-17	Ed Benoit
P-0290		Email dated September 17, 2016 (10:04:59 AM) from Joey Smyth to Bill Janes, Jason Sheppard, Joe Gullage, Mike Summers and John Drover regarding Dunphy Article	23-Jan-17	Joseph Smyth
P-0291		Use of Force Reports by Cst. Joseph Smyth	25-Jan-17	Joseph Smyth
P-0292		Royal Newfoundland Constabulary Regulations under the Royal Newfoundland Constabulary Act, 1992	23-Jan-17	Joseph Smyth
P-0293		Pages 1 and 2 were provided by Mike Adams from his RNC Investigational Findings/Record Book titled "Critical Incident Stress Information Sheets"; Page 3 is from the RNC Investigational Findings/Record Book and is provided as reference purposes only for the clarity of the page	30-Jan-17	Mike Adams
P-0294		Statement of Cpl. Doug Noel, RCMP interviewed by Cst. Nippard dated May 14, 2015 (1:56 PM)	2-Feb-17	Doug Noel
P-0295		Supplementary Occurrence Report dated May 7, 2015 of Cst. Nippard regarding Folder 095 - Statement of Cpl. Doug Noel	2-Feb-17	Doug Noel
P-0296		Email dated April 5, 2015 (7:14 PM) from Jamie Zettler to Kent Osmond regarding MHA Sandy Collins - Residence	2-Feb-17	Doug Noel

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0297		Email dated April 5, 2015 (9:33 PM) from Kent Osmond to Doug Noel regarding Written Account	2-Feb-17	Doug Noel
P-0298		Email dated April 7, 2015 (8:50 AM) from Premier to Doug Noel regarding Brutal	2-Feb-17	Doug Noel
P-0299		Email dated April 7, 2015 (2:55 PM) from Doug Noel to Joe Browne and Paul Davis regarding RCMP update; Mitchell's Brook Shooting	2-Feb-17	Doug Noel
P-0300		Oath of Office for Joseph Smyth dated May 28, 2001 and June 20, 2002	23-Jan-17	Joseph Smyth
P-0301		Email dated April 5, 2015 (7:57 pm) from Jamie Zettler to Doug Noel regarding tweet of concern	2-Feb-17	Doug Noel
P-0302		General Report of Lee Lush dated March 30, 2012	25-Jan-17	Trevor O'Keefe
P-0303		Hand drawing provided by Rochelle Nolan showing location of her residence to Donald Dunphy's residence	27-Jan-17	Rochelle Nolan
P-0304		Excerpt from Warren Sullivan's cell phone records	30-Jan-17	Warren Sullivan
P-0305		Royal Newfoundland Constabulary Act, 1992	24-Jan-17	Joseph Smyth
P-0306		Section 86 of the Criminal Code of Canada	24-Jan-17	Joseph Smyth
P-0307		Section 88 - Section 91 of the Criminal Code of Canada	24-Jan-17	Joseph Smyth
P-0308		"B" division operation support services, Major Crime Unit Chart	7-Feb-17	Steve Burke

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0309		Major Case Management Command Triangle	7-Feb-17	Steve Burke
P-0310		Email dated December 2, 2016 (8:47 AM) from Steve Burke to Lori Rasmussen regarding Interview Clarifying points	7-Feb-17	Steve Burke
P-0311		Investigation Report Prepared by Steve Burke dated April 29, 2015	7-Feb-17	Steve Burke
P-0312		General Report of Cpl. Steve Burke dated April 6, 2015 regarding Folder 012 - General notes of Cpl. Steve Burke	7-Feb-17	Steve Burke
P-0313		Email dated April 28, 2015 (9:47 AM) from RBC CIS GRIDS to Mike Nippard regarding Request for video and/or still pictures	7-Feb-17	Steve Burke
P-0314		Excerpt from RCMP Daily Log Report pages 400-418	7-Feb-17	Steve Burke
P-0315		Terms of Reference, Independent Observer's Role in Investigation	7-Feb-17	Steve Burke
P-0316		C-414 Request for Forensic Analysis dated April 9, 2015	1-Feb-17	John Galway
P-0317		Request for Forensic Analysis dated April 9, 2015	7-Feb-17	Steve Burke
P-0318		Email dated April 13, 2015 (3:14 PM) from John Galway to Steve Burke and Mike Nippard regarding file 2016-376186	7-Feb-17	Steve Burke
P-0319		Email dated September 8, 2015 (10:51 AM) from Mike Nippard to Steve Burke regarding file 2016-376186/ Lab File 2015N-002804	7-Feb-17	Steve Burke
P-0320		Forensic Science and Identification Services Lab Report dated September 23, 2015	7-Feb-17	Steve Burke

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0321		Email dated September 23, 2015 (11:34 AM) from Greg Williams to Steve Burke regarding Firearms Forensic Lab Report	7-Feb-17	Steve Burke
P-0322		Email dated September 24, 2015 (11:05 AM) from Mike Merritt to Steve Burke regarding Firearms Forensic Lab Report	7-Feb-17	Steve Burke
P-0323		Excerpt from RCMP Daily Log Report page 435, Task Assignment 39 -Lab Analysis	7-Feb-17	Steve Burke
P-0324		Email dated June 3, 2016 (6:09 PM) from Pat Cahill to Steve Burke copied to Chris Saunders regarding Mitchell's Brook	7-Feb-17	Steve Burke
P-0325		Meghan Dunphy Consent to Search dated April 15, 2015	7-Feb-17	Steve Burke
P-0326		Joseph Smyth Consent to Search	7-Feb-17	Steve Burke
P-0327		Video - Joe Smyth statement dated April 6, 2015	7-Feb-17	Steve Burke
P-0328		Notebook notes of Steve Burke dated April 5, 2015	7-Feb-17	Steve Burke
P-0329		Re-enactment Video between Joe Smyth and Cpl. Steve Burke dated April 10, 2015 (Note: Video embedded in January 18, Part II, webcast)	24-Jan-17	Joseph Smyth
P-0330		Notebook notes of Steve Burke dated April 5, 2015, Task 009 @ 19:43	7-Feb-17	Steve Burke
P-0331		Notebook notes of Steve Burke dated April 6, 2015, Task 12 @ 0800	7-Feb-17	Steve Burke
P-0332		Notebook notes of Steve Burke dated April 7, 2015, Task 12 @ 0800	7-Feb-17	Steve Burke

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0333		Notebook notes of Steve Burke dated April 8, 2015, Folder 52 @ 0800	7-Feb-17	Steve Burke
P-0334		Notebook notes of Steve Burke dated April 8, 2015, Task 024, 012 @ 20:06	7-Feb-17	Steve Burke
P-0335		Notebook notes of Steve Burke dated April 9, 2015, Folder 012 @ 9:00	7-Feb-17	Steve Burke
P-0336		Notebook notes of Steve Burke dated April 10, 2015, Folder 064 @ 08:00	7-Feb-17	Steve Burke
P-0337		Notebook notes of Steve Burke dated April 13, 2015, Folder 065 @ 08:00	7-Feb-17	Steve Burke
P-0338		Notebook notes of Steve Burke dated April 14, 2015, Folder 12 @ 08:00	7-Feb-17	Steve Burke
P-0339		Notebook notes of Steve Burke dated April 15, 2015, Folder 082 @ 08:00	7-Feb-17	Steve Burke
P-0340		Notebook notes of Steve Burke dated April 16, 2015, Folder 012 @ 08:00	7-Feb-17	Steve Burke
P-0341		Notebook notes of Steve Burke dated April 17, 2015 Task 012 @ 08:00	7-Feb-17	Steve Burke
P-0342		Notebook notes of Steve Burke dated April 24, 2015, Task 088 @ 08:00	7-Feb-17	Steve Burke
P-0343		Notebook notes of Steve Burke dated May 12, 2015, Task 069 @ 09:14	7-Feb-17	Steve Burke
P-0344		Notebook notes of Steve Burke dated June 8, 2015, Folder 067 @ 09:10	7-Feb-17	Steve Burke

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0345		Notebook notes of Steve Burke dated June 8, 2015, Folder 065 @ 10:45	7-Feb-17	Steve Burke
P-0346		Notebook notes of Steve Burke dated June 10, 201, Folder 054 @ 09:57	7-Feb-17	Steve Burke
P-0347		Notebook notes of Steve Burke dated June 12, 2015, Folder 054 @ 14:30	7-Feb-17	Steve Burke
P-0348		Notebook notes of Steve Burke dated June 12, 2015, Folder 106 @ 15:56	7-Feb-17	Steve Burke
P-0349		Notebook notes of Steve Burke dated August 7, 2015, Folder 54,12	7-Feb-17	Steve Burke
P-0350		Notebook notes of Steve Burke dated September 9, 2015, Folder 12 @ 10:00	7-Feb-17	Steve Burke
P-0351		Notebook notes of Steve Burke dated September 14, 2015, Folder 111	7-Feb-17	Steve Burke
P-0352		Notebook notes of Steve Burke dated September 14, 2015, Folder 111 @ 16:32	7-Feb-17	Steve Burke
P-0353		Notebook notes of Steve Burke dated September 25, 2015, Task 065 @ 08:36	7-Feb-17	Steve Burke
P-0354		Notebook notes of Steve Burke dated October 13, 2015, Folder 20 @ 10:00	7-Feb-17	Steve Burke
P-0355		Notebook notes of Steve Burke dated December 1, 2015, Task 118 @ 09:35	7-Feb-17	Steve Burke
P-0356		Notebook notes of Steve Burke dated April 22, 2016, Task 20 @ 10:10	7-Feb-17	Steve Burke

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0357		Notebook notes of Steve Burke dated September 12, 2016, Task 122 @ 10:10	7-Feb-17	Steve Burke
P-0358		Notebook notes of Steve Burke dated September 13, 2016, Task 126 @ 09:46	7-Feb-17	Steve Burke
P-0359		RCMP Daily Log Report dated April 5, 2015-September 22, 2016	7-Feb-17	Steve Burke
P-0360		Task Report - Project Dunphy generated September 22, 2016	7-Feb-17	Steve Burke
P-0361		Curriculum Vitae - Dr. Simon Avis	27-Feb-17	Simon Avis
P-0362		Email dated November 24, 2015 regarding Dr. Avis meeting with Erin Breen and Meghan Dunphy	27-Feb-17	Simon Avis
P-0363		Information Note - Department of Justice and Public Safety regarding Provide Information related to OCME	27-Feb-17	Simon Avis
P-0364		Supplementary Occurrence Report dated April 7, 2015 of Shawn Seward regarding Second Autopsy Attendance	27-Feb-17	Simon Avis
P-0365		Ident Continuation Report dated May 1, 2015 by Cpl. Kelly Lee	27-Feb-17	Simon Avis
P-0366		Email dated April 6, 2015 from Kent Osmond to Rod Tiller and Jamie Zettler regarding call from Cpl. Seward advising delay in Autopsy	27-Feb-17	Simon Avis
P-0367		Supplementary Occurrence Report dated April 6, 2015 of Shawn Seward regarding Autopsy Attendance	27-Feb-17	Simon Avis
P-0368		Excerpt from Daily Log Report dated April 6-7, 2015 pages 62,66,96,97 and 98	27-Feb-17	Simon Avis

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0369		Pages from Supplementary Occurrence Report dated April 6, 2015 of Cpl. Burke regarding General notes	27-Feb-17	Simon Avis
P-0370		Excerpt from Justice Riche's report pages 13 and 19	27-Feb-17	Simon Avis
P-0371		Excerpt from RCMP Investigation Report - Sudden Death of Donald Dunphy page 17	27-Feb-17	Simon Avis
P-0372		An Act Respecting the Investigation of Fatalities	27-Feb-17	Simon Avis
P-0373		Chief Medical Examiner Information From RCMP Regarding Incident	27-Feb-17	Simon Avis
P-0374		Notebook notes dated April 5-6, 2015 of Cst. Adrian Cox	20-Feb-17	Adrian Cox
P-0375		Notebook notes dated April 7, 2015 of Cst. Adrian Cox	20-Feb-17	Adrian Cox
P-0376		Supplementary Occurrence Report of Cst. Adrian Cox dated April 5, 2015 regarding Folder 003 - Scene Security	20-Feb-17	Adrian Cox
P-0377		Supplementary occurrence Report of Cst. Adrian Cox dated April 6, 2015 regarding 1041 Hours	20-Feb-17	Adrian Cox
P-0378		RNC General Occurrence Hardcopy dated April 8, 2015	20-Feb-17	Adrian Cox
P-0379		Statement of Bill Corcoran dated November 8, 2016	26-Jan-17	Billy Corcoran
P-0380		Statement of Sgt. Reginald Tilley by Cpl. Monty Henstridge dated April 6, 2015 at 15:30 Hrs.	6-Feb-17	Reg Tilley

 <p style="text-align: center;">Commission of Inquiry Respecting the Death of Donald Dunphy</p> <p style="text-align: center;">Exhibit Listing</p> <p style="text-align: center;">January 9, 2017 - March 10, 2017</p>				
<i>Public Exhibit</i>	<i>In Camera Exhibit</i>	<i>Description of Exhibit</i>	<i>Date Entered into Evidence</i>	<i>Witness Entered Under</i>
P-0381		RNC Inter-Office Communications handwritten notes	6-Feb-17	Reg Tilley
P-0382		Excerpts from Joe Smyth Blackberry Extraction Report	6-Feb-17	Reg Tilley
P-0383		Supplementary Occurrence Report dated April 5-24, 2015	6-Feb-17	Reg Tilley
P-0384		Supplementary Occurrence Report dated April 7, 2015 of Monty Henstridge regarding Folder 035 - Statement of S/Sgt. Reg Tilley	6-Feb-17	Reg Tilley
P-0385		Supplementary Occurrence Report of Monty Henstridge dated April 7, 2015 regarding Folder 031 - Statement of A/Insp. Mike Adams	30-Jan-17	Mike Adams
P-0386		Excerpt from RCMP statement of Lisa Smyth dated April 7, 2015	30-Jan-17	Mike Adams
P-0387		Statement of Rochelle Nolan dated April 5, 2015	27-Jan-17	Rochelle Nolan
P-0388		RNC Policy and Procedure Manual - General Order 246, Communications dated February 2, 2010	6-Feb-17	Kim Harding
P-0389		Correspondence dated October 5, 2016 from Chief William Janes to Inspector Sue Bill regarding Findings from Internal Investigation completed by Saskatoon Police regarding the actions of Cst. Smyth	6-Feb-17	Kim Harding
P-0390		CPIC Follow up Statement Report dated December 2016 by Kim Harding	6-Feb-17	Kim Harding
P-0391		Email dated April 5, 2015 (8:39 PM) from Ed Benoit to Jason Sheppard regarding As Per Your Request	2-Feb-17	Ed Benoit
P-0392		Notebook notes of John Galway dated April 5, 2015 @ 15:15	1-Feb-17	John Galway

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0393		Supplementary Occurrence Report dated April 5, 2015 @ 15:15 of John Galway regarding Shooting	1-Feb-17	John Galway
P-0394		Notebook notes of John Galway dated April 6, 2015 @ 10:30	1-Feb-17	John Galway
P-0395		Supplementary Occurrence Report dated April 6, 2015 of John Galway	1-Feb-17	John Galway
P-0396		Notebook notes dated April 7, 2015 @ 08:45 of John Galway	1-Feb-17	John Galway
P-0397		Notebook notes dated April 7, 2015 of John Galway	1-Feb-17	John Galway
P-0398		Supplementary Occurrence Report dated April 7, 2015 @ 08:45 of John Galway regarding Folder 010 & 015 - Autopsy and Family Liaison	1-Feb-17	John Galway
P-0399		Notebook notes dated April 8, 2015 @ 09:00 of John Galway	1-Feb-17	John Galway
P-0400		Supplementary Occurrence Report dated April 8, 2015 @ 08:45 of John Galway regarding Folder 015 - Family Liaison	1-Feb-17	John Galway
P-0401		Supplementary Occurrence Report dated April 9, 2015 @ 12:00 OF John Galway regarding Folder 15	1-Feb-17	John Galway
P-0402		Notebook notes of John Galway dated April 13, 2015 @ 09:00	1-Feb-17	John Galway
P-0403		Supplementary Occurrence Report dated April 13, 2015 @ 09:00 of John Galway regarding Folder 004 - Exhibit Custodian	1-Feb-17	John Galway
P-0404		Supplementary Occurrence Report dated April 13, 2015 @ 16:35 of John Galway regarding Folder 040 - Analysis of Rifle from the Scene	1-Feb-17	John Galway

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0405		Notebook notes of John Galway dated April 15, 2015 @ 10:00	1-Feb-17	John Galway
P-0406		Supplementary Occurrence Report dated April 15, 2015 @ 12:00 of John Galway regarding Folder 077 - Mr. Dunphy's Glasses	1-Feb-17	John Galway
P-0407		Supplementary Occurrence Report dated April 15, 2015 @ 12:00 of John Galway regarding Folder 068 - Mr. Dunphy's Cell Phone	1-Feb-17	John Galway
P-0408		Notebook notes of John Galway dated April 16, 2015 @ 09:00	1-Feb-17	John Galway
P-0409		Supplementary Occurrence Report dated April 16, 2015 @ 10:00 of John Galway regarding Folder 040 - Lab Analysis	1-Feb-17	John Galway
P-0410		Notebook notes of John Galway dated April 17, 2015 @ 09:00	1-Feb-17	John Galway
P-0411		Supplementary Occurrence Report dated April 17, 2015 @ 10:50 of John Galway regarding Folder # 068	1-Feb-17	John Galway
P-0412		Notebook notes of John Galway dated April 23, 2015 @ 14:25	1-Feb-17	John Galway
P-0413		Supplementary Occurrence Report dated April 24, 2015 @ 15:03 of John Galway	1-Feb-17	John Galway
P-0414		Supplementary Occurrence Report dated April 28, 2015 @ 12:30 of John Galway	1-Feb-17	John Galway
P-0415		Pros Exhibit Report	1-Feb-17	John Galway
P-0416		Supplementary Occurrence Report dated May 4, 2015 @ 09:45 of John Galway regarding Folder # 68	1-Feb-17	John Galway

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0417		Notebook notes of John Galway dated July 8, 2015 @ 09:00	1-Feb-17	John Galway
P-0418		Notebook notes of John Galway dated December 17, 2015 @ 09:00	1-Feb-17	John Galway
P-0419		Photos taken by John Galway	1-Feb-17	John Galway
P-0420		Photos taken by John Galway, Mr. Dunphy's Glasses	1-Feb-17	John Galway
P-0421		Email dated April 6, 2015 (5:48 PM) from John Galway to Steve Burke, Dion Foote, Monty Henstridge, Kent Osmond and Rod Tiller regarding Meeting with Meghan Dunphy	1-Feb-17	John Galway
P-0422		Email dated April 8, 2015 (4:47 PM) from Kent Osmond to Erin Breen copied to Pat Cahill, John Galway and Steve Burke regarding Scans from Simmonds Partners Defence	1-Feb-17	John Galway
P-0423		Correspondence dated April 8, 2015 from Erin Breen to John Galway regarding Meghan Dunphy	1-Feb-17	John Galway
P-0424		Email dated April 16, 2015 (12:58 PM) from FAC-CEJ to John Galway regarding your file: 2015-376186	1-Feb-17	John Galway
P-0425		Email dated April 16, 2015 (1:58 PM) from FAC-CEJ to John Galway regarding your file: 2015-376186	1-Feb-17	John Galway
P-0426		Email dated April 17, 2015 (9:48 AM) from Kent Osmond to Pat Cahill, Dion Foote, John Galway, Rod Tiller, Steve Burke copied to Kelly Lee and Chris Saunders regarding Donald Dunphy Investigation	1-Feb-17	John Galway
P-0427		Email dated April 27, 2015 (2:40 PM) from John Galway to Kent Osmond regarding Glasses	1-Feb-17	John Galway

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0428		Excerpt from Analysts Report prepared by Wanda Richards, Criminal Intelligence	10-Feb-17	Tim Buckle
P-0429		Office of the Chief Medical Examiner - Scene Report	1-Feb-17	John Galway
P-0430		Excerpt from RNC Use of Force Training Manual regarding Critical Stress Amnesia	31-Jan-17	Scott Harris
P-0431		Excerpt from RNC Use of Force Training Manual regarding Use of Force Model Continuum	31-Jan-17	Scott Harris
P-0432		Email dated April 24, 2016 (3:48) from John Galway to Steve Burke and Kent Osmond regarding Dunphy Scene	7-Feb-17	Steve Burke
P-0433		Supplementary Occurrence Report dated September 8, 2015 @ 09:45 of Mike Nippard regarding Folder 039 - Lab Exhibit Analysis Pertaining to C-414	7-Feb-17	Steve Burke
P-0434		Email dated April 7, 2015 (9:39 PM) from Joey Smyth to Steve Burke regarding Dunphy Notes	7-Feb-17	Steve Burke
P-0435		Email dated November 2, 2015 (12:58 PM) from Steve Burke to Sue Efford regarding Sudden Death - Advance Message	7-Feb-17	Steve Burke
P-0436		Excerpt from RCMP Daily Log Report, page 146	7-Feb-17	Steve Burke
P-0437		Correspondence dated January 22, 2016 from Insp. Pat Cahill to Supt. S. Sachsse regarding Justice David Riche - Independent Observer Report	7-Feb-17	Steve Burke
P-0438		Email dated January 12, 2017 (3:24 PM) from Wendy Zdebiak to Sandra Chaytor, Diane Blackmore copied to Nick Avis regarding 10-29 checks	6-Feb-17	Kim Harding
P-0439		Email dated January 25, 2017 (3:51 PM) from Wendy Zdebiak to Sandra Chaytor, Diane Blackmore, Nick Avis and Kim Harding regarding Email from S/Sgt. Tim Buckle to all RNC staff, CPIC on RMS - Additional Records	6-Feb-17	Kim Harding

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0440		Extraction Report from Joe Smyth's Cell Phone Records regarding messaging between Joe Smyth and Doug Noel	2-Feb-17	Doug Noel
P-0441		Statement of Nancy Linehan dated April 8, 2015	3-Feb-17	Nancy Linehan
P-0442		Statement of Kevin Bishop dated April 8, 2015	3-Feb-17	Nancy Linehan
P-0443		Handwritten notes of Supt. Jason Sheppard dated April 5, 2015 to November 8, 2016	15-Feb-17	Andrew Boland
P-0444		Email dated April 5, 2015 (4:52:21 PM) from Jason Sheppard to Bill Janes and Ab Singleton regarding Shooting	17-Feb-17	Jason Sheppard
P-0445		Email dated April 5, 2015 (5:21:31 PM) from Jason Sheppard to Bill Janes regarding Incident	17-Feb-17	Jason Sheppard
P-0446		Email dated April 5, 2015 (7:34:57 pm) from Jason Sheppard to Bill Janes, Ab Singleton copied to Jim Carroll regarding Incident	17-Feb-17	Jason Sheppard
P-0447		Email dated April 5, 2015 (8:36:19 PM) from Jason Sheppard to Ab Singleton and Bill Janes regarding Shooting	17-Feb-17	Jason Sheppard
P-0448		Email dated April 5, 2015 (8:41:42 PM) from Jason Sheppard to Ed Benoit regarding Request for information on Don Dunphy	17-Feb-17	Jason Sheppard
P-0449		Email dated April 6, 2015 (7:57:56 PM) from Jason Sheppard to Joe Gullage copied to Ab Singleton, Pat Roche, Jim Carroll, Barry Constantine, Ed Benoit	17-Feb-17	Jason Sheppard
P-0450		Email dated April 7, 2015 (9:38:08 AM) from Jason Sheppard to Joe Gullage regarding Security for Premier	17-Feb-17	Jason Sheppard
P-0451		Email dated April 7, 2015 (8:05:17 PM) from Jason Sheppard to Social Media copied to Paul Woodruff and Joe Gullage regarding Twitter-Facebook threats to Premier or MHAs	17-Feb-17	Jason Sheppard

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0452		Email dated April 7, 2015 (9:01 AM) from Catherine Evans to Jason Sheppard regarding Torture, Frauds and Corruption	17-Feb-17	Jason Sheppard
P-0453		Email dated April 7, 2015 (9:51:06 PM) from Jason Sheppard to Joe Smyth re File 2015-17896 - Don Dunphy	17-Feb-17	Jason Sheppard
P-0454		Email dated April 7, 2015 (10:08:34 PM) from Jason Sheppard to Dale Evans regarding RCMP Pros File - RNC member involved in shooting	17-Feb-17	Jason Sheppard
P-0455		Email dated April 9, 2015 (9:18:13 AM) from Jason Sheppard to Bill Janes copied to Joe Gullage regarding Joe Smyth	17-Feb-17	Jason Sheppard
P-0456		Personnel Order 2015-141 dated April 28, 2015 regarding Joe Smyth Lateral Transfer with CID	17-Feb-17	Jason Sheppard
P-0457		Email dated May 19, 2015 (11:54:47 AM) from Jason Sheppard to Ab Singleton regarding Saskatoon - Internal Fatal Police Shooting	17-Feb-17	Jason Sheppard
P-0458		Email dated July 28, 2015 (11:47:32 AM) from Jason Sheppard to Joe Smyth regarding Checking in	17-Feb-17	Jason Sheppard
P-0459		Email dated October 27, 2015 (3:13:43 PM) from Joe Gullage to Jason Sheppard regarding Twitter	17-Feb-17	Jason Sheppard
P-0460		Email dated January 26, 2016 (2:29:18 PM) from Jason Sheppard to Joe Gullage regarding Joe Smyth - Return to Work	17-Feb-17	Jason Sheppard
P-0461		Email dated January 26, 2016 (3:32:11 PM) from Pat Cahill to Jason Sheppard regarding Mitchell's Brook investigation	17-Feb-17	Jason Sheppard
P-0462		Email dated March 08, 2016 (11:12:51 AM) from Jason Sheppard to Joe Gullage regarding Joe Smyth	17-Feb-17	Jason Sheppard
P-0463		Excerpt from Joe Smyth's Blackberry Extraction Report	17-Feb-17	Jason Sheppard

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0464		Notebook Notes of Ab Singleton dated April 5, 2015	16-Feb-17	Ab Singleton
P-0465		Extraction Report from Joe Smyth's Cell Phone Records regarding messaging between Joe Smyth and Ab Singleton	16-Feb-17	Ab Singleton
P-0466		Email dated April 5, 2015 (3:38:37 PM) from Ab Singleton to Andrew Boland copied to Bill Janes	15-Feb-17	Andrew Boland
P-0467		Report for the Inquiry into the death of Donald Dunphy RE: RNC Communications Center	21-Feb-17	Barry Constantine
P-0468		Email dated April 5, 2015 (4:51 PM) from Ab Singleton to Bill Janes and Jason Sheppard regarding Shooting	16-Feb-17	Ab Singleton
P-0469		Email dated April 5, 2015 (4:56:02 PM) from Ab Singleton to Bill Janes regarding Shooting	16-Feb-17	Ab Singleton
P-0470		Email dated April 5, 2015 (5:56:07 PM) from Jim Carroll to Ab Singleton regarding Shooting	16-Feb-17	Ab Singleton
P-0471		Email dated April 5, 2015 (6:35:47 PM) from Andrew Boland to Ab Singleton copied to Tracy Hardy regarding 2015-04-05 RCMP investigating Shooting Incident in Mitchell's Brook	16-Feb-17	Ab Singleton
P-0472		Email dated April 5, 2015 (7:08 PM) from Ab Singleton to Andrew Boland copied to Tracy Hardy and Bill Janes regarding 2015-04-05 RCMP investigating Shooting Incident in Mitchell's Brook	16-Feb-17	Ab Singleton
P-0473		Email dated April 5, 2015 (7:11 PM) from Andrew Boland to Ab Singleton copied to Tracy Hardy and Bill Janes regarding 2015-04-05 RCMP investigating Shooting Incident in Mitchell's Brook	15-Feb-17	Andrew Boland
P-0474		Email dated April 5, 2015 (8:36 PM) from Jason Sheppard to Ab Singleton and Bill Janes regarding Shooting	16-Feb-17	Ab Singleton

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0475		Email dated April 5, 2015 (8:43 PM) from Jason Sheppard to Ab Singleton and Bill Janes regarding As per your request	16-Feb-17	Ab Singleton
P-0476		Email dated April 6, 2015 (9:31 AM) from Ab Singleton to Andrew Boland	15-Feb-17	Andrew Boland
P-0477		Email dated April 6, 2015 (12:07 PM) from Ab Singleton to Andrew Boland	15-Feb-17	Andrew Boland
P-0478		Email dated April 7, 2015 (9:36:08 AM) from Ab Singleton to Andrew Boland regarding Unanswered Questions	16-Feb-17	Ab Singleton
P-0479		Email dated April 7, 2015 (9:36 AM) from Andrew Boland to Ab Singleton regarding Unanswered Questions	15-Feb-17	Andrew Boland
P-0480		Email dated April 7, 2015 (4:56 PM) from Bill Janes to Ab Singleton and Jim Carroll regarding 2015-03-07; RCMP Update Mitchells Brook Shooting	15-Feb-17	Andrew Boland
P-0481		Email dated April 9, 2015 (6:56:04 AM) from Bill Janes to Joe Gullage, Jason Sheppard and Ab Singleton regarding Joe Smyth	16-Feb-17	Ab Singleton
P-0482		Email dated July 21, 2015 (3:58 PM) from Ab Singleton to RNCMediaRelations copied to Wendy Zdebiak regarding Hello Cst. Curnew. Here's the follow up email we discussed	16-Feb-17	Ab Singleton
P-0483		Email dated April 22, 2015 (10:37:43 PM) from Ab Singleton to Bill Janes regarding Status of RCMP Investigation	16-Feb-17	Ab Singleton
P-0484		Email dated May 4, 2015 (4:31:24 PM) from Ab Singleton to Rick Penny regarding Good afternoon from Saskatoon	16-Feb-17	Ab Singleton
P-0485		Email dated May 19, 2015 (11:56:37 AM) from Ab Singleton to Bill Janes regarding Saskatoon - Internal: Fatal Police Shooting	16-Feb-17	Ab Singleton
P-0486		Email dated July 19, 2015 (1:55:35 PM) from Ab Singleton to Bill Janes copied to Jim Carroll regarding Hello Cst. Curnew. Here's the follow up email we discussed	16-Feb-17	Ab Singleton

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0487		Email dated July 21, 2015 (3:31:13 PM) from Ab Singleton to RNCMediaRelations copied to Wendy Zdebiak, Jim Carroll and Bill Janes regarding Hello Cst. Curnew. Here's the follow up email we discussed	16-Feb-17	Ab Singleton
P-0488		Email dated July 21, 2015 (4:19:08 PM) from Ab Singleton to RNCMediaRelations copied to Wendy Zdebiak and Jim Carroll regarding Hello Cst. Curnew	16-Feb-17	Ab Singleton
P-0489		Email dated July 22, 2015 (11:19:03 AM) from Ab Singleton to RNCMediaRelations and Wendy Zdebiak regarding Couple of things...	16-Feb-17	Ab Singleton
P-0490		Email dated July 22, 2015 (12:32:15 PM) from Ab Singleton to Rick Penny copied to Jason Sheppard regarding Saskatoon's Investigation	16-Feb-17	Ab Singleton
P-0491		Email dated November 08, 2015 (7:19:28 PM) from Ab Singleton to Bill Janes, Jim Carroll and Jason Sheppard regarding Dunphy Shooting	16-Feb-17	Ab Singleton
P-0492		Email dated November 10, 2015 (6:19:13 PM) from Ab Singleton to Jason Sheppard, Bill Janes and Jim Carroll regarding Saskatoon Investigation	16-Feb-17	Ab Singleton
P-0493		Email dated May 4, 2016 (8:40:03 AM) from Bill Janes to Ab Singleton regarding Update	16-Feb-17	Ab Singleton
P-0494		Email dated September 13, 2016 (7:40:43 AM) from Joe Smyth to Ab Singleton regarding Meet	16-Feb-17	Ab Singleton
P-0495		Email dated September 13, 2016 (11:53:55 AM) from Ab Singleton to Clive Weighill regarding Officer Involved in Shooting	16-Feb-17	Ab Singleton
P-0496		Email dated August 28, 2015 (3:02:58 PM) from Ab Singleton to Jason Sheppard regarding Use of Force Report, Mitchell's Brook; and correspondence dated May 20, 2015 from Jason Sheppard to Ab Singleton regarding use of Force Report - April 2015, Criminal Investigation Division	16-Feb-17	Ab Singleton
P-0497		Letter dated April 16, 2015 from Chief Janes to Clive Weighill regarding Request for Internal Investigation	16-Feb-17	Ab Singleton

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
<i>Public Exhibit</i>	<i>In Camera Exhibit</i>	<i>Description of Exhibit</i>	<i>Date Entered into Evidence</i>	<i>Witness Entered Under</i>
P-0498		RNC General Order Revision 330 dated November 28, 2014 signed by Ab Singleton regarding Police Notebooks	16-Feb-17	Ab Singleton
P-0499		RNC Routine Order 2012-018 dated September 28, 2012 signed by Ab Singleton regarding Changes to Use of Force Policy	16-Feb-17	Ab Singleton
P-0500		Excerpt from Extraction Report of Joe Smyth's cell phone records provided on February 6, 2016	10-Feb-17	Tim Buckle
P-0501		Extraction Report from Joe Smyth's Cell Phone Records regarding messaging between Joe Smyth and Cheryl Davis	24-Feb-17	Paul Davis
P-0502		Email dated April 6, 2015 (9:37 AM) from Heather MacLean to Bill Janes regarding Speaking Points	22-Feb-17	Heather MacLean
P-0503		Email dated April 9, 2015 (12:36 PM) from Catherine Evans to Jason Sheppard, Doug Noel, Ed Benoit regarding Facebook	24-Feb-17	Paul Davis
P-0504		VOCM Article Premier Davis Unaware of Threat Investigation Until After Shooting	24-Feb-17	Paul Davis
P-0505		Correspondence between Erin Breen and Paul Davis regarding Meghan Dunphy	24-Feb-17	Paul Davis
P-0506		House of Assembly Proceedings dated April 22-April 23, 2015	24-Feb-17	Paul Davis
P-0507		Briefing note/Timeline dated April 20, 2015 prepared by Joy Buckle	24-Feb-17	Paul Davis
P-0508		Miscellaneous Media Reports dated April 10-May 27, 2015	24-Feb-17	Paul Davis
P-0509		Media Advisory and Media Reports regarding Donald Dunphy investigation	24-Feb-17	Paul Davis

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0510		Media Report by James McLeod "RNC Chief tight-lipped on shooting"	24-Feb-17	Paul Davis
P-0511		RCMP GRC Form 4074 - Assistance Request - Technological Crime submitted by Cst. John Galway, dated 2015-04-17	7-Feb-17	Steve Burke
P-0512		Email dated August 19, 2016 (12:32:38 PM) from Bill Janes to Joe Gullage; Jason Sheppard; Ab Singleton and Jim Carroll regarding Update	17-Feb-17	Jason Sheppard
P-0513		Excerpt from Extraction Report of Joe Smyth's cell phone records provided on February 6, 2016, Pages 11, 12, 14, 15, 50 and 51	8-Feb-17	Steve Burke
P-0514		Curriculum Vitae, Joe Gullage	23-Feb-17	Joe Gullage
P-0515		Department of Public Safety, RNC Organizational Chart - Criminal Operations	16-Feb-17	Ab Singleton
P-0516		Email dated April 6, 2015 (12:37:22 PM) from Joe Gullage to RNCMediaRelations, Joe Smyth, Jason Sheppard and Bill Janes regarding Follow up	23-Feb-17	Joe Gullage
P-0517		Email dated April 6, 2015 (12:50:09 PM) from Joe Gullage to Joe Smyth regarding thinking of you	23-Feb-17	Joe Gullage
P-0518		Email dated April 6, 2015 (10:25:50 PM) from Joe Gullage to Jason Sheppard copied to Ab Singleton and Barry Constantine	23-Feb-17	Joe Gullage
P-0519		Email dated April 7, 2015 (9:19:43 AM) from Joe Gullage to Bill Janes, Ab Singleton and Jim Carroll regarding Follow up to Bolo, Threat Assessment	23-Feb-17	Joe Gullage
P-0520		Email dated April 8, 2015 (1:39:40 PM) from Joe Gullage to Dolly regarding Name	23-Feb-17	Joe Gullage
P-0521		Email dated April 9, 2015 (4:27:30 PM) from Joe Gullage to Jim Carroll, Ed Benoit, Doug Noel and Paul Woodruff regarding Facebook	23-Feb-17	Joe Gullage

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0522		Email dated April 9, 2015 (2:00:40 PM) from Joe Gullage to Bill James regarding Cst. Joe Smyth	22-Feb-17	Bill James
P-0523		Email dated April 13, 2015 (11:27:02 AM) from Joe Gullage to Scott Haye copied to Jason Sheppard, Ab Singleton and Ed Benoit regarding Message	23-Feb-17	Joe Gullage
P-0524		Email dated April 17, 2015 (11:17:26 AM) from Joe Gullage to Joe Smyth regarding Personnel Order - Call for applications - Protective Services Unit	23-Feb-17	Joe Gullage
P-0525		Email dated April 18, 2015 (1:42:29 PM) from Joe Gullage to Jason Power regarding Threat Assessment	23-Feb-17	Joe Gullage
P-0526		Email dated August 21, 2015 (2:44:00 PM) from Joe Gullage to Jason Sheppard copied to Ab Singleton regarding Intelligence file	23-Feb-17	Joe Gullage
P-0527		Email dated April 5, 2015 (9:31 PM) from Kent Osmond to Rod Tiller, Stephan Remillard, Shawn Seward, Trevor O'Keefe, John Galway regarding Mount Carmel Scene	8-Feb-17	Steve Burke
P-0528		Email dated April 9, 2015 (1:24 PM) from Kent Osmond to Pat Cahill regarding Consideration for a Checklist from SERT	8-Feb-17	Steve Burke
P-0529		Email dated October 27, 2015 (3:00:18 PM) from Joe Smyth to Steve Burke copied to Joe Gullage regarding Social Media Activity	23-Feb-17	Joe Gullage
P-0530		Email dated November 2, 2015 (3:24 PM) from Sue Efford to Steve Burke and Pat Cahill regarding Dunphy: Sudden death - Advance Message	23-Feb-17	Joe Gullage
P-0531		Email dated December 9, 2015 (2:45:27 PM) from Joe Gullage to Bill Janes regarding Premier's Detail	23-Feb-17	Joe Gullage
P-0532		Email dated January 26, 2016 (2:57:50 PM) from Bill Janes to Joe Smyth, Joe Gullage, Jason Sheppard copied to Ab Singleton and Jim Carroll regarding Duty	23-Feb-17	Joe Gullage
P-0533		Email dated October 17, 2016 (12:06:26 PM) from Joe Gullage to Sue Bill regarding Info Required	23-Feb-17	Joe Gullage

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0534		Correspondence dated February 8, 2016 from Joe Gullage to William Janes regarding Initiative for restructuring of Protective Service Detail	23-Feb-17	Joe Gullage
P-0535		Correspondence dated September 14, 2016 from Grant Little to William Janes regarding Internal Investigation of the Actions of Constable Smyth	23-Feb-17	Joe Gullage
P-0536		Excerpt pages from Extraction Report Joe Smyth's blackberry	23-Feb-17	Joe Gullage
P-0537		Chris Saunders Ident Occurrence Report	13-Feb-17	Chris Saunders
P-0538		Curriculum Vitae, Chris Saunders	13-Feb-17	Chris Saunders
P-0539		Kelly Lee notebook notes dated April 5, 2015 - April 10, 2015	13-Feb-17	Chris Saunders
P-0540		Typed notes of Kelly Lee dated April 9, 2015	13-Feb-17	Chris Saunders
P-0541		Typed notes of Kelly Lee dated April 10, 2015 regarding video re-enactment with Joe Smyth at Dunphy residence	13-Feb-17	Chris Saunders
P-0542		Sketches of Dunphy residence by Kelly Lee	13-Feb-17	Chris Saunders
P-0543		Kelly Lee Ident continuation Report	13-Feb-17	Chris Saunders
P-0544		Forensic Identification Occurrence Report of Kelly Lee	13-Feb-17	Chris Saunders
P-0545		RCMP Policy - B Division Operational Manual - Part 41.3 Human Deaths - Amended 2013-01-28	8-Feb-17	Steve Burke

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0546		RCMP Policy - OM - ch. 41.3 Human Deaths - Amended 2013-12-20	8-Feb-17	Steve Burke
P-0547		Paul Davis Transcript Interview dated April 6, 2015	22-Feb-17	Heather MacLean
P-0548		Chris Saunders notebook notes dated April 5, 2015- April 6, 2015	13-Feb-17	Chris Saunders
P-0549		Excerpt from Extraction Report of Cst. Joseph Smyth's Blackberry	22-Feb-17	Heather MacLean
P-0550		Email dated April 5, 2015 (5:29 PM) from Heather MacLean to David Cochrane regarding Shooting In Mount Carmel Mitchells Brook	22-Feb-17	Heather MacLean
P-0551		Email dated April 6, 2015 (2:11 PM) from Heather MacLean to Sandy Collins regarding Incident	22-Feb-17	Heather MacLean
P-0552		Email dated April 7, 2015 (12:27 PM) from Heather MacLean to Greg Hicks regarding RCMP update this afternoon	22-Feb-17	Heather MacLean
P-0553		Email dated April 7, 2015 (2:42 PM) from RNC Media Relations to Greg Hicks regarding RCMP update this afternoon	22-Feb-17	Heather MacLean
P-0554		Email dated April 8, 2015 (9:05 AM) from Heather MacLean to Bill Janes and Luke Joyce regarding Follow up	22-Feb-17	Heather MacLean
P-0555		Anonymous Letter delivered to Erin Breen on November 4, 2016	9-Feb-17	Steve Burke
P-0556		Anonymous Letter delivered to Erin Breen on November 25, 2016	9-Feb-17	Steve Burke
P-0557		Correspondence dated April 14, 2015 from Pat Cahill to Jason Sheppard regarding Information Request - RNC re: RCMP PROS File #2015-376186 Dunphy/Mitchells Brook NL	9-Feb-17	Steve Burke

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0558		Page 304 of Extraction Report of Joe Smyth's cell phone records	10-Feb-17	Tim Buckle
P-0559		Email dated April 20, 2015 (11:17 AM) from Kent Osmond to Chris Saunders copied to Kelly Lee and Steve Burke regarding Dunphy Scene	13-Feb-17	Chris Saunders
P-0560		Email dated June 11, 2015 (8:19 PM) from Kent Osmond to Steve Burke, Kelly Lee and Chris Saunders regarding Donald Dunphy File	13-Feb-17	Chris Saunders
P-0561		Page 10 and 11 of RNC Policy and Procedure Manual - Use of Force - GO 312, dated December 20, 2012	16-Feb-17	Ab Singleton
P-0562		Email dated June 11, 2015 (10:08 PM) from Pat Cahill to Steve Burke regarding Dunphy/reply to Erin Breen	13-Feb-17	Chris Saunders
P-0563		Email dated December 15, 2015 (10:06:05 AM) from Ab Singleton to Jason Sheppard regarding Twitter Investigation	17-Feb-17	Jason Sheppard
P-0564		Threat Levels provided by Joe Gullage	23-Feb-17	Joe Gullage
P-0565		Handwritten notes of Andrew Boland dated April 8, 2015-April 28, 2015	15-Feb-17	Andrew Boland
P-0566		Email dated April 5, 2015 (4:11 PM) from Ab Singleton to Jamie Zettler and Andrew Boland copied to Chris Fitzgerald and Jason Sheppard regarding point of contact	15-Feb-17	Andrew Boland
P-0567		Email dated April 5, 2015 (9:31 PM) from Tracy Hardy to Jackie Lake-Kavanagh and Paul Noble copied to Andrew Boland regarding Mt Carmel investigation	15-Feb-17	Andrew Boland
P-0568		Email dated April 6, 2015 (8:54 PM) from Pat Cahill to Andrew Boland, Kent Osmond, Greg Hicks and Jamie Zettler regarding Media Suggestions	15-Feb-17	Andrew Boland
P-0569		Email dated April 7, 2015 (2:40 PM) from Jamie Zettler to Greg Hicks	15-Feb-17	Andrew Boland

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0570		Email dated April 7, 2015 (2:51 PM) from Greg Hicks to 2014 RCMP news releases regarding 2015-03-07 RCMP Update; Mitchell's Brook Shooting	15-Feb-17	Andrew Boland
P-0571		Email dated April 10, 2015 (1:00 PM) from Andrew Boland to Doug Noel and Steve Burke	15-Feb-17	Andrew Boland
P-0572		Email dated April 16, 2015 (4:13 PM) from Andrew Boland to Sue Bill copied to Steve Burke, Pat Cahill, Sheryl Keats, Doug Noel and Kent Osmond regarding Follow up	15-Feb-17	Andrew Boland
P-0573		Email dated April 23, 2015 (17:18) from Andrew Boland to Byron Boucher and Eric Stubbs copied to Tracy Hardy	15-Feb-17	Andrew Boland
P-0574		Email dated May 1, 2015 (9:24 AM) from Andrew Boland to Ab Singleton copied to Pat Cahill regarding Status of RCMP Investigation	15-Feb-17	Andrew Boland
P-0575		Email dated January 29, 2016 (5:43 PM) from Jackie Lake-Kavanagh to Stephanie Sachsse copied to Andrew Boland regarding Draft Request to Alberta's ADM for ASIRT	15-Feb-17	Andrew Boland
P-0576		Correspondence dated April 9, 2015 from Andrew Boland to Justice David Riche regarding RCMP Investigation into Fatal Shooting of Donald Dunphy by a member of the RNC	15-Feb-17	Andrew Boland
P-0577		Correspondence dated April 9, 2015 from Andrew Boland to Justice David Riche regarding RCMP Investigation into Fatal Shooting of Donald Dunphy by a member of the RNC - Signed Terms of Reference	15-Feb-17	Andrew Boland
P-0578		Correspondence dated April 29, 2015 from Andrew Boland to Justice David Riche regarding RCMP investigation into Fatal Shooting of Donald Dunphy by a Member of the RNC	15-Feb-17	Andrew Boland
P-0579		Correspondence dated November 26, 2015 from to Heather Jacobs regarding RNC Member Involved Shooting (Dunphy) - Investigation Overview	15-Feb-17	Andrew Boland

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0580		Correspondence dated January 12, 2016 from Justice Riche to Andrew Boland regarding Donald Dunphy - Fatal Shooting	15-Feb-17	Andrew Boland
P-0581		Extraction Report from Joe Smyth's Cell Phone Records provided on February 7, 2017	17-Feb-17	Jason Sheppard
P-0582		Curriculum Vitae for Jason Sheppard	17-Feb-17	Jason Sheppard
P-0583		Handwritten notes of Sgt. Kent Osmond dated April 5, 2015-April 7, 2015	17-Feb-17	Kent Osmond
P-0584		Handwritten notes of Sgt. Kent Osmond dated April 8, 2015 - April 10, 2015	17-Feb-17	Kent Osmond
P-0585		Handwritten notes of Sgt. Kent Osmond dated April 9, 2015	17-Feb-17	Kent Osmond
P-0586		Handwritten notes of Sgt. Kent Osmond dated April 13, 2015- April 28, 2015	17-Feb-17	Kent Osmond
P-0587		Handwritten notes of Sgt. Kent Osmond (No date)	17-Feb-17	Kent Osmond
P-0588		Supplementary Occurrence Report dated April 14, 2015 @ 13:09 of Kent Osmond regarding Folder 054 - Notes Re: Independent Observer	17-Feb-17	Kent Osmond
P-0589		Supplementary Occurrence Report dated April 15, 2015 @ 10:52 of Kent Osmond regarding Folder 045 - Contact with David Cochrane	17-Feb-17	Kent Osmond
P-0590		Supplementary Occurrence Report dated April 20, 2015 @ 12:18 of Kent Osmond regarding Folder 082 - Erin Breen - Correspondence	17-Feb-17	Kent Osmond
P-0591		Supplementary Occurrence Report dated April 20, 2015 @ 15:09 of Kent Osmond regarding SIRT Inquiry	17-Feb-17	Kent Osmond

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Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0592		Email dated April 5, 2015 (3:19 PM) from Kent Osmond to Chris Fitzgerald et al regarding RNC Shooting	17-Feb-17	Kent Osmond
P-0593		Email dated April 5, 2015 (9:30 PM) from Kent Osmond to Rod Tiller, Stephan Remillard, Shawn Seward, Trevor O'Keefe, John Galway regarding Mount Carmel Scene	17-Feb-17	Kent Osmond
P-0594		Email dated April 6, 2015 (9:42 AM) from Kent Osmond to Rod Tiller and Greg Hicks regarding Media	17-Feb-17	Kent Osmond
P-0595		Email dated April 6, 2015 (7:16 PM) from Kent Osmond to Andrew Boland; Pat Cahill; Chris Fitzgerald; Rob Tiller regarding C-237 Narrative (2015-376186 Shooting)	17-Feb-17	Kent Osmond
P-0596		Email dated April 7, 2015 (9:00 AM) from Jamie Zettler to Greg Hicks regarding Media Suggestion	17-Feb-17	Kent Osmond
P-0597		Email dated April 7, 2015 (9:41 AM) from Kent Osmond to Pat Cahill, Greg Hicks and Jamie Zettler regarding Media Draft for later today	17-Feb-17	Kent Osmond
P-0598		Email dated April 7, 2015 (10:24 AM) from Greg Hicks to Steve Burke, Pat Cahill, Kent Osmond and Jamie Zettler copied to Rod Tiller regarding Media draft for review at your meeting	17-Feb-17	Kent Osmond
P-0599		Email dated April 7, 2015 (10:39 AM) from Pat Cahill to Jamie Zettler, Kent Osmond, Greg Hicks and Steve Burke copied to Rod Tiller regarding Media draft for review at your meeting	17-Feb-17	Kent Osmond
P-0600		Email dated April 7, 2015 (6:43 PM) from Kent Osmond to Andrew Boland, Pat Cahill, Chris Fitzgerald, Dion Foote and Monty Henstridge regarding C-237 #2	17-Feb-17	Kent Osmond
P-0601		Email dated April 8, 2015 (9:34 AM) from Kent Osmond to Pat Cahill regarding Independent Observer	17-Feb-17	Kent Osmond
P-0602		Email dated April 8, 2015 (10:02 AM) from Kent Osmond to Pat Cahill copied to Steve Burke regarding Kent	17-Feb-17	Kent Osmond

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0603		Email dated April 8, 2015 (10:41 AM) from Kent Osmond to Steve Burke and Pat Cahill copied to John Galway and Rod Tiller regarding Re-enactment	17-Feb-17	Kent Osmond
P-0604		Email dated April 8, 2015 (10:45 AM) from Kent Osmond to Steve Burke and Pat Cahill copied to John Galway and Rod Tiller regarding Re-enactment	17-Feb-17	Kent Osmond
P-0605		Email dated April 8, 2015 (10:51 AM) from Kent Osmond to Pat Cahill and Steve Burke regarding Re-enactment	17-Feb-17	Kent Osmond
P-0606		Email dated April 8, 2015 (5:56 PM) from Kent Osmond to Pat Cahill, Rod Tiller and Steve Burke regarding Family Liaison - Breen Letter	17-Feb-17	Kent Osmond
P-0607		Email dated April 9, 2015 (10:53 AM) from Kent Osmond to Steve Burke	17-Feb-17	Kent Osmond
P-0608		Email dated April 13, 2015 (11:11 AM) from Kent Osmond to Pat Cahill, Chris Fitzgerald, Rod Tiller, Jamie Zettler copied to Dion Foote, Mike Nippard and Steve Burke regarding C-237 #3	17-Feb-17	Kent Osmond
P-0609		Email dated April 13, 2015 (11:33 AM) from Kent Osmond to Erin Breen regarding Question for clarification	17-Feb-17	Kent Osmond
P-0610		Email dated April 20, 2015 (11:16 AM) from Chris Saunders to Kent Osmond regarding Dunphy Scene	17-Feb-17	Kent Osmond
P-0611		Email dated April 21, 2015 (11:57 AM) from Kent Osmond to Pat Cahill and Chris Fitzgerald copied to Dion Foote, John Galway, Rod Tiller and Steve Burke regarding SMYTH C-237 #4	17-Feb-17	Kent Osmond
P-0612		Email dated April 29, 2015 (2:50 PM) from Kent Osmond to Pat Cahill, Chris Fitzgerald, Dion Foote, John Galway and Rob Tiller regarding Dunphy C-237 #5	17-Feb-17	Kent Osmond
P-0613		Email dated May 11, 2015 (1:25 PM) from Chris Saunders to Steve Burke and Kent Osmond regarding Darrell Barr	17-Feb-17	Kent Osmond

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Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0614		Email dated September 15, 2016 (2:09 PM) from Steve Burke to Pat Cahill copied to Kent Osmond regarding Dunphy Family Meeting 2016-09-13	17-Feb-17	Kent Osmond
P-0615		Assessment of Dunphy's eyeglasses by Sgt. Kent Osmond	17-Feb-17	Kent Osmond
P-0616		Transcription of texts between Sgt. Kent Osmond and Joe Smyth	17-Feb-17	Kent Osmond
P-0617		Curriculum Vitae for Alban Singleton	16-Feb-17	Ab Singleton
P-0618		Intelligence Led Policing	23-Feb-17	Joe Gullage
P-0619		Premier's Protective Detail - Electronic Files on ICAN 2012-2015 inclusive	23-Feb-17	Joe Gullage
P-0620		Threat Assessments - Intelligence & Organized Crime Section - 2014, 2015 & 2016	23-Feb-17	Joe Gullage
P-0621		Premier's Protective Detail - 2010 to Present	23-Feb-17	Joe Gullage
P-0622		Curriculum Vitae of William James	22-Feb-17	Bill James
P-0623		Statement of Bill James dated April 28, 2015	22-Feb-17	Bill James
P-0624		Sections of the RNC Use of Force Training Manual: Use of Force, Survival Stress, Modular Training, Positional Asphyxia and Excited Delirium	22-Feb-17	Bill James
P-0625		Protocol between the Royal Canadian Mount Police and the Royal Newfoundland Constabulary, dated November 25, 2002	23-Feb-17	Joe Gullage

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0626		Email dated April 7, 2015 (2:05 PM) from Andrew Boland to Steve Burke, Pat Cahill, Chris Fitzgerald, Dion Foote, et al.	15-Feb-17	Andrew Boland
P-0627		Excerpt from Section 3.7 of the RNC Firearms Policy and Procedure Manual	23-Feb-17	Joe Gullage
P-0628		Relevant files in which S/Sgt. Osmond acted as Team Commander	17-Feb-17	Kent Osmond
P-0629		Handwritten notes of Pat Cahill dated April 10, 2015-October 4, 2016	21-Feb-17	Pat Cahill
P-0630		Email dated April 9, 2015 (3:02 PM) from Trish LeGresley to Steve Burke regarding RCMP File # 2015-376186 - Victim Services Referral	21-Feb-17	Pat Cahill
P-0631		Email dated April 9, 2015 (3:16 PM) from Kent Osmond to Pat Cahill regarding RNC contact meeting	21-Feb-17	Pat Cahill
P-0632		Email dated April 9, 2015 (5:45 PM) from Kent Osmond to Pat Cahill and Rod Tiller regarding Keys to scene/ permission to enter	21-Feb-17	Pat Cahill
P-0633		Email dated April 13, 2015 (9:15 AM) from Kent Osmond to Pat Cahill regarding Independent Observer Retired Justice Riche	21-Feb-17	Pat Cahill
P-0634		Email dated April 14, 2015 (1:49 PM) from Pat Cahill to Jason Sheppard regarding Information Request - RNC : RE RCMP PROS file # 2016-376186 Mitchell's Brook	21-Feb-17	Pat Cahill
P-0635		Email dated April 20, 2015 (2:47 PM) from Paul Coughlin to Chris Fitzgerald copied to Pat Cahill regarding RNC member involved in shooting incident in RCMP jurisdiction	21-Feb-17	Pat Cahill
P-0636		Email dated April 30, 2015 (4:57 PM) from Pat Cahill to Kent Osmond regarding Justice Riche - Mitchell's Brook Shooting	21-Feb-17	Pat Cahill
P-0637		Email dated May 14, 2015 (6:18 PM) from Pat Cahill to Steve Burke regarding (retired) Justice Riche contacts	21-Feb-17	Pat Cahill

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0638		Email dated June 12, 2015 (4:58 PM) from Steve Burke to Kent Osmond, Pat Cahill and Chris Saunders regarding Found Bullet. Dunphy	21-Feb-17	Pat Cahill
P-0639		Email dated October 19, 2015 (11:35 AM) from Sue Efford to Pat Cahill regarding Dunphy File, Justice Riche contact	21-Feb-17	Pat Cahill
P-0640		Email dated November 4, 2015 (9:25 AM) from Pat Cahill to Steve Burke copied to Sue Efford, Stephanie Sachsse and Al Warner regarding Justice Riche Independent observer Dunphy File	21-Feb-17	Pat Cahill
P-0641		Email dated November 25, 2015 (9:47 AM) from Steve Burke to Pat Cahill regarding Justice Riche	21-Feb-17	Pat Cahill
P-0642		Email dated November 25, 2015 (12:42 PM) from Pat Cahill to Stephanie Sachsse regarding timelines for completion of Dunphy File	21-Feb-17	Pat Cahill
P-0643		Email dated December 15, 2015 (4:39 PM) from Pat Cahill to Steve Burke and Sue Efford regarding Dunphy	21-Feb-17	Pat Cahill
P-0644		Email dated December 16, 2015 (6:20 PM) from Steve Burke to Sue Efford regarding Response to CBC re: Dunphy - Final for approval	21-Feb-17	Pat Cahill
P-0645		Email dated January 18, 2016 (12:55 PM) from Pat Cahill to Sue Efford regarding Independent Observer Report	21-Feb-17	Pat Cahill
P-0646		Email dated January 20, 2016 (5:04 PM) from Pat Cahill to Steve Burke regarding Steve	21-Feb-17	Pat Cahill
P-0647		Email dated January 22, 2016 (6:28 PM) from Sue Hughson to Stephanie Sachsse copied to Mike Sekela, Bill Sweeney regarding Request for assistance	21-Feb-17	Pat Cahill
P-0648		Email dated January 25, 2016 (11:54 AM) from Pat Cahill to Chris Fitzgerald regarding Justice Riche Written Report/ Dunphy File	21-Feb-17	Pat Cahill
P-0649		Email dated September 17, 2015 (11:54 AM) from Laura Hepditch to Stephanie Sachsse, Pete McKay and Chris Fitzgerald regarding Telegram Article	21-Feb-17	Pat Cahill

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Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0650		Email dated April 27, 2015 (1:21 PM) from Kent Osmond to Andrew Boland regarding Dunphy File	17-Feb-17	Kent Osmond
P-0651		Decision/Direction Note, Department of Transportation and Works titled Capsulated Overview for enhancing security at the entrances to the Confederation Building, East and West Block	24-Feb-17	Paul Davis
P-0652		Courses of Fire Document provided by William James	22-Feb-17	Bill James
P-0653		Email dated April 26, 2015 (1:34:55 PM) from Jason Sheppard to Bill James regarding Information Request - RNC re: RCMP PROS File # 2015-376186 Mitchell's Brook	22-Feb-17	Bill James
P-0654		Email dated April 27, 2015 (10:33:39 AM) from Bill James to Jason Sheppard regarding Information Request - RNC re: RCMP PROS File # 2015-376186 Mitchell's Brook	22-Feb-17	Bill James
P-0655		Email dated June 24, 2015 (6:50:32 PM) from Grant Little to Bill James regarding Use of Force Training Log	22-Feb-17	Bill James
P-0656		Pages retrieved from WHSCC - Investigations File or Corporate Security File which outline WHSCC's monitoring of Mr. Dunphy's Twitter account	24-Feb-17	Paul Davis
P-0657		Email dated June 18, 2015 (2:43:47 PM) from Bill James to Grant Little regarding Cst. Joe Smyth	22-Feb-17	Bill James
P-0658		CR Audit for Adrian Cox	20-Feb-17	Adrian Cox
P-0659		CR Report for Adrian Cox	20-Feb-17	Adrian Cox
P-0660		Curriculum Vitae, Wanda Richards	23-Feb-17	Wanda Richards

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0661		Handwritten Notes of Wanda Richards dated May 20-22, 2015	23-Feb-17	Wanda Richards
P-0662		Handwritten Notes of Wanda Richards, Re-enactment notes	23-Feb-17	Wanda Richards
P-0663		Supplementary Occurrence Report dated June 9, 2015 @ 15:19 of Wanda Richards regarding DCAS product	23-Feb-17	Wanda Richards
P-0664		Analyst's report prepared by Wanda Richards, Criminal Intelligence	23-Feb-17	Wanda Richards
P-0665		Pros File 2015376186, B Division Major Crime Unit East dated June 9, 2015 prepared by Wanda Richards, signed copy	23-Feb-17	Wanda Richards
P-0666		Sudden Death Timeline dated May 1, 2015	23-Feb-17	Wanda Richards
P-0667		Sudden Death Timeline dated May 4, 2015	23-Feb-17	Wanda Richards
P-0668		Sudden Death Timeline dated May 5, 2015	23-Feb-17	Wanda Richards
P-0669		Sudden Death Timeline dated May 6, 2015	23-Feb-17	Wanda Richards
P-0670		Sudden Death Timeline dated May 12, 2015	23-Feb-17	Wanda Richards
P-0671		Email dated April 20, 2015 from Wanda Richards to Stephen Conohan and Kyle Strong regarding File 2015-376186 Dunphy - Sudden Death - DCAS Analysis	23-Feb-17	Wanda Richards
P-0672		Email dated May 1, 2015 (2:10 PM) from Wanda Richards to Steve Burke copied to Stephen Conohan and Kyle Strong regarding Dunphy living room mock up; Sudden Death 0501	23-Feb-17	Wanda Richards

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Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0673		Email dated June 9, 2015 (11:27 AM) from Wanda Richards to Steve Burke regarding Dunphy Sudden Death	23-Feb-17	Wanda Richards
P-0674		Email dated June 9, 2015 (3:28 PM) from Wanda Richards to Steve Burke copied to Kyle Strong regarding Dunphy Sudden Death PROS tasking	23-Feb-17	Wanda Richards
P-0675		Handwritten notes of Monty Henstridge dated April 5, 2015 @ 14:50	23-Feb-17	Monty Henstridge
P-0676		Handwritten notes of Monty Henstridge dated April 5, 2015 @ 20:02	23-Feb-17	Monty Henstridge
P-0677		Handwritten notes of Monty Henstridge dated April 6, 2015 @ 12:01	23-Feb-17	Monty Henstridge
P-0678		Handwritten notes of Monty Henstridge dated April 6, 2015 @ 14:30	23-Feb-17	Monty Henstridge
P-0679		Handwritten notes of Monty Henstridge dated April 7, 2015 @ 13:50	23-Feb-17	Monty Henstridge
P-0680		Handwritten notes of Monty Henstridge dated April 7, 2016 @ 14:10	23-Feb-17	Monty Henstridge
P-0681		Handwritten notes of Monty Henstridge dated April 7, 2017 @ 20:40	23-Feb-17	Monty Henstridge
P-0682		Handwritten notes of Monty Henstridge dated April 8, 2018	23-Feb-17	Monty Henstridge
P-0683		Handwritten notes of Monty Henstridge dated April 9, 2015 @ 12:00	23-Feb-17	Monty Henstridge
P-0684		Handwritten notes of Monty Henstridge dated April 10, 2015 @ 15:03	23-Feb-17	Monty Henstridge

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0685		Handwritten notes of Monty Henstridge dated April 17, 2015	23-Feb-17	Monty Henstridge
P-0686		Typed Monitor notes of Monty Henstridge dated August 26, 2015 @ 11:05	23-Feb-17	Monty Henstridge
P-0687		Supplementary Occurrence Report dated April 6, 2015 @ 09:02 of Monty Henstridge regarding General Notes	23-Feb-17	Monty Henstridge
P-0688		Supplementary Occurrence Report dated April 6, 2015 @ 10:25 of Monty Henstridge regarding Folder 009 - Statement of Richard Dunphy	23-Feb-17	Monty Henstridge
P-0689		Supplementary Occurrence Report dated April 6, 2015 @ 11:16 of Monty Henstridge regarding Folder 017, Statement of Debbie Dunphy	23-Feb-17	Monty Henstridge
P-0690		Supplementary Occurrence Report dated April 6, 2015 @ 11:49 of Monty Henstridge regarding Folder 016 - Statement of Meghan Dunphy	23-Feb-17	Monty Henstridge
P-0691		Supplementary Occurrence Report dated April 6, 2015 @ 13:46 of Monty Henstridge regarding Folder 024 - Statement of Colin Dinn	23-Feb-17	Monty Henstridge
P-0692		Supplementary Occurrence Report dated April 7, 2015 @ 15:17 of Monty Henstridge regarding Folder 027 - Statement of Donna Ivy	23-Feb-17	Monty Henstridge
P-0693		Supplementary Occurrence Report dated April 7, 2015 @ 21:36 of Monty Henstridge regarding Folder 035 - Statement of S/Sgt. Reg Tilley	23-Feb-17	Monty Henstridge
P-0694		Supplementary Occurrence Report dated April 9, 2015 @ 13:18 of Monty Henstridge regarding Folder 060 - Polygraph	23-Feb-17	Monty Henstridge
P-0695		Supplementary Occurrence Report dated April 9, 2015 @ 13:26 of Monty Henstridge regarding Folder 028 - Statement of Tom Mahoney	23-Feb-17	Monty Henstridge
P-0696		Supplementary Occurrence Report dated April 20, 2015 @ 08:44 of Monty Henstridge regarding Folder 079 - Statement of Colin Dinn #2	23-Feb-17	Monty Henstridge

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0697		Supplementary Occurrence Report dated April 20, 2015 @ 09:45 of Monty Henstridge regarding Folder 080 - Statement of Thomas Hearn #2	23-Feb-17	Monty Henstridge
P-0698		Supplementary Occurrence Report dated April 20, 2015 @ 11:28 of Monty Henstridge regarding Folder 081 - Folder Drop Demonstration	23-Feb-17	Monty Henstridge
P-0699		Supplementary Occurrence Report dated April 21, 2015 @ 12:01 of Monty Henstridge regarding Folder 089 - Criminal Code/Case Law Research	23-Feb-17	Monty Henstridge
P-0700		Supplementary Occurrence Report dated April 22, 2015 @ 14:28 of Monty Henstridge regarding Folder 093 - 2nd Statement of A/Insp. Mike Adams	23-Feb-17	Monty Henstridge
P-0701		Supplementary Occurrence Report dated April 22, 2015 @ 15:02 of Monty Henstridge regarding Folder 094 - 2nd Statement of Richard Dunphy	23-Feb-17	Monty Henstridge
P-0702		RNC Policy and Procedure Manual - Firearms - GO 359 - dated August 30, 2016	22-Feb-17	Bill James
P-0703		CPIC Maintenance Course Material	21-Feb-17	Barry Constantine
P-0704		Ten Codes - Revised 94-02-08	2-Mar-17	Mark Oram
P-0705		News Article regarding tweet from Mike - Standing up to Workers Comp Open Group, undated	24-Feb-17	Paul Davis
P-0706		Article from Rock Solid Politics - Updated - The Killing of Don Dunphy dated September 23, 2016	24-Feb-17	Paul Davis
P-0707		Statement of Judge Riche dated May 7, 2015	1-Mar-17	Justice David Riche
P-0708		Pers response, CRFO response and the CNI response received by Mark Oram in his v-mail on April 5, 2015	2-Mar-17	Mark Oram

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0709		CIDDD Questions prepared by Chief Bill Janes for Sandra Chaytor	28-Feb-17	Bill Janes
P-0710		Curriculum Vitae of William Janes	28-Feb-17	Bill Janes
P-0711		Handwritten notes of Chief William Janes dated April 5, 2015	28-Feb-17	Bill Janes
P-0712		Extraction excerpt from Analyst's Wanda Richards report	28-Feb-17	Bill Janes
P-0713		Email dated April 6, 2015 (9:36:11 AM) from Bill Janes to Heather Maclean regarding Speaking Points	28-Feb-17	Bill Janes
P-0714		Email dated April 6, 2015 (10:19:19 AM) from RNCMediaRelations to Bill Janes regarding Mitchells Brook	28-Feb-17	Bill Janes
P-0715		Email dated April 6, 2015 (10:49:01 AM) from Bill Janes to Luke Joyce, RNCMediaRelations and Heather MacLean regarding Mitchells Brook	28-Feb-17	Bill Janes
P-0716		Email dated April 6, 2015 (11:27:28 AM) from RNCMediaRelations to Joe Smyth regarding Mitchells brook	28-Feb-17	Bill Janes
P-0717		Email dated April 8, 2015 (5:08:13 PM) from Bill Janes to RNCMediaRelations regarding Follow up	28-Feb-17	Bill Janes
P-0718		Email dated April 9 , 2015 (11:22:52 AM) from Bill Janes to Joe Gullage regarding Follow up	28-Feb-17	Bill Janes
P-0719		Email dated April 9, 2015 (12:55:54 PM) from Bill Janes to RNCMediaRelations regarding Follow up	28-Feb-17	Bill Janes
P-0720		Email dated April 10, 2015 (10:31:07 AM) from David Cochrane to RNCMediaRelations regarding this is the email in question	28-Feb-17	Bill Janes

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0721		Email dated April 10, 2015 (2:53:38 PM) from Bill Janes to Luke Joyce and Heather Jacobs regarding this is the email in question	28-Feb-17	Bill Janes
P-0722		Email dated April 11, 2015 (4:02:59 PM) from Bill Janes to RNCMedia Relations regarding Request from the Canadian Press	28-Feb-17	Bill Janes
P-0723		Email dated April 13, 2015 (4:08:23 PM) From Bill Janes to RNCMediaRelations regarding Interview Request	28-Feb-17	Bill Janes
P-0724		Email dated April 13, 2015 (4:40 PM) from Brian Scott to Scott Barefoot, Milly Brown, Donna Ivy etc. regarding April 13 Afternoon roll up	28-Feb-17	Bill Janes
P-0725		Email dated December 15, 2015 (4:24:29 PM) from Bill Janes to RNCMediaRelations regarding Statement/Interview Request	28-Feb-17	Bill Janes
P-0726		Email dated January 29, 2016 (1:22:27 PM) from Bill Janes to Joe Smyth, Joe Gullage and Jason Sheppard regarding FYI	28-Feb-17	Bill Janes
P-0727		Email dated February 24, 2016 (5:08:22 PM) from Bill Janes to RNCMediaRelations regarding Police resources	28-Feb-17	Bill Janes
P-0728		Email dated April 15, 2016 (1:14:41 PM) from Bill Janes to Media regarding Independent review vs internal review queries	28-Feb-17	Bill Janes
P-0729		Email dated August 19, 2016 (12:54:20 PM) from Joe Smyth to Bill Janes regarding Update	28-Feb-17	Bill Janes
P-0730		Email dated September 13, 2016 (1:51:05 PM) from Media to Bill Janes regarding Draft Letter - Don Dunphy	28-Feb-17	Bill Janes
P-0731		Email dated September 17, 2016 (12:09:07 PM) from Bill Janes to Jason Sheppard and An Singleton regarding Dunphy Article	28-Feb-17	Bill Janes
P-0732		Email dated September 20, 2016 (9:58:39 PM) from Joe Smyth to Bill Janes, Jason Sheppard, Ab Singleton and Joe Gullage regarding David Riche	28-Feb-17	Bill Janes

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0733		Email dated October 7, 2016 (3:54:04 PM) from Joe Smyth to Bill Janes regarding David Riche and Inquiry	28-Feb-17	Bill Janes
P-0734		Email dated April 5, 2015 (8:13:04 PM) from Bill Janes to Jackie Lake-Kavanagh regarding RCMP Investigating Shooting Incident in Mitchell's Brook	28-Feb-17	Bill Janes
P-0735		Email dated February 5, 2015 (4:49:04 PM) from Joe Smyth to Tim Buckle regarding social media	28-Feb-17	Bill Janes
P-0736		RNC Policy and Procedure Manual, GO dated May 5, 2016	28-Feb-17	Bill Janes
P-0737		Correspondence dated May 19, 2015 - February 17, 2016 regarding Policy Review	28-Feb-17	Bill Janes
P-0738		Chief Medical Examiner Autopsy Report	27-Feb-17	Simon Avis
P-0739		Chief Medical Examiner Miscellaneous, Drafts, Notes	27-Feb-17	Simon Avis
P-0740		Email dated April 5, 2015 (8:54:45 PM) from Helen Escott to RNCMediaRelations regarding Shooting story	28-Feb-17	Bill Janes
P-0741		Memorandum of Understanding between Royal Newfoundland Constabulary and the Ontario Provincial Police - dated February 3, 2015	28-Feb-17	Bill Janes
P-0742		RNC Statements and Speaking Notes	28-Feb-17	Bill Janes
P-0743		Luther Inquiry Recommendations	28-Feb-17	Bill Janes
P-0744		Use of Force Review dated October 12, 2015 completed by Wayne Knapman	2-Mar-17	Wayne Knapman

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0745		PEER Review signed by Cpl. Darren Slaunwhite	2-Mar-17	Wayne Knapman
P-0746		Email dated September 15, 2015 (11:41 AM) from Angela Corscadden to Steve Burke regarding Opinion Report - Officer Involved Shooting Review - Request for further material	2-Mar-17	Wayne Knapman
P-0747		Letter dated August 5, 2015 from Steve Burke to Wayne Knapman regarding Dunphy Sudden Death, RCMP Pros File #2015-376186	2-Mar-17	Wayne Knapman
P-0748		Excerpt from Joe Smyth's Cell Phone record related to outgoing call to William Janes of April 5, 2015	28-Feb-17	Bill Janes
P-0749		Telegram article dated September 17, 2016	1-Mar-17	Justice David Riche
P-0750		CBC News article dated September 20, 2016	1-Mar-17	Justice David Riche
P-0751		CBC News article dated January 31, 2017	1-Mar-17	Justice David Riche
P-0752		Telegram article dated February 1, 2017	1-Mar-17	Justice David Riche
P-0753		Video Recording of Global TV interview with Retired Justice Riche	1-Mar-17	Justice David Riche
P-0754		Video Recording of Riche interview with CBC	1-Mar-17	Justice David Riche
P-0755		Video Recording of Riche interview with NTV	1-Mar-17	Justice David Riche
P-0756		Audio Recording of Riche interview with VOXM	1-Mar-17	Justice David Riche

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0757		Curriculum Vitae of Darryl Barr	3-Mar-17	Darryl Barr
P-0758		Consulting Agreement dated October 20, 2015 between RCMP and Bulletproof Forensic Consulting	3-Mar-17	Darryl Barr
P-0759		Review of Shooting Evidence - Report no. 1 - amended dated February 8, 2016 prepared by Darryl Barr	3-Mar-17	Darryl Barr
P-0760		3D Case Presentation - Review of Shooting Evidence dated February 8, 2016 prepared by Darryl Barr	3-Mar-17	Darryl Barr
P-0761		Letter dated February 8, 2016 from Darryl Barr to Steve Burke regarding review of shooting evidence	3-Mar-17	Darryl Barr
P-0762		Letter dated March 15, 2016 from Darryl Barr to Steve Burke regarding review of shooting evidence	3-Mar-17	Darryl Barr
P-0763		Location and direction of projectile impact damage to wall	3-Mar-17	Darryl Barr
P-0764		Elements of the account of Cst. Smyth re-enactment	3-Mar-17	Darryl Barr
P-0765		Oram vmail and dispatch transcript - July 2016	2-Mar-17	Mark Oram
P-0766		Training History and Certificate of Training for Mark Oram	2-Mar-17	Mark Oram
P-0767		Position Description Questionnaire pertaining to position of Mark Oram	2-Mar-17	Mark Oram
P-0768		Excerpt from Audio Recording of a call between Cst. Smyth and Mark Oram of April 5 (Not available due to personal information contained on recording)	2-Mar-17	Mark Oram

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0769		Curriculum Vitae of Gareth Jones	7-Mar-17	Gareth Jones
P-0770		Report - Commission of Inquiry Respecting the Death of Donald Dunphy dated February 7, 2017 prepared by Gareth Jones	7-Mar-17	Gareth Jones
P-0771		Curriculum Vitae of Michael Massine	8-Mar-17	Michael Massine & Dr. Terry Coleman
P-0772		Curriculum Vitae of Dr. Terry Coleman	8-Mar-17	Michael Massine & Dr. Terry Coleman
P-0773		Report with Redactions - Commission of Inquiry into the Death of Donald Dunphy dated February 26, 2017 prepared by Michael Massine and Dr. Terry Coleman	8-Mar-17	Michael Massine & Dr. Terry Coleman
P-0774		Extraction Report from Joe Smyth's Cell Phone Records provided on February 6, 2017, regarding deleted messages	6-Mar-17	Joseph Smyth
P-0775		Excerpt from Interview of Kevin Bishop dated November 10, 2016 by Commission Counsel	7-Mar-17	Gareth Jones
P-0776		Excerpt of Interview of Nancy Linehan dated November 10, 2016 by Commission Counsel	7-Mar-17	Gareth Jones
P-0777		Excerpt of Interview of Trevor O'Keefe dated November 30, 2016 by Commission Counsel	7-Mar-17	Gareth Jones
P-0778		Excerpt of Interview of Dion Foote dated November 30, 2016 by Commission Counsel	7-Mar-17	Gareth Jones
P-0779		Excerpt of Interview of Steven Burke dated December 1, 2016 by Commission Counsel	7-Mar-17	Gareth Jones

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
<i>Public Exhibit</i>	<i>In Camera Exhibit</i>	<i>Description of Exhibit</i>	<i>Date Entered into Evidence</i>	<i>Witness Entered Under</i>
P-0780		Excerpt of Interview of Kent Osmond dated December 19, 2016 by Commission Counsel	7-Mar-17	Gareth Jones
P-0781		Excerpt of Interview of Monty Henstridge dated December 20, 2016 by Commission Counsel	7-Mar-17	Gareth Jones
P-0782		Letter dated January 29, 2016 from Susan Hughson to Kathleen Ganley regarding ASIRT	6-Mar-17	Susan Hughson
P-0783		Letter dated September 12, 2016 from Susan Hughson to Heather Jacobs regarding ASIRT file No. 2016-04(N) - Review - Out of Province Officer Involved Shooting Fatality	6-Mar-17	Susan Hughson
P-0784		Justice Officials Protection and Investigations Section Case Review Opinion dated February 28, 2017 prepared by Patrick Lenehan	10-Mar-17	Patrick Lenehan
P-0785		Police Act, RSA 2000, c P-17 - Government of Alberta	6-Mar-17	Susan Hughson
P-0786		Police Security Division - Alberta Serious Incident Response Team	6-Mar-17	Susan Hughson
P-0787		ASIRT Statistics - Total Number of ASIRT Files	6-Mar-17	Susan Hughson
P-0788		Email dated February 17, 2017 (8:18 PM) from Joe Smyth to Jerome Kennedy regarding Change and email dated February 17, 2017 (8:19 PM) from Joe Smyth to Jerome Kennedy regarding thoughts	6-Mar-17	Joseph Smyth
P-0789		Excerpt from Extraction Report of Joe Smyth's cell phone records provided on February 6, 2016, regarding deleted messages	6-Mar-17	Joseph Smyth
P-0790		Excerpt from Briefing Note dated April 18, 2016, from Mike Arrowsmith to Sue Hughson regarding Review File 2016-0004 (N), Royal Newfoundland Constabulary - Officer Involved Shooting, RCMP B Division Investigation, File 2015376186	6-Mar-17	Susan Hughson

 <p style="text-align: center;">Commission of Inquiry Respecting the Death of Donald Dunphy</p> <p style="text-align: center;">Exhibit Listing</p> <p style="text-align: center;">January 9, 2017 - March 10, 2017</p>				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0791		Page 15 of Disclosure Document from ASIRT to Commission of Inquiry Respecting the Death of Donald Dunphy	6-Mar-17	Susan Hughson
P-0792		Excerpt from Investigator Arrowsmith Notebook No. 1, File No. 2016-0004(N)	6-Mar-17	Susan Hughson
P-0793		Curriculum Vitae of Dr. Stephen Hart	7-Mar-17	Dr. Stephen Hart
P-0794		Report of Dr. Stephen Hart dated March 3, 2017	7-Mar-17	Dr. Stephen Hart
P-0795		Summary of Facts by Dr. Stephen Hart	7-Mar-17	Dr. Stephen Hart
P-0796		Retainer Letter of Dr. Stephen Hart	7-Mar-17	Dr. Stephen Hart
P-0797		Correspondence dated May 18, 1999 from J.G.R. Goulet and Len Griffiths to Chief of Police	8-Mar-17	Michael Massine & Dr. Terry Coleman
P-0798		Excerpt from Issues of Policing report - Darryl Power	8-Mar-17	Michael Massine & Dr. Terry Coleman
P-0799		Dunphy Inquiry Synopsis prepared by Cpt. Kent Luther	10-Mar-17	CIDDD
P-0800		Forensic Data Analysis prepared by Kevin Ripa	10-Mar-17	CIDDD
P-0801		Excerpt from Authority and Responsibilities Chapter C Page 2 of the RNC Training Manual	8-Mar-17	Michael Massine & Dr. Terry Coleman

 Commission of Inquiry Respecting the Death of Donald Dunphy Exhibit Listing January 9, 2017 - March 10, 2017				
Public Exhibit	In Camera Exhibit	Description of Exhibit	Date Entered into Evidence	Witness Entered Under
P-0802		Exhibit Continuity Report provided by the RCMP	10-Mar-17	CIDDD
P-0803		Email dated February 24, 2017 (10:05 AM) from Lori Rasmussen to Kate O'Brien and Sandra Chaytor regarding Size of Stick	10-Mar-17	CIDDD
P-0804		Transcription of interview of Debbie Dunphy with Commission Co-Counsel dated November 9, 2016	10-Mar-17	CIDDD
P-0805		Statement Synopsis of Debbie Dunphy dated April 5, 2015	10-Mar-17	CIDDD
P-0806		Not Used	10-Mar-17	CIDDD
P-0807		Outline of Facts in relation to Cst. Joe Smyth's Threat and Risk Assessment provided to Sgt. Patrick Lenehan by Nick Avis	10-Mar-17	Patrick Lenehan
P-0808		Email dated February 25, 2017 (3:51 PM) from Nick Avis to Sandra Chaytor, et al regarding Application to call Threat Assessment Expert	10-Mar-17	Patrick Lenehan
P-0809		Auditor General of Newfoundland and Labrador Annual Report dated January 2012 - Department of Justice, Royal Newfoundland Constabulary - Firearms	10-Mar-17	CIDDD

Submissions and Decisions

Submissions

January 13, 2017	Application on behalf of Meghan Dunphy to have Dr. Stephen Czarnuch, Biomechanical Engineer, called as an Expert Witness, filed by Erin Breen and Robert Simmons, Q.C., of Sullivan Breen King
February 22, 2017	Application on behalf of Cst. Joseph Smyth to Call Expert Evidence of Dr. Peter Collins, filed by Jerome Kennedy, Q.C. of Roebathan McKay Marshall
February 24, 2017	Application on behalf of Cst. Joseph Smyth to Redact Text Messages, filed by Jerome Kennedy, Q.C. of Roebathan McKay Marshall
February 25, 2017	Application on behalf of the RNC to Call Expert Evidence of Sgt. Patrick Lenehan, filed by Nick Avis of Browne Fitzgerald Morgan & Avis
March 7, 2017	Application on behalf of the RNC challenging the qualifications and admissibility of portions of the report of Dr. Terence Coleman and Sgt. Michael Massine, filed by Nick Avis of Browne Fitzgerald Morgan & Avis
March 7, 2017	Brief of Law on behalf of Cst. Joseph Smyth re Application to exclude the report of Dr. Terence Coleman or portions of it, filed by Jerome Kennedy, Q.C. of Roebathan McKay Marshall
April 7, 2017	Final Submission on behalf of Meghan Dunphy, filed by Erin Breen of Sullivan Breen King
April 7, 2017	Final Submission on behalf of Cst. Joseph Smyth, filed by Jerome Kennedy, Q.C. of Roebathan McKay Marshall
April 7, 2017	Final Submission on behalf of the Royal Canadian Mounted Police, filed by Lori Rasmussen and Mark Freeman of the Department of Justice Canada
April 7, 2017	Final Submission on behalf of the Royal Newfoundland Constabulary, filed by Nick Avis, Q.C. of Browne Fitzgerald Morgan & Avis
April 7, 2017	Final Submission on behalf of the Royal Newfoundland Constabulary Association, filed by John Drover of Roebathan McKay Marshall

Submissions (Cont'd)

- April 7, 2017 Final Submission on behalf of Paul Davis, filed by Thomas E. Williams, Q.C. of O’Dea, Earle
- April 24, 2017 Reply Submission on behalf of Cst. Joseph Smyth to Meghan Dunphy’s Final Submission, filed by Jerome Kennedy, Q.C. of Roebathan McKay Marshall

Decisions

- October 21, 2016 Decision on Application for Standing of Andrew Abbass
- October 21, 2016 Decision on Application for Standing of the Don Dunphy Community Coalition
- November 8, 2016 Decision on Phases of the Inquiry
- November 8, 2016 Decision on Application for Standing and Funding of Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador
- March 21, 2017 Ruling 1 – Decision on Application to Retain Biomechanical Expert
- March 23, 2017 Ruling 2 – Decision on Application to Edit Blackberry Text Messages
- March 30, 2017 Ruling 3 – Decision on Application to Call Psychiatric Expert re Attention, Perception and Memory Distortions following Officer-Involved Shootings and re Memory Retrieval following a Deadly Force Encounter
- April 5, 2017 Ruling 4 – Decision on Application to Exclude Portions of Joint Report of Dr. Terry G. Coleman and Sgt. Michael Massine
- April 11, 2017 Ruling 5 – Decision on Application Regarding Proposed Experts: Dr. Stephen Hart and Sgt. Patrick Lenehan

IN THE MATTER OF THE COMMISSION OF INQUIRY
INTO THE DEATH OF DONALD DUNPHY

Ruling 1: Application to Retain Biomechanical Expert

I. Introduction

The Applicant, Meghan Dunphy, has applied to have Dr. Stephen Czarnuch, a biomechanical engineer, called as an expert witness, to testify concerning the submission of self-defence made by Constable Joseph Smyth in the shooting death of her father, Donald Dunphy. Ms. Dunphy seeks to have Dr. Czarnuch establish the physical movements involved and the time required for Donald Dunphy to access a rifle from his right hand side while seated in his chair. A copy of the application with an attached description of the proposed experiment and the qualifications of Dr. Czarnuch is attached as Appendix A.

II. Background Facts

Cst. Smyth has testified that, while questioning Donald Dunphy at his home, Mr. Dunphy raised a 22 calibre rifle from somewhere on the right side of the chair in which he sat and pointed it at the police officer. Cst. Smyth said that at the time he was looking down at a folder on which he was making notes and saw Mr. Dunphy in his peripheral vision. Cst. Smyth estimates he had been looking away from Mr. Dunphy for anywhere from two to six seconds.

Ms. Dunphy says she believes that the proposed expert evidence will establish that her father could not have raised the rifle in the manner stated by Cst. Smyth in the time he set out.

III. Submissions

(a) *Meghan Dunphy*

Counsel for Ms. Dunphy submits that the proposed experiment regarding the physical movements necessary to raise a rifle in the manner alleged and the time it would take would provide relevant and necessary evidence regarding whether Mr. Dunphy could have acted as he allegedly did within the suggested time frames. Counsel submits that this biomechanical engineering methodology would produce a reliable evidence-based standard against which the veracity of Cst. Smyth's testimony might be tested and, together with the evidence from other sources, would assist the Commission in addressing its Terms of Reference, particularly those mandating inquiry into the circumstances of death and the ascertaining of whether there were any material deficiencies in the investigation of the death.

Counsel says that if the time needed by Mr. Dunphy to raise the rifle exceeds the time Cst. Smyth estimates he was not looking at Mr. Dunphy, then this would raise doubts as to Cst. Smyth's credibility. First, it would raise the possibility that Cst. Smyth may have had time to escape the room or take other action short of lethal force. Second, if the time needed by Mr. Dunphy to raise the rifle was relatively long, or involved a significant physical movement, it casts doubt on Cst. Smyth's assertion that he did not see the rifle until it was pointed at him.

(b) *Cst. Joseph Smyth*

Counsel for Cst. Smyth submits the experimental conclusions would have to be premised upon so many estimated variables that the experiment would have little probative value. He notes that Cst. Smyth could easily have spent several seconds looking around the

living room and several more looking down at his folder. He also says that the principle of fairness binding a Commission when considering evidentiary issues requires that if evidence is submitted in support of serious misconduct alleged against an individual, then special care must be given as to whether or not to receive the evidence.

(c) Other parties

Other parties, except for the Ad Hoc Community Coalition, also oppose the application on various grounds, one ground being that a part of the experiment will require estimates of the effect of Mr. Dunphy's physical disabilities upon his ability to twist, turn and lift, matters outside the claimed expertise of Dr. Czarnuch.

IV. Issue

Whether the results of the proposed experiment would satisfy the test of relevant and necessary evidence.

V. The Law and Analysis

(a) Admission of expert evidence generally

The general rule that all relevant evidence is admissible has qualifications. In the present application we are concerned with the exclusionary rule for opinion evidence.

Normally a witness testifies to facts and does not express opinions about those facts. An exception where witnesses may offer opinions is in "matters of common experience", such as estimates of distance, or the speed of a vehicle, or the age of a person. See, Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (2009), at 323. Also, the law permits experts to express opinions in certain limited circumstances, where they are

qualified by some special skill, training or experience. The opinion must be on matters within their expertise. The subject matter must truly require expertise, be within a recognized discipline, and not be within the “common stock of knowledge” of the public. *Ratnushy*, at 323.

Assuming for the moment that the evidence which Dr. Czarnuch would produce through his experiment would in fact be expert evidence, I am satisfied, for the following reasons, that the proposed evidence does not meet the threshold test for admission of novel expert evidence.

(b) Admission of novel expert evidence

The proposed experiment falls within the category of novel scientific technique in that the expertise asserted as needed to carry it out does not fall within a previously recognized area of expertise.

In *R. v. Mohan*, [1994] 2 S.C.R. 9, the Supreme Court of Canada articulated the four part test to be considered with respect to the admission of novel expert evidence. The criteria are: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert.

Surprisingly, the Court did not expressly note the reliability of the evidence as one of the criteria to be considered. *Sopinka J.* did, however, at paragraph 18, refer to reliability in the context of relevance and when discussing the exclusionary rule relating to probative value. Also, at paragraph 28, *Sopinka J.* stated:

In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the

evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

The jurisprudence since *Mohan* has made it clear that the threshold reliability of the underlying science must be carefully considered in the case of novel scientific evidence or technique. See, for example, *R. v. J. (L.J.)*, 2000 SCC 51, [2000] 2 S.C.R. 600, and *R. v. Trochym*, [2007] 1 S.C.R. 239, 2007 SCC 6. In the present case, as explained below, the proposed evidence meets neither the necessity test nor the test of sufficient probative value and, therefore, I need not otherwise get into the assessment of reliability.

The *Mohan* test has been further refined by the more recent decision of *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182. In that case, the Supreme Court of Canada held that the inquiry for determining the admissibility of expert evidence is to be divided into two steps. The first step is the establishment of the four factors set out in *R. v. Mohan* as a threshold requirement before moving on to the second. If the *Mohan* test cannot be met by the party seeking to adduce the evidence, then it should be excluded. If the *Mohan* criteria can be met, then the second step must be considered. This step involves the trier of fact engaging in a discretionary gatekeeping role to ensure that the evidence proposed is of sufficient probative value so as to outweigh any potential prejudice or harm to the Inquiry's process.

(i) Relevance

In the present case the proposed experiment has some relevance in that I believe the results, if achievable, would, to some extent, advance this Inquiry because they would have a bearing upon an issue to be resolved, namely whether the description of the incident by Cst. Smyth is plausible. If it could be established that Mr. Dunphy could not have brought the rifle to bear upon Cst. Smyth within the alleged time frame, then this would challenge

Cst. Smyth’s testimony that he had insufficient time to see the raising of the rifle or to exit the living room and his only choice was to shoot at Mr. Dunphy.

(ii) Necessity

From the information provided concerning the proposed experiment, I do not believe that the times required for the alleged actions of Mr. Dunphy can be established with sufficient certainty to be considered necessary. The results of the proposed experiment will depend upon too many variables or hypotheticals. These include the various possible locations of the rifle, the various possible angles of the firearm if placed in a pocket on the side of Mr. Dunphy’s chair, the various possible degrees of disability of Mr. Dunphy, the various possible effects of agitation or adrenalin with respect to Mr. Dunphy at the time, the various positions he might have adopted in his chair (left side, middle or right side), the various ways Mr. Dunphy may have held the rifle (with one hand or two), and so forth. The evidence resulting from the proposed experiment will provide answers to what are hypothetical questions – where there is no agreement on the factual basis of the questions.

In *R.v.J.J.*, 2000 SCC 51, *Binnie J.* for the Court adopted the conclusion of *Sopinka J.* in *Mohan* that the expert opinion must be necessary “in the sense that it provide information, which is likely to be outside the experience and knowledge of a judge or jury; ... the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.”

The proposed expert says that the planned times and motion trials “will help understand both the *average* time it takes to perform the considered action as well as the amount of variation one could reasonably expect as a result of individual capabilities.” In other words, these trials will provide an expected range of times it would take for a healthy

adult male to perform the necessary actions for each possible location and position of the rifle and then these times would be adjusted, based upon estimates of how physical and mental capabilities would affect Mr. Dunphy's deviation from the average.

I have not been shown that the adjustment process is within the expertise of Dr. Czarnuch. He properly pointed out that to establish the extent to which Mr. Dunphy's physical disability may in fact have caused him to take more time than a young, healthy adult male to draw a weapon would require a better understanding of Mr. Dunphy's disability than is currently known at this time. I note that Mr. Dunphy's physician could provide only very general information in this regard. Dr. Thomas McGarry testified that Mr. Dunphy had suffered a crushed pelvis and would have some difficulty bending and twisting as a result of his physical problems. He had trouble getting out of a chair and was slow in his movements compared to a normal person.

Even if one were able to arrive at a reliable deviation for disability, this would point to a different result for each variable, including the assumed location and angle of the rifle, each position of Mr. Dunphy in the chair and each method of holding the firearm. This series of results would not be of significant assistance to this Inquiry, particularly considering the time period of interest ranges from only two or three to five or six seconds. Because the experimental evidence to be obtained will be too speculative and uncertain to be of assistance, the applicant has not shown it will be "necessary". She fails to meet the "necessity" criterion of *Mohan* or the first step of *White Burgess*.

(iii) Probative Value

In any event, considering the second step of *White Burgess*, I have concluded that the average times to be obtained under the many scenarios and variations would be of

insufficient probative value to justify embarking upon the process of carrying out the proposed experiment. Indeed, I should say experiments. Fairness to Cst. Smyth would require that he have time to search for an expert in rebuttal if the results of the first experiment were not acceptable to him. This would mean delay in seeking experts. Eventually a battle of experts would ensue and it would be very difficult to meet the deadline for the submission of the Commission's Report.

(c) A Matter of Common Experience

A good argument can be made that the evidence in question is not expert evidence at all. An expert may not be necessary, in that, for the most part, we are dealing with matters of common sense and something within the "common stock of knowledge" of the public. We can all roughly estimate within a second or so how long it would take a 58 year old man to raise a firearm if he has certain disabilities resulting in loss of flexibility or mobility. Such an estimate would arguably be as useful for present purposes as would the averages obtained by the proposed experiment.

One may question whether the proposed experiment involves anything more than a sophisticated measurement of distances and times, which non-expert members of the general public could perform or approximate by reasonable estimation. I have not been shown the usefulness of having detailed explanations of the movements involved or of the "biomechanical modeling of the posture and pose deformation potentially required to reach the weapon". The question is how many seconds or milliseconds it would take a person in Mr. Dunphy's situation to grab, raise and point the rifle. This is something which may fall within "matters of common experience" as opposed to an area of expertise or a particular discipline. But whether experimental results are sought to be put in through an expert or by

a demonstration of a non-expert, the same problem arises: there are too many variables at play to permit inferences to be drawn with the necessary degree of certainty. The probative value of the evidence will be insufficient to warrant the delay involved in obtaining it, whether the evidence goes in through an expert or non-expert. I am satisfied I will be able to arrive at satisfactory conclusions on the issues in question without the assistance of experts or experiments.

(d) The Chair Demonstration

To avoid any misunderstanding by counsel, I must note that what I have stated above will not prevent counsel from utilizing Mr. Dunphy's chair as a demonstrative aide in the course of final submissions.

Summary and Disposition

If viewed as novel expert evidence, the results of the proposed experiment or experiments will not meet the necessity test of *Mohan*. The experimental results will be too speculative and uncertain because of the many variables involved. For the same reason, the results will not have sufficient probative value to warrant admission. If the evidence is viewed as a matter of common experience, the same problems of too many variables and lack of probative value arise. I have kept in mind the importance Meghan Dunphy places upon what she sees as evidence which may challenge Cst. Smyth's testimony regarding how he had no choice but to shoot her father in order to save himself. But in law this sort of evidence does not go in. I should note that I will be considering the available non-experimental evidence regarding difficulties Mr. Dunphy might have had in raising the rifle and I will be arriving at my own independent conclusion as to

whether Cst. Smyth's description of what occurred is plausible. I do not need expert opinion in order to do this. The application is dismissed.



Leo Barry
Commissioner

2017-03-21

APPENDIX A

SULLIVAN + BREEN + KING

Robert E. Simmonds, QC (Counsel) + Rosellen Sullivan + Erin K. Breen + Michael N.R. King + Ellen C. O’Gorman

January 13, 2017

Commissioner Leo Barry
Commission of Inquiry into the Death of Donald Dunphy
Filed via e-mail attachment

Dear Commissioner Barry:

Re: Application on behalf of Meghan Dunphy to have Dr. Stephen Czarnuch, Biomechanical Engineer, called as an expert witness

As directed by the Commission on January 7, 2017, we provide this letter as the Application of Ms. Dunphy for the Commission to call Dr. Stephen Czarnuch, biomechanical engineer, as an expert witness. Dr. Czarnuch’s CV and preliminary report setting out his proposed methodology have been provided.

We submit that Dr. Czarnuch’s opinion will assist the Commission with respect to subsections 3(1) (f) and (j) of the terms of reference.

Constable Smyth has stated that Mr. Dunphy, while seated in his chair, obtained a rifle from his right hand side and then pointed the rifle while Constable Smyth stood across from him. Constable Smyth stated that he did not see this take place although he had Mr. Dunphy in his peripheral vision. The physical movements necessary to obtain a rifle in this manner and the time it would take are not known. Dr. Czarnuch’s preliminary statement proposes a biomechanical engineering methodology that will produce a reliable standard against which the veracity of Constable Smyth’s testimony may be tested. Dr. Czarnuch’s output would not be within the common knowledge of the Commission and would assist the Commission in its analysis of this material issue.

Respectfully submitted,

ERIN K. BREEN AND ROBERT E. SIMMONDS Q.C.

Suite 300, 233 Duckworth Street, St. John’s, NL A1C 1G8 + P 709.739.4141 + F 709.739.4145 + wefighthardcases.ca

Preliminary Statement related to the Commission of Inquiry
Respecting the Death of Donald Dunphy

Prepared for:

Erin Breen and Robert Simmonds, Q.C.,

SBK – Defense

Prepared by:

Stephen Czarnuch, Ph.D., P.Eng.

Assistant Professor

Department of Electrical and Computer Engineering,

Faculty of Engineering and Applied Science /

Discipline of Emergency Medicine, Faculty of Medicine

Memorial University of Newfoundland

January 12, 2017

Introduction

This statement is prepared in response to an email sent to me by Ms. Erin Breen on Sunday, January 8, 2017 at 4:36pm. I was provided with the following evidence for my preliminary statement:

1. Statement of Joseph Smyth – December 22, 2015 (transcripts);
2. Statement of Joseph Smyth – June 17, 2015 (transcripts);
3. A binder of approximately 40 photos of the room;
4. A three-page document beginning with a short statement followed by a Twitter tweet (unknown source); and
5. A one-page floorplan of Mr. Dunphy's house, titled Appendix II (p.23, unknown source)

My statement is solely based on these documents and contextualized by the original email sent by Ms. Breen.

Expertise in the area

I obtained my PhD in biomedical engineering at the University of Toronto in 2014, with a specific focus on human motion tracking, task and activity identification, detection and monitoring. My research on computer vision-based human motion tracking began in 2009 when I started my PhD, and is now largely centred on biomechanical modeling of humans and human motion in three-dimensions. My work in this area is largely focused on persons with physical and cognitive disabilities (e.g., dementia, multiple sclerosis), and has resulted in over ten peer-reviewed scholarly publications in the area [e.g., 1, 2-10]. Prior to my PhD, I worked for over a decade as an electrical and computer engineer, and spent the last five years of this period specializing in computerized human tracking and task identification in a manufacturing setting. Finally, through my research I routinely conduct motion trials with humans in an attempt to identify tasks and activities, including timing human motion.

Experience providing expert opinion in a judicial hearing

I have never provided an expert opinion in a judicial hearing.

Awareness and understanding of the role of an expert witness in a judicial proceeding.

I understand that my role as an expert witness is to maintain impartiality. With respect to my involvement in the Dunphy case I understand that all of my correspondences are to be documented, ideally in written form, to the greatest extent possible. Furthermore, any methodologies that I employ and opinions that I express must be scientifically based and unbiased toward any result. I am familiar with this role as an ongoing expectation of my role as a professional, as evidenced by my ongoing certification as a licensed and practicing Professional Engineering in the Province of Newfoundland and Labrador, member #08223.

Declaration of any bias, real or perceived, that may exist.

I hold no personal bias with respect to this role. In the interest of full disclosure of real or perceived conflicts of interests, I believe it prudent to disclose that my partner, Dr. Rosemary Ricciardelli is an Associate Professor in the Department of Sociology and the Coordinator of the Criminology Certificate at

Memorial University. She specializes in corrections research although does limited policing research as well. In her academic role, she serves on the police studies academic advisory committee and may teach Royal Newfoundland Constabulary (RNC) cadets (or future cadets) in her classes. She does work in partnership with the Royal Canadian Mounted Police (RCMP), B Division and has engaged in research with the Child Abuse and Sexual Assault Unit as well as that of the Child Internet Exploitation Unit of the RNC. To the best of her knowledge, she does not know Smyth nor anything beyond public knowledge of the Dunphy case.

Understanding of the questions being asked to consider for the Commission.

I am confident I fully understand the questions I am being asked to consider for the Commission. Namely, I am being asked to consider:

1. What physical movements were required for Mr. Dunphy (with the parameters outlined below) to obtain the rifle from his right hand side while seated in his chair?
2. How long, time wise, could these actions take?

I also understand that my proposed consideration and procedure must contemplate all reasonable possibilities, including the quickest and easiest way that the rifle could be obtained *by a young and fully able-bodied adult male*. To accomplish this, and implicit to my methodology, will be the determination of the possible/probable locations the rifle could have been stored during the exchange between Mr. Smyth and Mr. Dunphy while remaining accessible to Mr. Dunphy, but potentially not visible to Mr. Smyth.

Methodology and proposed results

I propose three main steps: 1) identify possible classes of locations for the rifle; 2) biomechanical modeling of a young and fully able-bodied adult male (of the same height and basic measurements of Mr. Dunphy) reaching for the rifle; and 3) timing trials with a representative sample of young and fully-able-bodied males. In this way, I expect to be able to produce the following results:

1. A list of possible locations to the right of the chair that the rifle could have been stored and accessible to Mr. Dunphy but potentially not visible to Mr. Smyth, categorized by classes.
 - In this context, a *class* would refer to a location that would be accessible by the same or similar physical and anatomical human movements, while allowing for some variation in the actual placement. For example, a class could be identified as “on the floor, approximately parallel to the chair with the barrel toward the mantle”.
 - Accessible to Mr. Dunphy suggests that he could reach the rifle without leaving his chair.
 - Potentially not visible to Mr. Smyth suggests that, under some circumstances Mr. Smyth may have been able to see the rifle, but that it was possible he could not see it depending on location, environmental conditions, etc.
 - Location classes would be identified by physical dimensioning and examination of the room and rifle.
2. A static biomechanical model of a young, able-bodied male of similar anatomical dimensions to Mr. Dunphy in his chair, and reaching for the rifle in the location classes identified in the first step.
 - This model will primarily identify the transformation of the posture and positioning of a man similar to Mr. Dunphy that would be required under ideal conditions to reach the rifle.
 - This modeling may also discount certain possible locations based on the motions required to reach them.

3. A set of simulated or real trials to help characterize how long, time wise, it would take a young, able bodied adult male to obtain the rifle into a defined position.
 - The position, currently, has not been fully defined but may include: the rifle being held by the grabbing hand; the rifle being held by both hands; the rifle being held and pointed at the probable location of Mr. Smyth by the mantle without necessarily being oriented properly; the rifle being held and pointed at Mr. Smyth and oriented properly.
 - The use of simulated trials (i.e., in a mock setting with objects of similar dimensions) versus real trials (i.e., in the Mr. Dunphy's home) will be determined under the advisement of the Commission.
 - The number of participants required to characterize a young, able-bodied adult male will be determined under the advisement of the Commission
 - These trials will help understand both the *average* time it takes to perform the considered action, as well as the amount of variation one could reasonably expect as a result of individual capabilities. In other words, these trials will provide an expected range of times it would take for a healthy adult male to perform the action for each possible location of the rifle.

How this opinion would assist the Commission in carrying out its mandate

From the data collected using the stated methodology, one could gain an understanding of the amount of time it would likely take for a seated, able bodied adult male to, for example, reach for the rifle in in a known storage location, properly orient the rifle (for example if it was picked up upside down), and point the rifle toward the mantle. These data could also be compared across possible rifle locations. From these data, in conjunction with the biomechanical modeling of the posture and pose deformation potentially required to reach the weapon, and from a review of the timing trials, one could also gain an evidence-based understanding of what Mr. Smyth may have seen, directly or peripherally, if a young, able-bodied adult male were reaching for and drawing the rifle from Mr. Dunphy's seat. Finally, and in consideration of any disability or injury Mr. Dunphy may have had, one could opine on how these data collected from a young, able-bodied adult male could have been affected. For example, an assertion could be made that Mr. Dunphy's physical disability or injury may in fact cause him to take more time than a young, healthy adult male to draw his weapon. However, this assertion would require a better understanding of Mr. Dunphy's disability than is currently known at this time.

References

- [1] A. J. R. Hynes and S. Czarnuch, "Assessing the gait of people with multiple sclerosis using 3D motion tracking: toward objective outcome measures," in *Americas Committee for Treatment & Research in Multiple Sclerosis (ACTRIMS)*, Orlando, FL, 2017.
- [2] S. Czarnuch and A. Mihailidis, "Development and evaluation of a hand tracker using depth images captured from an overhead perspective," *Disability & Rehabilitation: Assistive Technology*, vol. 11, pp. 150-157, 2016.
- [3] S. Czarnuch and M. Ploughman, "Toward inexpensive, autonomous, and unobtrusive exercise therapy support for persons with MS," in *Americas Committee for Treatment & Research in Multiple Sclerosis (ACTRIMS)*, New Orleans, LA, 2016.
- [4] A. J. R. Hynes and S. Czarnuch, "Combinatorial Optimization for Human Body Tracking," in *Lecture Notes in Computer Science, Proceedings of the International Symposium on Visual Computing*, Las Vegas, NV, 2016.

- [5] A. J. R. Hynes and S. Czarnuch, "Building a feature vector for assessing the gait of persons with multiple sclerosis," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2016.
- [6] Z. Yang and S. Czarnuch, "3D Point Cloud based Human Skeleton Identification," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2015.
- [7] S. Czarnuch, "Advancing the COACH automated prompting system toward an unsupervised, real-world deployment," Doctor of Philosophy, Institute of Biomaterials and Biomedical Engineering, University of Toronto, Toronto, 2014.
- [8] S. Czarnuch and M. Ploughman, "Automated gait analysis in people with Multiple Sclerosis using two unreferenced depth imaging sensors: Preliminary steps," presented at the Proceedings of the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2014.
- [9] S. Czarnuch and A. Mihailidis, "Development and evaluation of a hand tracker using depth images captured from an overhead perspective," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2014.
- [10] S. Czarnuch, S. Cohen, V. Parameswaran, and A. Mihailidis, "A real-world deployment of the COACH prompting system," *Journal of Ambient Intelligence and Smart Environments, Thematic Issue on Designing and Deploying Intelligent Environments*, vol. 5, pp. 463–478, 2013.

Robert Simmonds

From: Stephen Czarnuch <stephen.czarnuch@gmail.com>
Sent: January-16-17 11:58 PM
To: Robert Simmonds; Erin Breen
Subject: Clarifying statements

Dear Robert and Erin,

I am sending this email as a follow-up to our phone conversation earlier this evening, and specifically, our discussion of my role as an expert witness to the Commission. For the sake of brevity I am assuming that my Preliminary Statement, which I submitted to Ms. Breen on January 12, outlining my proposed methodology is available. The intent of this email is to provide you with further details on the following three points raised this evening:

1. ***My title of Biomedical Engineer, as compared to Biomechanical Engineer.*** Biomechanics, broadly speaking, is the study and analysis of human movement. Biomechanical engineering is thus the application of engineering principles to the movements of living things. Biomedical engineering is, broadly speaking, the study of biological systems (including humans) using engineering principles. I can cite numerous sources that consider one to be the more generalized form of the other and vice versa. However, in my opinion, particularly in this situation, the field of study is more relevant than the title. I received my PhD from the Institute of Biomaterials and Biomedical Engineering at the University of Toronto. My research has almost entirely focused on the application of engineering principles to the skeleton modeling of human motion and human activity detection. All graduates of this PhD program hold the same title, but conduct extremely different research suggesting that the title is not as relevant as the research. For example, a biomechanical engineer could focus specifically on the biomechanics of hearing or speech, while a biomedical engineer could focus entirely on human kinematics and motion analysis.
2. ***An estimate of the time and cost of completing the proposed work.*** Please refer to my Preliminary Statement for details on the methodology. I anticipate it will take 20-25 hours @ \$200/hr to complete the following work:
 1. Identify the possible location(s) of the rifle;
 2. Model the static biomechanics (posture and body positioning) of a young, able-bodied adult male (of similar dimensions to Mr. Dunphy) reaching for the rifle in the identified location(s); and
 3. Complete a small set of simple trials, if necessary, to develop a preliminary characterization of the pose, time, and effort it may take to reach the rifle in the identified locations.
3. ***My ability to complete my proposed work by February 17, 2017.*** I do not anticipate any difficulties that will prevent me from completing the work by February 17. This is conditional on a minimum of transportation and access to Mr. Dunphy's home with the chair in its original place, and access to the rifle to take measurements.

If you have any further questions, please let me know.

Sincerely,

Stephen Czarnuch, PhD, P.Eng.
Assistant Professor

Department of Electrical and Computer Engineering,
Faculty of Engineering and Applied Science /
Discipline of Emergency Medicine, Faculty of Medicine
Memorial University of Newfoundland

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<http://www.med.mun.ca/Medicine/Faculty/Czarnuch.-Stephen.aspx>

Curriculum Vitae

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Current Position: Assistant Professor
 Department of Electrical and Computer Engineering,
 Faculty of Engineering and Applied Science /
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Fax: 709.864.3490

1 EDUCATION

Degree	Institution	Department	Year
Ph.D.	University of Toronto	Institute of Biomaterials and Biomedical Engineering	2014
M.A.Sc.	McMaster University	Electrical and Computer Engineering	2005
B.Eng. & Mgmt.	McMaster University	Electrical and Computer Engineering	2002

2 EMPLOYMENT HISTORY

2.1 Academic Appointments

2015-present Assistant Professor
 Memorial University

2014-2015 Post-doctoral fellow
 Memorial University
 St. John's Canada
Co-advisors: Dr. Ray Gosine (Engineering), Dr. Michelle Ploughman (Medicine)
 Title: Toward automated rehabilitation support and progress assessment for people with Multiple Sclerosis: Improving recovery, objectivity and safety with technology

2014, Spring Per-course instructor, Concurrent Programming
 Memorial University
 St. John's Canada

2002, Fall Teaching Assistant, Electrical Machines
 McMaster University
 Hamilton Ontario

1 of 19

Curriculum Vitae

S. Czarnuch

2002, Teaching Assistant, Microelectronics
 Winter McMaster University
 Hamilton Ontario

2.2 Non-Academic Appointments

2005- Electrical Engineer
 2014 General Motors of Canada
 Oshawa, Ontario

- Created and supervised the implementation of research and development projects to improve manufacturing processes
 - Independently conceptualized and lead large-scale research based projects (up to \$250,000) to support manufacturing requirements such as:
 - Designing a human tracking systems to enforce the safety and security of manufacturing personnel in unsafe areas
 - Creating an innovative human-object interaction detection system to ensure compliance with safety regulations during the installation of critical vehicle components
 - Collaboratively contributed to team-based, interdisciplinary projects valued at as much as \$1 million, such as:
 - Redesigning infrastructure for tracking and verifying build data and processes across the General Motors Oshawa Car Plants
 - Explored the application of leading-edge hardware to improve manufacturing accountability and traceability
 - Designed custom industrial Human-Machine Interfaces to allow seamless interaction between process equipment, skilled trades and unskilled production workers
 - Supervised teams of skilled trades during the installation and validation of process equipment
- Autonomously provided engineering support for automated process equipment
 - Utilized problem solving skills to diagnose equipment failures and resolve chronic manufacturing issues
 - Coordinated teams of skilled trades and production personnel under significant pressure caused by the financial impact of lost production time

2003- Control Systems Engineer and Electrical Designer
 2005 ATL Industries
 Uxbridge, Ontario

- Conceptualized, designed and implemented innovative electrical and control systems for the automotive and manufacturing industries
 - Collaboratively designed electrical and pneumatic control system and novel industrial communication networks for projects up to \$2.5 million
- Supervised onsite installation teams during machine installation and commissioning for multiple projects in North America, such as:
 - Brose Technik full door assembly line, Vance, Alabama

Curriculum Vitae

S. Czarnuch

- ABC Technologies Inc., plastic processing equipment, Gallatin, Tennessee
- Honda Manufacturing, car battery installation line, Lincoln, Alabama
- Honda Manufacturing, air pressure decay HVAC test, Aliston, Ontario
- Communicated directly with customers during quoting, contract negotiation, equipment design, equipment testing, installation, training, and service

2002- Electrical Engineer

2003 Delphi Energy and Engine Management Systems
Oshawa, Ontario

- Implemented and supervised entire projects from start to finish, including the design, installation, debugging and training
- Supported manufacturing production with several processes such as:
 - Injection moulding (plastics)
 - Molten lead moulding
 - TIG and Extrusion/Fusion welding
 - Industrial computer vision systems
 - Hazardous material handling
- Maintained existing plant equipment during regular production and assisted with troubleshooting equipment malfunctions
- Supervised both production and maintenance teams as required and when the opportunity was available

3 PRIMARY RESEARCH INTERESTS

- Computer vision human motion tracking and activity detection
- Multi-sensor synthesis and 3D scene reconstruction
- Supporting aging-in-place with assistive technologies for persons with dementia
- Multiple sclerosis rehabilitation and assessment with intelligent technologies

4 PUBLICATION LIST

Publication Type	Pre-2015	2016	2017	Career Total
Peer-Reviewed Journal Articles	3	2	1	6
Peer-Reviewed Conference Papers/Abstracts	15	4	2	21
Peer-Reviewed Conference Proceedings	1	1	4	6
Chapters in Books	1	1	0	2
Reports	0	1	0	1
Non-Peer-Reviewed Articles/Proceedings/Presentations	13	2	0	15

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Invited Presentations/Lectures/Keynotes	11	5	2	18
Media Appearances	0	1	0	1

4.1 Peer-Reviewed Journal Articles

- [1] E. M. D. Jean-Baptiste, **S. Czarnuch**, A. Mihailidis, "Monte Carlo Algorithm for Factored POMDP-based Assistive System," *Journal of Ambient Intelligence and Smart Environments*, 2017 (under review).
- [2] **S. Czarnuch**, R. Ricciardelli, and A. Mihailidis, "Predicting the role of assistive technologies in the lives of people with dementia using objective care recipient factors," *BMC Geriatrics*, vol. 16, pp. 1-11, 2016.
- [3] **S. Czarnuch** and A. Mihailidis, "Development and evaluation of a hand tracker using depth images captured from an overhead perspective," *Disability & Rehabilitation: Assistive Technology*, vol. 11, pp. 150-157, 2016.
- [4] M. Grzes, J. Hoey, S. Khan, A. Mihailidis, **S. Czarnuch**, D. Jackson, and A. Monk, "Relational approach to knowledge engineering for POMDP-based assistance systems as a translation of a psychological model," *International Journal of Approximate Reasoning*, vol. 55, pp. 36-58, 2014.
- [5] **S. Czarnuch**, S. Cohen, V. Parameswaran, and A. Mihailidis, "A real-world deployment of the COACH prompting system," *Journal of Ambient Intelligence and Smart Environments, Thematic Issue on Designing and Deploying Intelligent Environments*, vol. 5, pp. 463-478, 2013.
- [6] **S. Czarnuch** and A. Mihailidis, "The design of intelligent in-home assistive technologies: Assessing the needs of older adults with dementia and their caregivers," *Gerontechnology*, vol. 10, pp. 165-178, 2011.

4.2 Peer-Reviewed Conference Papers/Abstracts

Student first-authors *italicized*.

- [1] *K. Habib* and **S. Czarnuch**, "State of the art of ground plane detection in 3D applications: A systematic review," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2016.
- [2] *A. J. R. Hynes* and **S. Czarnuch**, "Building a feature vector for assessing the gait of persons with multiple sclerosis," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2016.
- [3] *Z. Yang* and **S. Czarnuch**, "3D Point Cloud based Human Skeleton Identification," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2015.

Curriculum Vitae

S. Czarnuch

- [4] M. Ploughman, S. N. Rancourt, L. P. Kelly, G. Grover, E. M. Wallack, S. Granter-Button, D. T. G. Philpott, D. Button, K. Power, and **S. Czarnuch**, "Assessing peak oxygen consumption in people with multiple sclerosis using total body recumbent stepper and weight supported treadmill," presented at the Rehabilitation in MS Annual Conference, Milan, Italy, 2015.
- [5] M. Ploughman, S. N. Rancourt, L. P. Kelly, G. Grover, E. M. Wallack, S. Granter-Button, D. T. G. Philpott, D. Button, K. Power, and **S. Czarnuch**, "Reducing post-exercise decrements in performance in MS: Preliminary Steps," presented at the Rehabilitation in MS Annual Conference, Milan, Italy, 2015.
- [6] **S. Czarnuch**, "Automated ground plane detection using human motion and environmental geometry," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2015.
- [7] *L. Lin*, **S. Czarnuch**, A. Malhotra, C. Yu, and J. Hoey, "Affectively aligned cognitive assistance using Bayesian affect control theory," presented at the 8th International Conference on Ubiquitous Computing & Ambient Intelligence (UCAmI) & 6th International Work-conference on Ambient Assisted Living (IWAAL) Belfast, Ireland, 2014.
- [8] **S. Czarnuch** and M. Ploughman, "Automated gait analysis in people with Multiple Sclerosis using two unreferenced depth imaging sensors: Preliminary steps," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2014.
- [9] **S. Czarnuch** and A. Mihailidis, "Development and evaluation of a hand tracker using depth images captured from an overhead perspective," presented at the Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section, St. John's, NL, 2014.
- [10] R. Wang, P. Viswanathan, **S. Czarnuch**, J. Boger, G. Nejat, and A. Mihailidis, "Developing advanced assistive technologies for older adults with dementia: Lessons learned," presented at the Rehabilitation Engineering and Assistive Technology Society of North America (RESNA), Bellevue, WA, 2013.
- [11] R. Ricciardelli, A. Bridgman, **S. Czarnuch**, B. Ye, J. Bell, and A. Mihailidis, "The impact of caregiver socio-demographic factors on assistive technology needs when caring for a person with Alzheimer's disease," presented at the Canadian Association on Gerontology (CAG): Aging...from Cells to Society, Halifax, NS, 2013.
- [12] R. Ricciardelli, J. Bell, **S. Czarnuch**, B. Ye, J. Tong, and A. Mihailidis, "The impact of care recipient factors on their assistive technology needs for daily task completion," presented at the Canadian Association on Gerontology (CAG): Aging...from Cells to Society, Halifax, NS, 2013.
- [13] *J. Hill*, R. Ricciardelli, **S. Czarnuch**, and A. Mihailidis, "The relationship between perceptions of assistive technology and the ethical and legal concerns relevant to their acceptance and use," presented at the Canadian Association on Gerontology (CAG): Aging...from Cells to Society, Halifax, NS, 2013.

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- [14] **S. Czarnuch**, R. Ricciardelli, J. Bell, B. Ye, and A. Mihailidis, "Financial realities and occupational strain: Designing accessible, needed, and appropriate Intelligent Assistive Technologies for people with dementia," presented at the Canadian Association on Gerontology (CAG): Aging...from Cells to Society, Halifax, NS, 2013.
- [15] **S. Czarnuch** and A. Mihailidis, "An in-home efficacy study of the COACH prompting system," presented at the Canadian Association on Gerontology (CAG): Aging...from Cells to Society, Halifax, NS, 2013.
- [16] *A. Bridgman*, **S. Czarnuch**, R. Ricciardelli, and A. Mihailidis, "Linking caregiver's experiences of 'caregiver burden' with their perception of the usefulness of Assistive Technologies when caring for a person with Alzheimer's disease," presented at the Canadian Association on Gerontology (CAG): Aging...from Cells to Society, Halifax, NS, 2013.
- [17] **S. Czarnuch** and A. Mihailidis, "The COACH: Assisted Cognition," presented at the Humboldt Colloquium, Toronto, Canada, 2012.
- [18] **S. Czarnuch** and A. Mihailidis, "The COACH: A real-world effectiveness study," presented at the Canadian Student Health Research Forum, Winnipeg, Manitoba, 2012.
- [19] **S. Czarnuch** and A. Mihailidis, "The COACH: A real-world efficacy study," presented at the Alzheimer's Association International Conference (AAIC), Vancouver, British Columbia, 2012.
- [20] **S. Czarnuch** and A. Mihailidis, "The COACH prompting system: Determining and understanding the needs of caregivers and older adults with dementia," presented at the 6th Annual Canadian Conference on Dementia, Montreal, Canada, 2011.
- [21] **S. Czarnuch**, J. Boger, and A. Mihailidis, "COACH@Home: An Ambient Assistive Living Technology for People with Dementia," presented at the Festival of International Conferences on Caregiving, Disability, Aging and Technology, Toronto, Ontario, 2011.

4.3 Peer-Reviewed Conference Proceedings

- [1] **S. Czarnuch**, "The role of technology as an MS endpoint: Old problems with new perspectives," in Americas Committee for Treatment & Research in Multiple Sclerosis (ACTRIMS), Orlando, FL, 2017.
- [2] A. Hynes, and **S. Czarnuch**, "Assessing the gait of people with multiple sclerosis using 3D motion tracking: toward objective outcome measures," in Americas Committee for Treatment & Research in Multiple Sclerosis (ACTRIMS), Orlando, FL, 2017.
- [3] Z. Chen, **S. Czarnuch**, A. Smith, and M. Shehata, "Performance evaluation of 3D keypoints and descriptors," in Lecture Notes in Computer Science, Proceedings of the International Symposium on Visual Computing, Las Vegas, NV, 2016.

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- [4] A. J. R. Hynes and **S. Czarnuch**, "Combinatorial Optimization for Human Body Tracking," in *Lecture Notes in Computer Science, Proceedings of the International Symposium on Visual Computing*, Las Vegas, NV, 2016.
- [5] **S. Czarnuch** and M. Ploughman, "Toward inexpensive, autonomous, and unobtrusive exercise therapy support for persons with MS," in *Americas Committee for Treatment & Research in Multiple Sclerosis (ACTRIMS)*, New Orleans, LA, 2016.
- [6] M. Grzes, J. Hoey, S. Khan, A. Mihailidis, **S. Czarnuch**, D. Jackson, and A. F. Monk, "Relational Approach to Knowledge Engineering for POMDP-based Assistance Systems with Encoding of a Psychological Model," in *Proceedings of the ICAPS 2011 Workshop on Knowledge Engineering for Planning and Scheduling (KEPS)*, Freiburg, Germany, 2011.

4.4 Chapters in Books

- [1] R. Ricciardelli and **S. Czarnuch**, "Surviving parenthood in academia: Two professionals striving to maintain work life balance," in *The parent-track: Timing, balance and choice within academia*, E. Berger and C. DeRoche, Eds., Waterloo: Wilfred Laurier Press, 2016.
- [2] A. Mihailidis, J. Boger, **S. Czarnuch**, T. Nagdee, and J. Hoey, "Ambient Assisted Living Technology to Support Older Adults with Dementia with Activities of Daily Living: Key Concepts and the State of the Art," in *Handbook of Ambient Assisted Living - Technology for Healthcare, Rehabilitation and Well-being*, J. C. Augusto, M. Huch, A. Kameas, J. Maitland, P. McCullagh, J. Roberts, A. Sixsmith, and R. Wichert, Eds., ed Amsterdam, The Netherlands: IOS Press, 2012, pp. 304 - 330.

4.5 Reports

- [1] **S. Czarnuch**, R. Ricciardelli, B. Ye, and A. Mihailidis, "Moving toward a user-centred design: Assistive technology for older adults with dementia," *Alzheimer Society of Canada*, Ottawa, ON, 2015.

4.6 Non-Peer-Reviewed Articles/Proceedings/Presentations

- [1] **S. Czarnuch**, J. Connolly, and C. Maddox, "MS Society of Canada, Avalon Chapter annual newsletter," ed. St. John's, Canada, 2016.
- [2] R. Ricciardelli and **S. Czarnuch**. (2013) Moving into milestones... with multiples. *Multiple Moments Quarterly: Multiple Births Canada*. 16-18.
- [3] **S. Czarnuch** and A. Mihailidis, "The COACH: An automated daily task support for older adults with dementia," presented at the Toronto Rehab's 9th Annual Research Day, Toronto, Canada, 2013.
- [4] **S. Czarnuch** and A. Mihailidis, "A community-based efficacy study of the COACH," presented at the IBBME Scientific Day, Toronto, Canada, 2012.

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- [5] A. Mihailidis and **S. Czarnuch**, "Towards a Pervasive Prompting System: Improving and Expanding the COACH," presented at the 7th Annual Every Day Technologies for Alzheimer's Care (ETAC) symposium, Toronto, ON, 2011.
- [6] A. Hwang, K. Truong, **S. Czarnuch**, and A. Mihailidis, "Bringing C.O.A.C.H. one step closer to the home: Designing a computer-based tool for dementia caregivers," presented at the Toronto Rehab's 7th Annual Research Day, Toronto, Canada, 2011.
- [7] M. Grzes, J. Hoey, K. Shehroz, A. Mihailidis, **S. Czarnuch**, D. Jackson, and A. Monk, "Relational Approach to Knowledge Engineering for POMDP-based Assistance Systems with Encoding of a Psychological Model," presented at the Toronto Rehab's 7th Annual Research Day, Toronto, Canada, 2011.
- [8] **S. Czarnuch**, A. Mihailidis, and J. Boger, "Determining Technical Design Criteria for the COACH Prompting System," presented at the Toronto Rehab's 7th Annual Research Day, Toronto, Canada, 2011.
- [9] **S. Czarnuch**, J. Boger, and A. Mihailidis, "Supporting Older Adults with Dementia with Ambient Assistive Living Technology," presented at the IBBME Scientific Day, Toronto, Ontario, 2011.
- [10] **S. Czarnuch**, J. Boger, and A. Mihailidis, "COACH@Home: Participatory Design of AT for People with Dementia," presented at the Caregiving Best Practices Day, Toronto, Ontario, 2011.
- [11] **S. Czarnuch**. (2011) Challenges in caring. Multiple Moments. 12.
- [12] **S. Czarnuch**, "CARE Trainee Profile," Institute for Biomaterials and Biomedical Engineering, University of Toronto, Toronto, 2011.
- [13] **S. Czarnuch**, J. Boger, and A. Mihailidis, "Prompting older adults with dementia through tasks with the COACH," presented at the Toronto Rehab's 6th Annual Research Day, Toronto, Canada, 2010.
- [14] A. Mihailidis and **S. Czarnuch**, "Towards a Pervasive Prompting System: Improving and Expanding the COACH," presented at the 5th Annual Every Day Technologies for Alzheimer's Care (ETAC) symposium, Portland & Hillsboro, OR., 2009.
- [15] **S. Czarnuch**, K. Zagorovsky, P. Tang, N. Wu, and A. Posatskiy, "A Tool For Rudimentary Self-Screening of Diabetic Retinopathy and Related Disorders," presented at the BME1450 Poster session, 2009.

4.7 Invited Presentations/Lectures/Keynotes

- [1] S. Czarnuch, "The medicalization of deviance, disability, aging and technology," in Guest lecture in the Faculty of Humanities and Social Sciences, department of Sociology at Memorial University, ed. St. John's, NL, 2016.

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- [2] **S. Czarnuch**, "Enhancing rehabilitation in MS with pervasive technology," in Avalon MS Society chapter meeting, ed. St. John's, NL, 2016.
- [3] **S. Czarnuch**, "Perspectives on work-life balance: Can it be achieved in academic research?," in Toronto Rehabilitation Institute/University of Toronto, ed. Toronto, Ontario, 2016.
- [4] **S. Czarnuch**, "Intelligent technologies: Supporting persons with MS," in Avalon MS Society chapter meeting, ed. St. John's, NL, 2015.
- [5] **S. Czarnuch**, "Pervasive technology for healthcare: Supporting an aging population," in Invited presentation at the Newfoundland and Labrador Centre for Applied Health Research, Research Group on Aging, ed. St. John's, NL, 2015.
- [6] **S. Czarnuch**, "Biomedical Engineering," in Speaker series lecture conducted at the Faculty of Engineering and Applied Science, Memorial University, ed. St. John's, NL, 2015.
- [7] **S. Czarnuch**, "Enhancing rehabilitation in MS," in Invited presentation at the Atlantic endMS 2014 MS Research Retreat, ed. Halifax, NS, 2014.
- [8] **S. Czarnuch** and J. G. Bell, "Toward Developing an Assistive Technology Framework for Older Adults with Dementia: A User-Centred Design Approach," in Invited presentation at the Alzheimer Society of Niagara Region, ed. St. Catherines, Ontario, 2013.
- [9] **S. Czarnuch**, "Activity tracking from an overhead depth camera: From joint proposals to a skeleton model," in Speaker series lecture conducted at the Department of Computer Science, Memorial University, ed. St. John's, NL, 2013.
- [10] **A. Mihailidis** and **S. Czarnuch**, "Innovations in technology to support people with Alzheimer's disease," in Invited presentation at the Toronto Memory Program, ed. Toronto, ON, 2012.
- [11] **S. Czarnuch** and **A. Arcelus**, "Smart Home Technologies and Artificial Intelligence: Applications to Older Adults," in Invited lecture on Artificial Intelligence for the Da Vinci Engineering Enrichment (DEEP) program, University of Toronto, ed. Toronto, Ontario, 2012.
- [12] **S. Czarnuch**, "The COACH prompting system," in Invited presentation at the Southlake Regional Health Centre, ed. Newmarket, ON, 2012.
- [13] **S. Czarnuch**, "Technology and an aging population," in Guest lecture in the Faculty of Liberal Arts and Professional Studies, department of Sociology at York University, ed. North York, ON, 2011.
- [14] **S. Czarnuch**, "Assistive technology: The future of health and health care?," in Guest lecture in the Faculty of Health Sciences, department of Sociology at York University, ed. North York, ON, 2010.

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- [15] **S. Czarnuch**, "Towards a pervasive prompting system for older adults with dementia: Improving and expanding the COACH," in Invited presentation at the West Hill Community Services Centre, ed. Toronto, ON, 2010.
- [16] **S. Czarnuch**, "Introduction to research methodologies," in Guest lecture in the Faculty of Criminology, Justice and Policy Studies at the University of Ontario Institute of Technology, ed. Oshawa, ON, 2009.
- [17] **S. Czarnuch**, "Exploring interdisciplinary research methodologies," in Guest lecture in the Faculty of Arts, department of Sociology at Trent University, ed. Peterborough, ON, 2009.

4.8 Media Appearances

- [1] K. Breen, "Engineers give man technology to compete in boccia," in NTV News, ed. St. John's, NL, 2015, <http://ntv.ca/engineers-give-man-technology-to-compete-in-boccia/>.

4.9 Dissertations and Theses

- [1] **S. Czarnuch**, "Advancing the COACH automated prompting system toward an unsupervised, real-world deployment," Doctor of Philosophy, Institute of Biomaterials and Biomedical Engineering, University of Toronto, Toronto, 2014.
- [2] **S. Czarnuch**, "Interbar Currents in Rotating Stator Induction Machines," M.A.Sc., Electrical and Computer Engineering, McMaster University, Hamilton, Ontario, Canada, 2005.

4.10 Manuscripts in Preparation

- [1] Z. Chen, S. Czarnuch & M. Shehata, "3D Hand Tracking using Multiple RGB-D Sensors".
- [2] A. Hynes and S. Czarnuch, "Graph theory and Dijkstra's shortest path: four limb skeleton modelling optimization".
- [3] S. Czarnuch. & A. Mihailidis, "Overhead hand, grip and arm tracking using skeleton models".
- [4] S. Czarnuch, R. Ricciardelli, and A. Mihailidis, "Culture, ethnicity, and race: Impacting caregiver use of assistive technology for cognition".
- [5] S. Czarnuch, R. Ricciardelli, and A. Mihailidis, "The predictive efficacy of objective carer factors: Helping persons with dementia by understanding their needs".

5 RESEARCH FUNDING

5.1 Funding Received or Under Review

Year	Grantor; Type; Title; Investigators	Role	Status	Amount
2016	Memorial University, Seed, Bridge and Multidisciplinary Fund; <i>Exploring factors</i>	PI	Awarded	\$9,776.16

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	<i>affecting participation in home exercise therapies for persons with multiple sclerosis: A needs assessment</i> , S. Czarnuch.			
2016	NSERC; Discovery Grant; <i>Human motion tracking-by-detection using point cloud data from multiple depth sensors</i> ; S. Czarnuch.	PI	Awarded	\$145,000
2016	Canadian Foundation for Innovation (CFI); <i>Computer-Aided Design Laboratory for Analog and Mixed-Signal VLSI Systems</i> ; L. Zhang (PI) and H. Heys (PI), S. Czarnuch.	Collaborator	Awarded	\$91,756
2015	Memorial University; Faculties of Engineering and Applied Science and Medicine Start-up funds; <i>Human Motion Tracking and Automated Planning</i> ; S. Czarnuch	PI	Awarded	\$50,000
2014-2017	Multiple Sclerosis Society of Canada; Post-doctoral fellowship; <i>Toward automated rehabilitation support and progress assessment for people with Multiple Sclerosis: Improving recovery, objectivity and safety with technology</i> ; S. Czarnuch	PI	Awarded	\$117,000
2012-2014	Alzheimer Society of Canada; Alzheimer Society Research Program; <i>Toward developing an assistive technology framework for older adults with dementia: A user-centred design approach</i> ; A. Mihailidis, R. Ricciardelli, S. Czarnuch, T. Nagdee	Collaborator	Awarded	\$118,040

5.2 Unsuccessful Funding Applications

Year	Grantor; Type; Title; Investigators	Role	Amount
2016	SSHRC; Connection Grant; <i>Post-Traumatic Stress Disorder: A Multidisciplinary Conference on Causes, Consequences and Responses</i> ; R. Ricciardelli, S. Czarnuch and S. Bornstein	Co-Investigator	\$ 24,135
2016	CIHR; CIHR Project Scheme; <i>Quantifying disease progression in persons with multiple sclerosis using unobtrusive, three-dimensional full-body gait analysis</i> ; S. Czarnuch.	PI	\$170,000
2016	Memorial University Faculty of Medicine; Dean's Innovation Fund; <i>Improving the evaluation of treatment</i>	PI	\$19,985

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	<i>efficacy and disease progression in multiple sclerosis using automated full-body gait analysis</i> ; S. Czarnuch.		
2015	Memorial University; Seed, Bridge and Multidisciplinary Fund; <i>International Extension of an Assistive Technology Framework for Older Adults with Dementia: A Pilot Study</i> ; S. Czarnuch, R. Ricciardelli, L. Swiss.	PI	\$9776
2015 (fall)	Multiple Sclerosis Society of Canada; Clinical and Population Health Research Operating Grant; <i>Automated rehabilitation support and assessment for people with Multiple Sclerosis: Improving recovery, objectivity and safety with intelligent technology</i> ; S. Czarnuch, M. Ploughman, R. Ricciardelli	PI	\$116,462
2015 (spring)	Multiple Sclerosis Society of Canada; Clinical and Population Health Research Operating Grant; <i>Automated rehabilitation support and assessment for people with Multiple Sclerosis: Improving recovery, objectivity and safety with intelligent technology</i> ; S. Czarnuch, M. Ploughman, R. Ricciardelli	PI	\$269,771
2015	Memorial University; Seed, Bridge and Multidisciplinary Fund; <i>Toward Developing an Assistive Technology Framework for Older Adults with Dementia: A User-Centred Design Approach</i> ; Stephen Czarnuch, Rosemary Ricciardelli, Liam Swiss	PI	\$9979.83
2015	CIHR; Strategy for Patient-Oriented Research (SPOR), <i>GoMobile with Clear</i> , P. Wang et al., S. Czarnuch	Collaborator	N/A
2014	Multiple Sclerosis Society of Canada; Clinical and Population Health Research Operating Grant; M. Ploughman, C. Moore, K. Power, D. Button, S. Czarnuch, M. Stefanelli	Collaborator	\$300,000
2014	Newfoundland and Labrador Centre for Applied Health Research; Project Grant; <i>Automated fatigue detection in people with MS: Improving the safety and efficacy of rehabilitation exercise</i> ; Stephen Czarnuch, Michelle Ploughman, Diane Cook	PI	\$22,068

6 AWARDS AND FUNDING

Year	Award Title	Organization	Amount
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2016	Best Paper Award	Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section	\$0
2016	Young Investigator Award: Educational Grant	Americas Committee for Treatment & Research in Multiple Sclerosis (ACTRIMS)	\$600 USD
2014	Doctoral Completion Award	Institute of Biomaterials and Biomedical Engineering, University of Toronto	\$5,000
2014	Best Paper award: Engineering in a Clinical Setting	Institute of Biomaterials and Biomedical Engineering, University of Toronto	\$250
2013	Travel Fellowship	Annual General Meeting of the Canadian Association on Gerontology	\$250
2012	Travel Fellowship	Alzheimer's Association International Conference	\$2,500
2012	Travel Fellowship	CIHR Canadian Student Health Research Forum	\$1,000
2011-2012	Research Assistant Stipend	CIHR/Alzheimer's Association	\$17,500
2011-2012	University of Toronto Fellowship	Institute of Biomaterials and Biomedical Engineering	\$2,000
2010-2012	NSERC CREATE: Care Scholarship	NSERC/University of Toronto	\$39,000
2010-2011	Research Assistant Stipend	CIHR/Alzheimer's Association	\$15,000
2009-2010	Research Assistant Stipend	CIHR/Alzheimer's Association	\$15,000
2009-2010	University of Toronto Fellowship	Institute of Biomaterials and Biomedical Engineering	\$10,000
2009-2010	Barbara and Frank Milligan Fellowship	University of Toronto	\$3,000
2002-2004	Graduate Student Scholarship	McMaster University	\$24,000
2000	Millennium Bursary	Canada Millennium Scholarship Foundation	\$3,000
1999	Ontario Student Opportunity Grant	Ministry of Training, Colleges and Universities	\$459

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7 SCHOLARLY AND PROFESSIONAL ACTIVITIES

7.1 Teaching

7.1.1 Courses Taught at Memorial University

Year	Course No.	Level	Course Name	Institution
2017	ENGI 8853	Undergraduate	Computer Engineering project course II	Memorial University
2017	ENGI 8103	Undergraduate	Engineering in Medicine	Memorial University
2016	ENGI 7803	Undergraduate	Computer Engineering project course I	Memorial University
2016	ENGI 8103	Undergraduate	Engineering in Medicine	Memorial University
2015	ENGI 8853	Undergraduate	Computer Engineering project course II	Memorial University
2015	ENGI 7804	Undergraduate	Computer Engineering project course I	Memorial University
2014	ENGI 7894/ 9869	Undergraduate/ Graduate	Concurrent programming	Memorial University
2012	DEEP	High-school	Da Vinci Engineering Enrichment Program	University of Toronto

7.2 Supervisory Activities

7.2.1 M.Eng. (Thesis) Students

Start Year	Role	Status	Student	Project Title
2016	Supervisor	In progress	Hynes, A. J. R.	Combinatorial optimization for human body tracking
2014	Co-supervisor	In progress	Chen, Z.	Automatic evaluation of ultrasound operators' skill

7.2.2 M.A.Sc. (Coursework) Students

Year	Course	Status	Student	Project Title
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2016	ENGI 980A/980B	In progress	Tian, Y.	Finger Joint Detection for Clinical Practice
2015	ENGI 980A/980B	Completed	Yang, Z.	Human motion tracking-by-detection using point cloud data from multiple depth sensors

7.2.3 Undergraduate Research Project Supervision

Year	Course	Status	Students	Project Title
2016	ENGI 7804/8854	In progress	George, M., Pratt, C., Seymour, R.	Precise point
2016	ENGI 7804/8854	In progress	Beazley, M., Bennett, T., Murrin, H., Power, M., Ryan, C.	Kloud 9: Automated multi-sensor ground plane detection and depth calibration
2015	ENGI 7804/8854	Completed	Bonnell, A., Chaytor, S., Randell, A., Wicks, J.	Wearable Integrated Safety Alarm and Locator (WISAL)
2015	ENGI 7804/8854	Completed	Davis, M., Nugent, S., Rodgers, J., Stevens, T.	Vision-impaired emblem warning system (VIEWS)
2014	ENGI 7926/8926	Completed	Ellwood, D., Mandke, U., McGrath, B., Williams, M.	An improved ramp and pointer for Boccia Ball players with cerebral palsy
2014	HKR 4610	Completed	Abbot, C., Buckle, N., Holloway, B., Lockyer, E.,	Creation of a dual-task, metronome-timed bipedal hop test: A sensitive and reliable measure for mild Multiple Sclerosis

7.2.4 Medical Student Research Phase Mentoring

Year	Research Phase	Status	Student	Project Title
2016	Phase 2	In progress	Krustev, E.	Assessing Abnormal Gait in Patients with Multiple Sclerosis
2016	Phase 2	In progress	Ballouk, H.	Intelligent Technologies that can Assist Seniors with Dementia to Age at Home
2015	Phase 1	Completed	Krustev, E.	Assessing Abnormal Gait in Patients with Multiple Sclerosis: A Review

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2015	Phase 1	Completed	Ballouk, H.	Survey of Intelligent Technologies that can Assist Seniors with Dementia to Age at Home
2015	Phase 1	Completed	Vessey, C.	Prosthetics for Dancers with Transtibial Amputations: A literature review

7.2.5 Research Assistant Supervision

Period	Name	Education	Hiring/Training objective
September, 2016 – present	Andres, E.	M.A	Further development of skills to support transition from graduate school to industry
August, 2016 – December, 2016	Habib, K.	M. Eng.	Exploration of biomedical engineering in consideration of graduate studies (PhD)
September, 2016 – December, 2016	Rahimi, A.	M. Sc.	Further development of skills to support transition from graduate school to industry
September, 2016 – December, 2016	Crichton, H.	M. A.	Expansion and evaluation of qualitative skills into health and healthcare
September, 2016 – December, 2016	Mooney, T.	B. A.	No specific training objectives for this project
August, 2016 – present	Fathi, P.	B. Eng.	Exploration of biomedical engineering in consideration of graduate studies (M.A.Sc.)
June - July, 2016	Chen, Z.	B. Eng.	No specific training objectives for this project
June 2014 – May, 2015	Tong, J.	M.Sc.	No specific training objectives for this project

7.3 Assessment and Review Activities

7.3.1 Graduate Examination Activities

Date	Activity	Role	Level	Student
2016	Thesis submission and Defense	Internal Examiner	PhD	Dion Hicks
2016	Thesis submission and Defense	Internal Examiner	PhD	Amir Tahavorgar
2016	Comprehensive examination	Chair	PhD	Muamer Shebani
2016	Comprehensive examination	Chair	PhD	Murtada Abdein El-Haj
2016	Comprehensive examination	Chair	PhD	Khalifa Alrbee
2016	Thesis submission	Internal Examiner	M.Eng.	Abdelrahman Ahmed

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2015	Thesis submission and Defense	Internal Examiner	PhD	Javier Ortiz Castro
2015	Comprehensive examination	Chair	PhD	Swapna Puthukkudi Chalil
2015	Comprehensive examination	Chair	PhD	Suhad Sbeih

7.3.2 Journal Reviewer

Journal	Year(s)	Role
Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section	2016	Invited Reviewer
Journal of Ambient Intelligence and Smart Environments (JAISE)	2015, 2016	Invited Reviewer
PLOS ONE	2015	Invited Reviewer
Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section	2015	Invited Reviewer
IEEE 23 rd Annual Newfoundland Electrical and Computer Engineering Conference	2014	Invited Reviewer
IEEE Transactions on Human-Machine Systems	2014	Invited Reviewer
Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section	2014	Invited Reviewer
International Conference on Pervasive Computing Technologies for Healthcare	2012	Invited Reviewer
IEEE Transactions on Mechatronics	2010, 2011	Invited Reviewer
RESNA Annual Conference	2009	Invited Reviewer

7.3.3 Roles in Major Conferences

Conference	Date	Role
National Falls Prevention	2017 (April)	Advisory Committee
Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section	2015 (November)	Session Chair – Controls & Instrumentation II

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Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section	2015 (November)	Session Chair – Power
PervasiveHealth 2016	2016	Programme Committee
Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section	2015 (November)	Session Chair – Biomedical
Newfoundland Electrical and Computer Engineering Conference, IEEE, Newfoundland and Labrador Section	2015 (November)	Session Chair – Communication and Networking
Newfoundland Electrical and Computer Engineering Conference, IEEE, NL Section	2014 (November)	Session Chair – Computer Vision
Toronto Rehab's 9th Annual Research Day	2013 (November)	Student poster competition judge

7.4 Academic Service

Committee	Year	Role
Multiple Sclerosis Society of Canada, endMS Summer School Review Committee	2017	Scientific Reviewer
Multiple Sclerosis Society of Canada, Personnel Awards Review Committee	2016 – 2017	Scientific Reviewer
Electrical and Computer Engineering undergraduate curriculum committee	2016 - present	Member
Electrical and Computer Engineering department head search committee	2016	Member
Faculty of Engineering and Applied Science Program Review Committee – Design Courses	2016	Chair and member

7.5 Community Service

Organization; Contribution	Year	Role
MS Society of Canada, Avalon Chapter; annual newsletter	2016 - present	Editor

7.6 Research Groups

Organization, Group	Year(s)	Role
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Social Sciences and Humanities Council (SSHRC) Centre for Research on Work Disability Policy (CRWDP), Disability Inclusion Group (DIG-MUN)	2015 – present	Member
Newfoundland and Labrador Centre for Applied Health Research, Research Exchange Group on Aging	2015 - present	Member

7.7 Memberships in Academic, Community and Professional Societies

Status	Year(s)	Organization
Active	2015 – present	Professional Engineers and Geoscientists of Newfoundland and Labrador (PEGNL) Member #08233
Active	2014 – present	Tetra Society of North America
Active	2010 – present	Alzheimer's Association International Society to Advance Alzheimer Research and Treatment (ISTAART)
Inactive	2009 – 2014	Rehabilitation Engineering and Assistive Technology Society of North America (RESNA)
Inactive	2013 – 2015	Canadian Association on Gerontology (CAG)
Inactive	2014 – 2015	IEEE Student Member #93214255

8 PROFESSIONAL DEVELOPMENT

Year	Course Title	Institution
2015	Problem-Based Learning	Memorial University
2014	Teaching Skills Enhancement Program (TSEP)	Memorial University

9 ACREDITATIONS AND ACCOMPLISHMENTS

- Graduated from PhD (2014) with 4.0 GPA (Note: The University of Toronto does not provide distinction for graduate students)
- Graduated Summa Cum Laude from Masters Degree (2005) with 4.0 GPA
- Graduated Summa Cum Laude from Undergraduate Degree (2002) with 3.7 GPA
- Deans Honour List (1998-2002)
- Good Citizen Award (1998, 1999)
- Golden Key Honour Society Member (1998)

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IN THE MATTER OF THE COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Ruling 2: On Application to Edit Blackberry Text Messages

Counsel for Joseph Smyth has applied to exclude from evidence Blackberry messaging exchanges dated April 9, 2015, between 3:14:32 and 3:25:13, inclusive. Cst. Smyth submits that the comments he exchanged with a friend were nothing but black humour as he sought to ease the mental strain he was experiencing in the days following the death of Mr. Donald Dunphy. On February 27, 2017, I redacted certain portions of the messages with reasons to follow. These are those reasons:

Evidence is admissible if it is relevant and not subject to exclusion under any other rule of law or policy. Justice Sopinka discussed the notion of relevance in *R. v. Mohan*, [1994] 2 S.C.R. 9, when considering the admissibility of expert evidence:

... Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is, ‘whether its value is worth what it costs’: see *McCormick on Evidence*, ... Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule: see *R. v. Morris* ... Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

The comments in issue in the present case are portrayed by counsel for the Dunphy family as insensitive and tending to establish an attitude by Cst. Smyth which is arguably incompatible with the empathetic, non-confrontational, approach Cst. Smyth says he exhibited while speaking with Mr. Dunphy before the shooting. As such, the evidence of the comments is put forward to challenge the credibility of Cst. Smyth, as well as to support an inference that it was his demeanour and attitude rather than Mr. Dunphy's which led to the confrontation and shooting.

I note the comment in Ratushny, *The Conduct of Public Inquiries: Law, policy and practice* (2009), at p. 317:

While a commissioner has flexibility to the extent to which these [trial rules of evidence] are applied, having them in mind can contribute to the fair and expeditious conduct of hearings.

I will follow this practice and recognize the caution of Professor Ratushny, at p. 318, that “particularly where potential findings of misconduct are engaged, a stricter assessment of the relevance and fairness of receiving evidence should occur”.

Cst. Smyth relies upon the principle of proportionality, discussed at p.318 by Professor Ratushny:

The foremost requirement in conducting hearings is to ensure that the evidence adduced is relevant to the terms of reference. Does it relate to some issue arising out of those terms and does it help to reach some conclusion about that issue? This is not a legal question but must be answered simply on the basis of logic and common sense. The legal standard for judicial review is “reasonably” relevant, but that seems inherent in the word “relevant” itself. Still, it is a reminder that it does not mean remotely relevant or potentially relevant through speculation. It may be tempting at the early stages of hearings to be lax in this respect. But, if hearings counsel has done the necessary preparation in advance to define the issues, the standard of relevance can be strictly applied from the outset.

In this respect, the concept of “proportionality” may also be helpful. Even though the proposed line of questioning can be “associated with an issue, to what extent does it really assist in understanding or resolving the issue? If it contributes only marginally and there is better evidence to serve the same purpose, it should be avoided.

I accept that I have a duty to properly exercise my discretion to exclude evidence that would result in an unfair process. I will exclude evidence where its probative value is outweighed by its prejudicial effect.

In assessing probative value I will necessarily be “determining the degree or extent to which the evidence will prove the fact in issue for which it is tendered.” See Lederman, Bryant, Fuerst, *The Law of Evidence in Canada – Fourth Edition, 2014*, at p. 62. In the present case, this requires “an assessment of the strength of the inferential link between the evidence in question and the fact in issue”. Ibid.

In the present case the inferential link between the black humour of Cst. Smyth on April 9, 2015 and what his demeanor or attitude had been on April 5, 2015 is weak. It has minimal probative value. On the other hand, the insensitive nature of his text exchange with his friend between 3:15:40 and 3:25:13, inclusive would have significant prejudicial impact on the Inquiry process in that it risks doing significant damage to Cst. Smyth’s reputation in the community whatever my findings in this Inquiry might be. This prejudicial effect outweighs the probative value.

The prejudicial effect of the comments regarding the firearm, between 3:14:32 and 3:15:40 (to the words “still works”) will not be significant. Their probative value outweighs the prejudicial effect.

It is ordered that the text exchanges from 3:14:32 to 3:15:40 (up to the words “still works”) go in and the exchange from 3:15:40 (“still works”) to 3:25:13, inclusive shall not be admitted.



Leo Barry
Commissioner

2017-03-23

IN THE MATTER OF THE COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

**Ruling 3: On Application to Call Psychiatric Expert
re Attention, Perception and Memory Distortions following Officer-Involved Shootings and
re Memory Retrieval following a Deadly Force Encounter**

Constable Joseph Smyth applies for leave to call Dr. Peter Collins, a forensic psychiatrist, to give opinion evidence regarding “the psychological effects of [sic: on?] officers during a shooting event and the aftermath of an officer-involved shooting incident.”

Donald Dunphy was shot and killed in his residence by Cst. Joseph Smyth on April 5, 2015, after Mr. Dunphy allegedly pointed a 22 rifle at the police officer.

During Cst. Smyth’s testimony at the Inquiry issues were raised as to alleged inconsistencies and discrepancies arising from his various police statements concerning what had occurred in the Dunphy residence on the date in question, including:

- descriptions of the event itself;
- the time frames involved;
- the placement of the rifle;
- how he identified himself; and
- his forgetting of attempted calls to Mr. Dunphy

Cst. Smyth seeks to have Dr. Collins testify as to how the effect of stress and trauma on a police officer might explain any alleged inconsistencies and discrepancies.

The question also arose whether Cst. Smyth had been given preferential treatment on the night of the shooting by being allowed to meet with RNC officers and to postpone giving a statement. Various police officers testified they understood that the best time for obtaining an accurate and complete statement from an officer involved in a shooting is at least 24 hours after the event.

Cst. Smyth seeks to have Dr. Collins explain why valid reasons relating to the impact upon memory recall justified a delay in taking a statement from Cst. Smyth, without this resulting in preferential treatment for him. On February 27, I rejected the application for expert evidence, with reasons to follow. These are my reasons:

Attention, Perception and Memory Distortions

Dr. Collins has had extensive involvement in providing expert consultation and testimony in cases of officer-involved deaths. His report of February 21, 2017, which Cst. Smyth wishes to enter into evidence, describes how our brains tend to screen, filter and distort what we were looking at, particularly when we are intently concentrating. Dr. Collins writes:

When human beings are forced to make quick decisions, in response to sudden threats, their attention tends to become very narrowly and externally focused on the perceived threat. [See his opinion, attached as Appendix A].

If called upon, he would testify that individuals, in a high threat situation, “devote their attention to a particular object and tend not to notice unexpected objects”.

In his opinion he would describe how individuals when threatened are subjected to cognitive arousal, leading to perceptual narrowing, especially if a weapon is involved. This “weapons focus effect” is “a biologically mediated, automatic reaction to a traumatic event in

order to focus on that which is most salient to survival”. Attention is directed to a weapon, during the violent event, at the expense of other details.

Dr. Collins refers in his report to a survey by A. Artwohl, *Perceptual and Memory Distortion During Officer-Involved Shootings*: FBI Law Enforcement Bulletin (2002), 71(10), pp. 18-24. A majority of those surveyed felt the incident transpired in slow motion but others thought time sped up. Hearing and vision were affected differently. Officers responded to the threat not with “conscious thought” but, rather on “autopilot”. Most say they responded automatically to the perceived threat and that their training just automatically “kicked in” without thinking about it.

Memory Retrieval

On delaying statements for memory retrieval, Dr. Collins notes the practice varies. Ontario and Alberta normally seek interviews with “witness” as opposed to “subject” officers who it is not possible to compel, within 24 hours. But ASIRT says its preference is to interview witness officers as soon as possible. Also the International Association of Chiefs of Police may ask for pertinent information soon after a shooting and allow recovery time before a full formal statement.

The Applicable Law

This is my second ruling in this Inquiry on the admissibility of expert evidence. Since my decision on February 13, 2017, to refuse admission of an expert report by a biomedical engineer, the Supreme Court of Canada has rendered another decision on the admissibility of expert evidence. In *R. v. Bingley*, 2017 SCC 12, the Court confirmed the criteria of *R. V. Mohan*, [1994]

2 S.C.R. 9 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, applied in my first decision, and allowed the testimony of a “drug recognition expert” certified under a statutory scheme.

At paragraph 13 in *Bingley*, the Court cautioned against permitting trials to devolve into a battle of experts and stressed that the trier of fact must maintain the ability to critically assess the evidence. The Court noted that the trial judge “acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process”.

The Court in *Bingley*, at paragraph 14, confirmed that expert evidence analysis is divided into two stages:

“First, the evidence must meet the *Mohan* factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence: *White Burgess*, at para. 24.”

In the present case the main elements to be considered are relevance, necessity and probative value. In *R. v. Myrie*, [2003] O.J. No. 1030 (Sup. Ct.), the defence sought to have admitted expert evidence by a professor of psychology on the frailties of eye witness identification. One of the factors to be discussed was “weapon focus” and how factors such as this affect the validity and reliability of eyewitness identification. MacKenzie J., at para. 24, quoted from *Mohan* regarding the cost benefit analysis involved in assessing probative value versus prejudice:

Cost in this context is not used in [a] traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect; if it involves an inordinate amount of time which is not commensurate with this value or if it is misleading in the sense that its effect on the trier of fact; particularly a jury, is out of proportion to its reliability: p. 411.

MacKenzie J. concluded that the proposed expert evidence was neither relevant nor necessary since the expert would not be testifying to matters that are outside the normal experience of the triers of fact but rather reminding the jury of their normal experience that all witnesses have problems in perception and recall with respect to what occurred during any given circumstance that is brief and stressful.

Another decision worthy of note for present purposes is *Dalla Lana v. University of Alberta*, 2013 ABCA 327, leave to appeal to the SCC refused [2013] S.C.C.A. No. 483. There a majority upheld the decisions of a University Appeal Board and a lower court not to admit the evidence of Dr. Collins, the same expert put forward in the present matter, in a case of alleged sexual assault by a student in residence. In the will-say statement of Dr. Collins he stated “in my professional opinion the case has the hallmarks of a false complaint”. Dr. Collins had never examined the complainant. The Court of Appeal concluded there had been no procedural unfairness in refusing to admit the evidence of Dr. Collins.

Analysis

Let us consider the purposes for which the opinion of Dr. Collins might be considered:

1. Attention, perception and memory distortions

(a) *To help understand why Cst. Smyth fired four shots in quick succession.*

The uncontradicted evidence already before the inquiry is that Cst. Smyth’s training kicked in when he saw the rifle and he went on “autopilot”, firing two shots at Mr. Dunphy’s centre mass and two at his head when he perceived that Mr. Dunphy continued to pose a threat. It is not feasible to train police officers to shoot to wound only, in high stress situations where

their lives are in danger from a weapon levelled at them. Other witnesses have confirmed this is what RNC members and many other police forces are taught in use-of-force training and this is confirmed by the RNC training manual. The evidence of Dr. Collins is not necessary and to admit it would delay the Inquiry while other parties considered whether they need to call expert evidence.

(b) *To understand why the time frames alleged by Cst. Smyth between the time he saw the rifle and the time the shooting ended varied somewhat in his statements.*

I have dealt with the time frames generally in my first decision regarding the biomedical expert. The minimum and maximum times alleged ranging from two to six seconds are clear, I do not need expert evidence to understand why uncertainty regarding the time frames might exist when split-second decisions are being made.

(c) *To help understand why Cst. Smyth in the re-enactment could not recall the Rubbermaid tub upon which the rifle allegedly came to rest after the shooting and initially recalled the barrel of the rifle pointing up instead of down.*

Cst. Smyth admits his memory is inadequate regarding the presence of the tub and the way the rifle was pointed. Expert evidence explaining why his memory might have been faulty will not help to establish the actual position of the rifle, which is the issue for consideration. The evidence is not necessary, therefore, in the sense adopted in *Mohan*.

(d) *Whether or not Cst. Smyth identified himself with his rank (Acting Sergeant) or just as “Joe Smyth”.*

This does appear to be an inconsistency but Cst. Smyth in his testimony did not claim it resulted from memory distortion. He said he remembered not using his title to try and build rapport with Mr. Dunphy. I have not been shown how expert evidence on the frailties of memory would help resolve this discrepancy.

(e) *Why Cst. Smyth might have forgotten initially to tell investigators he had attempted four calls to Mr. Dunphy shortly before his visit to Mr. Dunphy’s brother’s residence.*

The proposed expert evidence might assist in establishing this could be due to Cst. Smyth’s memory failure following the stress of the incident but the minimal probative value is outweighed by the probable delay in the Inquiry from the admission of the evidence.

Generally, it appears that the opinion of Dr. Collins is being put forward to enhance the credibility of Cst. Smyth in some areas where his statements have been inconsistent or somewhat inaccurate. For the most part these inaccuracies or inconsistencies have been relatively minor and no more than one with common sense would expect from anyone following a traumatic incident such as occurred here. Keeping in mind that it is my task to ultimately determine the credibility of Cst. Smyth, I am not persuaded that the expert evidence on memory distortion will add anything significant in this regard. The expert evidence is not necessary and it should not be admitted. See *Bingley* and *White Burgess*. Again, any probative value is minimal and outweighed

by the significant prejudice resulting from delay. I am influenced also by the caution in *Bingley* against having the process devolve into a battle of experts.

2. Memory Retrieval

Several police officers have testified they have seen authoritative articles which recommend waiting from 24 to 72 hours before taking a statement from police officers who have been involved in a shooting or other traumatic event.

The RNC training manual refers to “post-incident amnesia and allowing for a healthy night’s sleep” in order to permit the greatest and most “pure” memory recall. The report of Dr. Collins noted that in Alberta the preference is to interview witness officers as soon as possible, in Ontario generally they do this within 24 hours, and the International Association of Chiefs of Police suggests “while many officers be asked to provide pertinent information soon after a shooting to aid the initial investigative process, whenever feasible, officers should have some recovery time before providing a full formal statement”. It appears that Dr. Collins is accepting that a mainstream consensus does not exist on this point. This process is not one which fits within the time provided for this Inquiry. I note that this is not a case where the police officer was in shock to the extent noted in the literature provided by Dr. Collins. For example, the article by R. Edward Geiselman, Rest and Eyewitness Memory Recall (2010), 28 Amer. J. of Forensic Psychology, Issue 2, page 1 refers to witnesses in apparent shock, incoherent, sweating or pacing and recommends that decisions to delay their statements be made on a case-by-case basis, with a preliminary brief interview followed by a later full investigative interview. Cst. Smyth appeared pale, withdrawn and shaky but considered himself capable of doing an interview.

In any event, Cst. Smyth was given approximately 24 hours to make his statement. Dr. Collins' opinion on this is not necessary in Cst. Smyth's situation. The opinion may be helpful in this Inquiry's second phase of recommending policy changes, should I decide it would be beneficial to mandate when statements should be taken. But for now, I do not need to know why it may have been a good thing in terms of accuracy of detail to have had Cst. Smyth's statement delayed. It may be that further psychiatric information will have to be obtained by government to determine what the best practice should be in the timing of statements.

On the relevance of this evidence to the question of whether Cst. Smyth received preferential treatment on when his statement was taken, this is not a material fact because Cst. Smyth, as a "subject" officer, involved in the shooting and not merely a witness, could not be compelled to give a statement if he did not consent. This is a matter requiring public education on the law involved, something which Dr. Collins would not address but which this Inquiry Report might address.

Disposition

For the reasons set out above, the application to call Dr. Collins is dismissed.



Leo Barry
Commissioner

2017-03-30

IN THE MATTER OF THE COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

**Ruling 4: On Application to Exclude Portions of Joint Report of
Dr. Terry G. Coleman and Sgt. Michael Massine**

Cst. Smyth has applied to exclude Dr. Coleman's portion of a joint report he prepared with Sgt. Massine on the grounds that the report (a) exhibits lack of objectivity and bias towards Cst. Smyth; (b) comments negatively on Cst. Smyth's credibility (the ultimate issue for the trier of fact) and unduly denigrates Cst. Smyth's professional training and experience; (c) ventures significantly into an area outside of Dr. Coleman's expertise, as it relates to the conducting of a threat assessment in the context of the protection of public officials; and (d) uses inflammatory and prejudicial language of the type that should not be contained in the report of an independent, objective and impartial report. Cst. Smyth asks that if not totally excluded, portions of Dr. Coleman's report be redacted.

The Royal Newfoundland Constabulary (RNC) has applied to exclude portions of the joint report of Dr. Coleman and Sgt. Massine on the grounds that (a) Dr. Coleman is not qualified with respect to threat and risk assessment as performed by units such as the Protective Services Unit (PSU) and (b) in questioning and/or determining Cst. Smyth's credibility, Dr. Coleman and Sgt. Massine have usurped the function of the Commissioner in answering the ultimate issue.

On March 8, after preliminary discussions with counsel on March 6 and a brief filed on behalf of Cst. Smyth on March 7, I ruled that the most efficient way to proceed and the approach conforming with the case law was to defer a decision on the exclusion of Dr. Coleman's report until after he and Sgt. Massine had been questioned on their qualifications. I would then decide, following counsels' submissions whether all or portions of the expert report should be excluded from evidence, or whether the opinions expressed should be left in and dealt with in terms of the weight to be afforded them.

Counsel for Cst. Smyth and counsel for the RNC accepted that this approach would be appropriate.

I made certain redactions to the report of Dr. Coleman before he testified, based on some of the concerns raised by counsel for Cst. Smyth and counsel for the RNC.

I reserved my decision in order to provide written reasons. These are those reasons:

The Experts' Qualifications: Dr. Coleman

Dr. Coleman is a retired Chief of Police from Moose Jaw and holds a Ph.D. in Police Studies from the University of Regina and a Master of Human Resource Management from the same university. He began his career as a police officer in 1969 with the Calgary Police Service and remained there until 1996, having achieved the rank of Inspector.

While with Calgary Police, Dr. Coleman established the Crisis Negotiation Team to help resolve situations without the use of force. He was the Commander of the Tactical Unit (SWAT), and involved in protecting the safety of police officers in serious situations that might require the use of force. He was the Crisis Negotiation Commander in a situation where a person who was upset about the handling of his Workers Compensation claim, fired a shot gun at an officer and

held staff for several hours, a very tense situation which was ultimately successfully resolved by negotiation.

As Chief of Police, Dr. Coleman was responsible for the workplace safety of his personnel. He re-wrote policies and procedures, including those with regard to officer safety. He provided training and education for police officers in crisis negotiation to maximize not only their safety but that of the public. He was responsible for reviewing use-of-force incidents and addressing any lapses of officer safety either one on one with a police officer or in a larger de-briefing of an incident.

Dr. Coleman was acknowledged by retired Justice Iacobacci to have assisted in his review carried out for the Toronto Police Service in 2014 dealing with Police Encounters with People in Crisis. His work was also cited in the Report of the Fatality Inquiry Regarding the Death of Howard Hyde in Halifax, Nova Scotia, in 2010.

Dr. Coleman has written and published as well as presented extensively on police interaction with persons with mental illness. This includes de-escalation strategies to be employed by police, which in Dr. Coleman's view have broader application than in the mental health field. De-escalation techniques he believes are applicable in many different situations and are not unique to interactions with persons with mental health problems. De-escalation in Dr. Coleman's view is about communication skills to reach a resolution of crises covering a broad range of situations.

Commission counsel initially asked that Dr. Coleman be qualified to give opinion evidence regarding strategies and techniques to be employed by police in situations such as that encountered by Cst. Joseph Smyth in his interaction with Donald Dunphy, including appropriate de-escalation strategies and measures to be taken to ensure officer safety. Commission counsel

later, after discussions with counsel, modified the submission and requested that Dr. Coleman be qualified to give opinion evidence regarding appropriate de-escalation strategies and measures to be employed by police to ensure officer safety in situations such as that encountered by Cst. Smyth in his interaction with Donald Dunphy.

The Experts' Qualifications: Sgt. Massine

Sgt. Massine has been employed in law enforcement since 1987, including as a patrol officer, in plain clothes, in undercover operations, as a community liaison, on Emergency Response Teams, in major crime investigation, and in identification services, with the main focus on officer safety training. He holds a Master of Arts Degree in Leadership and Training from Royal Roads University and an Advanced Certificate in Police Leadership from Dalhousie University.

He is currently employed as the Police Academy Use of Force Coordinator at the Justice Institute of British Columbia – a position held since December 2014. In that position Sgt. Massine is responsible for curriculum development and delivery of the Standardized Use of Force Instructor Course, Fundamentals of Police Instruction. As well he acts as liaison for the Justice Institute with the Government of BC (Police Services Branch) relating to the creation of use of force related standards under the BC PSB relating to the creation of use of force related Standards under the BC Police Act. He also teaches in the Recruit Training Program, develops curriculum and delivers training for special projects as they arise.

Sgt. Massine has previously been qualified to provide expert opinion in court on Use of Force, use of various weapons, and excited delirium. In 2011, he provided expert opinion

evidence at a coroner's inquest into an in-custody death in British Columbia pertaining to the Victoria Police Department's training program for excited delirium.

In 2008 he presented to the Braidwood Commission, which included an explanation of the National Use of Force Framework, and since June 2010 he has worked with the BC Ministry of Public Safety and Solicitor General to develop provincial standard training courses including Crisis Intervention and De-Escalation Techniques, which were mandated as part of the recommendations from the Braidwood Commission.

Sgt. Massine has written and published several articles on topics related to Police Use of Force and Use of Force Training of Police Officers He is currently chair of the Province of BC Use of Force Community of Practice which is a panel of twelve use of force coordinators from BC municipal police agencies. The mandate of that committee is to research best practices in officer safety training and to develop provincial training standards.

Sgt. Massine described his operational experience as including:

- Being shot at
- Having guns pointed at him
- Being threatened with other weapons as well

In one incident, his actions (non-firearm) were a factor in the death of a subject. He has also used all force options on the National Use of Force Model with varying degrees of force, specifically: Presence (plain clothes, patrol uniform, ERT), Communication (CID), Physical Control Soft/hard (various techniques), Intermediate Weapons (OC Spray, CS Gas, baton, CEW, Bean Bag rounds, Noise Flash Diversionary Devices), Lethal Force (non-firearm). He has drawn and presented his firearm (pistol and long gun) on several occasions but has never discharged it in the course of his duties.

Commission Counsel asked to have Sgt. Massine qualified to give expert opinion evidence on the use of force, including crisis intervention and de-escalation training and curriculum development, design and delivery as it relates to officer safety.

Background Information

On November 26, 2016, a letter of retainer was completed for Dr. Coleman. This read in part:

2. Scope of Retainer

Your mandate is to provide the following services to the Commission:

(a) To review relevant documentation and evidence regarding the interaction between Donald Dunphy and Cst. Joseph Smyth leading up to Donald Dunphy's death and to provide your opinion regarding strategies and techniques to be employed by police in such situations. This would include provision of a written report.

(b) To provide advice regarding such other matters, within your expertise, that may be identified by the Commission from time to time.

Notice of the retainer of Dr. Coleman and his curriculum vitae were distributed to Counsel on December 7, 2016. Feedback was requested.

On December 28, 2016, Sgt. Massine was retained, with a mandate as follows:

2. Scope of Retainer

Your mandate is to provide the following services to the Commission:

(a) To review evidence and documentation including policies, procedures, protocols and manuals of the Royal Newfoundland Constabulary related to

use of force and to provide your opinion regarding issues related to use of force pertinent to the Commission's mandate. This would include provision of a written report and collaborating, as needed, with Dr. Terry Coleman.

Similarly, counsel were notified of Sgt. Massine's retention and qualifications.

Counsel were aware of the qualifications of Dr. Coleman and Sgt. Massine since December. Counsel for Cst. Smyth had several discussions with Commission Counsel after receiving notification of the retainers of Dr. Coleman and Sgt. Massine and did not raise any concerns prior to receipt of the report. Counsel for the RNC and Cst. Smyth also attended a meeting of all counsel on January 4, 2017 and again no issue was raised with respect to the retention of the experts. No concern was expressed about these experts by any party until February 27, after receipt of their report. At that time counsel for the RNC gave notice the RNC would be challenging the qualifications of Dr. Coleman and Sgt. Massine because of their alleged lack of qualifications, because they allegedly determine ultimate issues and take issue with and/or determine Cst. Smyth's credibility, and because their report allegedly lacks objectivity and independence. Later counsel for the RNC restricted the challenge of qualifications to Dr. Coleman. Counsel for Cst. Smyth gave similar notice with respect to a challenge related to Dr. Coleman only.

The Applicable Law

Cst. Smyth seeks to have the expert report of Dr. Coleman excluded at the qualification stage, arguing that, as decided in *White Burgess Langille Irman*, 2015 SCC 23, [2015] 2 S.C.R. 182 ("*White Burgess*"), at paragraphs 40 and 45, the objectivity, independence and impartiality of an expert bears not just on the weight but also on the admissibility of the evidence.

Cromwell J. in *White Burgess*, at para. 46, makes it clear, however that the threshold requirement of recognizing a duty to the court that overrides their obligation to the party calling them is “not particularly onerous”. If the proposed expert attests that he or she is able and willing to comply with the expert’s duty to the court, the admissibility threshold is met. The burden then shifts to the party opposing admission to establish “a realistic concern” that the expert is unable or unwilling to comply with the duty. See *White Burgess*, at para. 48.

It is helpful at this stage to set out a complete review of the principles recently confirmed by the Supreme Court of Canada on the matter of excluding an expert’s testimony at the qualifications stage for lack of objectivity, independence, and impartiality, as opposed to dealing with the issue of admissibility after finding the witness otherwise qualified or admitting and treating any frailties as going to weight.

I will first give a summary of applicable issues and then examine the case law in more detail.

In *White Burgess*, the Supreme Court of Canada confirmed the following principles applicable to the admissibility of expert evidence:

- Admissibility of expert opinion evidence is governed by the four part test in *R. v Mohan*, [1994] 2 SCR 9: (a) relevance, (b) necessity in assisting the trier of fact, (c) absence of an exclusionary rule, and (d) a properly qualified expert;
- An expert has a duty to the Court to be impartial, independent, and unbiased;
- A lack of objectivity can go to the admissibility of the expert evidence, but more commonly it will merely go to weight;
- At the admissibility stage, the objectivity of the expert should be examined under the final part of the *Mohan* test: “a properly qualified expert”;
- After an expert attests that he or she accepts the duty to the court, then the party challenging admissibility has a burden to raise a “realistic concern” that the expert is unable or unwilling to comply with that duty;

- If a realistic concern is raised, then the burden shifts back to the party seeking to rely on the expert evidence to establish on a balance of probabilities that the expert is capable of complying with his or her duty to the court;
- The threshold test for admissibility is “not particularly onerous”, and it will be “quite rare” and only in “very clear” cases that expert evidence will be completely inadmissible and excluded at the threshold stage;
- Anything less than clear unwillingness or inability on the part of proposed expert to provide the court with fair, objective and non-partisan evidence should not lead to exclusion.
- If the evidence meets the threshold requirements of admissibility, then the court must still exercise its gatekeeper function and balance the potential risks and benefits of admitting the evidence. At this ‘stage’, the scope of expert evidence might also be circumscribed to minimize any lingering concerns about the proposed expert testimony.
- Once the threshold for admissibility has been met, the trial judge must still take into consideration the expert’s independence and impartiality in weighing the evidence.

In exercising its gatekeeper function and balancing the potential risks and benefits of admitting the evidence, the court must consider the degree to which the opinion evidence is relevant, necessary, reliable, and unbiased, as well as any risk that the evidence will be confusing, prejudicial, or too time consuming: *White Burgess*, paras 23-25 and 54.

In *White Burgess*, Cromwell J. speaking for the Court explained the nature of an expert’s duty to the court as follows:

[27] One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd’s Rep. 68 (Q.B.). Following an 87-day trial, Creswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation...

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise....An expert witness in the High Court should never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her....

Issues with an expert's ability to carry out its duty to the court can be addressed at the admissibility stage:

[45] Following what I take to be the dominant view in the Canadian cases, I would hold that **an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted.** That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

[46] I have already described **the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty.** I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept . . . that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 Can. Crim. L.R. 135, at p. 152 (footnote omitted). **The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.**

The expert's testimony accepting the duty will generally be sufficient to establish that the admissibility threshold is met (absent challenge). If there is a challenge, then the burden shifts to the party opposing admission of the evidence to establish a "realistic concern" that the expert is unable or unwilling to comply with the duty to the court. If the party challenging admissibility raises a realistic concern, then the burden shifts back to the party seeking to rely on the expert evidence to establish on a balance of probabilities that the expert is capable of complying with his or her duty to the court.

Although the Court did not define what constitutes a "realistic concern", it gave some examples (including 'becoming an advocate'). A high standard was set for complete exclusion of expert evidence (para. 49):

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. **Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.**

With respect to situating the analysis within the *Mohan* framework, the Court clarified, at paragraph 53 that concerns related to the expert’s duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the “qualified expert” element. Cromwell J. noted that “Situating this concern in the ‘properly qualified expert’ ensures that the courts will focus expressly on the important risks associated with biased experts”.

Finally, it was noted that, if the threshold requirements for admissibility are met, there then follows a second discretionary gatekeeping step where a judge must decide whether the expert evidence is sufficiently beneficial to the trial process to warrant its admission despite any potential harm or prejudice that may result:

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert’s independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

At the ‘gatekeeper’ stage of the analysis, which requires the judge to balance the potential risks and benefits of admitting the evidence, the scope of the expert’s testimony can be circumscribed to manage any lingering concerns (including about impartiality), see *Ps International Canada Corp. v Palimar Farms Inc.*, 2016 SKQB 23:

[36] The judge’s function as gatekeeper is of particular importance. Part of the gatekeeper function includes carefully identifying and delineating the scope of expertise within which the witness will be permitted to give opinion evidence. In *Vigoren v Nystuen*, 279 Sask R 1, the Court of Appeal described the importance of properly identifying the scope of the witness’ expertise at para. 67:

67 In recent years, this Court and the Supreme Court of Canada have consistently underlined the need for trial judges to carefully assess and identify the scope of the expertise of an expert witness in advance of him or her testifying. For example, in *Parker v. Saskatchewan Hospital Assn.*, [2001] 7 W.W.R. 230 (Sask. C.A.), Cameron J.A. stated as follows at para. 112:

Again, this ties in with the need to carefully qualify expert witnesses before they testify. All reasonable efforts should be made to ensure they are qualified neither too narrowly nor too widely. This may entail enquiry into the nature and extent of the opinions to which they propose to testify. While care at the qualification stage is especially important in jury cases, it remains of considerable importance in non-jury cases as well. A rigorous approach at this stage can avoid difficulty, especially the difficulty posed by the potential reception of opinion evidence that transcends the scope of expertise of the witness. Strictly speaking such evidence is not admissible, and its admission can be troublesome.

See also: *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. J.-L.J.*, [2000] 2 S.C.R. 600.

This was the approach taken in *Anderson v. Canada (Attorney General)*, 2015 CanLII 63429 (NL SCTD), where Canada argued that the proposed expert, who was intended to provide evidence on the history of Newfoundland and Labrador, should not be qualified to give expert testimony because he was ‘unable to provide fair, objective and non-partisan assistance to the Court’. In considering the objection raised by Canada, Stack J. identified and applied the principles set out in *White Burgess* (paras. 24 – 29):

[24] In *White, [Burgess]* the Supreme Court of Canada has held that the impartiality, independence and absence of bias of a proffered expert witness go to his qualifications to provide the intended evidence to the court. At paragraph 2, Cromwell, J. says:

[2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert’s independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[25] At paragraph 53, Cromwell, J. confirms that concerns about the duty of the expert witness to be impartial, independent and without bias should be addressed in assessing whether the proffered witness is a properly qualified expert:

[53] In my opinion, concerns related to the expert’s duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the “qualified expert” element of the *Mohan* framework... A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the “properly qualified expert” ensures that the courts will focus expressly on the important risks associated with biased experts
[Citations omitted.]

[26] Before we examine Canada’s specific concern, let us review in more detail the duties of impartiality, independence and lack of bias that an expert witness owes to the Court.

Experts’ Duties to the Court

[27] Many Canadian jurisdictions have explicit rules governing the roles and duties of expert witnesses. This province does not. Consequently, the common law principles prevail (*White [Burgess]* at paragraph 31). Cromwell, J. sets out the applicable concepts in paragraph 32:

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert’s opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert’s independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party’s position over another... These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert’s independence, impartiality and freedom from bias.

[28] The proffered expert is duty-bound to be independent, impartial and unbiased. **How is the expert’s adherence to these duties tested?** At the first instance by reliance on the expert himself. Mr. Cuff has stated in the covering letter to the Narrative Report:

I acknowledge that it is my duty to provide evidence in relation to these proceedings that is fair, objective and non-partisan, that is only related to my area of expertise and to provide additional assistance to the court as may be

required. I acknowledge that these duties prevail above and over any obligations which I may owe to any party by whom I have been engaged.

[29] Thus, Mr. Cuff has attested to his duties to the Court. This could be enough to meet the threshold for admissibility. As stated in *White [Burgess]* at paragraphs 48 and 49:

[48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it [...]

[Emphasis added by Stack J.]

The concern identified by Canada was that the expert was potentially “unable or unwilling to provide the Court with fair, objective and non-partisan evidence” because he had assumed the role of an advocate. Evidence included an e-mail where the expert referenced part of his task as being to find ‘evidence which points to the liability of the Government of Canada’. It was explained that this was meant in a joking manner. Although Justice Stack had a ‘concern’, he did not rule the expert testimony inadmissible (paras. 36-40):

[36] In assessing whether Mr. Cuff's evidence should be ruled inadmissible, I am to have regard to both his particular circumstance and the substance of his proposed evidence (*White [Burgess]* at paragraph 49). Notwithstanding the email referred to above, opposing counsel has not established that Mr. Cuff is, in fact, biased, or that he is acting as an advocate for the Plaintiffs. Canada has not pointed to anything in Mr. Cuff's background or to anything specific in the Narrative Report itself to establish that Mr. Cuff is unable or unwilling to discharge his duties to the Court. In this case, I am satisfied that there are

sufficient safeguards to protect the integrity of the trial, including the nature of the evidence to be given by Mr. Cuff, its ability to be assessed by the trier of fact after cross-examination and the likelihood of testimony from other potential experts.

[37] I have identified a concern about Mr. Cuff's impartiality and independence that does not preclude admission of his evidence at the first level of the admissibility analysis. Is that the end of the inquiry? Cromwell, J. says at paragraph 54 of *White [Burgess]* that it is not:

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

[38] In these circumstances, given the limited (but necessary) utility of the evidence as to the chronology and context of the historic records, the potential helpfulness of the evidence is not outweighed by the risk of the dangers that are associated with expert evidence materializing.

[39] Mr. Cuff is therefore a qualified expert for the purposes of the Narrative Report, and the remaining *Mohan* factors have been resolved in favour of permitting his evidence. What then am I to do with any lingering concern that I have about his impartiality and independence? Cromwell, J. addresses this in *White [Burgess]* at paragraph 45:

[45] I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted.

Justice Stack was overall satisfied that the expert evidence should be admitted and subjected to the normal rigours of the trial process, aside from one section of the expert's report which 'strayed from history into the realms of cultural anthropology and sociology'. As neither

discipline was within the expertise of the proposed expert, that section of the report was declared inadmissible.

Position of Cst. Smyth

Let us now consider the arguments and case law relied on by counsel for Cst. Smyth.

Report should be excluded

In *Day v. Karagianis*, 2005 NLTD 21 (“*Day*”), a medico-legal report introduced by the plaintiff was ruled inadmissible because the trial judge found that it: (a) lacked independence and objectivity; (b) contained pejorative and judgmental language; (c) made legal interpretations and conclusions; (d) was an instrument of advocacy and argument on behalf of the Plaintiff; and (e) failed to confine itself to the appropriate area of expertise.

Although the court ruled the report inadmissible, the expert was permitted to give viva voce evidence subject to guidelines set by the court. In *Gallant v. Brake-Patten*, 2012 NLCA 23 (“*Gallant*”), the Court, at paragraph 72 characterized this result as “an illustration of a court purging inappropriate material from an expert’s evidence so as to enable otherwise valuable evidence to be put before the court”, which allowed the expert to be heard, provided that she “confined her evidence to assisting the court with matters within her area of expertise”. Counsel for Cst. Smyth submits that, as in *Day*, Dr. Coleman’s portion of the joint report should be excluded from evidence.

Offending portions of report should be redacted

In *Gallant* the issue was potential witness bias. Hoegg, J.A., for a unanimous court, made an extensive review of the law of expert testimony. She noted that experts' reports containing legal analysis were ruled inadmissible in *McNamara Construction Co. v. Newfoundland Transshipment Ltd.*, [2000] N.J. No. 447 (Nfld. T.D.); *Day, supra*; and *Corner Brook Pulp & Paper Ltd. V. Geocon*, [2000] N.J. No. 446 (Nfld. T.D.).

This issue of encroachment on legal commentary was addressed by Hoegg, J.A., at para 88:

On a practical level however, there will be cases where the expression of an opinion by an expert may, depending on the subject matter, inevitably have to stray into the area of legal commentary. The fact that an expert's report may incidentally do so, should not necessarily so taint the report as to render it inadmissible in totality. It is only where the approach taken is so comprehensive and blatant that the court concludes that the reliability or utility of the opinion as a whole is seriously compromised - ie. [sic] so tainted as a whole as not to have a modicum of objectivity - that the report as a whole should be rejected as inadmissible. **In other cases, the court should consider redacting offending portions and admitting the rest. In still other cases where the offending passages are minor or incidental, the report could be admitted with the issue being dealt with as one of weight.**

Also note the following statement (although it was pre-*White Burgess*), at para 93:

93 In summary, in civil cases, if expert evidence meets the Mohan criteria for admissibility, it is admissible. Bias or partiality in expert evidence which is based on the expert having a connection with a party or issue or a **possible pre-disposition or approach in the case is a reliability issue** which is best determined when the whole of the expert evidence is considered in the context of all of the trial evidence. **As such, the issue is one of weight and not admissibility.**

Coleman should not be allowed to give any opinion “approaching the ultimate issue of credibility”

In *R. v. J.-L.J.*, 2000 SCC 51 (“J.-L.J.”), the Court was establishing a framework for assessing the reliability of novel science and, consequently, the admissibility of novel scientific evidence in court. Counsel for Cst. Smyth cites paragraph 37 of this decision on the matter of ‘approaching the ultimate issue’.

37 Dr. Beltrami's evidence, if accepted, was potentially very powerful. Once it is accepted that the offence was probably committed by a member of a "distinctive group" from which the accused has been excluded, it is a short step to the conclusion on the ultimate issue of guilt or innocence. Dr. Beltrami's underlying hypothesis was that if the respondent did not "score" on the plethysmograph, he must lack the disposition to commit such acts. The inference is that if he lacks the disposition then he did not do it. The closeness of his opinion to the ultimate issue is another reason for special scrutiny, as mentioned by Sopinka J. in *Mohan* , at p. 25:

The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

In *Mohan*, the Supreme Court considered the admissibility of evidence concerning paedophilia. The defence had sought to call a psychiatrist to testify that the perpetrator of three of the four offences was likely a paedophile and that testing of the accused showed that he was not a paedophile.

Sopinka J., writing for the Court, held that in determining admissibility it was “necessary to consider the limitations imposed by the rules relating to character evidence, having regard to the restrictions imposed by the criteria in respect of expert evidence”. Sopinka J. held that this kind of psychiatric evidence must be carefully scrutinized. He sounded a special caution where the evidence was tendered on the ultimate issue before the trier of fact:

In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Sopinka J. held that the judge in deciding whether this expert evidence is admissible should consider "the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group".

On this point of 'ultimate issue' see also *R v. Natsis*, 2014 ONCJ 532:

126 The Supreme Court of Canada has repeatedly affirmed that the common law rule precluding expert evidence on the ultimate issue no longer applies in Canada: *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), at para. 25:

While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court: *Graat v. The Queen*, [1982] 2 S.C.R. 819. See also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.), at p. 666 (per Doherty J.A).

See also *R. v. Bryan* (2003), 175 C.C.C. (3d) 285, at para. 16: "there is now no general rule precluding expert evidence on the ultimate issue"; and *R. v. Solleveld*, 2014 ONCA 418, at paras 17 – 20.

Coleman should be restricted to giving opinion evidence on de-escalation techniques

In *R. v. Sekhon*, 2014 SCC 15, at para. 46, Moldaver J. for the majority, underscored the importance of ensuring that expert evidence remains within its proper scope:

Given the concerns about the impact expert evidence can have on a trial — including the possibility that experts may usurp the role of the trier of fact — trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges — including those in judge-alone trials — have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply

consider the Mohan criteria at the outset of the expert's testimony and make initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence.

The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to minimize any potential harm to the trial process. **A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential.** The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal.

In *R. v. Bingley*, 2017 SCC 12 (“*Bingley*”), counsel for Cst. Smyth references para. 17, which concludes the following discussion on admissibility beginning at para 13:

13 The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 (S.C.C.). This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into “trial by expert” and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess Langille Inman*, at paras. 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.

14 The expert evidence analysis is divided into two stages. First, the evidence must meet the four *Mohan* factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence: *White*, at para. 24.

15 If at the first stage, the evidence does not meet the threshold *Mohan* requirements, it should not be admitted. The evidence must be logically relevant to a fact in issue: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 82; *R. c. J. (J.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.), at para. 47. It must be necessary “to enable the trier of fact to appreciate the matters in issue” by providing information outside of the experience and knowledge of the trier of fact: *Mohan*, at p. 23; *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275 (S.C.C.), at para. 57. Opinion evidence that otherwise meets the *Mohan* requirements will be inadmissible if another exclusionary rule applies: *Mohan*, at p. 25. The opinion evidence must be given by a witness with special knowledge or expertise: *Mohan*, at p. 25. In the case of an opinion that is based on a novel scientific theory or technique, a basic threshold of reliability of the underlying science must also be established: *White Burgess Langille Inman*, at para. 23; *Mohan*, at p. 25.

16 At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process: *Abbey*, at para. 76. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *Mohan*, at p. 21; *White Burgess Langille Inman*, at paras. 19 and 24.

17 The expert opinion admissibility analysis cannot be "conducted in a vacuum": *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. **The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized:** see *Abbey*, at para. 62; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 (S.C.C.), at para. 46.

The issue in *Bingley* was whether the witness, a "drug recognition expert" or "DRE", had special expertise as required by the fourth *Mohan* factor. The basic requirement of expertise for an expert witness is that the witness has expertise outside the experience and knowledge of the trier of fact. It was concluded that the witness did. A DRE receives special training in how to administer a 12-step drug recognition evaluation and in what inferences may be drawn from the factual data noted. It was for this limited purpose that the DRE was permitted to assist the court by offering expert opinion evidence.

Analysis

I believe that the law as set out in *Day* and *Gallant* must now be viewed in the context of the more recent cases from the Supreme Court of Canada, particularly *White Burgess*; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 ("*Saguenay*"); and *Bingley*.

White Burgess makes it clear that once an expert witness attests to an ability and a willingness to accept the duty owed to the court to be impartial, independent and unbiased, the

party challenging admissibility has the burden to raise a “realistic concern” that the expert is unable or unwilling to comply with that duty. If a realistic concern is raised, then the burden shifts back to the party seeking to rely on the expert evidence to raise on a balance of probabilities that the expert is capable of complying with his or her duty to the court.

Although some uncertainty exists because of the reference by Binnie J. in *J-L.J.*, confirmed by Cromwell J. in *White Burgess*, at para. 45, that expert evidence should “not be allowed too easy an entry” by letting frailties go to weight rather than admissibility, Cromwell J. holds for the Court in *White Burgess* at para. 49, that the threshold requirement “is not particularly onerous and it will likely be quite rare that a proposed expert’s evidence would be ruled inadmissible for failing to meet it”.

This low threshold for admissibility for expert evidence was confirmed in *Saguenay*, at para. 106, where Gascon J. for the Court applied the test of “whether the expert’s lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case”.

In *Bingley*, McLachlin C.J. for the majority, at para. 13, confirmed the “modern legal framework for the admissibility of expert opinion evidence” was set out in *Mohan* and clarified in *White Burgess*.

In the present case, Dr. Coleman attested to his ability and willingness to accept his duty to the Inquiry to be impartial, independent and unbiased. The parties challenging admission of his evidence, the RNC and Cst. Smyth, have failed to raise any realistic concern that he is unable or unwilling to comply with that duty. Let us consider the submissions made by each party.

Cst. Smyth’s Concerns

Counsel for Cst. Smyth stresses the fact that *White Burgess* has confirmed that the independence and impartiality of an expert bears not just on the weight but also on the admissibility of the evidence. Counsel omitted to note that the Court in *White Burgess* accepted that the test for admissibility is “not particularly onerous” and it will be “quite rare” and only in “very clear” cases that expert evidence will be completely inadmissible and excluded at the threshold stage. Also, the Court established that, once the admissibility threshold has been met (by the expert attesting that he or she is able and willing to be fair, objective and non-artisan), the party challenging admissibility must identify a “realistic concern” that the expert is unable or unwilling to comply with the duty owed to the court.

Counsel for Cst. Smyth relies upon what counsel regards as “pejorative” and “inflammatory” language used in Dr. Coleman’s report, alleged negative comments regarding Cst. Smyth’s credibility, supposed “undue denigration” of Cst. Smyth’s professional training and experience as showing a bias against Cst. Smyth. Counsel specifically refers to terms like “it is interesting to note”, “according to Cst. Smyth”, “it is important to note” used throughout the report as implicitly questioning Cst. Smyth’s credibility.

Counsel for Cst. Smyth also noted what he saw as “specific examples of inappropriate language”:

- “Not good police practice”
- “This is a spurious argument”
- “Assuming this is a valid concern”
- “Certainly not how the writer would expect a 14 year police officer to behave”
- “the writer finds that difficult to understand”

The following are noted as “blatant” examples where Dr. Coleman impugns Cst. Smyth’s creditability:

- 1) p. 8 – “one is left wondering about his statement that he wouldn’t have attended had he been advised of additional CPIC information”;
- 2) p. 9 – “In summary, this exchange is disturbing and, arguably, indicative of a somewhat aggressive approach to the meeting with Mr. Dunphy. What is not clear is if he at some point in his later conversation with Mr. Dunphy raised the matter of arresting Mr. Dunphy or apprehending him under the Mental Health Act”;
- 3) p. 12 – “According to Cst. Smyth, at times Mr. Dunphy was incoherent. This suggests that he might have been confused and stressed such that he might not have fully understood the situation”;
- 4) p. 13 – “However, we are told, the result was that Mr. Dunphy became sufficiently agitated to raise a rifle from beside his chair”;
- 5) p. 55 – he did not learn about a 22 rifle being in the house and “this begs the question did Cst. Smyth ask the right questions”;
- 6) p. 56 – Joe Smyth vs. Sgt. Joe Smyth – “The writer considers that these are important inconsistencies to note”;
- 7) p. 57 – “Although, he apparently now says that if he had known [a ‘violent’ flag existed on CPIC] that he wouldn’t have attended alone, whether that would have been the case is subject to speculation”;
- 8) On p. 58 Dr. Coleman writes:

While the writer has many concerns about Cst. Smyth’s preparation for his visit to Mr. Dunphy, his frame of mind and attitude is of perhaps the greatest concern in that it can, and possibly did, influence his actions before and during the interaction with Mr. Dunphy. Some evidence of his attitude can be learned

from the text exchange he had with Trevor on the day prior to his visit to Mr. Dunphy. For example, in one text he characterized Mr. Dunphy as “some lunatic.” He also indicated to Trevor that “if I have to arrest him I’ll be late.” Given that post-incident, he has apparently agreed that he considered the Tweets in question were not serious, or words to that effect, it is of concern that he is raising the issue of arrest. Perhaps, more importantly is that if an arrest was an option, why did he go alone?

Even without considering the text exchange, it seems that Cst. Smyth approached the assessment/investigation of Mr. Dunphy casually. Based on materials read and audio listened to, it seems that Cst. Smyth had the attitude that this situation was not a ‘big deal’. There is an indication of complacency and, arguable, neglect as well as poor judgement. A key behavioural competency for police officers is that of good judgement. Cst. Smyth failed to demonstrate good judgement. When one adds the text exchange and considers the indication of pre-incident mindset and attitude, it is not difficult to envision that the interaction with Mr. Dunphy might have been more aggressive and disrespectful than we have initially been told.

- 9) p. 61 – “however, this argument is inconsistent with introducing himself as Sgt. Smyth as he explained in his ‘typed notes’. One is left wondering what was initially said by both parties”;
- 10) p. 61 – “Given the marijuana in his house, was he unsure and fearful about Cst. Smyth’s real motives at the house”.

I do not regard these objections by Cst. Smyth to Dr. Coleman’s language as meeting the test of “realistic concern” regarding Dr. Coleman’s ability and willingness to meet his duty to the Inquiry of being impartial, independent, and unbiased in his testimony.

First, it is not reasonable to require an expert, who has been retained with the specific mandate to provide an opinion regarding strategies and techniques to be employed by police in situation such as the interaction between Donald Dunphy and Cst. Smyth, to refrain from being critical of Cst. Smyth’s conduct, where Dr. Coleman, an experienced police officer, with many years of operational and academic training, believes Cst. Smyth has not met the standard

required of a police officer in his situation. The terms of reference of this Inquiry require that I approach the examination of Cst. Smyth's conduct with a critical eye.

Section 3 of the terms of reference requires me to inquire into the circumstances surrounding the death of Donald Dunphy, including why a RNC officer attended at his home, the information relied upon for the officer's actions, the circumstances under which the officer fired the fatal shots, and the facts surrounding any relevant police operation on the day of Mr. Dunphy's death. The terms of reference required this Commission to retain experts with appropriate expertise in policing and to have these experts apply a critical eye to Cst. Smyth's conduct in light of what is required of police officers in his position. Dr. Coleman has this expertise and acted reasonably in the course of commenting upon Cst. Smyth's actions.

I do not accept the submissions of Counsel for Cst. Smyth that the language used by Dr. Coleman should be viewed as so pejorative or inflammatory as to raise any reasonable doubt or realistic concern about his objectivity, independence or impartiality. To the extent that this conclusion differs from the conclusions of the Court in *Day*, I respectfully note that *Day* has been over-taken by *White Burgess*, which I believe I am bound to apply. I do not believe that the sorts of comments by Dr. Coleman in criticizing Cst. Smyth meet the test of the "very clear" and "quite rare" case, noted in *White Burgess*, where expert evidence should be completely inadmissible and excluded at the threshold stage. I also note that in *Day*, the Court permitted the expert to testify, despite excluding the expert report.

Since the first days of this Inquiry, I have noted that since there were no eyewitnesses to the death of Donald Dunphy, other than Cst. Smyth, who shot him, it is essential in determining the manner of his death that the explanation given by Cst. Smyth be scrutinized in minute detail to see if there may be inconsistencies or discrepancies which may lead one to question

Cst. Smyth's credibility. No party has questioned that this approach must be taken. It would be illogical to conclude that this testing of credibility has to proceed without any reference to poor police practice by Cst. Smyth or without any critical examination of his method of performing his duties.

I recognize that damage may be done to Cst. Smyth's reputation in the course of this Inquiry and he is entitled to be treated fairly. However, I agree with the comments of Justice Cory in *Canada (A.G.) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 ("Krever"), at para. 39, where he adopted the following by Decary, J.A. from the judgement of the court below:

A public inquiry would be quite pointless if it did not lead to identification of the causes and players for fear of harming reputations.... I doubt it would be possible to meet the need for public inquiries whose aim is to shed light on a particular incident without in some way interfering with the reputations of the individuals involved.

Cory J. added that damaged reputation might simply be "the price which must be paid". But he stressed the need for procedural fairness, which requires advanced notice and the opportunity to respond.

Cst. Smyth had advance notice that his conduct before, during and after the shooting of Donald Dunphy would be closely scrutinized and criticized where it may have fallen below the standards expected of police officers. Dr. Coleman did not exceed the bounds of appropriate criticism. Cst. Smyth has been accorded a reasonable opportunity to respond. I am not persuaded that Dr. Coleman has been anything other than fair and objective.

Counsel for Cst. Smyth challenges Dr. Coleman for commenting negatively on Cst. Smyth's creditability. He says this is a role for the trier of fact. There is a difference between giving an opinion directly on an ultimate issue, such as credibility, which may, but not necessarily, be inappropriate and giving an opinion on matters from which an inference as to

credibility may be drawn. For the most part, the comments of Dr. Coleman are his drawing the attention of the Inquiry to issues which depend for their resolution upon the position taken as to the credibility of Cst. Smyth alone, with no corroborating facts. This is a legitimate role for Dr. Coleman to play. On a few occasions, Dr. Coleman's report verges on speculation when he suggests weaknesses in Cst. Smyth's version of events. As noted previously, I redacted several comments of this nature before the report went into evidence. Specifically, the redactions were:

- “Given his planning and determination to attend Mr. Dunphy’s house that day, one is left wondering about his statement that he wouldn’t have attended had he been advised of the additional CPIC information.” (p. 8)
- “In summary, this exchange [where Cst. Smyth expresses to a friend an intent to arrest Donald Dunphy] is disturbing and, arguably, indicative of a somewhat aggressive approach to his meeting with Mr. Dunphy. What is not clear is if he at some point in his later conversation with Mr. Dunphy raised the matter of arresting Mr. Dunphy or apprehending him under the Mental Health Act.” (p. 9)
- “The attempts to ‘read’ the situation and take steps to de-fuse/de-escalate should have been such that the situation did not deteriorate as it did.” (p. 13)
- “Although, he apparently now says that if he had known that [a ‘violent’ flag existed on CPIC] he wouldn’t have attended alone, whether that would have been the case is subject to speculation.” (p. 57)
- From the sentence “There is an indication of complacency and, arguably, neglect as well as poor judgement” delete the words “and, arguably neglect”. (p. 58)
- [Regarding the introduction to Mr. Dunphy as “Joe Smyth” or “Sgt. Smyth] One is left wording what was initially said by both parties”. (p. 61)

- “Given the marijuana in his house, was he unsure and fearful about Cst. Smyth’s real motives at the house?” (p. 61)

Apart from these speculative remarks, I am satisfied that the concerns raised by Cst. Smyth do not warrant excluding Dr. Coleman’s report. They are not realistic concerns in the sense used in *White Burgess*.

The RNC’s Concerns

The RNC submits, like Cst. Smyth, that the joint report of Dr. Coleman and Sgt. Massine is inadmissible because of Dr. Coleman’s lack of qualification with respect to threat and risk assessment as performed by units such as the PSU and because they determine ultimate issues, take issue with and/or determine Cst. Smyth’s credibility, and overall lack objectivity and independence.

Counsel for the RNC submits that in questioning, let alone deciding Cst. Smyth’s credibility, Dr. Coleman loses all credibility and independence and this undermines his entire expert opinion. I have already addressed this issue in discussing Cst. Smyth’s concerns. It is illogical to say that Cst. Smyth’s credibility cannot be criticized when his version of events is the only one available and the terms of reference of this Inquiry mandate that I seek to determine the circumstances of death. As noted by Justice Cory in *Krever*, it would be pointless to hold an inquiry if possible damage to a reputation from criticism was a ground for excluding expert opinion.

The RNC refers to certain words or phrases used in a rhetorical fashion to comment upon Cst. Smyth’s evidence and question his credibility, namely “apparently”, “asserts”, “assuming”, “it seems”, “maintains that”, and “interesting”. The RNC objects to the constant reference to

these words and phrases throughout the report and says this is a technique to question Cst. Smyth's credibility. While I agree that the references to the fact that the only statement of what transpired is that of Cst. Smyth need not have been as repetitive, I do not accept that this raises a realistic concern as to Dr. Coleman's objectivity, independence and impartiality. The use of the words noted above is reminders to the reader of the report that underlying the reliability of various statements is the credibility of Cst. Smyth. This is reasonable comment by Dr. Coleman.

Counsel for the RNC takes particular objection to the use by Dr. Coleman of the term "spurious" in characterizing an explanation of Cst. Smyth as to why he did not call in his RCMP PSU partner to provide backup. Cst. Smyth testified it was the officer's day off and he didn't want to burn him out. The RNC submits that, in calling this a spurious argument, Dr. Coleman is making an outright accusation that Cst. Smyth is being deceitful. Counsel for the RNC refers to various dictionaries which define "spurious" as connoting not true or genuine. In fact the Cambridge English Dictionary online defines "spurious" (of reasons and judgements) as "based on something that has not been correctly understood and therefore false." Merriam-Webster online defines it in part as "outwardly similar or corresponding to something without having its genuine qualities." Collins English Dictionary online defines "spurious" as "something that is spurious seems to be genuine but is false". To say someone has used a false argument does not necessarily mean you question the person's credibility. It is not an accusation that the person is being deceitful. Like the word "apparently" it may carry the connotation that things are apparent as opposed to real.

I believe the comments in *Lederman, Bryan, Furst, The Law of Evidence in Canada* (2014), at p. 837, are applicable here:

The case law illustrates that there are certain subject matters which go to the very heart of judicial decision-making and courts remain wary of expert witnesses

providing advice as to how they should decide issues such as whether a witness is telling the truth or the meaning of English words. Perhaps it is just a matter of sensitivity over the way in which the expert gives his or her evidence. For example, a court would be loath to receive explicit evidence from an expert that an accused is guilty or innocent or that a defendant was negligent or not, or that an individual was insane or not. However, it will readily receive evidence which is not so direct but which, if accepted, inescapably leads to that conclusion.

I am satisfied that the opinions expressed by Dr. Coleman are appropriate, although at times they could have been better worded. They inform this Inquiry about nuances of policing which might not be obvious to a lay person. They help ensure that this Inquiry does not overlook factors significant in assessing the validity of arguments or lines of reasoning raised by police officers or other parties at Inquiry hearings. Dr. Coleman, for the most part, avoids direct opinions regarding the ultimate issue in the Inquiry, the credibility of Cst. Smyth, and instead addresses inferences which are not so direct but which, if accepted, may lead to a conclusion in that respect. As noted in *Lederman*, this is acceptable expert testimony.

I note that Counsel for the RNC indicates in his brief raising concerns about Dr. Coleman's report, that if it is decided that Dr. Coleman is not qualified to give opinion evidence in the area of threat and risk assessment as it applies to preventative policing in units such as the PSU, most, if not all of the disturbing comments regarding credibility will have been removed. While I do not fully follow the logic of this position, I note that, as set out above, Dr. Coleman was ultimately qualified to give opinion evidence regarding appropriate de-escalation strategies and measures to be employed by police to ensure officer safety in situations such as that encountered by Cst. Smyth in his interaction with Donald Dunphy. Any opinions relating to the PSU would be merely incidental to his report and may be dealt with as a matter of weight.

Conclusion

The reports of Dr. Coleman and Sgt. Massine will go in, subject to submissions as to weight and specific objections to admissibility after questioning, with the redactions previously noted.



Leo Barry
Commissioner

2017-04-05

IN THE MATTER OF THE COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Ruling 5: On Application Regarding Proposed Experts:

Dr. Stephen Hart and Sgt. Patrick Lenehan

On February 25, 2017, the Royal Newfoundland Constabulary (RNC) filed an application to adduce expert evidence by Sgt. Patrick Lenehan of the Justice Officials Protection and Investigation Section of the Ontario Provincial Police. Cst. Joseph Smyth applied to have Dr. Stephen Hart, who holds a PhD in clinical psychology, provide expert evidence. Both experts were proposed to give evidence regarding risk/threat assessment in the context of protection of public officials. On March 3, 2017 the Commission received from counsel for Cst. Smyth, a report authored by Dr. Hart. On the same date, I heard the applications with respect to both proposed experts as well as submissions from parties with respect to the applications. While I allowed both experts to testify, I reserved my decision to prepare full written reasons. These are those reasons.

As this is the third ruling I have made in this Inquiry with respect to the admissibility of expert evidence, I will not repeat the applicable law. Suffice it to say, I have to apply the criteria for admitting expert evidence as set out by the Supreme Court of Canada in *Mohan* and *White Burgess*, and recently confirmed in *Bingley*, all of which have been previously cited in rulings before this Commission.

The key aspects of the test to be applied with respect to these two proposed experts are: the relevance and necessity of the opinions, and whether the probative value of the opinions to be rendered outweighs any potential prejudicial effect.

Dr. Hart was available to be heard on March 7, 2017, so no significant delay would arise which might negatively impact the Inquiry process. The evidence which Dr. Hart will provide challenges the qualifications of Dr. Coleman insofar as Dr. Coleman may give an opinion on violence/risk/threat assessment, particularly in the context of the protection of public figures. I note that Dr. Hart's evidence on the definition of these terms is yet again different from that of others who have already given evidence before the Commission. But in any event, I accept that Dr. Hart's opinion will be relevant and necessary and that it could assist me in understanding the nuances of threat assessment in the context of preventing violence against public figures. I am satisfied also that the probative value of his report will outweigh any prejudicial effect. I must note that the prejudice to Constable Smyth, if it is not admitted, could be significant in terms of the impact upon reputation, career and so forth, while the impact upon the case presented by Ms. Dunphy would not be that significant.

Counsel for Meghan Dunphy did not strenuously object to Dr. Hart being permitted to testify but did request that if he were to be allowed to give evidence, that his evidence be heard at a later date to permit counsel for Ms. Dunphy more time to prepare for his evidence. I was not prepared to allow a delay in the Inquiry process for that purpose. I was prepared, however, to allow counsel a reasonable amount of funding (to be determined in consultation with Commission counsel), to permit the obtaining of advice to assist in the preparation of appropriate questions for the examination of Dr. Hart and the testing of his qualifications.

With respect to the application for the admission of opinion by Sgt. Lenehan, counsel for the RNC sought to admit the testimony of Sgt. Lenehan regarding whether the threat-risk assessment of Constable Smyth was appropriate in the circumstances. I am satisfied the opinion of Sgt. Lenehan is relevant and necessary and that it would help me better understand what is involved in threat and risk assessment in the context of the protection of public figures. I am also satisfied the probative value outweighs any potential prejudicial effect.



Leo Barry
Commissioner

2017-04-11



Commission of Inquiry Respecting the Death of Donald Dunphy

Notice of Alleged Misconduct

(Public Inquiries Act, 2006 ss. 5(4))

Pursuant to subsection 5(4) of the Public Inquiries act, 2006 you are notified that in its report(s), the Commission of Inquiry Respecting the Death of Donald Dunphy may make findings of misconduct, which the Commission considers to be any finding or conclusion that could reasonably be construed as bringing discredit on an individual. The substance of allegations that may be made which, if accepted, may result in an unfavorable report or a finding of misconduct which relates to you is set out in Schedule “A”, attached.

This notice is given without prejudice to the ability of the Commission of Inquiry Respecting the Death of Donald Dunphy, through its counsel, to modify the particulars of the substances of the alleged misconduct as circumstances may necessitate.

Receipt of this notice entitles you full opportunity to be heard in person or through counsel with regard to those issues or areas of evidence outlined in Schedule “A” that affect your interest.

TO:

From: _____
Sandra Chaytor, Q.C.
Kate O’Brien
Commission Co-Counsel

Date: _____, 2017

SCHEDULE “A”

The Commission of Inquiry Respecting the Death of Donald Dunphy may be asked to find misconduct against you with respect to the following:

Phase II Papers, Submissions and Reports

1. Report of Gareth Jones to the Commission of Inquiry Respecting the Death of Donald Dunphy
2. Police Involved Deaths: The Need for Reform, © 2012 BC Civil Liberties Association, David MacAlister et al.
3. Police Involved Deaths: The Failure of Self-Investigation, © 2010 BC Civil Liberties Association, David MacAlister
4. Royal Canadian Mounted Police – Phase II – Investigation of Officer-Involved Serious Incidents in Newfoundland and Labrador
5. Royal Newfoundland Constabulary – Investigation of Officer-Involved Serious Incidents in Newfoundland and Labrador – Serious Incident Response Team
6. Royal Newfoundland Constabulary – Police Communications with the Public Following Serious Incidents and During Active Investigations – Communications Manager
7. Royal Newfoundland Constabulary – Use of Force Training for Police Including De-escalation Techniques for Dealing with People in Crisis – Mobile Crisis Response Team
8. Royal Newfoundland Constabulary – Protecting Freedom of Expression in an Age of Social Media – Statements on Government’s Social Media Sites
9. Royal Newfoundland Constabulary – Policies and Protocols of Government or the Royal Newfoundland Constabulary with respect to the Security of the Premier and Cabinet Members - RNC Protective Service Unit and Inspector Position
10. Royal Newfoundland Constabulary – Policies and Protocols of Government or the Royal Newfoundland Constabulary with respect to the Security of the Premier and Cabinet Members – Policy Planning and Research Capacity
11. Special Investigations Unit (Ontario) Operations Policy 015 Media Relations
12. Commission of Inquiry into the Death of Donald Dunphy (CIDDD) - A review undertaken for the Commission (Dr. Terry Coleman and Sgt. Michael Massine)
13. Report of Inquiries into the Sudden Deaths of Norman Edward Reid and Darryl Brandon Power, December 16, 2003, The Honourable Donald S. Luther
14. Braidwood Commission on the Death of Robert Dziekanski, May 20, 2010. Thomas R. Braidwood Commissioner, ISBN 978-0-7726-6252-1
15. Police Encounters with People in Crisis, July 2014, Honourable Frank Iacobucci, Copyright Toronto Police Service
16. A Matter of Life and Death, June 2016, Ombudsman Report, Paul Dubé

17. TEMPO: Police Interactions, Mental Health Commission of Canada, June 2014, Terry Coleman and Dorothy Cotton
18. Ad Hoc Coalition for Civil Liberties: Social Media and Civil Rights in Light of the Death of Donald Dunphy
19. Protecting Freedom of Expression over the Internet: An International Approach, Notre Dame Journal of International & Comparative Law, Alan Sears, Citation: 5 Notre Dame J. Int'l Comp. L. 171 2015
20. The Dangers of Surveillance, Harvard Law, Neil M. Richards, Citation: 126 Harv. L. Rev. 1934 2012-2013
21. Social Media Use in Law Enforcement: Crime prevention and investigative activities continue to drive usage, LexisNexis Risk Solutions. (2014) [Survey of Law Enforcement Personnel and Their Use of Social Media]
22. Social Media Surveillance and Law Enforcement (10.27.2015) Alexandra Mateescu et al, Data & Civil Rights: A New Era of Policing and Justice



Commission of Inquiry Respecting the Death of Donald Dunphy

**Draft Letter to Parties with Standing
Regarding the Secure Destruction of Documents
Disclosed by the Commission of Inquiry**

June __, 2017

TO: Counsel for Parties with Standing

**RE: Secure Destruction of Documents Disclosed by the Commission of Inquiry
Respecting the Death of Donald Dunphy “the Commission”**

In accordance with Rule 36 of the Rules of Procedure and Practice, we hereby request that you return to the Commission the two USBs provided to you by the Commission on October 28 and November 16, 2016.

If you have transferred electronic records from the USBs or our Kiteworks Secure File Transfer site to another storage medium, such as a computer hard drive, network server, flash drive, CD-ROM, DVD, or made a printed version of documents, other than those that were made public as “P” Exhibits during the Inquiry, we ask that you certify to us in writing that you have securely destroyed all versions of the documents.

The USBs and a letter certifying that the electronic and paper documents have been securely destroyed should be returned to our office no later than Friday, June __, 2017.

Sincerely yours,

Diane Blackmore
Chief Administrative Officer

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Commissioner

Justice Leo Barry

Commission Co-Counsel

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Kate O'Brien

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Commission Statistics

Key Dates

Order-in-Council establishing the Commission and appointing the Honourable Leo Barry as Commissioner	September 23, 2016
Hearing of Applications for Standing and/or Funding	October 19, 2016
First Day of Phase I Hearings	January 9, 2017
Phase II – Symposium	March 9, 2017
Last Day of Phase I Hearings.....	March 10, 2017
Deadline for written submissions by parties with standing	April 7, 2017

Number of Parties with Standing and Funding

Phase I and Phase II Standing.....	7
Phase I and Phase II Funding	5
Phase II – Standing Only	1
Phase II – Funding Only	1

Phase I – Fact-Finding Phase

Number of witnesses.....	56
Number of hearing days.....	39
Number of public exhibits	809
Number of public RCMP scene photos	165
Number of in camera exhibits.....	21
Number of in camera RCMP scene photos.....	22
Number of pages of transcripts – Witness Interviews	5,785
Number of pages of transcripts – Public Hearings	11,416
Number of documents in Commission database.....	Approx. 10,000

Phase II – Policy Phase

Number of papers posted on line for review.....	22
Number of reports and papers prepared for Commission.....	10
Number of Symposium sessions.....	4

Commission’s Expenditures by Fiscal Year

September 23, 2016 – March 31, 2017	\$2,317,589
April 1, 2017 – June 15, 2017.....	<u>\$ 489,104</u>
Total	<u>\$2,806,693</u>

Note:

1. Expenditures only include invoices paid to June 15, 2017
2. HST is not included

 Bell 3G 18:17 39% 

 Donahue2DonDunphy 27.5K Tweets  

CIDDD Exhibit P-0009 Page 1

Tweets Media Favorites

 Donahue2DonDunphy @sculpen 3d
 @SandyRCollins @PremierOfNL
 @ShermanDowney won't mention names this time,2 prick dead MHAs might have good family members I may hurt #nlpoli
  1  4 

 Donahue2DonDunphy @sculpen 3d
 @SandyRCollins @PremierOfNL
 @ShermanDowney he got them before they got to enjoy the pension they didn't deserve,i won't mention #nlpoli
   1 

 Donahue2DonDunphy @sculpen 3d
 @SandyRCollins @PremierOfNL
 @ShermanDowney I hope there is a God,I think I c him work on two garbage MHAs who laughed at poor ppl #nlpoli

 Timelines  Notifications  Messages  Me

Bell 3G 18:17 39%

Donahue2DonDunphy
27.5K Tweets

CIDDD Exhibit P-0009 Page 2

Tweets Media Favorites

 **Donahue2DonDunphy** @sculpen 3d
@SandyRCollins @PremierOfNL
@ShermanDowney but why would u care after putting in hard time getting that poor mans MHA pension,I hope #nlpoli

1

 **Donahue2DonDunphy** @sculpen 3d
@SandyRCollins @PremierOfNL
@ShermanDowney put on sun glasses & take out the ear plugs u might c & hear ppl crying for help,but why #nlpoli

2 1

 **Donahue2DonDunphy** @sculpen 3d
@SandyRCollins @PremierOfNL
@ShermanDowney is that why u can't c problems of seniors & injured workers,the sun is in your eyes,put #nlpoli

Timelines Notifications Messages Me

●●●○ Bell 3G 18:17 39% 🔋

< Donahue2DonDunphy 27.5K Tweets 🔍 ✍️

CIDDD Exhibit P-0009 Page 3

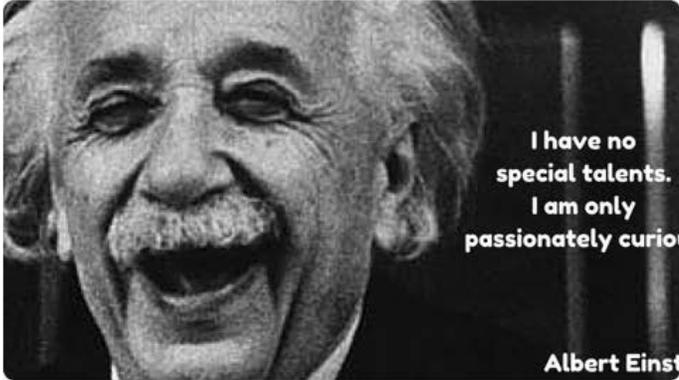
Tweets Media Favorites

 **Sandy Collins** @SandyRCollins 3d
Traveled with @PremierOfNL in his car today...guess what CD was playing? @ShermanDowney The Sun in Your Eyes. #ListenLocal

↩️ ↻ 11 ★ 26 +👤

↻ Donahue2DonDunphy retweeted

 **Achim Nowak** @AchimNowak 3d
I have no special talents. I am only passionately #curious. - Albert Einstein #passion #inspiration #quotes #success


I have no special talents. I am only passionately curious.
Albert Einstein

↩️ ↻ 8 ★ 7 +👤

 Timelines  Notifications  Messages  Me

Database Systems Utilized by the RNC (Acronyms included)

ICAN (Integrated Constabulary Automated Network)

Used to manage RNC files and records. It is a Versadex program.

ACIIS (Automated Criminal Intelligence Information System)

A national database used by Canadian police forces used to capture intelligence information from major law enforcement agencies across Canada. This system is managed by CISC (Canadian Intelligence Services Canada). Most major special police operations are entered into this system under the operation name; this information is usually restricted until the project is complete and the system is updated.

CPIC (Canadian Police Information Center)

This a program administered by the RCMP; several categories exist under CPIC:

- Criminal records of individuals charged and convicted of criminal offences throughout Canada.
- Persons of special interest to police (SIP). In this category subject is known to be potentially dangerous to harm themselves or members of the general public.
- Surveillance persons – persons of interest in relation to an ongoing investigation and may be known to travel throughout the country (ie. Persons involved in the drug trade); individuals who have made serious threats to another individual(s) – person may not have committed a crime.
- Stolen Vehicles
- Missing Persons
- Officer safety (persons with communicable disease, persons suspected of carrying firearms)

PROS (Police Reporting and Occurrence System)

This system is the system used by the RCMP across Canada for their records management.

A Primer on CPIC checks

The Canadian Police Information Centre (CPIC) is a police database where Canada's law enforcement agencies can access and share information on a number of law enforcement matters. The CPIC database is comprised of four databanks, two of which are: Investigative and Identification.

The Investigative databank includes people who have current matters of concern to law enforcement such as people who are the subject of active investigations or are the subject of current Court Orders. This databank is accessed by a persons (PERS) query on CPIC.

The Identification databank includes names of people who may have a criminal record. This databank is accessed by a Criminal Name Index (CNI) query on CPIC. The Identification databank also includes the Criminal Record Synopsis (CRS) which contains: (1) personal information and physical characteristics of people whose names appear in the CNI; (2) information as to the type of criminal offence involved (eg. drugs or violence); (3) any caution warnings or flags with respect to the person; and (4) the Fingerprint Section (FPS) number for the person (a unique number assigned to a person based on his/her fingerprints).

To conduct a CPIC query through the RNC system, their searcher enters the subject's name, date of birth and gender on the CPIC database which is interfaced with the RNC's record management system (Versadex system). Three pieces of electronic mail (referred to as v-mail) are returned, including the PERS information; the CNI information; and the Canadian Firearms Registry Online (CFRO) information. CFRO is a database, access through the CPIC database, that stores information on people with registered firearms.

In response to Cst. Smyth's request for a "10-29", Mark Oram conducted a CPIC query on Mr. Dunphy and received back the three expected pieces of v-mail. Mr. Oram passed along to Cst. Smyth the PERS information and the CFRO information (both negative), but did not open the v-mail containing the CNI information and, therefore, did not give that information to Cst. Smyth. Kim Harding, Director of Information Services at the RNC, prepared a report for the Commission which contained a screenshot of what is seen by a user when CPIC is opened on the RNC system.⁵⁰² The CFRO and CNI options are selected by default so that these two pieces of information are automatically sent by separate v-mail messages to the person conducting the search. It would seem logically therefore that all messages received would be opened and the information relayed when a CPIC search is conducted. Mark Oram offered an explanation as to why

⁵⁰² Exhibit P-0390 at p 3.

that was not his practice. His explanation is rooted in his understanding of what is being requested when an officer asks for a “10-29”.

What does a 10-29 request mean?

The 10 code system of communication is used by police agencies particularly when transmitting information by way of radio so as to protect the confidentiality of the information being relayed. The meaning attributed to various 10 codes differs from one police agency to another. The evidence adduced at the Inquiry indicated that even within the same police agency (in this case, the RNC), the understanding of the meaning of the codes may differ from member to member.

Cst. Smyth testified that he understood a 10-29 search would include a full CPIC check (PERS and CNI) and expected the response to include all that information, including any active court orders, criminal convictions, or cautions including cautions for violence, drugs or weapons. This has been his understanding throughout his career. He did not expect to have to specifically request the CNI information.⁵⁰³

Mr. Oram, on the other hand, testified that if an officer requested a 10-29, it was his practice to provide only the PERS information and not the CNI information, unless the officer specifically requested it. Mr. Oram takes a very literal interpretation as to what is asked of him and stated that he did not see it as his place to question an officer about the searches requested. Counsel for the RNC subjected Mr. Oram to a rather protracted cross-examination on this issue. It was suggested to him that other RNC communications technicians provide all three pieces of information (PERS, CNI and CFRO) in response to a 10-29 request and that the RNC had conducted a review and found that Mr. Oram had on another occasion opened up a v-mail containing CNI information that had not been specifically requested by the officer. Mr. Oram replied that in the example given, he may simply have opened the v-mail by mistake. Mr. Oram did not waiver in stating that his practice was only to provide what was specifically requested. In this case, Cst. Smyth requested a 10-29 and a CFRO. He did not request a CNI. Mr. Oram asked him if there was anything in particular he was looking for and Cst. Smyth replied:

looking to see right now if he got any vehicles registered to 'em and then I need a 29 on him and a CFRO check.⁵⁰⁴

⁵⁰³ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 45.

⁵⁰⁴ Exhibit P-0136 (transcript of telephone call between Mr. Oram and Cst. Smyth, April 5, 2015).

As noted above, in response Mr. Oram provided Cst. Smyth with the vehicle information, the PERS information (nothing current on file), and the CFRO information (no registered firearm). The following is an extract from Mr. Oram's evidence on this point:

MR. ORAM: And at that time when Constable Smyth was asking me for a 29 and a CFRO, I understood him to be asking for that 10-29 information, the person queried portion of this search.

...

MR. ORAM: There was nothing there on his file.

MS. CHAYTOR: Okay. And then you also opened up the CFRO and he had no registered weapons.

MR. ORAM: I opened up the CFRO and found that there was no registered firearms to Donald Dunphy.

MS. CHAYTOR: Okay. And the third piece of information you would have received would have been the CNI.

MR. ORAM: The CNI, I would have received that in my VMail.

MS. CHAYTOR: Yes.

MR. ORAM: But I never opened it because I believe Constable Smyth was asking me for a 29 and a CFRO, so I didn't know if the CNI was something that he was going to be looking for.⁵⁰⁵

Two lists were provided to the Commission by the RNC which contained definitions of 10- codes. The definition for a 10-29 was not the same on both. One simply noted a 10-29 code to be "Background checks"⁵⁰⁶ while the other noted a 10-29 to mean: "Records CK, Person-Vehicle Property – Boats & Motors CNI-CRS File."⁵⁰⁷ Mr. Oram stated the second definition looked more familiar to him and noted a 10-29 can mean a request for any of those things but usually it means to query a person. In his practice, he relies upon the officer to indicate to him what to search based upon what is relevant to the investigation.⁵⁰⁸ He stated:

⁵⁰⁵ Transcript of Evidence of Mark Oram, March 2, 2017 at p 22.

⁵⁰⁶ Exhibit P-0215 at p 2.

⁵⁰⁷ Exhibit P-0704.

⁵⁰⁸ Transcript of Evidence of Mark Oram, March 2, 2017 at p 9.

MR. ORAM: I mean that really means a number of things but I don't see anywhere where it clearly defines any one of them. That it is really generalized in that a 10-29 could possibly mean any one of those things, but unless I've been requested to query any of those things, I don't know which ones to look for.⁵⁰⁹

Having reviewed the evidence, it is clear that there is ambiguity as to what is required to be provided in response to a 10-29 request.

RNC Internal Review and an Attempt to Fix the Problem

The RNC advised of two steps it took in response to learning of the 10-29 issue that emerged: it launched an internal review, and management sent an email to communications technicians in an effort to clarify what is required in response to a 10-29 request. Insp. Barry Constantine conducted the internal review. Communications technicians were interviewed and asked how they respond to a 10-29 request. Insp. Constantine drafted a report of his review and spoke to this report during his evidence.⁵¹⁰ In the report, he wrote, "it appears from most of the Communications technicians who have been interviewed and it seems that their practice is to provide all information from all three responses from CPIC to officers requesting a 10-29 check."⁵¹¹ It is noted, however, that the interviews were carried out *after* the miscommunication between Cst. Smyth and Mr. Oram came to light and *after* the communications personnel had received the email from management as to how they are expected to respond to a 10-29 query. Inspector Constantine acknowledged that the staff had not been specifically asked whether this was their practice or understanding prior to the issue arising.

On December 23, 2016, Supt. Joe Boland sent an email to Sgt. Bernard Jesso, the sergeant in charge of one of the Communication Centre teams, in an effort to "mitigate any further misunderstandings when a 10-29 is requested." Sgt. Jesso forwarded this email to RNC Communications. The email instructed as follows:

When completing a 10-29 ensure that all CPIC response messages including the PERS, CNI, **CR and any additional information** is disclosed to a member [Emphasis added].⁵¹²

⁵⁰⁹ Transcript of Evidence of Mark Oram, March 2, 2017 at p 43.

⁵¹⁰ Exhibit P-0467 (Report of Insp. Barry Constantine dated January 25, 2017).

⁵¹¹ Exhibit P-0467 (Report of Insp. Barry Constantine dated January 25, 2017).

⁵¹² Exhibit P-0467 at p 66.

It appears, however, that Supt. Boland's email was unclear as it raised further questions as seen in the response sent four days later from one of the communications technicians, Danielle Green:

The CR is not done automatically. You have to get the FPS# (fingerprints #) from the CNI if it is positive. Do you mean PERS, CNI and CFRO? CFRO is done automatically with PERS and CNI.

Supt. Boland responded to Ms. Green's email:

Yes, that's correct. I am referring to all checks that come back from a 10-29, (PERS, CNI and CFRO) **I am not asking for the Criminal Records check** [Emphasis added].

Supt. Boland's response was only sent to Ms. Green and Sgt. Jesso.

Approximately a month later, it came to the attention of Supt. Boland that his response had not been sent to all Communications Centre staff so he instructed that it be sent. This was done by forwarding the complete email chain. Ultimately, the communication on this issue that was distributed to the Communications Centre staff is a convoluted series of email that they would have to scroll through in an attempt to glean the message. The email chain includes Supt. Boland's original message to include "any additional information" without explanation as to what that might mean. Furthermore, the final email in the series is that of Supt. Boland in which he states that he was not referencing a Criminal Records check. This too could cause confusion as to whether the criminal records information is to be conveyed in response to a 10-29 query. Insp. Constantine confirmed in his evidence that up to that point in time, this was the extent of communications sent to staff in an effort to clarify the situation. No further directive had been given.

While, no doubt, this communication was intended to offer clarity, at best it is confusing. At worse, it could potentially have confounded the problem. In its final written submission, the RNC stated that it was in the process of confirming and ensuring that all communications personnel were familiar with the 10-codes.

A Second Missed Opportunity?

En route to Mitchells Brook, Cst. Smyth also had a discussion with RCMP officer, Cst. Adrian Cox. Cst. Smyth requested Cst. Cox to conduct a search of the RCMP's Police Reporting and Occurrence System (PROS) in the name of Donald Dunphy. PROS is the RCMP's internal database system. There is no record or transcript of this

conversation and neither officer recorded any notes of what was relayed in terms of the results of the search. The RCMP provided a document to the Commission containing the results of the PROS search.⁵¹³ It recorded that Mr. Dunphy was a complainant on two files and that in 2012 he was arrested for possession of marijuana, but released without charge after it was confirmed he had a permit to grow it for medical purposes.

There was no mention on the PROS search report of the uttering threats charge which had been lodged by Debbie Dunphy and which resolved by way of a peace bond. Cst. Smyth acknowledged, however, that he had been told of the uttering threats charge by Cst. Cox. Later in the Inquiry process, the RCMP discovered another document which was then disclosed to the Commission. This was a General Report contained in the PROS system in relation to Mr. Dunphy's 2012 file.⁵¹⁴ This report was created by Cpl. Lush at the time of his encounter with Mr. Dunphy. In creating this report, Cpl. Lush cut and pasted information from the CPIC system into the report. This information contained the "caution V" as well as the note "violence, drugs". An audit conducted by the RCMP determined that Cst. Cox had accessed this document on April 5, 2015 during his search in Mr. Dunphy's name prior to the shooting and that he had conducted a criminal records search in Mr. Dunphy's name.⁵¹⁵ Cpl. O'Keefe also acknowledged that he had viewed Cpl. Lush's report on the morning of April 5, 2015 and was of the opinion that the information regarding the violence flag should have been relayed to Cst. Smyth.⁵¹⁶

Cst. Cox could not recall if he relayed the information included in these reports, including the violence caution, to Cst. Smyth. Cst. Smyth testified that he did not receive the information related to the violence flag. Cst. Smyth's assertion appears supported by a conversation that Cst. Cox had after the shooting on April 5, 2015, with a staff member of the RCMP Call Centre. In that conversation, Cst. Cox referenced the uttering threats charge but did not mention any cautions on Mr. Dunphy's file.

Would it have mattered?

There can be no doubt that background checks are extremely important to police officers in carrying out their duties. Cst. Smyth testified that the primary purpose in requesting background information on Mr. Dunphy, when he called Mr. Oram, was to assist with his personal risk assessment in attending at Mr. Dunphy's residence.⁵¹⁷ He also testified that perhaps the most important aspect of a CPIC check is the CNI portion

⁵¹³ Exhibit P-0141.

⁵¹⁴ Exhibit P-0302.

⁵¹⁵ Exhibits P-0658 and P-0659.

⁵¹⁶ Transcript of Evidence of Cpl. Trevor O'Keefe, January 26, 2017 at p 9.

⁵¹⁷ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at p 46.

which contains the cautions and applicable histories.⁵¹⁸ Insp. Constantine also emphasized the importance of obtaining any information regarding cautions on officer's personal risk assessment:

MR. KENNEDY: Sir, so what does that V for violence or that caution V tell you if you're a police officer either responding to a scene or doing a – or checking on someone?

INSP. CONSTANTINE: Well, what it tells me is that he's had involvement or she's had involvement with the police before and there was some element of an offence that caused the officer or – yeah, I guess the officer who would make those remarks and enter it on the file. There was some events that occurred that would make the officer think that he has a propensity towards violence.

MR. KENNEDY: So it would make you more cautious?

INSP. CONSTANTINE: Of course, yes.

MR. KENNEDY: And it could change your risk assessment if you were planning to proceed to a call on your own.

INSP. CONSTANTINE: Of course.⁵¹⁹

Cpl. Wayne Knapman, an RCMP expert in use of force, did not view caution flags on Mr. Dunphy's file as being of much significance, if any. He assumed the violence caution existed because of the, rather dated, charge of uttering threats. If the caution flag had been part of the PERS (current) information it would have been of concern to Cpl. Knapman:

CPL. KNAPMAN: But I believe he had that information with respect that he received from Constable Cox saying that there was a withdrawn uttering threats charge. When I look at what we call a Criminal Name Index – and I'll be frank that a lot of police officers are given that information and it's not paid to it attention because it's dealing with a matter that, again, when there was a charge but didn't result in a conviction. So if it was withdrawn, they have to put the weight, you know, did it actually happen? The charge was withdrawn. I know in this case it went to a peace bond.

I believe, in my opinion, that he was aware of that uttering threats charge, which would be indicative of this V, and my opinion would be the same.

My opinion would be different if it was a caution under 29, which would mean that it was very recent. We're dealing with a Criminal Name Index that's 10 years old.⁵²⁰

⁵¹⁸ Transcript of Evidence of Cst. Joseph Smyth, January 18, 2017 at p 115.

⁵¹⁹ Transcript of Evidence of Insp. Barry Constantine, February 21, 2017 at p 111.

In the two pages of handwritten notes contained in Cst. Smyth's yellow file folder, the only information recorded by Cst. Smyth from his inquiry of Mr. Oram was information pertaining to Mr. Dunphy's vehicle. There is no mention of any uttering threats charge or other information that he received from either Mr. Oram or Cst. Cox.

Cst. Smyth stated in his evidence that, if he had known about the violence flag, it would have changed how he went about his visit with Mr. Dunphy in that he would have felt an obligation to take another officer. He would not have necessarily assumed that the violence flag was related to the uttering threats charge which had been withdrawn. The following is an excerpt of his evidence on this issue:

MS. CHAYTOR: Constable Smyth, would the receipt of this information have made any difference in how you went about doing your visit with Mr. Dunphy on April 5?

CST. SMYTH: Yes, it would.

MS. CHAYTOR: What would you have done differently?

CST. SMYTH: I would have been obligated to take additional resources, other officers.

MS. CHAYTOR: You would have been obligated?

CST. SMYTH: I feel it as an obligation and a responsibility that when we're seized with that type of information that we take it seriously and we go in such a fashion that we could address a person who is known to be violent.

MS. CHAYTOR: Prior to visiting Mr. Dunphy, did you nonetheless know whether or not he had a criminal record?

CST. SMYTH: Sorry?

MS. CHAYTOR: Prior to visiting Mr. Dunphy, did you know whether or not he had a criminal record?

CST. SMYTH: I had known from speaking with the RCMP that there had been charges laid.

MS. CHAYTOR: Okay, and what charges did they tell you had been laid against Mr. Dunphy?

⁵²⁰ Transcript of Evidence of Cpl. Wayne Knapman, March 2, 2017 at p 120.

CST. SMYTH: There was some drug-related charges, but were – I think that were resolved and determined that he had a medicinal license and also that, I believe, there was an additional search there. There was some allegation of drugs being sold to high school kids and there had been an uttering-threats complaint that was resolved with a peace bond.

...

MS. CHAYTOR: Well, all the information that I've now shown you. For example, there is the V-flag and it does mention drugs, but if the extent of his criminal record had been a possession conviction, sometime ago, and you know that he's – had been charged with uttering threats sometime prior and that resulted in a peace bond. With that amount of information, would that have changed your decision in how you visited Mr. Dunphy that day?

CST. SMYTH: If I had solely the caution violence, and not knowing exactly where that derived from, then I would have to assume that it could be from a history of violence that I'm not aware of, so I had to treat it seriously.

...

CST. SMYTH: It could hypothetically be entered into it from a different part of the country, and while the incident may not have resulted in a criminal conviction that you'd find on their record, it may be an incident that indicates a propensity of violence that I don't know the details of, so I have to treat it seriously enough that I don't know the details.⁵²¹

I accept that if Cst. Smyth had known about the violence caution on Mr. Dunphy's file, it would have at least caused him to re-think his strategy of visiting Mr. Dunphy alone.

⁵²¹ Transcript of Evidence of Cst. Joseph Smyth, January 17, 2017 at pp 52-54.

RECOMMENDATIONS

Recommendation 1 (Chapter 12, Page 194)

Crisis intervention and de-escalation (CID) training should be implemented for all police officers in this Province (not just RNC officers), with mandatory requalification every three years, and the RNC should be provided with adequate resources for this.

Commentary: With better training in de-escalation, the situation might not have escalated as it did or Cst. Smyth might have been prompted to remove himself from the residence before lethal force was required.

Recommendation 2 (Chapter 13, Page 210)

The PSU should remain in house at RNC Headquarters and continue as a permanent unit under the direct supervision of the Criminal Investigation Unit of the CID-IOC, or such other unit of that division as the RNC deems appropriate. The RNC's organizational chart should be updated to reflect this change and the organizational chart and reporting lines should be followed in the future. Investigations should commence with a formal complaint and files should always be opened.

Commentary: The PSU in April 2015 was acting without proper supervision.

Recommendation 3 (Chapter 10 – Finding 4, Page 90)

The RNC should take measures to ensure that police officers engaged in threat assessments scrupulously observe the *Charter* requirement to protect the sanctity of the home; entry into private residences without a warrant should be only with the voluntary and informed consent of the home owner, following identification, including rank and unit assignment.

Commentary: Donald Dunphy did not provide informed consent because he had not been told Cst. Smyth was with the PSU.

Recommendation 4 (Chapter 15, Page 220)

The investigating officers in police-involved shootings should maintain an attitude of suspicion, and continue with a rigorous and robust investigation until the involved police officer's version of events has been completely examined and tested.

Commentary: This is current RCMP and RNC policy but was not followed in the present case.

Recommendation 5 (Chapter 16, Page 229)

To avoid the appearance of preferential treatment for police officers, the Province should make arrangements for the investigation of police-involved serious incidents or deaths by a civilian-led Serious Incident Response Team (SIRT), either by participation in a regional organization or through memoranda of agreement with other provinces.

Recommendation 6 (Chapter 8, Page 59)

The RNC should develop a protocol for when home visits are to occur in proactive policing, identifying the factors to be considered and how supervision and oversight by senior officers is to occur.

Recommendation 7 (Chapter 8, Page 59)

The RNC should undertake a review to determine and institute best practices for conducting threat assessments in proactive policing to ensure standardization of the process and application of appropriate criteria or protocols.

Recommendation 8 (Chapter 12, Page 197)

The RNC should review its use of force training, including its courses of fire, and develop standardized lesson plans and curricula with corresponding evaluations. The RNC use of force training should be consistent with current national standards.

Recommendation 9 (Chapter 12, Page 195)

The RNC should ensure that instructors for use of force and CID are qualified adult educators with appropriate training.

Recommendation 10 (Chapter 12, Page 196)

The RNC should adopt a modified version of the PERF's Critical Decision-Making model⁵²² for incorporation into use of force and CID education and should be provided with adequate resources for this.

Recommendation 11 (Chapter 12, Page 198)

The RNC should review and update its Use of Force Manual to use terminology that better reflects modern use of force, crisis intervention and de-escalation (CID) principles.

Recommendation 12 (Chapter 12, Page 198)

The RNC should incorporate scenario-based training into its standardized lesson plans and curricula.

Recommendation 13 (Chapter 8, Page 62)

The RNC should ensure that all communications personnel are familiar with the call codes (10-codes) and that their training is appropriately documented.

Recommendation 14 (Chapter 8, Page 63)

The RNC should proceed with its plan to develop a technical and a policy and procedure manual with respect to the communications centre and call code requests as soon as resources are available

⁵²² "PERF'S 30 Guiding Principles on Use of Force" in *Guiding Principles on Use of Force* (Washington, D.C: Police Executive Research Forum, 2016) 33.

Recommendation 15 (Chapter 8, Page 60)

The RNC should educate and train all RNC officers in personal risk assessment during basic training and all serving police officers in the next three years.

Recommendation 16 (Chapter 12, Page 197)

The RNC should review the means of presenting Module 4 to officers and explore whether in-class presentations might be a more effective way to teach officers the Module 4 material.

Recommendation 17 (Chapter 9, Page 67)

The RNC should set out in writing in the appropriate manual the instruction for government employees to pass on to the RNC any communication which raises a security concern, without attempting to definitively interpret the communication.

Recommendation 18 (Chapter 17, Page 237)

In determining whether to communicate with the public during investigations, the RNC should adopt a policy of periodically assessing whether a release of information is important for preserving public confidence and increasing transparency, and whether the benefit of that clearly outweighs the paramount goal of not impairing the integrity of the investigation.

Recommendation 19 (Chapter 17, Page 239)

The RNC should develop a clear policy regarding a subject officer's return to work after a serious incident.

Recommendation 20 (Chapter 7, Page 55)

The RNC should continue its recently adopted practice of reviewing all reported incidents of use of force, not only those where remedial training has been recommended, and should ensure use of force data is regularly analysed to identify problematic trends or potential deficiencies in training. The RNC should be provided with adequate resources for this.

Recommendation 21 (Chapter 12, Page 199)

The RNC should ensure that verbal and non-verbal communications are taught during basic training to create a foundation for programs such as CID. All serving police officers should receive the same training in the next three years.

Recommendation 22 (Chapter 10 – Finding 5, Page 97)

The RNC should ensure that its note-taking policy is enforced to require all officers to maintain active notebooks.

Recommendation 23 (Chapter 13, Page 210)

Regulations should mandate that the RNC determine the level of close protection required for the Premier and other public officials. The decision should not be that of the Premier, the Premier's Office or the public official involved

Recommendation 24 (Chapter 13, Page 210)

Officers performing close protection services with the PSU should not be the same ones carrying out intelligence gathering with respect to persons of interest in threats against the Premier or public officials.

Recommendation 25 (Chapter 10 – Finding 3, Page 77)

Any issue regarding one officer patrols should be left for resolution in collective bargaining.

Recommendation 26 (Chapter 12, Page 201)

The Province should continue to pursue a collaborative approach, such as the Memphis Model, between the police and health care providers.

Recommendation 27 (Chapter 12, Page 202)

Before any decision is taken to implement body cameras for police officers, careful analysis should be made of the impact this might have on funding for other initiatives.

Recommendation 28 (Chapter 17, Page 237)

The RNC should have funds provided to hire a professional media relations person to assist with creating communications strategies and policies and advising RNC members with respect to communications with the public.

Recommendation 29 (Chapter 10 – Finding 15, Page 148)

An Independent Observer's mandate and duties should be clearly defined before the Independent Observer commences work.

Commentary: The details of the procedures and protocols that the Independent Observer and the investigating agency are to follow should be clearly articulated and communicated to all parties involved. The Independent observer should follow a protocol that objectively measures the integrity and impartiality of the investigation.

Recommendation 30 (Chapter 10 – Finding 15, Page 148)

An Independent Observer should have unrestricted access to members of the investigating force and the disclosure collected, but should not have direct contact with any potential witnesses.

Commentary: An Independent Observer is not an investigator and should not be permitted to take any investigative steps. If the Independent Observer has concerns during the investigation or suggestions that could improve the impartiality, fairness or transparency of the investigation, these should be

communicated to the investigative team. The investigative team should maintain final decision-making authority over the direction of the investigation.

Recommendation 31 (Chapter 10 – Finding 15, Page 149)

An Independent Observer should be subject to appropriate terms of confidentiality, but the ultimate findings of the Independent Observer should be made public, subject to any redactions or other modifications that may be needed to protect legitimate privilege or privacy interests.

Commentary: While it is not appropriate for an Independent Observer to make public statements or speak to the media other than with the advance approval of the investigative body, to maximize transparency and accountability of the process the Independent Observer's ultimate findings should be published.

Recommendation 32 (Chapter 10 – Finding 15, Page 158)

A Family Liaison should be appointed in police-involved deaths to assist the family of the deceased. The Family Liaison should be trained to deal with people experiencing grief and trauma. The Family Liaison should also have training and experience to successfully work with people from diverse social and cultural backgrounds, and with families that have dealt with persons in crisis.

Recommendation 33 (Chapter 10 – Finding 15, Page 162)

Government should consider preparing a brochure to inform bereaved families on issues relating to viewing of remains following an autopsy.

Recommendation 34 (Chapter 16, Page 231)

A period of 90 days should be set as the desired maximum length of an investigation with a requirement of an interim report if the investigation proceeds beyond 45 days.