

IN THE MATTER OF THE
Commission of Inquiry
Respecting
the Death of Donald Dunphy

**FINAL WRITTEN SUBMISSIONS OF THE ROYAL NEWFOUNDLAND
CONSTABULARY ASSOCIATION**

Before Commissioner Leo Barry

Filed by:

JOHN DROVER

Roebathan Mckay Marshall

34 Harvey Road

St. John's, NL A1C 2G1

Counsel for the RNCA

INTRODUCTION

1. The Honourable Andrew Parsons, Minister of Justice and Public Safety and Attorney General announced the Commission of Inquiry into the Death of Donald Dunphy (“CIDDD”) on September 23, 2016 to look into the circumstances surrounding the shooting death of Mr. Dunphy of Mitchell’s Brook, NL on April 5, 2015 by a member of the Royal Newfoundland Constabulary (“RNC”).
2. Interested parties submitted applications for standing and/or funding and made oral submissions before the Commissioner on October 19, 2017. The Royal Newfoundland Constabulary Association (“RNCA”), bargaining unit for employees of the RNC, became a party with standing after application to the Commission based in part on the impact of the Commission’s expected recommendations on the members.
3. Hearings on January 9, 2017. During 38 sitting days through March 10th, the CIDDD entered more than 800 exhibits into evidence including the final investigative report of the Royal Canadian Mounted Police (“RCMP”) who investigated the shooting; the Alberta Serious Incident Response Team (“ASIRT”) who reviewed the RCMP investigation; Retired Justice David Riche, the RCMP’s independent observer; the Saskatoon Police Service (“SPS”) who conducted the internal investigation at the request of the RNC; and several expert opinion reports in the areas noted below.
4. The CIDDD also heard from 56 witnesses including Donald Dunphy’s family, friends and neighbours; Constable 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 major command triangle 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 5th; various experts in areas such as police use of force, de-escalation techniques, risk and threat assessments, ballistics and 3D modelling; as well as the director of the Alberta Serious Incident Response Team

(ASIRT) and former director of the Ontario Serious Incident Unit (“SIU”) to give insight into the two police oversight models used in Canada.

5. An overarching theme of the actual conduct of the inquiry was efficiency and economy. The per diem cost of the inquiry was certainly six figures. Given the province’s fiscal situation, careful management of resources was important. In that vein, the Commission granted standing to the RNCA on the stipulation that it would avoid duplication when possible and where its interests overlapped with those of Cst. Smyth, a member of the RNCA, and those of the RNC, the employer of the RNCA’s members.
6. The objects of the RNCA are to act on behalf of its members in securing and maintaining improved working conditions; to use legitimate and reasonable efforts to maintain a just, impartial and efficient police force; to engage in activities which foster the social, economic and general welfare of members of the RNCA; and to promote legislation that ensures the safety and security of both the public and the police.
7. It is the intersection between the theme of efficiency and economy espoused by the Commission, and the objects of the RNCA which guide the following submission on behalf of the RNCA. Without the opportunity to review the submissions of the RNC and Cst. Smyth in advance, the RNCA presumes that counsel for Cst. Smyth will more than adequately summarize the evidence related to the events leading up to and including the incident at Mitchell’s Brook and the activities of Constable Smyth in the days and weeks following. Similarly, counsel for the RNC, given his access to all levels of management within the force, will present a thorough overview of the policies, procedures, and training developed and implemented by the RNC.
8. It is therefore not the intent of the RNCA to duplicate or repeat the presumed submissions of counsel for Cst. Smyth or those of the RNC. Instead, the RNCA takes a prospective approach to the within submissions and recommendations which will form part of the Commissioner’s final report.

9. Such an approach incorporates the CIDDD's goal of efficiency and economy and the RNCA's objectives to secure and maintain improved working conditions; maintain a just, impartial and efficient force; foster the wellbeing and welfare of members; and particularly to promote legislation that ensures the safety and security of members and the public and police officers. In relation to this last point, the CIDDD presents a unique opportunity to address issues of policies, protocols and training on which the reputation of the RNCA's members rests.

RECOMMENDATIONS

Oversight

10. Perhaps one of the most important issues explored at the CIDDD in terms of policies and protocols for policing was that of police oversight. There was much criticism from the public since the incident at Mitchell's Brook about the bias, whether real or perceived, inherent in police investigating police.
11. Two expert witnesses in police oversight testified at the CIDDD: Gareth Jones, formerly of Ontario's Special Investigations Unit ("SIU"), and Susan Hughson, executive director of the Alberta Serious Incident Response Team ("ASIRT"). SIU and SIRT are the two primary models used in Canada to oversee and investigate incidents involving police officers. Undoubtedly, the Government of Newfoundland and Labrador will implement one or the other of these oversight models, or perhaps some combination of both.
12. Mr Jones stated that he was involved in approximately 100 investigations into officer involved shootings during his time with SIU. Of those, Mr. Jones was lead investigator in 35 to 40.
13. Mr. Jones prepared an expert report for CIDDD counsel dated February 7, 2017 (P-0770). The purpose of the report, as noted by Mr. Jones, was "to provide an opinion regarding any material deficiencies in the investigation into the death of Donald Dunphy." While Mr. Jones commented on a number of areas of concern for

him within the RCMP investigation, he did not reach any conclusion as to whether any of the deficiencies identified would impact the final conclusion reached by the RCMP.

14. At any rate, the RNCA's interest in Mr. Jones' evidence relates specifically to the SIU oversight model and how that model might translate into police oversight in this province.

15. According to the SIU's website (<https://www.siu.on.ca/en/index.php>), it's mandate is:

[T]o maintain confidence in Ontario's police services by assuring the public that police actions resulting in serious injury, death, or allegations of sexual assault are subjected to rigorous, independent investigations. Incidents which fall within this mandate must be reported to the SIU by the police service involved and/or may be reported by the complainant or any other person.

The objective of every SIU investigation is to determine whether there is evidence of criminal wrongdoing on the part of the police. It is not to determine whether the involved officer(s) may have committed some lesser offence, such as the breach of a provincial law or professional misconduct under the Code of Conduct of police officers.

16. The SIU describes itself as a "civilian law enforcement agency independent of the police." Mr. Jones stated that SIU does employ former police officers, but that "there's been a conscious movement towards hiring more and more civilians." He noted that of the current 14 SIU investigators, eight or nine are civilians with no prior connection to policing. These civilian investigators receive training at police colleges as well as in-house training with the SIU in order to prepare them for their role in the investigation of serious incidents involving police officers.

17. According to Mr. Jones, the SIU investigates hundreds of incidents per year which therefore provides an opportunity for its investigators to quickly gain practical

experience. It goes without saying that the same opportunity does not exist in Newfoundland and Labrador and therefore it would be difficult to create a completely civilian staffed oversight body for police involved serious incidents without sacrificing necessary experience.

18. Susan Hughson, QC is a former crown prosecutor and current executive director of ASIRT whose mandate is “to effectively, independently, and objectively investigate incidents involving Alberta's police that have resulted in serious injury or death to any person, as well as serious or sensitive allegations of police misconduct.”
19. ASIRT's investigative team is entirely composed of former police officers and officers seconded from other police agencies in the province of Alberta such as the RCMP, Calgary Police Service and Edmonton Police Service, among others. Ms. Hughson noted that ASIRT does not assign a seconded officer to an investigation into the force of which that officer is a member.
20. Ms. Hughson noted the importance of experienced investigators while she recognized the issue of police officers investigating police officers. Ms. Hughson stated in her testimony:

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.

21. The RNCA's desire in terms of police oversight is that the Commissioner will recommend a SIRT model over that of the SIU. 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.

22. Newfoundland and Labrador, and even Atlantic Canada simply does not have the population and therefore number of serious incidents to provide the necessary experience to civilian investigators even where those investigators are properly trained in investigative techniques.
23. As with the skills and experience of the investigators, the timeline for investigations is also important. In the case of the shooting death of Donald Dunphy, the RCMP took approximately 17 months to reach their conclusion and release their findings that there were no grounds to lay a criminal charge against Cst. Smyth. This 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.
24. Mr. Jones addressed the length of the RCMP investigation and of SIU investigations during his testimony:

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.

25. While the Alberta *Police Act*, under which ASIRT operates, does not specify a time within which to complete an investigation into a serious incident involving police, there are clear timelines for continued reporting to the complainant. Section 46.1(7) requires the Chief of Police to advise a complainant at least once every 45 days as to the status of the complaint. Section 46.2(3) allows the Minister responsible to designate ASIRT as the Chief of Police for the purposes of of s. 46.1(7). There was no similar reporting requirements in the investigation into the incident at Mitchell's Brook,
26. The RNCA is of the opinion that the length of the investigation and lack of information during that time was unacceptable and had negative impacts on Cst. Smyth, the Dunphy family and the general public. This situation could have been avoided had clear timelines been in place for both the investigation and reporting to the parties and the public.
27. The RNCA hopes the Commissioner will make a recommendation that all investigations into serious incidents involving police be completed within 30 days in the same manner as the policy of the SIU. In the event it is not feasible to complete the investigation in that time, the oversight agency should notify the parties and the public of the *bona fide* reasons why it cannot complete the investigation within the proscribed time. Any communication to the public must be done in a way that does not interfere with the investigation or call its integrity into question.
28. The RNCA would also like to see the Attorney General for the province oversee any timelines imposed on the oversight body's investigation including requests for extensions for *bona fide* reasons.
29. The RNCA also believes that prioritization of forensic testing is necessary in order to avoid any delays in the investigations of officer involved shootings. While other cases which do not involve police are no doubt important, the relatively low number

of officer involved shootings should not cause problems for forensic labs. Cpl. Steve Burke testified that even the US Federal Bureau of Investigation and Interpol were available to assist in the event it was necessary. There is therefore no valid reason to delay an investigation into an officer involved shooting or any other serious incident involving police because of the availability of forensic testing.

30. The mandate of the recommended oversight body is important. If it is too narrow, it may not capture serious investigations which in turn could erode public confidence in the process. If it is too broad, it could impair the ability of police officers to carry out their work.

31. Mr Jones described the mandate of the SIU which is “to conduct criminal investigations into any incident involving an on-duty police officer where there’s been a death or a serious injury.”

32. Ms. Hughson described the mandate in terms of the process by which complaints are referred to ASIRT:

So the section of the *Police Act* was drafted before ASIRT was brought into existence. I don’t have the act in front of me, but I can tell you basically how it works. Section 46.1 requires chiefs of police or the commissioner to report serious incidents involving serious injury or death to a person that may have been caused by police conduct, and also to report any allegations of police misconduct of a serious or sensitive nature.

They are required to report that to the Director of Law Enforcement, which is the Assistant Deputy Minister for Alberta Justice and Solicitor General, Public Security Division so that requirement does not have a timeframe to it but the expectation is – there are expectations in place where if it’s a serious injury or death case it’s to occur within the hour, as much as possible, and if it’s an allegation of a serious or sensitive nature concerning police conduct such as corruption, breach of trust, sexual assault – dated,

historical sexual assault – those types of things, obstruction of justice, it's supposed to occur within twenty-four hours.

What happens is once they make that report to the Director of Law Enforcement under the *Police Act*, there are a series of options as to how the Director of Law Enforcement may direct that matter to be investigated.

33. As with SIU, ASIRT's mandate relates to incidents which involve serious injury or death to a person as a result of police conduct. The RNCA believes that the oversight agency which will be responsible for policing in Newfoundland and Labrador ought also to limit it's mandate to incidents of serious injury or death as a result of police conduct. The RNCA believes sexual assault should fall under this definition, and that the mandate ought to be broadened to include allegations of corruption against the Chief of Police and senior management.

Training and Policy

34. The RNCA advocates for training and resources for its members as part of its object to secure and maintain improved working conditions. It is for this reason that the RNCA has an obvious interest in the Commissioner's recommendations surrounding training of officers and the resources they require to perform their duties.

35. More than any other area of training, de-escalation attracted the most attention at the CIDDD as numerous witnesses including experts testified about de-escalation as it currently exists within the RNC training model, and how the RNC might better train its officers in the future in de-escalation techniques.

36. Before we discuss possible recommendations around de-escalation training, it is important to note that there was no evidence tendered at the CIDDD to suggest it could have been used to successfully avoid the situation in Mitchell's Brook on April 5, 2015.

37. Admittedly, de-escalation as a separate topic does not appear to be a large part of the RNC's use of force training. Sgt. Bill James, a use of force instructor with the

RNC, could only identify one short portion of the use of force training manual which deals with de-escalation (P0624 at page 18). That passage reads:

6. DE-ESCALATION

What can the officer do to lessen the danger? The officers 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 them self 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.

38. The training provided by the RNC in de-escalation certainly does not meet the modern training provided to other police forces across the country. However, Sgt. James did testify that he was in contact with Insp. Wayne Rudderman of the Atlantic Police Academy to explore training in de-escalation for RNC members.
39. Cpl. Wayne Knapman of the RCMP was qualified as an expert in police use of force at the CIDDD. Cpl. Knapman gave his professional opinion on the quality of the use of force training received my members of the RNC, as well as his opinion on Cst. Smyth's own use of force in the shooting death of Donald Dunphy.
40. In relation to de-escalation, Cpl. Knapman described its role in RCMP training:

It's a part of the]Incident Management Intervention Model, the use of force model taught to RCMP members] and the training; there is de-escalation within the model as well as built into our training for our frontline officers. There are separate de-escalation courses that are in the RCMP, but since the Braidwood Inquiry with respect to the conducted energy weapons, de-

escalation was brought into that training as well as in a lot of the scenario-based trainings that we'd used during the Incident Management Intervention Model, training that members have to certify every three years in the RCMP, there is de-escalation as well, taught in those courses.

41. Cpl. Knapman also testified that between his pre-Inquiry interview and his appearance at the CIDDD, he completed a separate course dedicated to de-escalation techniques. Given that he took this course in British Columbia and referenced the Braidwood Inquiry as the impetus for the development of such course, it is safe to assume that Cpl. Knapman completed the course offered by the British Columbia Institute of Justice and described in more detail by Sgt. Mike Massine.
42. While RNC members do not receive specific or intensive training in de-escalation, it was noted by some witnesses that verbal communication and de-escalation is an inherent part of policing. Cpl. Knapman identified several instances where Cst. Smyth attempted to de-escalate the situation with Donald Dunphy prior to Mr. Dunphy pointing a rifle at Cst. Smyth. Cpl. Knapman testified:

With respect to what I think he did for deescalation; number one is I know when he moved his feet around on the carpet and he saw that there was some bugs. Although I believe Mr. Dunphy took it out of context, I think he was actually trying to de-escalate by showing some empathy for him saying that I have concerns. The concerns were the conditions that he was living in. In Constable Smyth's statement he believes that Mr. Dunphy believed that he had, he was talking about the tweets but I really think that was possibly a de-escalation.

The second one that I already talked to, it seemed that Constable Smyth looking around the room, I guess the squalor or the condition of the residence. That seemed to aggravate Mr. Dunphy. So Constable Smyth, to

try to alleviate that, looked down at his file folder and pretended to write notes in it in attempts to de-escalate.

The third thing was that he leaned on the fireplace which, again, a lot of times when you look at de-escalation or crisis intervention or de-escalation – again, I don't think there's any indication here we were dealing with someone that was an emotionally disturbed person or what we refer to as an EDP, but I think body language can play a big part into trying to calm things down. So I think by leaning on the mantel, that's what he was doing.

And lastly, even though sometimes if we look back at our tactical principles and we talk about verbalization, sometimes you have to take control. And that means – again, I don't know the context of how it was said, what level the inflection, but at one point he tells him: Calm down, you're not under arrest. And I think he was trying to ease Mr. Dunphy.

43. Cpl. Knapman identified four instances where Cst. Smyth attempted to de-escalate the situation with Mr. Dunphy. However, Cpl. Knapman also opined that these four instances also represent tactical errors. It is the wish of the RNCA that the development or implementation of de-escalation training ought not to take away from the tactical aspects of use of force training as it is likely to have a negative impact on officer and public safety.

44. Dr. Terry Coleman, a former police chief in Moose Jaw, Saskatchewan and Ph.D. in police studies, gave expert evidence on de-escalation techniques particularly in relation to mental health where his work has largely focused since around 2001. Dr. Coleman described de-escalation as follows:

De-escalation is becoming in vogue in terms of the policing world as a result of publications such as, studies such as Justice Iacobucci. But it's not a new phenomenon at all. It's a communication skills to resolve a situation and customer service reps in retail business, for example, use de-escalation for people that are upset with perhaps a level of services or

perceived the level of service they received. Neighbors have used de-escalation across the fence if there is something that is going on that is getting tense and it needs to be resolved peacefully.

45. Sgt. Mike Massine co-authored the expert report with Dr. Coleman. Sgt. Massine is a use of force instructor with the Justice Institute of British Columbia ("JIBC") with a particular interest in de-escalation techniques. Following the Braidwood Inquiry, Sgt. Massine worked with BC Ministry of Public Safety and the Solicitor General to develop provincial standard training courses in crisis intervention and de-escalation.
46. Sgt. Massine gives an overview of the BC Crisis Intervention De-escalation ("CID") model at page 31 of his co-authored report (P-0773).

In January 2012, the Province of BC set binding standards to ensure that BC police officers are trained to use crisis intervention and de-escalation techniques. Along with the standard the province also released standardized training—the BC CID training;

Since that time all police recruits at the JIBC police Academy receive the BC CID training. It is also required learning for all operational police officers in BC (frontline and supervisors) and to date over 6000 police officers in BC have taken it. There is also mandatory refresher training every three years;

The course consists of both an online component and a classroom component designed to ensure that all police have an understanding of the kinds 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 BC CID 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 crisis;

The BC CID 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 for all police in BC.

47. The RNCA fully supports any recommendation the Commissioner may make in relation to new or enhanced training for RNC officers in the area of crisis intervention and de-escalation, or any other area of policing the Commissioner may deem appropriate. As with the BC model, the RNCA would like to see regular re-training. Three years between retraining such as in BC is likely an appropriate timeframe.
48. The RNCA also desires that any training around de-escalation include appropriate scenario training. Sgt. Massine described this aspect of the BC CID training:

We also have another component to it and it's basically a full day of scenarios. The BC CID training only calls for one scenario; we actually do nine separate scenarios with the recruits specific to effective communications and crisis intervention de-escalation where we hire professional actors, there not cops. And these people are good and they come in and they deal with imaginative situations where people are in crisis so not just mental health issues, but people that have had a bad day. And it has an impact, the recruits really learn a lot and the actors give some very good, pointed feedback, from a civilian perspective, on how they felt they were treated by the officers.

49. The scenario training described by Sgt. Massine above included the use of professional actors. Sgt. Massine likened them to standardized patients used for training medical students. Since MUN Medicine already has a standardized patient program, it might be possible for the RNC to tap that resource for scenario training thereby incorporating citizens into scenario training rather than simply fellow officers.
50. Sgt. Massine criticized the RNC for its lack of lesson plans and assessment documentation in officers' training files. Sgt. Massine testified:

When you get down into the lesson plan aspect of it, a lesson plan is set out so that if you have a lead instructor or an instructor on the day and that person calls in sick or can't make the training, a second or, a substitute teacher basically, will be able to come in, take that lesson plan and teach it from start to finish and be able to do it professionally and meet all the learning objectives of that specific training goal, whatever that is. And, again, we don't see any learning objectives. And I have to say from a trainer's standpoint, if one of the most important things that should be there are the learning objectives. What information do the instructors wish to pass on to the students of the day and are those objectives met through the actions of the students, if you will, or the officers in that training.

There's no documentation anywhere in there and that's what we call the assessment strategies or the rubrics. So it's an accountability piece and that should be maintained in a member's – police member's training file. So those are the main areas where the training program is lacking is the recentness, the terminology and then the overall structure of the training program by today's modern standards.

51. The RNCA agrees that lesson plans and documentation are an important component of use of force training. As Sgt. Massine states, it adds an "accountability piece" to the training. Properly documented quality training would also bolster the integrity of RNC officers' involved in use of force incidents.

52. It was noted by Sgt. Massine that the RNC's use of force training is outdated. It appears the RNC's use of force training was last updated in 2001. It is of note that in 2003 Judge Luther, in his report into the shooting deaths of Messrs. Reid and Power, commented as follows regarding the quality of RNC use of force training:

The inquiry is satisfied that R.N.C. officers, including the incident officers, have been adequately trained in use of force. The present model, 'National Use of Force Model,' was adopted by the R.N.C. in 2001 with the input of academics and leading police trainers, including Inspector James Carroll.

The training programme of the R.N.C. in this subject area is consistent with Ontario, British Columbia, R.C.M.P., etc. It also adheres to the principles set out by the United Nations in its Code of Conduct for Law Enforcement Officials and Use of Force and Firearms by Law Enforcement Officials

53. While the RNC's use of force training undoubtedly required review and updates by 2015, it still represented the Canadian standard of training — the National Use of Force Framework Model ("NUFFM").

54. The RNCA would like to see a recommendation that the RNC's use of force training be thoroughly reviewed and updated where necessary to conform to national and international standards. The RNC should strive to maintain the high standards for which it was lauded by Judge Luther in 2003. In order to do so, the RNCA believes regular reviews of use of force training ought to happen no more than every five years.

55. Despite some controversy over Dr. Coleman and Sgt. Massine and their co-authored report borne out by argument at their qualification *voir dire*s and on cross-examination, Dr. Coleman and Sgt. Massine made a number of useful suggested recommendations. The RNCA endorses the following recommendations with respect to use of force and de-escalation training:

- [A]ll serving [RNC members] be educated and/or [re-]trained in personal risk assessment.
- That the RNC ensure that verbal and non-verbal communications are well covered by an expert during basic police training to create a foundation for learning programs such as the CID. Further, that all serving police officers receive the same education and training.
- That the RNC implement the Crisis Intervention and De-escalation (CID) education and training for police basic training. Further, that all serving [RNC members] receive CID education and training.
- That all RNC police officers re-qualify every three years in verbal, non-verbal communications as well as Crisis Intervention and De-escalation (CID) education and training.
- That all education and training concerning Crisis Resolution take a balanced approach that includes de-escalation as well as the use-of-force.
- That instructors responsible for delivering and facilitating 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 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.
- Certain terminology (“bad guy” and “perp”) used in the RNC training materials... should be replaced with a neutral term such as “subject” or “subject of complaint.”

- All scenario-based learning should be assigned a context of where it fits into the education and training program. If the scenarios are used to reinforce a specific skill that has been learned, they should form part of that lesson plan.
- The RNC pistol courses of fire are not training police officers in the skills of pistol handling, marksmanship, or judgement. They are simply tests to determine the suitability of RNC police officers to carry a pistol while in the course of their duties. Other drills that incorporate the skills required to pass should be included and the instructor/learner interactions should be documented in a lesson plan.

56. The RNCA would also welcome a recommendation that all use of force reports filed by officers be reviewed regularly by the RNC. It appears that there is no current process in place for such reviews. The RNCA believes regular review and reporting will contribute to the integrity of the police force and the public's confidence in its officers.

Communications

57. Communication was a major issue explored by the CIDDD. In her opening address, Commission counsel Sandra Chaytor, QC highlighted communication as perhaps the main theme underlying the shooting death of Donald Dunphy. Ms. Chaytor stated in her opening address:

If there is a theme to this story, perhaps it is communication. Woven throughout many aspects of the evidence that you will hear are issues – the root of which is largely communication. Issues that relate to how we communicate with one another and perhaps how we do not; how communication in this day of social media may complicate what we say and how we say it; how small errors or oversights in all forms of communication or misinterpretation of communications may have significant consequences; how police forces communicate, or don't, with

the public in the aftermath of serious incidents and during active investigations.

Indeed, your mandate includes inquiring into the policies and protocols of the Royal Newfoundland Constabulary governing such communications with the public and media.

58. Many witnesses testified at the CIDDD regarding communication with the public and with affected parties in the aftermath of the events of April 5, 2015. These included Meghan Dunphy, Cst. Smyth, members of the RCMP MCU, Gareth Jones and, most importantly from the RNCA's perspective, Chief Bill Janes of the RNC.

59. Chief Janes testified that the RNC produces more than 1,000 media releases per year for the general public to update them on police activities and ongoing and concluded investigations. Chief Janes admitted that there was no communication plan or protocol in place to communicate with the public in relation to the investigation into the death of Donald Dunphy. This decision was in part based on the RNC's Policy and Procedure Manual — General Order #304 — “Media Relations” (P0027), but appeared largely based on the fact the investigation was being handled by the RCMP and RNC management was reticent to become involved in public communications as a result.

60. Chief Janes gave a very detailed account of his reasons:

So earlier you pointed out the three sections under our policy in terms of not communicating when it talks about policy or ongoing investigation or may impact an investigation. And I mentioned section 18 of the policy in relation to Major Case Management or maybe 19, section 19.

So I'll read to you the section 19 of the Major Case Management policy which states: “The RNC must maintain a consistent approach when dealing with the media regarding the investigation of major cases ... Investigations may be impacted by the manner and conduct of

relationships with the media. The information released, and the manner by which it is released, can have consequences to the ongoing investigation and any subsequent prosecution. The media can be a valuable assist in an investigation. It is imperative that the RNC maintain a positive relationship with the media.”

So just to go back, because I don't think I quoted the right section, the sections we had looked at earlier were under 8.1 of the Media Relations policy and that's the policy dated from 2012. So I guess from a holistic perspective, I think it would be important for the Commissioner to know that there are sections of our provincial privacy legislation and, as well, federal privacy legislation which protect the contents of criminal investigations and other investigations.

Under section 5(1)(k) of the ATIPP Act it indicates that the Privacy Commissioner does not have the authority to either view or release any information from an RNC criminal investigation, if that investigation is ongoing. And under 31(1)(a) of that same legislation, ATIPPA, is that the contents of an investigation are protected from release. As well under section 16(1)(a)(ii) of the federal Access to Information Act, the contents of investigations are protected under that as well.

So there are significant restrictions and protections in place to protect the contents of criminal investigations while they are ongoing under both provincial and federal legislation; federal legislation being of significance here because it was an RCMP investigation.

I think it's important for the inquiry to recognize that my role is with the Royal Newfoundland Constabulary and this is a Royal Canadian Mounted Police investigation. And it's an ongoing investigation and I can't either impact or be seen as impacting, in any way, the investigation of another police agency in any way.

I think in the role that I'm in and the role of senior, people in the RNC, we always need to be seen as being impartial. It's only appropriate to respond in any way when the investigation is complete and we'd had a chance to review the investigative reports at the end of the investigation.

Normally, in the course of regular business, as the information in an investigation is released through court processes or through disclosure, and that's normally how any information in relation to any investigation is released, and of course investigations are very live. 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.

I think it's important that there's a balance always between the integrity of an investigation and the right of the community to know things, but I think the integrity of the investigation is what has to come first and the long term in terms of what's right for our community.

I know that in April of 2015, the RCMP gave their very detailed media release, their own reasons for I'll let them speak to. But I'm wondering – and it's a case of how much did that impact the public's perception, and then if you do further releases, what impact will you have if that detailed release had a questionable impact?

61. While Chief Janes' reasoning is no doubt sound, the RNCA submits that the lack of information available to the public and the lack of public support provided to Cst. Smyth throughout the process had a negative psychological effect on him about which he testified. Furthermore, the information vacuum provided a situation in which conspiracy theories and misinformation flourished thereby compounding the impact on Cst. Smyth and created a negative public perception of the RNC, generally.

62. Chief Janes described the media relations work of the RNC. He, along with a sixth year Constable as his media relations officer, is responsible for the 1,000+ media releases issued each year by the RNC. Chief Janes testified:

It's, as you mentioned earlier, or I mentioned earlier, we give more than 1,000 news releases per year. We get five to 10 media requests per day; we do two to three media interviews per week. We deal with very significant issues in terms of homicides, fatal car accidents, sexual assaults, armed robberies: matters of significant public interest. And I'd say more than any entity in our province we are often the lead news story.

So it's a big part as well as to how we connect with the community. And I think that's an important point to make in terms of the importance of having a professional in communications and media relations, something that we don't currently have.

We have a – in my finance office I have somebody who's a chartered accountant, and in my HR office I have somebody who has a master's in labour – or human resource management. But in my media office I have a five- or six-year constable who's a fine officer and does a great job, but they don't have a master's degree in communications or journalism, and it's the type of skills that we need connected to the office of the chief of police and whoever is in that role.

Our current officer is trying to do the role of media relations and at the same time help maintain Twitter accounts, and Facebook accounts, and YouTube accounts, and Snapchat accounts, and Instagram and probably some other stuff I don't even know about. And so it's very challenging for one person to try and do that.

If you look out throughout other government departments you'll see managers or directors of communications attached to government departments. And I suggest that we're as busy as or busier than many of

those other entities, or even combined in some cases. So we do share very large volumes of information with the community on a daily basis and I think that's an important part of what we do. Sometimes it can be through our website, sometimes through news releases.

So communications with the public is a big piece of what we do. And we have done a jurisdictional scan, more information from which I hope to provide for Phase 2 of the inquiry. But in every case across the country we can only find one other police department that didn't have a communications specialist, a civilian professional person attached to the chief's office.

So it's looking at 95 percent of the ones we found, there was a communications person, a civilian who's professionally trained, attached to the office of chief of police helping with strategies and media relations for the department.

63. Chief Janes expressed a desire to have funds available in the RNC's budget to hire a civilian professional media relations person for the RNC to assist with press releases and other communications with the public.

64. The RNCA supports any recommendations of the Commissioner in this respect. The RNCA believes that communication with the public in cases of serious incidents involving officers is paramount to maintaining the integrity of the force and public confidence in the RNC's members.

Staffing

65. During testimony at the CIDDD, the issue of why Cst. Smyth attended the residence of Donald Dunphy alone was much discussed. There appears to be a belief among the general public that officers patrol in pairs. In fact, this is not the case. Testimony showed that it is not the case for the RNC nor the RCMP in Newfoundland and

Labrador. Police officers routinely patrol alone and regularly perform home visits alone.

66. Chief Janes agreed that when he joined the RNC in 1985, two-officer patrols were the norm for night-time patrols and there were certain instances where two-officer patrols operated during daytime shifts such as the police van.
67. In the early 1990s in response to government cuts to the RNC budget, the RNCA agreed to one-officer patrols in order to avoid layoffs. Despite the RNCA asking for the reinstatement of two-officer patrols in the first round of every collective bargaining negotiation since, one-officer patrols are still the norm.
68. The RNCA supports any recommendation of the Commissioner to hire more officers in order to reinstate two-officer patrols. The RNCA recognizes that the province's fiscal situation is such that this is not likely feasible. Therefore, the RNCA advocates for a review of the policies and operations of the RNCA to determine where two-person patrols are most needed and to hire the number of officers required to meet those operational goals.

PSU

69. There was much testimony at the CIDDD about the organization and operations of the PSU on April 5, 2017. The history of the PSU suggests that it was an *ad hoc* unit whose organizational make-up in terms of the number of officers, and its operations in terms of the tasks it undertook, were largely influenced by the wishes and needs of the Premier at any given time.
70. In a prospective sense, RNC management and experts testified regarding the continued need for such a unit and how that unit ought to be staffed and how it should operate in the future.
71. Chief Janes testified:

So I do see it as a balance. The premier determines the full team around the premier, in terms of what it looks like, the skills that they have and the jobs that they do. So on one hand you look at it and you say, well, should we be dictating to the premier who's going to be sitting to them in the vehicle and who's going to be stood by their side as they travel around the community?

And then the other side is if you take it out of the decision making of the premier's office is that, as you alluded to, takes any pressure off in terms of the public perception then that they can be looked after and it's not just the premier's office, but other ministers quite often as well. So I do see a balance there between the two.

And in terms of looking forward in the years and decades to come, which is part of what an inquiry does, I think I would lean towards having the unit in place and, and that premier's office comes in and this is the unit that's there, and it's the same as the last premier and same as the next. So trying to balance between the two, I would lean toward having the unit there.

72. On April 5, 2015 the officer in charge of the PSU (who at that time was Cst. Smyth — then Acting Sgt. Smyth) reported directly to Insp. Joe Gullage, of the Intelligence and Organized Crime Unit of the Criminal Investigation Division ("CIU") but only on administrative matters such as attendance, days off and overtime. The files generated by the PSU at that time were not reviewed by Insp. Gullage.

73. Following the incident at Mitchell's Brook, the RNC brought the PSU back in-house under the direct supervision of the CIU. Insp. Gullage described the rationale as follows:

I had received a call — if I can go back — back in December month when there was a change of government. Myself and Chief Janes had met with the new premier and the chief of staff, and we had explained to them the

policy in relation to – and provide them with a copy of the policy in relation to the protective service detail, what their role was, how the situation worked, and it continued on under Sergeant Marrie and – I think maybe Corporal or Sergeant, excuse me, I'm not sure of the rank – they stayed there.

And in February month I received a call from the chief of staff, Mr. Kelvin Parsons, who asked me if we could meet to discuss the protective services detail. And myself and the chief went into a meeting with him and he felt that, from his conversations with the premier, that there was not enough work there to maintain the unit and we discussed options, and the initiative that I looked at a little while ago was what we put in place.

74. Similar to Chief Janes, Insp. Gullage testified as to what he would like to see in terms of the future of the PSU:

The first [recommendation for the PSU] would be I think it should be legislated; a piece of legislation setting up a Protective Services detail, more particular, close protection. That it's not left to the discretion of the person that's elected. That would take some of the political process out of it.

The other one would be I see it as two different and distinct functions: one being VIP security, close protection I call it; and the other one would be the investigation of any complaints, threats, that sort of stuff. I think that should come within the intelligence Organized Crime that resources would be provided to that unit to investigate all those complaints instead of the officer assigned to VIP security.

75. The RNCA's interest in the PSU is much the same as that of Chief Janes and Insp. Gullage. The RNCA would support any recommendations of the Commissioner which would properly establish a permanent PSU whether that is through legislation, regulations or RNC policy. The RNCA believes that members of the RNCA ought to

be selected through the process set out in the Collective Agreement between the RNCA and the Government of Newfoundland and Labrador; that members of the PSU should be provided with sufficient and up-to-date standardized training consistent with other similar units across the country; and that the PSU be properly resourced and without political influence in regards to its make-up and mandate.

Police Officers

76. Another topic of discussion at the CIDDD was the attendance of A/Insp. Mike Adams and S/Sgt. Reg Tilley at the Holyrood RCMP Detachment to meet with Cst. Smyth for the purpose a Critical Incident Stress Debriefing (“CISD”), as well as the attendance of RNCA members Cst. Warren Sullivan and Cst. Scott Harris to provide support for Cst. Smyth following the incident at Mitchell’s Brook.
77. However the Commissioner chooses to characterize the nature of a police involved shooting and whether or not the ensuing investigation ought to be treated as criminal or not, RNC members viewed the event as a workplace incident and understood the emotional and psychological impact of the shooting on the subject officer.
78. S/Sgt. Mike Adams was the senior RNC officer on duty on April 5, 2015. S/Sgt. Adams was also trained in CISD. It was in these two roles that S/Sgt. Adams decided to travel to the Holyrood Detachment. S/Sgt. Adams testified:

Well, there was a couple of reasons that I felt responsible to go there on that particular day. One of the responsibilities I felt I was the senior officer working and there wasn’t a lot of information that Staff Sergeant Tilley had to give me.

I looked at, also considered the point that I was trained in critical incident stress management back some years ago. But the main reason I went there that particular morning was to see Joey and support Joey and try to give him some encouragement because of what he’s just been through.

79. Sgt. Reg Tilley largely attended because he was asked by S/Sgt. Adams, his supervising officer, and S/Sgt. Adams required a driver while he made calls and took notes en route.

80. Similarly, Cst. Sullivan, then President of the RNCA, testified that his impetus for attending the Holyrood Detachment to visit with Cst. Smyth was out of concern for Cst. Smyth. Cst. Sullivan testified:

My role was completely as a supportive role. Being in the position, or being a police association business, Mr. Commissioner, I have had on many occasion have heard and have attended many seminars, conferences whereby guest speakers had spoken on PTSD, the effects of PTSD, how it affects police officers after the fact. And it was just through that ongoing conversation, ongoing knowledge, that we were very concerned for Joe Smyth's well-being, and not only then and there, but we certainly wanted to ensure that from that point going forward that his mental wellbeing was going to be taken care of.

81. Cst. Harris testified to the same motivation:

Again, as a member of the Royal Newfoundland Constabulary Association executive, our role is to provide support and representation to our members. At that point one of our members had been involved in a traumatic incident and we wanted to go out and provide support to him.

82. While much was made about the decisions of these four officers to attend the Holyrood Detachment to visit with Cst. Smyth, and the decision of the RCMP officers to allow the visit, it must be remembered that Cst. Smyth was not under arrest, nor was he under investigative detention. Numerous RCMP officers testified that there were no reasonable and probable grounds upon which to arrest or detain Cst. Smyth given the information available at that time. While one may take issue with the RCMP allowing the visit, it was within Cst. Smyth's rights to simply leave the

Holyrood Detachment at any time and meet with the four officers. The Holyrood Detachment was simply a convenient place for the meeting that evening.

83. Susan Hughson, QC testified about ASIRT's policies and procedures around police association support for subject officers:

In a general practice, I should tell you that in Alberta, we do allow association representatives to come assist for – assist witness officers and subject officers when a critical incident occurs. They are to come in solely to give for a support purpose. We certainly try to work with the associations as much as possible as is reasonable but association members will not be present generally during an interview. And any contact that an association member has with the subject officer on the night of an occurrence we document it, so if an association member comes in and discusses or goes to talk to the subject officer, our expectations is, he is simply there to provide support, to provide him with a lawyer if he needs one and not to discuss the incident., but there is some contact on occasion.

84. In terms of recommendations by the Commissioner regarding support for subject officers following a serious incident, the RNCA advocates for contact between the Association and the subject officer. This is particularly important given the emotional and psychological stress the subject officer experiences following a serious incident. The RNCA believes, however, that the contact should be limited as much as possible. Therefore, the RNCA would like a recommendation that the Association be allowed a designated officer for such purposes and that officer be properly trained and regularly re-qualified in CISD. That officer can also act as a liaison between the subject officer and the Chief of Police in relation to communications and employment issues which arise following a serious incident.

85. The RNCA also believes there is a need for a comprehensive and clear strategy surrounding a subject officer's return to work following a serious incident. Cst.

Smyth described his return to work following the incident at Mitchell's Brook as follows:

MS. CHAYTOR: And then when you returned to work, where did you return to work? Which unit were you then assigned? Is that as we saw in your CV, you went into the Criminal Intelligence Unit?

CST. SMYTH: Yes I did, that's correct.

MS. CHAYTOR: Okay. So you didn't go back to your PSU position?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And the position that you took in Criminal Intelligence, was that an operational position?

CST. SMYTH: At some point in time it became non-operational. Originally, I was left with the understanding it was an operational position.

MS. CHAYTOR: Okay. And for how long did, were you in an operational position when you went back?

CST. SMYTH: I think it was probably one to two weeks?

MS. CHAYTOR: And then what happened?

CST. SMYTH: I was told that they felt it was better that I carry out administrative duties.

MS. CHAYTOR: Okay. And who told you that?

CST. SMYTH: Originally, I was told that by my immediate supervisor, Glen Noseworthy.

MS. CHAYTOR: And what was the understanding for taking you out of operational position and putting you on an administrative position?

CST. SMYTH: I didn't think they wanted to put myself or the department at risk of being involved in any other type of incident that might – while this one wasn't resolved.

MS. CHAYTOR: Okay. So while you were under investigation with, by the RCMP.

CST. SMYTH: Correct.

MS. CHAYTOR: Okay. Did you have any input into that decision?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And was that a normal practice in terms of the situation which you found yourself to be in, to be assigned an administrative position?

CST. SMYTH: I'm not sure if I'm aware of what a normal practice would be.

MS. CHAYTOR: Okay. And then how long did you remain in a non-operational position?

CST. SMYTH: Up until the following fall.

MS. CHAYTOR: I'm sorry, until when?

CST. SMYTH: The following fall. I believe it was November of 2015.

MS. CHAYTOR: So in November of 2015, what happens then?

CST. SMYTH: I took time off work.

MS. CHAYTOR: Okay. And what was the purpose of taking time off work in November of 2015?

CST. SMYTH: At that point, I had been at work for a number of months and hadn't really, from my perspective, done anything meaningful. And was

also, at that stage, the subject of a lot of vitriolic social media commentary. That was becoming increasingly challenging to be exposed to, and the same goes for my family, and ultimately felt it would be best that I not continue to be in a workplace where I wasn't contributing anything meaningful.

MS. CHAYTOR: Okay. So, Constable Smyth, was that what we sometimes refer to as, it was a stress leave?

CST. SMYTH: I think that would be a safe categorization, yes.

MS. CHAYTOR: You went on leave. It was a medical leave that you took?

CST. SMYTH: Yeah, I think it would be safe to categorize it as voluntary stress leave.

MS. CHAYTOR: Okay. Did you require medical documentation to take that leave?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. And so it was a mental health leave.

CST. SMYTH: I think that would be safe to say, yes.

MS. CHAYTOR: And so after this incident you went back to work. Did you take an annual leave shortly after the incident?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. And so then after you came back from that, you were in Criminal Intelligence Unit –

CST. SMYTH: Correct.

MS. CHAYTOR: – up until November of 2015.

CST. SMYTH: That's correct.

MS. CHAYTOR: So for a few months and then you went on mental health leave.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. When did you then ultimately return to work?

CST. SMYTH: October 2016.

MS. CHAYTOR: October 2016. And how long did you remain on your mental health leave?

CST. SMYTH: Up until May 2016.

MS. CHAYTOR: And what happened then?

CST. SMYTH: I went on parental leave.

MS. CHAYTOR: Okay, so from May 2016 to October 2016 you're on parental leave.

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay. So you were off work from November 2015 up until, then, October of this year.

CST. SMYTH: That's right.

86. It is obvious from Cst. Smyth's testimony, above that his return to work following the incident at Mitchell's Brook was haphazard. Cst. Smyth testified that the process was confusing to him, and that he felt he was sidelined and no longer conducting any meaningful police work. Cst. Smyth testified that this had a negative impact on his psychological well-being.

87. The RNCA supports a recommendation by the Commissioner that the RNC develop a clear policy around a subject officer's return to work following a serious incident. Such a policy would protect the integrity of the force while also addressing concerns about the well-being of the subject officer.

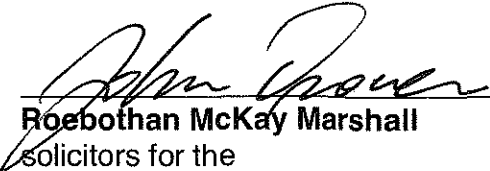
CONCLUSION

88. The RNCA appreciated the opportunity to participate in the Commission of Inquiry into the Death of Donald Dunphy. It was important for the RNCA to have the opportunity to cross-examine witnesses where their testimony related to the objects of the RNCA.

89. The within brief focuses on the recommendations which will form part of the Commissioner's final report. The RNCA was not responsible for the policies and procedures in place on April 5, 2015 and while one of its members was the subject officer, that officer had separate legal counsel and interests which were much wider than those of the RNCA. Similarly, the RNCA was in no way involved in the investigation or reviews into the incident at Mitchell's Brook or the internal investigation into Cst. Smyth's actions in the days before and after the shooting.

90. It is for this reason that the within brief deals specifically with recommendations which will make the workplace a safer one for members of the RNCA and consequently members of the public.

Respectfully submitted to the Commission of Inquiry into the Death of Donald Dunphy this 7 day of April, 2017.



Roebothan McKay Marshall
solicitors for the
Royal Newfoundland Constabulary Association
34 Harvey Road
St. John's, NL A1C 2G1
Per: John Drover