

**IN THE MATTER OF THE COMMISSION OF INQUIRY  
INTO THE DEATH OF DONALD DUNPHY**

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**WRITTEN SUBMISSIONS ON BEHALF OF THE RCMP**

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**COMMISSION OF INQUIRY**

**RESPECTING THE DEATH OF  
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## OVERVIEW

1. The Commission of Inquiry into the Death of Donald Dunphy was established on September 23, 2016 with a mandate to examine the facts and circumstances surrounding the death of Donald Dunphy. Mr. Dunphy was fatally shot in his home in Mitchells Brook, NL on April 5, 2015 by Cst. Joe Smyth, an officer of the Royal Newfoundland Constabulary (“RNC,”) and then A/Sgt. in charge of the Protective Services Unit (“PSU.”) Mr. Dunphy’s death was investigated by the Royal Canadian Mounted Police (“RCMP,”) B Division.
2. The RCMP’s investigation did not disclose any wrongdoing on the part Cst. Smyth, and no charges were laid. The RCMP maintains that its investigation was carried out in good faith and was at all times thorough and impartial. Decisions made in any investigation may be critiqued and no investigation is perfect. Investigations in which police investigate police, by their nature, almost inevitably raise accusations of bias and tunnel vision on the part of the investigating agency, however such accusations are almost always based on perception as opposed to reality. In many jurisdictions these perception problems are addressed through the use of independent bodies to observe, investigate or review investigations.
3. We do not propose to review the facts of this matter, except as necessary in the course of submissions on each issue.

## TERMS OF REFERENCE

4. The only term of reference of this Inquiry that engages the involvement of the RCMP is 3(1)(j): The commission of inquiry shall ascertain whether there were any material deficiencies in the investigation into Mr. Dunphy's death.<sup>1</sup>
5. Before the Commission can assess the investigation pursuant to this term, it is necessary to decide what "material deficiency" means.
6. *Black's Law Dictionary* defines "deficiency" simply as "A lack, shortage, or insufficiency of something that is necessary,"<sup>2</sup> however, it speaks mainly in terms of the amount by which a debt exceeds the sum paid or realized on a sale of property. The English *Oxford Living Dictionary* defines "deficiency" as "A failing or shortcoming" and gives the synonyms "defect, fault, flaw, imperfection, weakness..."<sup>3</sup>
7. As for "material," *Black's* defines it as "Of such a nature that knowledge of the item would affect a person's decision-making."<sup>4</sup> The *Oxford Living Dictionary* defines the adjective "material" in the legal sense as "significant or relevant, especially to the extent of determining a cause or affecting a judgement."<sup>5</sup>
8. From these definitions, a concept emerges of a "material deficiency" as a defect, flaw, or shortcoming that changed the outcome of a matter or "determined a cause." The question is whether a deficiency can be said to have changed the outcome of this investigation, not whether it might possibly have changed the outcome of a hypothetical investigation.

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<sup>1</sup> *Commission of Inquiry Respecting the Death of Mr. Donald Dunphy*, NLR 57/16, (*Public Inquiries Act*, 2006). It is arguable whether 3(1)(c) encompasses the actions of Cst. Adrian Cox, in terms of "information [that] provided the basis" for Cst. Smyth's attendance that day, and whether 3(1)(e) encompasses the actions of RCMP officers when carrying out the investigation, however, these matters will essentially be subsumed in the discussion of 3(1)(j).

<sup>2</sup> 10<sup>th</sup> Ed., St. Paul: West Publishing, 2014.

<sup>3</sup> Oxforddictionaries.com 2017.

<sup>4</sup> 10<sup>th</sup> Ed., St. Paul: West Publishing, 2014.

<sup>5</sup> Oxforddictionaries.com 2017.

## EXPERTS IN INVESTIGATION

9. The Commission heard from two expert witnesses with regard to investigations, Gareth Jones, former Investigator with the Special Investigations Unit for Ontario, and currently of the Ontario Ombudsman's Office, and Susan Hughson, the Executive Director of the Alberta Serious Incident Response Team ("ASIRT.") Each of them was qualified as an expert in the investigation of serious incidents involving police officers.<sup>6</sup>
10. Mr. Jones provided a report to the Commission after reviewing some, but not all of the RCMP's investigation file.<sup>7</sup> His main conclusion was that:

In many respects this investigation was conducted thoroughly and objectively, at least in my view. There is no evidence that I can see of a deliberate attempt to suppress or destroy evidence that was central to the only issue the RCMP investigators had to investigate - was A/Sgt. Smyth's use of force criminal or not?

However, in some respects the investigative process fell short of meeting the standards expected of a thorough and objective investigation into a police shooting investigation, as outlined above.<sup>8</sup>

11. In early 2016, the RCMP requested that ASIRT review its investigation and provide a report. The reasoning for engaging ASIRT was articulated by Chief Superintendent Boland, who was RCMP B Division's Criminal Operations Officer at the time of the incident:

Where ASIRT is an investigative entity, they have experienced, skilled, trained investigators and they would be looking at our investigation from an investigator's set of eyes, lenses or perspective, and I saw their work as being a peer-to-peer process, to have a look – did we miss anything.

We haven't completed the investigation yet. The ASIRT work is within the start-finish points of the investigation. And I saw their work as just, like I said, check and balance, a quality assurance, to have a look at the

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<sup>6</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 11, Susan Hughson, Transcript Vol. 36, March 6, 2017, p. 109.

<sup>7</sup> Jones Report, February 7, 2017, Ex. P-0770, p. 6.

<sup>8</sup> Jones Report, February 7, 2017, p. 62.

investigation and see if we've missed anything, or if we could've done anything differently.<sup>9</sup>

12. ASIRT's investigator, Mike Arrowsmith, reviewed the RCMP's entire investigative file and provided a briefing note to the Executive Director, Susan Hughson, who addressed her summary report to the RCMP.<sup>10</sup>
13. The ultimate conclusion in ASIRT's report, dated August 30, 2016, was as follows:

Notwithstanding the earlier comments, this investigation was done well, following best practices and major case management principles. While some shortcomings were identified, when viewed in the context of the investigation as a whole, they do not taint the overall quality of the investigation and the reliability of the evidence obtained. ASIRT has very carefully reviewed the RCMP investigation into the circumstances surrounding the officer involved shooting that resulted in the death of Donald Dunphy. Subject to the observations shared earlier, the investigation was thorough and provides sufficient context to make a determination, based on evidence, as to whether the subject officer was lawfully placed, and to assess whether the use of force was authorized in law. The investigation reflects an intention to be objective and fair and was reported in an organized, logical, professional, and understandable manner.<sup>11</sup>

14. Both experts agreed that the issues being addressed were often matters of judgment, on which reasonable and educated people could disagree.<sup>12</sup>

### **PERCEIVED BIAS**

15. The main thrust of the criticism leveled at the RCMP's investigation of this matter was that there was a perceived bias on the part of the RCMP and its members in favor of Cst. Smyth, based on his status as a "fellow police officer." It is alleged that this perceived bias led to "tunnel vision" or lack of an open mind, causing the

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<sup>9</sup> C/Supt. Boland, Transcript Vol. 23, Feb. 15, 2017, p. 62.

<sup>10</sup> ASIRT Report, Ex. P-0004.

<sup>11</sup> ASIRT Report, Ex. P-0004, p. 10.

<sup>12</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 79, Susan Hughson, Transcript Vol. 36, March 6, 2017, p. 136.

RCMP to accept Cst. Smyth's version of events early and unquestioningly, to the exclusion of other possible scenarios.

### **Different v. Preferential**

16. 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 citizen who had just shot and killed someone, even in self-defence. This idea is misguided, and ignores the unique situation Cst. Smyth was in when compared to an ordinary citizen.
17. Police officers, unlike ordinary citizens are trained and authorized to carry weapons and use force in the line of duty. For this reason, police officers in the execution of their duties (and others in limited circumstances who are enforcing the law) have the protection of s. 25 of the *Criminal Code*, which states in relevant part:

25 (1) Every one 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.

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<sup>13</sup> *Criminal Code*, R.S.C 1985, c. C-46, s. 25.

18. This section of the *Criminal Code* places a police officer in the execution of his duties on a very different footing from an ordinary citizen. Numerous witnesses testified at the hearing of the Inquiry as to the protections afforded a police officer by s. 25 of the *Criminal Code*, and why this accorded a police officer different treatment than a civilian.<sup>14</sup> This is because if the officer was *prima facie* acting within the scope of his duties, the investigation centers around determining if he was lawfully carrying out his duty and whether the force used was excessive. This is very different from investigating a civilian homicide, which often begins with having to determine who killed the deceased.
19. In addition, there was evidence presented that a police officer who was not engaged in his duty, but was suspected of, for example, impaired driving or domestic violence would get no “special” treatment whatsoever.<sup>15</sup>
20. It was clear that at no time did the RCMP have grounds to arrest or detain Cst. Smyth.<sup>16</sup> He could not be handcuffed, compelled to give a statement, or in fact, compelled to do anything.
21. Ms. Hughson of ASIRT commented on the unique position of a police officer involved in a serious incident:

**MS. RASMUSSEN:** Thank you, and when we are talking about the timing of taking a statement from an officer involved in a critical incident, when you were having that discussion you said these types of investigations were unique, and so is it fair to say that you wouldn't, you couldn't and in fact you shouldn't treat a police officer in this position the same as you would a civilian who had just killed someone?

**MS. HUGHSON:** I think it is dangerous to even assume or to believe that they are similar in any way, shape or form. When you're looking ... one of the examples in my pre-interview that was given was the person who is driving impaired and kills, has a collision and kills a family, we would take a statement from that person at the time if we could and that's absolutely correct but this is a person who has gone into a critical incident for a specific lawful purpose, which is not what that person in the impaired driving

<sup>14</sup> Cpl. Burke, Transcript Vol. 18, Feb. 7, 2017, pp. 11, 39, Vol. 20, Feb. 9, 2017, pp. 10, 34-5.

<sup>15</sup> Cst. Galway, Transcript Vol. 14, Feb. 1, 2017, p. 124.

<sup>16</sup> Cst. Galway, Transcript Vol. 14, Feb. 1, 2017, p. 123, Cpl. Burke, Transcript Vol. 20, Feb. 9, 2017, p. 93, Cst. Cox, Transcript Vol. 26, Feb. 20, 2017, p. 66.



situation is contemplating nor is it the same situation when you have somebody who is armed with a firearm who shouldn't be, who is not lawfully entitled to carry that firearm like a police officer is, or to use force like a police officer is in the execution of his duty and then the situations escalate.

I don't think there is – there are similarities, but it's not the same. The – generally speaking, there's – with few exceptions, ah, ASIRT investigated a homicide involving a police officer, but police officers get up in the morning – and I don't think that generally, in officer involved shootings; they went out that day thinking that they would be involved in an incident where somebody would die. And, the impact of those incidents, and the mindset that they have when they go into those incidents is very different than what one might find in a criminal context.

So, I do think that is a very specialized unique area, and I do think that while you should examine the science behind it – and it is controversial – in particular with respect to the delay. There are articulable principled reasons put forward by psychologists – why the situation is different. And why it should be treated differently. And, I think there's a principled articulable reason to follow that advice in the case of an officer involved shooting. And I think you can take the requisite steps to minimize the risks that that delay might give rise to.

**MS. RASMUSSEN:** And so, would you agree that that differential treatment is in no way preferential treatment, based on some sort of brotherhood of police investigating police?

**MS. HUGHSON:** It has nothing to do with brotherhood. I can tell you...<sup>17</sup>

### **Smyth's account was tested but consistent**

22. The first person to arrive at the scene after the incident was Cst. Adrian Cox, of the RCMP's Holyrood Detachment. Cst. Cox is the officer with whom Cst. Smyth consulted to ask about a background check of the RCMP files previous to his visit to Mr. Dunphy's. When the shooting call came in, Cst. Cox already knew Cst. Smyth's name, that he was from the RNC, and why he had been going to Mitchells Brook that day. Cst. Cox testified that when the call came in, he raced to the scene to be met by Cst. Smyth in the driveway of Mr. Dunphy's home. After Cst. Smyth identified himself, Cst. Cox had a brief conversation with him:

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<sup>17</sup> Susan Hughson, Transcript Vol. 36, March 6, 2017, p. 134.

**MS. RASMUSSEN:** And I think you had a brief conversation, you said, with him and asked him what had happened and he gave you a brief account. You then went to the window to look in the window, right?

**CST. COX:** That's correct.

**MS. RASMUSSEN:** What was your purpose in looking in the window?

**CST. COX:** Some of it was to corroborate what he was saying, the other part was to see if indeed Mr. Dunphy was deceased or if I could see if he was deceased.

**MS. RASMUSSEN:** And when you looked in the window did anything corroborate what he was saying?

**CST. COX:** Mr. Dunphy was in the chair that he described. And I did see a firearm or the barrel, what I believed to be a firearm.

**MS. RASMUSSEN:** If you had not seen a firearm would that have caused you any concern?

**CST. COX:** Just because I couldn't see it from the window doesn't mean there – wouldn't mean there wasn't one there. I still would have had to go in the house like we did. [Emphasis added.]<sup>18</sup>

23. Clearly, despite the fact that Cst. Cox already had more information than one would normally have going into an emergency call, he still did not take what Cst. Smyth said at face value. He proceeded to look in the window of Mr. Dunphy's home to see whether the scene inside accorded with Cst. Smyth's account.
24. Next on the scene were Cst. Downey, who made note of what Cst. Smyth told her, and Cpl. Trevor O'Keefe, who was also aware of Cst. Smyth's previous inquiry over the phone. As among these three RCMP officers, everything they had learned up to that point was consistent with Cst. Smyth's account of the events, yet there is nothing to indicate that they would not have followed up any indication of something suspicious.
25. In large measure, the perception that the RCMP was quick to accept the veracity of Cst. Smyth's version of events is due to the fact that they had much more

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<sup>18</sup> Cst. Cox, Transcript Vol. 26, Feb. 20, 2017, p. 66.

information much earlier in the process of the investigation than they normally would:

**CPL BURKE:** I think the issue was that we knew a lot of information before we attended the scene, not Major Crime but the RCMP itself. Constable Smyth advised the RCMP that he was attending Mitchells Brook. He told us why he was going there and he told us where he was going. He made checks on Mr. Dunphy. So we had all this information I can –

**THE COMMISSIONER:** But none of that would go to whether there was a culpable homicide as opposed to a non-culpable homicide or a justifiable use of force.

**CPL BURKE:** No, but it would, it would put him in Mitchells Brook and a reason to put him in Mitchells Brook. And I think the first responders didn't – it wasn't a surprise to them that Constable Smyth was in Mitchells Brook. Another investigation or another incident of homicide where it's a civilian person, we would have no knowledge of that person being in that area and it would come to a surprise and we'd have to learn all this information when –

**THE COMMISSIONER:** But it was –

**CPL BURKE:** – we got there.

**THE COMMISSIONER:** But it was a surprise that the person had been shot?

**CPL BURKE:** It was, yes.

**THE COMMISSIONER:** And at that point, you didn't know whether, in fact, the homicide, which it was, would have been culpable or non-culpable?

**CPL BURKE:** Right.

**THE COMMISSIONER:** And you wouldn't have known whether there was a justifiable use of force under section 25 of the Criminal Code?

**CPL BURKE:** Right, but the utterances and, you know, people that commit homicides don't usually discuss what they did immediately. And, in this case, there was discussion. So we are gaining a lot of information fairly quickly when we attended that scene, so that would be a difference, I guess.<sup>19</sup>

26. This was not a conventional homicide investigation. Here the investigators knew the subject officer was in the area and why. He called authorities, remained on the scene, and gave an account that appeared to accord with the scene as found.

<sup>19</sup> Cpl. Burke, Transcript Vol. 18, Feb. 7, 2017, pp. 39-40.

As such, there was good reason for the investigators to form a preliminary view of what occurred. That is no indication that their opinion would not have changed had contrary evidence come to light, nor that they would not pursue every reasonable avenue of investigation. Indeed, Mr. Jones was very complimentary of the thoroughness of their investigation and many of the paths they explored.

## Interviews

27. One of the aspects of the investigation that Mr. Jones and ASIRT found most problematic was the overly friendly tone of the RCMP's interviews of Cst. Smyth, and the fact that too much information was shared. This was seen as indicative of the premature and uncritical acceptance of his version of events, and the tendency to over empathize. In fact, the team commander, Sgt. Osmond, who was monitoring the first interview, had pulled the interviewers Cpl. Burke and Cpl. Henstridge aside immediately following the interview and put them on notice that the tone was overly friendly.<sup>20</sup>
28. Cpl. Henstridge was very forthcoming in his testimony at the Inquiry in terms of his empathy for Cst. Smyth. In hindsight, he clearly felt that Sgt. Osmond's criticism was justified,<sup>21</sup> however, he maintained that he did not have a closed mind in terms of other possible evidence that might have appeared.<sup>22</sup> Further, Cpl. Henstridge made it clear that his empathy extended not only to Cst. Smyth's situation, but also to the entire tragedy that had unfolded, leaving Meghan Dunphy without her beloved father.<sup>23</sup>
29. While both Mr. Jones and ASIRT were critical of what they described as the overly empathetic approach to Cst. Smyth's interviews, there is no evidence to suggest that the investigators' empathy clouded their judgment to the point of

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<sup>20</sup> Sgt. Osmond, Transcript Vol. 27, February 20, 2017, pp. 79-80.

<sup>21</sup> Cpl. Henstridge, Transcript Vol. 29, Feb. 23, 2017, pp. 121-4.

<sup>22</sup> Cpl. Henstridge, Transcript Vol. 29, Feb. 23, 2017, pp. 119, 121, 123, Vol. 30, Feb. 24, 2017, p. 32.

<sup>23</sup> Cpl. Henstridge, Transcript Vol. 29, Feb. 23, 2017, pp. 115, Vol. 30, Feb. 24, 2017, p. 32.

closing their minds to the exclusion of alternate scenarios, should such evidence have come to light.

### Press Release

30. The other major issue that Mr. Jones raised was the press release put out by the RCMP on April 7, 2015.<sup>24</sup> This caused him concern for two reasons: he believes it was an indication of a premature acceptance of Cst. Smyth's account, and he was concerned that it would discourage witnesses from coming forward because they might think that the RCMP had already determined it was an open-and-shut case.<sup>25</sup> ASIRT did not comment on the press release.<sup>26</sup>
31. Sgt. (now S/Sgt.) Osmond had a hand in drafting the release and gave evidence at the Inquiry with respect to it:

**MS. O'BRIEN:** – the release to be, the press release.

I understand that you had some involvement in drafting that press release.

**S/SGT. OSMOND:** Yes, I did.

**MS. O'BRIEN:** Okay.

And we know that there was a number of individuals involved in that. Do you recall whether there was any discussion or consideration in developing the draft as to how Mr. Dunphy was being portrayed in the document?

**S/SGT. OSMOND:** No. The purpose of the press release was to get as much information to the public as possible without tainting the investigation, if possible, I mean anything that taints the investigation we're not going to release anyway.

**MS. O'BRIEN:** Okay.

**S/SGT. OSMOND:** Clearly, this was a matter of high public interest and we wanted to allow the public to have as much information as they could.

**MS. O'BRIEN:** Okay.<sup>27</sup>

32. Clearly, the RCMP saw the misinformation that was apparently spreading "like wildfire" in the community (which Mr. Jones acknowledged) as the greater evil

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<sup>24</sup> Exhibit P-0570.

<sup>25</sup> Jones Report, February 7, 2017, Ex. P-0770, p. 15.

<sup>26</sup> ASIRT Report, Ex. P-0004.

<sup>27</sup> Sgt. Osmond, Transcript Vol. 26, Feb. 20, 2017, p. 94.

and they made a judgment call to release more information.<sup>28</sup> The inclusion of the language “to date” was meant to indicate that the investigation was ongoing and that no final conclusion had been drawn.<sup>29</sup> They obviously did not believe that this would “taint” the investigation, and Mr. Jones agreed there is no evidence that it did.<sup>30</sup> As for the press release possibly leaving the impression that the RCMP had formed a premature opinion of the incident, again, this is a perception and not the reality.

### Optics

33. It seems that in the end the main issues identified by Mr. Jones as problematic come down to optics. Ms. Hughson agreed that this was often the case:

**MS. RASMUSSEN:** So again there’s been a lot of talk about perception of bias always being a problem with police agencies, investigating police, in police involved incidents and or you might use the word optics as well. In your experience how often is actual bias a problem as opposed to perception?

**MS. HUGHSON:** In terms of our work, optics seem to be the primary issue, there are occasions where I have had concern, this was not one of those cases, but generally speaking, usually the biggest complaint is the optics. And my position is that a reasonably informed person understanding the circumstances and the articulation for the result understands the difference between optics, how something looks, and whether that is evidence of tunnel vision or bias.

While you always have to be concerned about perception, and that’s why I mentioned it in the letters to the RCMP that’s something that they really need to be mindful of in these types of investigations because the scrutiny is much greater than in any other investigation. So you might not have to document these decisions in your average investigations, people are going to ask you why you didn’t be more aggressive with this officer? They’re going to ask you why you didn’t encourage him to talk to you in the car. It’s important to do the right thing, if you believe you were right at the time for an articulable reason because somebody will always have a complaint.

So you can’t govern your conduct, concerned about how everybody else is going to perceive it because there will be somebody who will be dissatisfied, guaranteed. You have to do the best job possible in the circumstances you’re given.

<sup>28</sup> C/Supt. Boland, Transcript Vol. 24, Feb. 16, 2017, p. 4.

<sup>29</sup> C/Supt. Boland, Transcript Vol. 24, Feb. 16, 2017, p. 60.

<sup>30</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 69.

The optics, the perception of bias in my opinion is often high, even in our investigations where I know for a fact there is no investigational bias or tunnel vision, that I know for a fact that this is not ASIRT does not have investigators, that are concerned about protecting the blue line, or police protecting police and that are not interested in holding police accountable, so my instructions to them are make your best judgement call, follow best practices, and you're going to get criticized down the road but be prepared to articulate why you did the things you did.

**MS. RASMUSSEN:** And again you had no concern in this case of tunnel vision or any actual bias.

**MS. HUGHSON:** To me, in my opinion looking at the evidence of the investigation as a whole, there was no evidence of tunnel vision; investigational bias; or a lack of objectivity in this investigation.<sup>31</sup>

34. The fact is that optics or perception will always be an issue in a police-on-police investigation, which is why, not surprisingly, the RCMP has expressed its agreement that a civilian-led entity for this type of investigation would not only be appropriate, but welcome.<sup>32</sup>

## MINOR ISSUES

### **Cst. Cox's phone conversation with Cst. Smyth was appropriate**

35. Cst. Smyth communicated with Cst. Cox before attending Mitchells Brook. At Cst. Smyth's request, Cst. Cox properly conducted a PROS search.<sup>33</sup> He conveyed that Mr. Dunphy had prior convictions and an uttering threats charge that was withdrawn under a peace bond.<sup>34</sup> Cst. Cox offered to attend with Cst. Smyth, but the offer was declined.<sup>35</sup> Cst. Cox's interaction with Cst. Smyth was appropriate.
36. Cst. Smyth's decision to attend Mr. Dunphy's residence alone, while important to the Inquiry and any internal RNC review, has little bearing on the criminal

<sup>31</sup> Susan Hughson, Transcript Vol. 36, March 6, 2017, p. 137.

<sup>32</sup> Royal Canadian Mounted Police, Phase II submissions, Investigation of Officer-Involved Serious Incidents in Newfoundland and Labrador, March 9, 2017.

<sup>33</sup> Supplementary Occurrence Report of Cst. Adrian Cox dated April 5, 2015, P-0376 at p. 2.

<sup>34</sup> RNC Narrative Text Hardcopy - Case Summary dated April 7, 2015, P-0128 at p. 6.

<sup>35</sup> Supplementary Occurrence Report of Cst. Adrian Cox dated April 5, 2015, P-0376 at p. 2.

investigation. That said, Cpl. Knapman and others testified that Cst. Smyth's attending alone was reasonable.<sup>36</sup> Cst. Smyth's attending alone in the circumstances was not a case of officer-induced jeopardy<sup>37</sup> that could have a bearing on any criminal liability.

**Use or non-use of the term "criminal investigation" is immaterial**

37. The RCMP conducted a criminal investigation into whether or not Cst. Smyth committed a culpable homicide. Whether each involved RCMP member would use the phrase "criminal investigation" or some other term to describe the investigation is immaterial.
38. Cst. Cox, as the first member on the scene, set the tone for all members who arrived after him. Cst. Cox had spoken to Cst. Smyth hours before. He knew Cst. Smyth was an RNC officer and that he was in Mitchells Brook investigating Mr. Dunphy.<sup>38</sup>
39. When Cst. Cox arrived on the scene Cst. Smyth showed him his badge and identified himself as an RNC officer. He appeared non-threatening to Cst. Cox. He did not appear intoxicated or otherwise suspicious. Cst. Smyth told Cst. Cox that Mr. Dunphy became agitated and pointed a firearm at him. He stated he had to shoot Mr. Dunphy as a result. Cst. Cox looked in the window of the house and saw an apparently deceased Mr. Dunphy with a firearm in front of him. Cst. Cox had no evidence to contradict Cst. Smyth's story at that time.<sup>39</sup>
40. While a serious incident had no doubt occurred, Cst. Cox had no reasonable and probable grounds to arrest Cst. Smyth<sup>40</sup> nor did any of the RCMP members who arrived after him. Cst. Cox, Cpl. O'Keefe, Cst. Downey, and Cst. X, (the "first responders,") secured and cleared the scene as a potential crime scene. The scene

<sup>36</sup> Cpl. Knapman, Transcript Vol. 34, March 2, 2017, p. 104.

<sup>37</sup> Cpl. Knapman, Transcript Vol. 34, March 2, 2017, p. 137.

<sup>38</sup> Supplementary Occurrence Report of Cst. Adrian Cox dated April 5, 2015, P-0376 at p. 2.

<sup>39</sup> Supplementary Occurrence Report of Cst. Adrian Cox dated April 5, 2015, P-0376 at p. 2, and Cst. Cox, Transcript Vol. 26, February 20, 2017, pp. 18, 52, 66.

<sup>40</sup> Cst. Cox, Transcript Vol. 26, February 20, 2017, p. 66.



was held for the RCMP major crime unit (“MCU”) and forensic identification section (“FIS.”)

41. Cpl. Burke, the lead investigator, testified that this was a criminal investigation.<sup>41</sup> Cst. Smyth was the subject of the investigation. RCMP MCU worked to determine whether or not he had committed a culpable homicide under the *Criminal Code*.<sup>42</sup> The RCMP followed its national and regional policies on sudden deaths in investigating the incident.<sup>43</sup>

**First responders made reasonable judgment calls and secured the residence with the resources available**

42. The residence is in a rural location and backs on the woods. The first responders put police tape across the front of the scene and had a limited view up the driveway to the back of the house. Given there were only four officers, two were placed on the road to control the increasing local traffic as word of the incident spread. Cst. Cox and Cpl. O’Keefe cleared the residence to their satisfaction based on the evidence they had, their risk assessment, and judgment. After that, Cst. Cox remained near the front of the house. Cpl. O’Keefe, as officer in charge, met with Ms. Dunphy and was coordinating the effort.<sup>44</sup>
43. Placing an officer to guard the back of the house may have been ideal in a perfect world. However, the resources immediately available did not allow it. Once Cpl. Foote was inside, the living room was fully guarded. There is no evidence that anyone came in from the woods and tampered with the scene.<sup>45</sup> Any speculation that this potentially could have happened is immaterial. The RCMP made an appropriate judgment call to leave the back of the house unguarded based on what they knew and the location of the residence.

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<sup>41</sup> Cpl. Burke, Transcript Vol. 18, February 7, 2017, p. 28.

<sup>42</sup> Cpl. Burke, Transcript Vol. 18, February 7, 2017, p. 39, 40.

<sup>43</sup> Sgt. Osmond, Transcript Vol. 27, February 21, 2017, p. 4, RCMP Policy--B Division Operational Manual--Part 41.3, Human Deaths, P-0545, RCMP Policy—OM, ch. 41.3, Human Deaths, P-0546.

<sup>44</sup> Cpl. O’Keefe, Transcript Vol. 10, January 26, 2017, p. 36, 102-104.

<sup>45</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 73-75.

**Cst. X properly diverted the conversation with Cst. Smyth and recorded any spontaneous utterances**

44. Cst. X was tasked with transporting Cst. Smyth to the Holyrood detachment. When a more junior member like Cst. X is tasked with merely transporting the subject of a homicide investigation it is critical that he not insert himself into the matter. Cst. Smyth's status and potential jeopardy had not yet been determined by MCU. Any potential evidence that Cst. X might elicit in conversation about the incident, intentionally or unintentionally, could have had serious consequences for any future prosecution. Any information or leads that flowed from any conversation about the incident could later be inadmissible as potential "fruit of the poison tree."<sup>46</sup>
45. Officers in Cst. X's position are conditioned to divert any conversation with such a subject away from the incident.<sup>47</sup> He did so with Cst. Smyth, which was appropriate. Despite this, Cst. Smyth did speak spontaneously about the incident while in transit. Cst. X properly recorded Cst. Smyth's spontaneous utterances in his notes.<sup>48</sup>
46. On this issue the experts, Mr. Jones and Ms. Hughson, disagree. Mr. Jones feels Cst. X's diverting the conversation was inappropriate. Ms. Hughson says it was wholly appropriate. This is another example of how even reasonable experts can disagree when reviewing the finer details of an investigation. On this issue the RCMP agrees with Ms. Hughson that Cst. X's decision to keep the investigation "clean" was correct.<sup>49</sup>

**Things not requested from Cst. Smyth were immaterial to the outcome of the investigation**

47. It has been argued that Cst. Smyth should have been cautioned. The RCMP did not read Cst. Smyth his *Charter* rights because they did not have grounds to arrest

<sup>46</sup> Susan Hughson, Transcript Vol. 36, March 6, 2017, pp. 135-136.

<sup>47</sup> Cpl. Burke, Transcript Vol. 18, February 7, 2017, p. 100.

<sup>48</sup> Cst. X, Transcript Vol.9, January 25, 2017, p. 140 and Handwritten Notes of Cst. X dated April 5, 2015, P-0105.

<sup>49</sup> Susan Hughson, Transcript Vol. 36, March 6, 2017, p. 136.

him and his legal rights under the *Charter* were not triggered.<sup>50</sup> Cst. Smyth was cooperative and was providing information throughout. In the circumstances, particularly in the absence of reasonable and probable grounds to believe he had committed an offence, there was no basis to caution him. Cst. Smyth had a positive right to liberty and to be secure against unreasonable search or seizure. The RCMP had a corresponding duty to respect Cst. Smyth's *Charter* rights in those respects. The RCMP's decision not to caution Cst. Smyth was appropriate.

48. On this issue, Mr. Jones agrees with the RCMP while ASIRT/Ms. Hughson disagree. This is a further example of how even the experts can disagree when reviewing aspects of the investigation in hindsight. On this issue, the RCMP agrees with Mr. Jones that not cautioning Cst. Smyth was the correct course of action.<sup>51</sup>
49. The RCMP did not ask Cst. Smyth for his phone until April 24, 2015. He was under no obligation to provide it, but in hindsight it would have ideally been requested on the day of the incident. The phone was ultimately obtained and the data was retrieved. There is no evidence that any data was lost or that the delay in obtaining the phone affected the outcome of the investigation.<sup>52</sup>
50. The RCMP originally failed to retrieve certain BBM conversations from Cst. Smyth's phone. Cst. Smyth also failed to recall certain BBM conversations and call them to the RCMP's attention. The RCMP's not originally retrieving all the BBM conversations in the relevant date range has been adequately explained to the Commission by Cpl. Luther.<sup>53</sup> The issue was caused by an apparent software problem outside the control of the RCMP. Nothing in the originally overlooked BBM conversations was inculpatory of Cst. Smyth. All the BBM conversations

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<sup>50</sup> Sgt. Osmond, Transcript Vol. 26, February 20, 2017, pp. 81-82.

<sup>51</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, pp. 35-36.

<sup>52</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 79.

<sup>53</sup> Dunphy Inquiry Synopsis prepared by Cpl. Kent Luther, P-0799.

were ultimately retrieved.<sup>54</sup> This situation, while frustrating, was not a material deficiency in the RCMP's investigation.

51. The RCMP did not ask Cst. Smyth for a blood or urine sample on the day of the incident. As Mr. Jones testified, this is something SIU does now as a matter of course, but for a long time they did not.<sup>55</sup> The RCMP had no evidence that Cst. Smyth was intoxicated or under the influence of drugs and no such suggestion arose during the investigation. The RCMP's not asking Cst. Smyth for such samples in the circumstances was appropriate.
52. The RCMP did not photograph Cst. Smyth at the scene. The RCMP agrees it would have been best practice to do so, but Cst. Smyth's clothes were seized and there is no reason to believe not photographing him affected the outcome of the investigation.
53. The RCMP did not ask Cst. Smyth about his personnel records and RNC reporting obligations immediately. However, Cst. Smyth's employment records and his RNC report were ultimately obtained and reviewed by the RCMP in the course of the investigation.<sup>56</sup> The RCMP received Cst. Smyth's use of force reports going back five years. They also reviewed his professional standards file, which would have included any discipline records (for inappropriate use of force, code of conduct violations, or criminal records) over his career.<sup>57</sup> The RCMP's not asking Cst. Smyth about his personnel records and RNC reporting obligations immediately did not affect the investigation. The pertinent materials were ultimately reviewed and considered.
54. Cst. Smyth was not asked by the RCMP to take a polygraph. However, the RCMP appropriately consulted its polygraph expert, Sgt. Townsend, on whether Cst. Smyth's account was testable. In his expert opinion, Cst. Smyth's account

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<sup>54</sup> Forensic Data Analysis prepared by Kevin Ripa, P-0800.

<sup>55</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, pp. 22, 77.

<sup>56</sup> Cpl. Burke, Transcript Vol. 18, February 7, 2017, p. 120; Cpl. Burke, Transcript Vol. 19, February 8, 2017, p. 39; and RNC Narrative Text Hardcopy - Case Summary dated April 7, 2015, P-0128.

<sup>57</sup> Insp. Cahill, Transcript Vol. 27, February 21, 2017, pp. 31, 67, 69-70.

was not testable.<sup>58</sup> The RCMP's not asking Cst. Smyth to take a polygraph was the only appropriate course of action in the circumstances.

55. The RCMP did not seek consent from Cst. Smyth, or the RNC, to enter and search his vehicle. In hindsight, it may have been advisable for the RCMP to enter and search the vehicle. However, at the time, the evidence available did not lead the RCMP to determine a search was necessary.<sup>59</sup> Cst. Smyth's statement to the RCMP did not suggest anything of evidentiary value would be located in the vehicle. The interaction between Cst. Smyth and Mr. Dunphy occurred within the residence.
56. Cpl. Saunders looked in the window of the vehicle and saw nothing inside of evidentiary value.<sup>60</sup> While entering and searching the vehicle may have been advisable in hindsight, MCU followed the objective evidence as prudent investigators. The evidence did not lead them to conclude searching the vehicle was necessary. There is no reason to believe there was anything of value in the vehicle that was missed. The RCMP's decision not to enter the vehicle did not affect the outcome of the investigation.
57. Cst. Smyth was not asked for his medical records, but the RCMP obtained Mr. Dunphy's. There was no objective reason to seek out Cst. Smyth's medical records. None of the people the RCMP interviewed, including his wife and co-workers, led the RCMP to suspect he had physical or mental health issues. On the other hand, the condition of Mr. Dunphy's residence led the RCMP to reasonably conclude Mr. Dunphy may have issues they needed to explore.<sup>61</sup> Furthermore, Mr. Dunphy's level of disability was relevant to whether he could have physically pulled a weapon as Cst. Smyth said. It was appropriate for the RCMP to seek Mr. Dunphy's medical records, but not Cst. Smyth's, in the circumstances.

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<sup>58</sup> Sgt. Townsend, Transcript Vol. 22, February 13, 2017, pp. 10-14.

<sup>59</sup> Cpl. Burke, Transcript Vol. 18, February 7, 2017, pp. 42-44.

<sup>60</sup> Sgt. Saunders, Transcript Vol. 22, February 13, 2017, pp. 88-89.

<sup>61</sup> Cpl. Burke, Transcript Vol. 19, February 8, 2017, p. 87.

**The RCMP's interactions with Ms. Dunphy were appropriate**

58. The timing, tone, length, and content of the RCMP's interviews with Ms. Dunphy were appropriate. This is abundantly clear when one listens to the audio of these interviews. Cpl. Henstridge called Ms. Dunphy on the date of the incident, he asked if she was prepared to give a statement at that time, and she agreed. The RCMP did not simply show up at Ms. Dunphy's home unannounced.<sup>62</sup>
59. It is unfair to compare the interviews of Cst. Smyth and Ms. Dunphy in a vacuum. One is the subject of a criminal investigation, the other is the bereaved daughter of the deceased. At all times the RCMP were respectful of Ms. Dunphy. They were appropriately eager to speak to her in seeking to further the investigation.
60. The appointment of Cst. Galway as family liaison was appropriate. The RCMP went above and beyond to investigate the glasses, which Ms. Dunphy brought to their attention after the scene had been released. While this part of the investigation was ultimately not fruitful, the RCMP appropriately undertook this investigative step.
61. The RCMP did not ask Ms. Dunphy to identify her father's rifle from the scene photos. That said, there was no reason to doubt the .22 was her father's. She acknowledged he possessed an old firearm. There was no reason to believe the rifle at the scene was not the one she described in her statement.<sup>63</sup>

**The RCMP fairly reviewed Cst. Smyth's use of force in this case**

62. Cpl. Knapman provided an in-depth expert analysis of Cst. Smyth's use of force.<sup>64</sup> From the perspective of the criminal investigation, the key was to determine whether or not Cst. Smyth was lawfully placed, whether his risk assessment was so grossly erroneous as to be classified as bringing about officer-induced jeopardy, and whether or not he was justified in using lethal force in the

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<sup>62</sup> Cpl. Henstridge, Transcript Vol. 29, February 23, 2017, pp. 129-130.

<sup>63</sup> Statement of Meghan Dunphy, dated April 8, 2015, P-0037, pp. 4-5.

<sup>64</sup> Use of Force Review dated October 12, 2015 completed by Cpl. Knapman, P-0744.

circumstances. Short of that, any tactical errors by Cst. Smyth are important to the Inquiry and RNC internal investigation but not the criminal investigation.

63. Cpl. Knapman found Cst. Smyth was lawfully placed, did not put himself in officer-induced jeopardy, and lawfully used lethal force. He fairly noted where Cst. Smyth made tactical errors. The retainer of Cpl. Knapman was praised by Mr. Jones.<sup>65</sup> Sgt. Massine took no issue with Cpl. Knapman's use of force opinion.<sup>66</sup>

**The RCMP properly checked with members of the MCU regarding any conflicts of interest**

64. Sgt. Osmond appropriately asked whether the members of the MCU knew Cst. Smyth, or otherwise had conflicts.<sup>67</sup> Cpl. Burke had interacted with Cst. Smyth on a few occasions, but no conflict warranting recusal existed.<sup>68</sup>
65. Mr. Jones suggested these interactions should have been brought to the Dunphy family's attention. It is unclear what would have occurred if the Dunphy family had objected to Cpl. Burke despite there being no recusal-worthy conflict. Had the RCMP sought the Dunphys' input and then declined to follow it, nothing would have been gained.<sup>69</sup> The RCMP appropriately checked the MCU for conflicts and allowed Cpl. Burke to investigate where no recusal-worthy conflict existed.
66. It is unrealistic to expect every RCMP member who touched the file to be asked about potential conflicts, especially first responders who had to respond to the call regardless. That said, members are expected to self-identify any conflicts to their superiors.<sup>70</sup> None existed in this case.

<sup>65</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 41.

<sup>66</sup> Sgt. Massine, Transcript Vol. 38, March 8, 2017, p. 130.

<sup>67</sup> Sgt. Osmond, Transcript Vol. 25, February 17, 2017, p. 124.

<sup>68</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 61.

<sup>69</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, pp. 61-62.

<sup>70</sup> Sgt. Osmond, Transcript Vol. 27, February 21, 2017, p. 9.

**RCMP communications with Cst. Smyth were appropriate and did not prejudice the investigation**

67. Cpl. Burke, Cpl. Noel, and Sgt. Osmond each had some limited communication with Cst. Smyth at various times after the incident. None of this communication revealed information that could prejudice the investigation. The lead investigator knew where the line was for such communication and did not cross it.<sup>71</sup> For example, Cpl. Burke appropriately declined to provide Cst. Smyth a copy of his statement when he asked. Eventually, Cpl. Burke stopped responding to Cst. Smyth's correspondence altogether.<sup>72</sup>
68. The RCMP acknowledges Cpl. O'Keefe's April 10, 2015, call to Cst. Smyth to see how he was doing was ill advised. That said, Cpl. O'Keefe was a first responder, not an investigator, and he did not provide any information to Cst. Smyth that could prejudice the investigation.<sup>73</sup>
69. While Mr. Jones felt no communication should occur between the lead investigator and the subject of the investigation, he said in his report that he did this himself on one occasion.<sup>74</sup> He further acknowledged Cst. Smyth was one of the most cooperative officers he had seen and that usually such officers are represented by counsel, which would affect the way communications occurred.<sup>75</sup> The RCMP's limited communication with Cst. Smyth was appropriate in this case.

**RCMP communication with the RNC was appropriate and did not prejudice the investigation**

70. The RCMP had some limited communication with the RNC during the investigation. None of this communication revealed information that could prejudice the investigation. The RCMP provided the RNC with information as a

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<sup>71</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 68.

<sup>72</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 68.

<sup>73</sup> Cpl. O'Keefe, Transcript Vol. 10, January 26, 2017, pp. 61-64.

<sup>74</sup> Report - Commission of Inquiry Respecting the Death of Donald Dunphy, P-0770, p. 12.

<sup>75</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, pp. 16-17.



professional courtesy, given the RNC had an internal investigation to consider and also some obligation to communicate with the public about the incident.

71. The information provided by the RNC to the RCMP mostly came from the appointed liaison, Insp. Sheppard. For example, he provided access to Cst. Smyth's employment records when requested. Communication with a subject's employer could arguably occur in any investigation where, as here, employment records are relevant.
72. C/Supt. Boland, Insp. Cahill and Sgt. Osmond had an in-person meeting with Insp. Sheppard on one occasion. Insp. Sheppard also attended the second reenactment with Insp. Cahill. The RCMP did not provide any information to Insp. Sheppard or the RNC that could prejudice the RCMP investigation.<sup>76</sup>
73. The RNC did not have any say over how the investigation was conducted, observed, or reviewed. It was appropriate for the RCMP to communicate with the RNC in the limited way it did.

**The RCMP's undertaking the investigation, hiring the independent observer, and getting the ASIRT review were proper**

74. When C/Supt. Boland learned of the incident, he considered how to proceed and decided the RCMP were best placed to investigate. He communicated this decision to the various stakeholders. As more facts became known, the potential for perception problems came into focus.<sup>77</sup> In hindsight, going to a force outside the province was a viable option that may have reduced perception problems. That said, the perception problem of "police investigating police" would not have been eliminated by the RCMP asking the Halifax Regional Police to do the investigation, for example.
75. As C/Supt. Boland became more fully aware of the perception problem, he elected to retain the independent observer. This was an attempt to bolster public

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<sup>76</sup> Insp. Cahill, Transcript Vol. 27, February 21, 2017, p. 69.

<sup>77</sup> A/Supt. Boland, Transcript Vol. 23, Feb. 15, 2017, pp. 10-14.

confidence in the investigation. According to Mr. Jones, hiring of the independent observer was a step in the right direction by the RCMP.<sup>78</sup> Obviously, the choice of Justice Riche as the independent observer here is regrettable. Justice Riche admits he had difficulty stepping out of his former role as a judge.<sup>79</sup> He consistently attempted to act as an investigator, which was not in keeping with the terms of reference he signed. He ran afoul of the terms of reference when he breached the confidentiality clause and spoke to the media. For the RCMP's part, the timing of the independent observer's report vis-à-vis the RCMP's report perhaps should have been considered and explicitly decided upon.

76. Some may take issue with the RCMP's interaction with the independent observer. However, the RCMP were in a catch-22 situation on this front.<sup>80</sup> If the RCMP allowed Justice Riche to question witnesses or called certain things (but not others) to his attention, or took too heavy a hand in shaping his opinion, then there would have been a perception of a lack of independence. However, if the RCMP failed to call certain things to his attention, and took too hands-off an approach to breaches of the terms of reference, then they would be criticized for letting the observer go too far with too little information to navigate the materials. The RCMP's decision to take a hands-off approach to the observer and make a note to file regarding their issues with his report after receiving it was reasonable.
77. All that said, the RCMP's decision to hire an independent observer was made in good faith with the goal of promoting public confidence in the investigation. The independent observer did bring certain issues to the investigator's attention that were explored, and ultimately the difficulties with the independent observer here did not affect the outcome of the investigation.

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<sup>78</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 18.

<sup>79</sup> Justice Riche, Transcript Vol. 33, March 1, 2017, pp. 68, 75-76.

<sup>80</sup> Cpl. Burke, Transcript Vol. 19, February 8, 2017, p. 22.

78. The RCMP's decision to have ASIRT review the investigation was praised by Mr. Jones.<sup>81</sup> The decision to get an ASIRT review was made by the RCMP alone, in good faith, with the goal of promoting public confidence in the investigation.

**Cst. Smyth's meeting with the RNCA at the RCMP detachment was reasonable**

79. Cst. Smyth was not under arrest at the RCMP detachment. The RCMP had no grounds to arrest him or caution him, given the evidence available at the time. Permitting Cst. Smyth to meet with the RNC Association ("RNCA") at the detachment does not amount to preferential treatment.
80. Based on his experience in Ontario, Mr. Jones stated it would be acceptable to allow a subject officer to get mental health support from others before being interviewed, but ideally they would not discuss the incident.<sup>82</sup> In Ontario, there are regulations prohibiting communications about the incident between the subject officer and others involved. In Newfoundland and Labrador, there are no regulations about who an officer in the place of Cst. Smyth can speak with or what they can discuss. Here the RNC members who met with Cst. Smyth were not involved in the incident. They testified they were there to support Cst. Smyth's mental health and not to question him on the event or somehow prejudice the investigation.<sup>83</sup> Each of the RNC members was later interviewed by the RCMP to determine whether Cst. Smyth said anything to them that was inconsistent with his statements to that point.

**FIS' processing of the scene and communication between FIS and MCU was sufficient**

81. FIS takes direction from MCU. FIS prefers to process the scene with the basics of the incident only. This allows them to keep an open mind. They were provided with the basics here before processing the scene.<sup>84</sup> If, as the investigation unfolds,

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<sup>81</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 16.

<sup>82</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 87.

<sup>83</sup> Cst. Sullivan, Transcript Vol. 13, January 31, 2017, p. 41 and A/Insp. Mike Adams, Transcript Vol. 12, January 30, 2017, p. 9.

<sup>84</sup> Sgt. Saunders, Transcript Vol. 22, February 13, 2017, p. 104; Cpl. Lee, Transcript Vol. 27, February 21, 2017, p. 83.

MCU wants FIS to focus on certain things then MCU can communicate that to FIS. Sometimes nothing arises that MCU needs FIS to follow up on. In this case, nothing arose from Cst. Smyth's interview, and others, that warranted MCU requesting FIS to follow up.

82. It is neither practical nor realistic to expect first responders to wear FIS gear in responding to a call like this. Their priority is to protect life, ensure officer safety, and secure the scene. This was not a "who done it" where a body was discovered, there were no leads, and FIS would be trying to identify suspects. Cst. Smyth told RCMP OCC he had shot Mr. Dunphy and needed first responders to attend. They attended and Cst. Smyth provided his version of the events. The evidence to that point matched his version. It was reasonable for first responders to enter the house without wearing FIS gear to check on Mr. Dunphy, clear the house, and secure the scene.
83. FIS did not locate one .22 round, which was later located by Ms. Dunphy after the scene was released. Ideally, it would have been located by FIS, but its being overlooked is not surprising, given the state of the residence and the location of the round. Not locating the .22 round was unfortunate but immaterial to the investigation. After the scene was released, the round was located by Ms. Dunphy who turned it over to the RCMP.
84. FIS ran all the tests that were reasonable in the circumstances. The rifle was not printable.<sup>85</sup> The seized .22 rounds from the rifle and the table were not printable.<sup>86</sup> Touch DNA from Cst. Smyth could not have been obtained from the rifle, even if he had briefly handled it, because such a test requires handling over long periods of time.<sup>87</sup> Mr. Dunphy's touch DNA may have been obtainable from the rifle, for example, but that would not have been probative of anything. There was no obvious source of DNA for testing apparent on the rifle.<sup>88</sup>

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<sup>85</sup> Cpl. Lee, Transcript Vol. 27, February 21, 2017, p. 80.

<sup>86</sup> Sgt. Saunders, Transcript Vol. 22, February 13, 2017, p. 92.

<sup>87</sup> Sgt. Saunders, Transcript Vol. 22, February 13, 2017, pp. 129-130.

<sup>88</sup> Cpl. Lee, Transcript Vol. 27, February 21, 2017, p. 91.

85. FIS took pictures of the glasses, which show they were in wearable condition immediately after the incident.<sup>89</sup> After the scene was released, the glasses were provided to the RCMP in a damaged, crushed condition, different than depicted in the FIS photographs.<sup>90</sup> The origin of the damage was sufficiently investigated.
86. FIS took pictures from multiple angles, including at least one from approximately where Cst. Smyth was standing.<sup>91</sup> FIS also took a scene video that shows myriad angles within the residence.<sup>92</sup>
87. MCU did not direct FIS to search Cst. Smyth's RNC vehicle. However, as already discussed, nothing in Cst. Smyth's statement, the physical evidence, or the observations by Sgt. Saunders led the RCMP to reasonably believe there was anything of investigative value in the vehicle. In hindsight, searching the vehicle may have been ideal, but not doing so is not a material deficiency in the investigation.
88. FIS was not asked to check the mantel and Cst. Smyth's jacket for dust. Cst. Smyth said he may have been leaning on the mantel before Mr. Dunphy pointed the rifle at him. The potential dust investigation was suggested by Mr. Jones. He essentially agreed that whether or not there was dust on Cst. Smyth's jacket or dust disturbance on the mantel doesn't necessarily mean anything.<sup>93</sup> RCMP's not checking into something of such limited probative value cannot be considered a material deficiency in the investigation.
89. FIS was not asked to attempt to locate Cst. Smyth's pen at the scene. Cst. Smyth said he had been writing on his folder before Mr. Dunphy pointed the rifle at him. The pen was of little probative value. If no pen had been found, it would not necessarily have meant Cst. Smyth was lying. If a pen had been found, it would

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<sup>89</sup> Scene Photo Package prepared by Sgt. Chris Saunders, Forensic Identification Services, dated April 5, 2015, P-0010, Scene 100.

<sup>90</sup> Photos provided by Meghan Dunphy - Glasses on table, P-0061-63.

<sup>91</sup> Scene Photo Package prepared by Sgt. Chris Saunders, Forensic Identification Services, dated April 5, 2015, C-0001, Scene 044.

<sup>92</sup> Scene Video taken by Cpl. Lee and Sgt. Saunders - Recorded on April 5-6, 2015, C-0021.

<sup>93</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, pp. 76-77.

not necessarily have meant Cst. Smyth was telling the truth. Ideally FIS would have searched for the pen, however MCU not directing FIS to do so had no impact on the outcome of the investigation.

90. There were pens at the scene. Cpl. Lee recalls a pen on or near the oval coffee table, which could be the pen in question, but it was not seized. Cpl. Lee thought the pen might have been under the yellow folder, but the FIS scene photos and scene video are inconclusive. The reenactment video shows a pen on the oval table that could have been under the folder after the incident, but the video is from after the scene was released and is therefore of limited value.
91. FIS' video equipment failed during the first reenactment. This was unfortunate but as ASIRT points out, these things happen with technology sometimes. The RCMP had internal discussions and correctly concluded they would ask Sgt. Smyth to do a second reenactment, which he did.<sup>94</sup> The loss of the first video did not harm the investigation.

**The trickle of blood, lack of warrant, and seizing of medication issues were addressed by Dr. Simon Avis**

92. Cpl. Burke properly noted the trickle of blood from Mr. Dunphy's temple did not travel in a straight downward direction, which seemed odd and warranted follow-up. While not reflected in the RCMP's final investigation report, Dr. Avis was asked about this issue. Mr. Dunphy's body likely moved during the agonal period between when the fatal shots were fired and his actual death. Dr. Avis explained the direction of the trickle of blood was nothing of significance from his perspective.<sup>95</sup>
93. Dr. Avis had previously indicated he did not understand why a warrant was not obtained by the RCMP to hold and search Mr. Dunphy's residence. Dr. Avis acknowledged he was not qualified to give a legal opinion on this issue and he

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<sup>94</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, pp. 63-65.

<sup>95</sup> Dr. Simon Avis, Transcript Vol. 31, February 27, 2017, pp. 127, 131.

was just drawing on his previous experience.<sup>96</sup> Cpl. Burke explained that the RCMP did not require a warrant in the circumstances. Cst. Smyth was the subject of the investigation and he had no reasonable expectation of privacy in Mr. Dunphy's residence.<sup>97</sup> Mr. Dunphy was deceased and it was reasonable for the RCMP to hold and search the residence with Ms. Dunphy's consent. It was neither necessary nor practical for the RCMP to obtain a warrant.

94. At his interview Dr. Avis expressed some concern about the RCMP not seizing medications from the scene. However, he testified that this was not an abnormal occurrence.<sup>98</sup> The RCMP obtained the medications and delivered them to Dr. Avis when requested.

**The RCMP had sufficient evidence regarding the rifle's resting position to conclude it was as shown in the FIS photos**

95. In Mr. Jones' opinion the RCMP should have done more to fully establish the resting position of the rifle. There remains some contradictory evidence, mainly from the paramedics, about whether it was lying on the floor or resting on the floor and leaning against the blue-green tub (as shown in the FIS photos.)
96. The RCMP submits the resting position of the rifle was sufficiently clear that no further follow-up was required. MCU had the FIS photos, Cpl. Foote's photos, and Cst. Cox's notes on the issue. Cst. Cox's notes described his looking in the window of the residence and seeing the barrel of the rifle in the same position as shown in the photos. Cst. Cox saw the rifle positioned as depicted in the photos when he cleared the residence, before the paramedics entered.<sup>99</sup>
97. If the RCMP had spent further resources on interviewing the paramedics on this issue, it is likely their erroneous perceptions and memories would have remained as they did at the Inquiry. Memory and perception are not perfect; Cst. Cox's contemporaneous notes and the photos are superior. It was reasonable for the

<sup>96</sup> Dr. Simon Avis, Transcript Vol. 31, February 27, 2017, p. 130.

<sup>97</sup> Cpl. Burke, Transcript Vol. 18, February 7, 2017, p. 45.

<sup>98</sup> Dr. Simon Avis, Transcript Vol. 31, February 27, 2017, p. 130.

<sup>99</sup> Supplementary Occurrence Report of Cst. Adrian Cox dated April 5, 2015, P-0376 at pp. 2-3.

RCMP to rely on Cst. Cox's notes and the photos to draw a conclusion regarding the resting position of the rifle.

**The RCMP's internal record keeping, file creation, investigative steps, and final report were adequate despite some minor shortcomings**

98. RCMP Communications ("OCC") received the call from Cst. Smyth after the incident. Based on the limited information provided at that time, the file was opened in RCMP's PROS database listing Mr. Dunphy as the subject of the complaint with the complaint being "Pointing a firearm 87(2) CC." This is the typical way a file is created when OCC receives a call. It is not suggestive of a closed mind by the RCMP at the time regarding the incident. As the evidence was gathered, this description was as apt as any other and the file name was not updated. Regardless, the file naming in PROS is essentially a placeholder, and as such, is immaterial. The file was eventually transferred to the RCMP's MCU database called E&R and the PROS naming was then of even less relevance.
99. Sgt. Osmond occasionally wrote updates to senior management called C237s. These provide senior management with an overview of how the investigation is progressing. They identify risks and challenges in the investigation and must be read in that context. On a few occasions, these documents contained minor errors or simplified the complexities of the case for the high-level audience. C237s are not critical to the lead investigator, nor are they a perfect depiction of every aspect of the investigation; they are an accountability/oversight mechanism for senior management. The minor errors in Sgt. Osmond's C237s are immaterial.<sup>100</sup>
100. ASIRT noted there was a dearth of handwritten notes from RCMP first responders Cpl. O'Keefe and Cst. X. After receiving the ASIRT report, the RCMP followed up with these members. Cpl. O'Keefe did not have any handwritten notes regarding the incident; his notes of the incident were as reflected in PROS. Cst. X's handwritten notes were obtained and they accorded with his typed notes in

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<sup>100</sup> Sgt. Osmond, Transcript Vol. 26, February 20, 2017, pp. 73-79.



PROS. While the note taking and collecting by the RCMP regarding these two members was imperfect, the investigation was not prejudiced by it.

101. RCMP analyst Wanda Richards created a timeline as an aid for the investigators and anyone reviewing the RCMP investigation report. The timeline, in hindsight, contains mistakes. It was the RCMP's error that Cst. Smyth's attempted calls to Mr. Dunphy were mistakenly labelled as calls to Colin Dinn. It was the RCMP's error that the timeline created an appearance that Cst. Smyth took 14 minutes to call the RCMP after the incident. In his evidence, and at the reenactment, he stated this happened within a few minutes of the shooting.
102. However, Cst. Smyth erred in forgetting to tell the RCMP that he had stopped on the roadside and tried to make some calls before going to Dick and Debbie Dunphy's home. This omission led to a cascading problem in the timeline, making the estimated times of little use today considering all the evidence. As the timeline was merely meant as a visual aid, this was not a fatal flaw in the investigation by any means.
103. The RCMP attempted a "folder drop" demonstration as part of the investigation. Cpl. Henstridge attempted to recreate Cst. Smyth's dropping his folder to determine whether it could likely have landed closed on the oval coffee table as shown in the scene photos. The demonstration was inconclusive. This is another example of where the experts, Ms. Hughson and Mr. Jones, somewhat disagree. Both agree the RCMP's intentions were good. However, while Mr. Jones praises the "folder drop," ASIRT opines that such physical reenactments/experiments are of dubious assistance. In any event, the RCMP's looking into the issue was reasonable in this case.

#### **ISSUES NOT RELATED TO THE INVESTIGATION**

104. Lastly, there were some items that came to light that, although distressing to Ms. Dunphy, had no bearing on the quality of the RCMP's investigation, its

impartiality, or thoroughness. These matters should play no part in the Commission's determination of whether there were material deficiencies in the investigation.

105. For example, immediately following Mr. Dunphy's death and repeatedly throughout the following days, Ms. Dunphy had expressed the desire to see her father's body. She was quite understandably upset that when she was ultimately able to be with his body, it had been disturbed to such an extent by the autopsy that she could not see his face, and was simply able to hold his hand.<sup>101</sup> Cst. Galway had noted Ms. Dunphy's desire to see her father's body, and undertaken to follow up. When he next spoke to Ms. Dunphy, he was told that she had made arrangements with the funeral home.<sup>102</sup> As the Commissioner noted<sup>103</sup> during the hearing, it would perhaps be desirable to have some sort of brochure for guidance in these situations. There is presently no practical way for a person in Ms. Dunphy's position to see or touch a family member's body until after the autopsy.<sup>104</sup> In any event, the circumstances were extremely unfortunate, but this issue cannot be said to have played any part in the quality of the investigation or its outcome.
106. Another example is the fact that Cst. Smyth was allowed to freely move about the yard after the incident. This caused Ms. Dunphy distress, as she knew that he was the officer who had caused her father's death. But, there were no grounds to confine or detain Cst. Smyth at that point. He remained cooperative, and did not seek to re-enter the house or leave the scene.
107. Ms. Dunphy may have been focused on Cst. Smyth's movements, but the fact is the RCMP first responders had to concern themselves with securing the scene, controlling traffic, providing information to Ms. Dunphy, and eventually transporting Cst. Smyth to the Holyrood detachment. Cst. Smyth did spend a fair

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<sup>101</sup> Correspondence dated April 8, 2015 from Erin Breen to John Galway, P-0041, p. 2.

<sup>102</sup> Cst. Galway, Transcript Vol. 14, February 1, 2017, p. 72.

<sup>103</sup> Commissioner Barry, Transcript Vol. 23, February 15, 2017, p. 72.

<sup>104</sup> Dr. Simon Avis, Transcript Vol. 31, February 27, 2017, pp. 130-131.

bit of time in and near one of the RCMP vehicles after their arrival. Ultimately, the fact that Cst. Smyth was not immediately dispatched from the scene and was able to move about unimpeded may contribute to the perception of special treatment, but it had absolutely no bearing on the quality of the RCMP's investigation.

108. Finally, it was alleged that feral cats who were not normally present in Mr. Dunphy's home were allowed to gain entry when RCMP officers left the front door open in the course of their investigation. In reality, it is difficult to say how many cats were present in the home before or after the RCMP were on the scene. It is difficult to reconcile the assertion that no feral cats were allowed in the home with the observations of various witnesses that the home was overrun with cats in the ceilings and in the "cat room," and that the smell of cat urine was enough to penetrate a respirator.<sup>105</sup> In any event, the presence of many cats on site was a reality that the RCMP did their best to contain and work around in the course of the investigation. They were clearly alive to the fact that the presence of cats could contaminate the scene and did their best to avoid any unnecessary contact as early as they could. The presence or absence of cats otherwise had no bearing on the investigation.

### CONCLUSION

109. Over the course of the Inquiry's hearing, it was said many times that "hindsight is 20/20" and that no investigation is perfect. When looking back with the benefit of time, it is easy to find fault with any endeavour that is as involved, and has as many participants, as this investigation. Both experts in investigation agreed as much.
110. ASIRT's report concluded:

While ASIRT has some observations and recommendations regarding aspects of the investigation, it is our opinion that none of the issues identified rise to a

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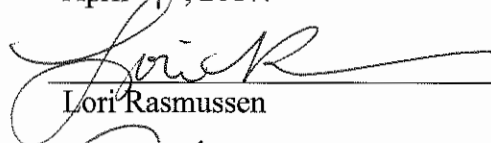
<sup>105</sup> Cpl. Lee, Transcript Vol. 27, February 21, 2017, pp. 91-92.

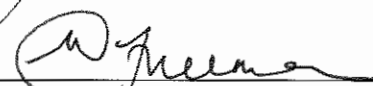
level of seriousness that would bring into question the integrity or validity of the investigation or **would impact any conclusions reached based on the evidence.**<sup>106</sup> [Emphasis added.]

111. ASIRT was clearly of the opinion that any deficiencies in the investigation were not material, i.e. they would not have impacted any conclusions. Even Mr. Jones was unable to point to any instance where he was of the view that any shortcoming in the investigation had changed the outcome.<sup>107</sup>
112. While any police force investigating a fellow law enforcement officer raises a perception of bias and tunnel vision, particularly in the minds of the public, it is just that: a perception, and perception is not the measure of the quality of the investigation. It is not the mandate of this Commission to decide if the optics of this investigation were less than desirable, but rather, whether there were any deficiencies important enough to have affected the outcome. While the RCMP acknowledges there may have been weaknesses in the investigation, none rose to the level of a material deficiency. Per Judge Luther's report in the Reid-Power Inquiry, "While there were some noted deficiencies in the RCMP investigation, none were of a serious nature and in the end made no real difference to the outcome."<sup>108</sup>

RESPECTFULLY SUBMITTED.

April 7<sup>th</sup>, 2017.

  
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<sup>106</sup> ASIRT Report, Ex. P-0004, p. 4.

<sup>107</sup> Gareth Jones, Transcript Vol. 37, March 7, 2017, p. 41.

<sup>108</sup> Report of Inquiries into the Sudden Deaths of Norman Edward Reid and Darryl Brandon Power, Honourable Donald S. Luther, 16 December 2003, p. 50.

**TO: COMMISSIONER**  
**The Honourable Justice Leo Barry**

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