

# REPORT

## Commission of Inquiry Respecting the Death of Donald Dunphy

### 1. Introduction

Please note that this report is based on the information I have reviewed to date. I may revise the report if more information becomes available.

### 2. Purpose of Report

I have been asked by counsel for the Commission to provide an opinion regarding any material deficiencies in the investigation into the death of Donald Dunphy.

### 3. Experience

I am a former police officer with the Metropolitan Police, London, UK. I was sworn as a police officer in January 1982. I was posted to a high-crime area of London, where I worked as a uniform street patrol officer. I was promoted to Sergeant in January 1986. I worked as a street patrol supervisor for most of my career as a Sergeant.

I immigrated to Canada in October 1988. I worked for Allstate Insurance between 1989 and 1991, including investigating incidents that involved fatal or serious injuries.

I became an investigator with the Attorney General of the Province of Ontario, Special Investigations Unit (SIU) when it began operations in January 1991. The SIU is a civilian agency created by Statute. It has a mandate to conduct criminal investigations arising from incidents where there is a death or serious injury involving police officers. SIU investigators are peace officers with powers of arrest. Serving police officers cannot be SIU investigators.<sup>1</sup>

The Director of the SIU reports directly to the Attorney General.

SIU had jurisdiction over approximately 23,000 police officers in the Province of Ontario, but not over RCMP members.

Police officers are obliged by law to co-operate fully with the SIU. However, officers who are subject of a SIU investigation are not obliged to submit to interview by SIU investigators. A subject officer is defined as *'a police officer whose conduct appears, in the opinion of the SIU Director, to have caused the death or serious injury under*

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<sup>1</sup> Currently, 8 of the 14 full-time investigators are from a purely civilian background. The rest are former police officers. The Statute provides that former officers cannot be involved in investigations of their former force. There are 39 'as needed' investigators and 10 Forensic Identification officers.

*investigation.*<sup>2</sup> While a subject officer must complete his or her notes about an incident, those notes will not be provided to the SIU without the subject officer's consent.<sup>3</sup>

I was involved in the investigation of approximately five hundred incidents where police were involved in a death or a serious injury. They included police related firearms deaths and serious injuries, custody deaths and serious injuries, police pursuits and operation of police motor vehicles that resulted in a death or serious injury, as well as allegations of sexual assault by an on-duty police officer.

I was the lead investigator in a very significant percentage of these investigations. In major incidents, I was responsible for directing a team of investigators in ensuring that all the evidence was gathered and the investigation was thorough and objective. I normally attended the scene as soon as practical after an incident, usually within a matter of minutes or hours of the event, depending on its location.

I interviewed or reviewed the statements of thousands of police officers and civilians during the course of these investigations.

Approximately one hundred of the cases I investigated were incidents involving the discharge of a firearm. While not all incidents resulted in a full field investigation, when such an investigation was required I interviewed involved parties, including subject and witness police officers, police supervisors, affected persons and their family members, as well as civilian witnesses.

I was responsible for ensuring that all physical evidence at the scene was identified, secured and properly processed. I worked closely with forensic identification officers processing evidence. I attended the autopsies of deceased parties, working closely with forensic pathologists and Coroners. I also worked with forensic experts, normally from the Centre of Forensic Sciences in Toronto but on at least 2 occasions with the RCMP lab in Ottawa.

I was responsible for identifying, securing and reviewing documentary and digital evidence related to the incident, including police communications tapes, Mobile Data Terminal (MDT), training histories, policies and procedures and emails.<sup>4</sup>

In each police shooting case, I reviewed legislation governing use of force as well as police department rules, regulations and policies relating to the use of force.

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<sup>2</sup> Ontario Regulation 267/10 at section 1(1)

<sup>3</sup> Section 113 of the Police Services Act of Ontario and Ontario Regulation 267/10 of the Police Services Act (Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit) at <https://www.ontario.ca/laws/statute/90p15> and <https://www.ontario.ca/laws/regulation/100267> respectively. Accessed Jan 21, 2017

<sup>4</sup> An MDT is a device in vehicles used by emergency services and others to communicate by text with dispatch and colleagues.

I interviewed police officers and civilians responsible for training police officers in the use of force at both individual police forces and at the Ontario Police College (OPC). The OPC provides training in use of force for all police recruits in the Province of Ontario, as well as train-the-trainer programmes for use of force. I worked with use of force experts from the OPC, police services and on one occasion in a high profile police shooting, from the RCMP.

I dealt with persons seriously injured in incidents, as well as the families of persons impacted by the death or serious injuries – and/or their counsel - in many of the cases I was involved in, including virtually all cases where I was the lead investigator. I was involved in debriefing family members or seriously injured persons at the conclusion of an investigation. This included explaining why charges had not been laid, if that was the case.

I dealt with counsel representing subject and witness officers, as well as senior management and investigators at the involved police service.

I worked with SIU media relations preparing media releases. On occasion, I gave media interviews about investigations, usually at or near the time/location of an incident.

In the cases where I was the lead investigator, I reviewed and assessed all the evidence gathered in the course of the investigation. I then drafted a detailed report for the SIU Director, with a recommendation as to whether an involved officer or officers should be charged with a criminal offence or offences. In cases where I was not the lead, I worked with the lead and other involved investigators, as well as SIU legal counsel, on assessing the evidence and crafting such a recommendation.

I also worked directly with senior Assistant Crown Attorneys at the Ministry of the Attorney General when assessing whether or not to recommend if a charge or charges should be laid, as well as when prosecuting cases when they were.

I recommended a charge in about 3% of the investigations I was involved in.

In cases where I was the lead investigator when a charge was laid, or an inquest was held, I worked with Crown Counsel or Coroners Counsel throughout the process.

I attended several training courses while at SIU, including the General Investigative Techniques, Advanced Case Management and Advanced Sexual Assault Investigations courses at the Ontario Police College. I attended the Homicide Investigators Course held by the Harvard Associates in Police Sciences (HAPS) in Baltimore. I completed the SCAN interviewing course. I was a participant at two Homicide Investigations Seminars organized by the Toronto Police Service.

To the best of my knowledge, at the time I left SIU, I had directly investigated more police related deaths or serious injuries than any other law-enforcement officer in North America.

Since I left SIU, I have been retained in Ontario, British Columbia, Alberta, New York State, Oregon, Alabama, Minnesota and the Cayman Islands to provide an expert opinion on police pursuits that resulted in a death or serious injury. I was retained in 2005 to provide an opinion on a police shooting in BC.

I have been qualified as an expert in police pursuits at Coroner's Court in Hamilton, Ontario in 1992 and in the Grand Court of the Cayman Islands in 2013.

I am the author of *Conducting Administrative, Oversight and Ombudsman Investigations* published by Canada Law Book (now Carswell) in 2009. The book includes an 82-page chapter entitled '*Investigating the Police.*' A second edition is due in early 2018.

I am the co-author of an article entitled *Death or Injury Cases Involving Law Enforcement Officers.* The article was published in *The Champion*, which is the journal of the United States National Association of Criminal Defense Lawyers (NACDL), in two parts in July and August 2002.

I wrote a chapter entitled *The Top Ten Things Not To Do When Setting Up A Police Oversight Agency* in a book entitled *Police Involved Deaths: The Need for Reform* published by the BCCLA in 2012, which included discussion of the investigation of police involved deaths and serious injuries. I have also written an article on conducting interviews in police related deaths and serious injury investigations for the United States National Association of Civilian Oversight of Law Enforcement (NACOLE) on-line publication.

I am the author of *Undertaking Effective Investigations: A Guide for National Human Rights Institutions*, a 240-page manual published in 2013. I was commissioned to write the manual by the Asia Pacific Forum (APF). The APF is an umbrella organization that represents National Human Rights Institutions from 15 nations from the Asia and Pacific region, some of whom are responsible for investigating allegations of police misconduct, including deaths. The case study used throughout the manual is based on a high-profile Australian police custody death. The manual has been translated into Arabic and Mongolian.

During my tenure as Director of the Special Ombudsman Response Team at the Department of National Defence and Canadian Forces (DND/CF) Ombudsman's office, I led the investigation into how DND/CF investigated the deaths of CF personnel in non-combat incidents. I co-authored a 420-page report recommending improvements in how such deaths were investigated and reviewed. All the recommendations were accepted by the Chief of Defence Staff and subsequently implemented.

I have created and delivered customized training on how to investigate deaths and serious injuries involving police, including the investigation of police shootings, to the Royal Canadian Mounted Police (RCMP) Complaints Commission, the Complaints Commissioner of the Cayman Islands, the Police Complaints Authority of Trinidad and Tobago and the Independent Police Review Authority (IPRA) of the City of Chicago. Students at the latter included members of the Chicago Police Internal Affairs Division.

In 2010 I was a panel member on a forum on deaths in police custody organized by the British Columbia Civil Liberties Association, held in Vancouver, BC. In 2009 I gave evidence on conducting investigations into police deaths to the Inquiry into the death of Frank Paul, an aboriginal man who died in a police custody situation.

In 2014, I created and delivered a customized ½ day course on investigating police deaths and serious injuries for NACOLE in Austin, Texas. I have also presented on investigating police deaths and serious injuries on several occasions at NACOLE and Canadian Association for the Civilian Oversight of Law Enforcement (CACOLE) annual conferences.

Since 2007, I have also provided training in how to conduct investigations and/or how to conduct investigative interviews on every continent except Australia, including for UN organizations. While these sessions primarily involve oversight, administrative and human rights investigative agencies, police officers and those involved in investigating police have attended many of these courses.

I have created and delivered customized investigative training for regulators and similar investigative agencies across Canada, including the Department of Justice War Crimes and Crimes Against Humanity, the Law Society of Upper Canada, the College of Physicians and Surgeons of Nova Scotia and the CBSA.

I am a member of Harvard Associates in Police Science (HAPS). HAPS is a US organization of law enforcement officers who have completed a Seminar on Legal Medicine for Police Officers at Harvard Medical School or other approved medical school. Most members are serving or former homicide investigators.<sup>5</sup>

I am currently employed as the Director of the Special Ombudsman Response Team (SORT) at the Office of the Ombudsman of Ontario. The Ombudsman is an Officer of the Ontario Legislature. I have directed all 35 or so major investigations conducted by the Office since 2005. Several were systemic investigations that involve policing issues. They include *A Matter of Life and Death* (2016). This investigation focused on the training provided to police officers in Ontario on the subject of de-escalation. SORT conducted two investigations into the effectiveness of the Special Investigations Unit - *Oversight Unseen* (2008) and *Oversight Undermined* (2010). Both investigations

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<sup>5</sup> The seminar is always held in Baltimore, as far as I am aware. See the HAPS website at <http://harvardpolicescience.org>

examined the objectivity and thoroughness of SIU investigations, including investigations into police shootings.<sup>6</sup>

Other police-related SORT investigations I directed are *Caught in The Act* (2010) into issues involving police arising from the 2010 Toronto G20 Summit and *In The Line Of Duty* (2012). The latter investigation focused on how the Ontario Provincial Police (OPP) and the Ministry of Community Safety and Correctional Services (MCSCS) dealt with Operational Stress Injuries, including officers with PTSD.

#### **4. Material Reviewed**

I have been provided with two USB sticks of material. The first contains what I understand to be the entire RCMP file of their investigation into the death of Mr. Donald Dunphy. The second is from the Office of the Chief Medical Examiner (OCME). The material includes the ASIRT and Independent Observer reviews.

I have also been provided with transcripts of several interviews of witnesses completed by Commission counsel, as well as other documents.

Please note that given the sheer volume of material and the time I have had available, I have not reviewed every document, video or audio item provided. I have not reviewed any material from the OCME. I have attempted to focus on material that appears to be most relevant to the issue I have been asked to report on.

#### **5. Analysis and Opinion**

##### **RCMP investigative process**

Based on the material I have reviewed, the RCMP investigation followed the principles of major case management. The progress of the investigation was well documented, though some relevant information that should have been inputted into the RCMP case management systems was not.

##### **The quality of the investigation**

The quality of a police shooting investigation can usually be determined by answering 8 questions. They are:

- 1. How independent and impartial were the investigators assigned to investigate the incident?**
- 2. Did the investigators have the training and experience necessary to conduct this particular investigation?**

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<sup>6</sup> Please note that my involvement was somewhat limited in the first investigation.

3. **Were all potentially relevant issues identified and, where appropriate, pursued?**
4. **Was the investigation sufficiently resourced?**
5. **Was all potentially relevant digital and physical evidence identified, collected and, where necessary, forensically examined?**
6. **Was all potentially relevant documentation gathered and reviewed?**
7. **Did the investigators identify all persons who may have information relevant to the issue under investigation, did they make justifiable decisions whether or not to interview them and if they did decide to interview them, was that interview thorough and fair?**
8. **Was the analysis of the evidence gathered during the investigation objective and based solely on the facts?**

I have attempted to answer those questions, based on my assessment of what a thorough and objective investigator would do, in the circumstances presented by this case.

**1. How independent and impartial were the investigators assigned to investigate the incident?**

In an investigative context, independence means the degree of real and perceived separation between those being investigated and those conducting the investigation. The greater degree of independence, then the more impartial the investigation will likely be perceived to be.

It is becoming increasingly more difficult to investigate yourself and for the process to have credibility. This is particularly true in police conduct investigations, and even more so in police-involved fatalities. Hence the creation of various oversight models across Canada and many other jurisdictions that - to significantly varying degrees - remove the responsibility for investigating incidents involving police away from police officers and put it in the hands of civilians.

In this case the RCMP investigated the shooting, as the incident occurred within their jurisdiction. It was therefore police investigating police, albeit police officers from a different police service.

There is no evidence that I am aware of that there was any significant actual conflict of interest on the part of any of the investigators. There were no personal relationships between Cpl. Burke, A/Sgt. Smyth or the Dunphy family.

However, there may have been a potentially perceived conflict of interest that should have been dealt upfront and openly.

I understand that Cpl. Burke had contact previously with A/Sgt. Smyth. A/Sgt. Smyth was working in the Royal Newfoundland Constabulary (RNC) Criminal Intelligence Unit and Cpl. Burke contacted him briefly on one occasion for information about an investigation into a burglary. He also had some dealings with A/Sgt. Smyth when he (Burke) worked with VIP protection, coordinating visits. According to him, these dealings amounted to '*one or two visits*'<sup>7</sup> in 2008/9.

Immediately after he was assigned to the shooting, Cpl. Burke quite rightly advised the Team Commander, Sgt. Osmond, of his prior dealings with A/Sgt. Smyth. It was decided that he could continue to lead the investigation. There is nothing in the RCMP material that I have been provided that documents this decision. Sgt. Osmond stated that he canvassed his team members for potential conflicts and that he expected anyone who may have had a conflict to self identify, but he did not make any notes of this.<sup>8</sup>

Cpl. Henstridge advised that he had no dealings of significance with A/Sgt. Smyth prior to this incident. Sgt. Osmond stated he had no prior dealings with A/Sgt. Smyth or the Dunphy family.

When I was leading SIU investigations, I expected my investigators to advise me of any possible real or perceived conflict, which as noted above Sgt. Osmond stated Cpl. Burke did in this instance. I would have recorded that process in writing, particularly if any member of my team had any previous contact with the subject officer, as happened in this case. I would volunteer any such information to the lead investigator, in cases where I was not the lead.

Given the limited extent of these prior contacts, their dates and the absence of any personal or significant professional relationship, there was not a serious enough conflict of interest to warrant recusing Cpl. Burke.

That said, in the interests of full disclosure and transparency, the investigators should have advised the Dunphy family of this prior contact as soon as possible, explaining the reasons why Cpl. Burke's involvement in the investigation was not, in their view, a conflict and then consider any representations that the family or counsel may want to make.

### **Impartiality**

In some respects this investigation did not, at least in my view, meet the standards of impartiality expected in a thorough and objective investigation of an incident of this nature.

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<sup>7</sup> Interview of Cpl. Burke by Commission Counsel at p28 onward

<sup>8</sup> Interview of S/Sgt. Osmond by Commission counsel at p55 onward

This investigation was a police service investigating an officer from another police service.

Investigating fellow officers has many potential downsides. It can create a tremendous amount of pressure on the investigators. However professional the investigating officers want to be, they are still investigating one of their own, and that is what members of the public and/or family members may perceive them to be doing. As Cpl. Henstridge stated during the interview of A/Sgt. Smyth as they were discussing public and media perceptions about the shooting, ‘.....*you are with the RNC and we are with the RCMP so there’s – there’s a big cover up or whatever. That’s what people say.*’<sup>9</sup>

Police investigating police is generally not a real (as opposed to perceived) issue where corruption, dishonesty or sexual misconduct are alleged. Police officers do not tolerate dirty cops, at least in my experience. However in cases such as this one, where the investigation involves a judgment call in the application of force, the picture can become more blurred. The investigators may - consciously or otherwise - have a tendency to be overly empathetic with the subject officer, particularly if they conclude early in the investigation that the use of force was warranted.

When discussing the impartiality of the first interview of A/Sgt. Smyth when speaking to Commission counsel, Cpl. Burke referred to the difficulties created by having police investigating police. When asked if he was affected by the fact that he was interviewing ‘*a fellow officer*’ he replied that ‘*I felt some portions of it was.*’<sup>10</sup>

While stating that the interview was impartial, he advised that “*it may have been a little different because it was a police officer interviewing a police officer, but I don’t think it tainted the interview.*”<sup>11</sup>

Some of the comments made during A/Sgt. Smyth’s first interview, including that ‘*the public doesn’t really understand the pressure we are under*’ suggest, at least to me, a ‘we are all on the same side here’ mentality. Unless there is a legitimate investigative reason for doing that, then such wording is inappropriate in this situation.

Another example. Cpl. Burke stated that: “*...you could put yourself in his shoes basically because you are trained the same way and things like that.*”<sup>12</sup>

With great respect to Cpl. Burke, the main reason a thorough and objective investigator puts him or herself in the interviewee’s shoes in these circumstances is to focus on areas that the interviewee may or may not like to be questioned about, including whether they have an agenda, an interest in the outcome of the investigation and so on. It is not, as Cpl. Burke would appear to imply, if I understand him correctly, so one can sympathize with

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<sup>9</sup> Interview of A/Sgt. Smyth April 6 2015 at p71

<sup>10</sup> Interview of Cpl. Burke by Commission counsel at p298

<sup>11</sup> *ibid*

<sup>12</sup> *ibid* at p297 onward

the interviewee. If that interpretation is right, this is an example of the ‘there but for the grace of God go I’ mentality mentioned above.

That mindset may impact the investigative process. Cpl. Henstridge was asked whether the fact that A/Sgt. Smyth was a police officer influenced his decision to agree to delay A/Sgt. Smyth’s interview. He replied that:

*I will say that I don’t think it specifically affected it, but I will say I had enormous empathy for the situation and I looked at him and I felt that he had been through a lot.*<sup>13</sup>

That does not reflect well on the objectivity of the investigation.

Another indication that may point to an overall mindset that permeated this investigation is in Sgt. Osmond’s notes. When the investigators learned that the recording of first reenactment had been lost, Sgt. Osmond met with Cpl. Burke, prior to attending a meeting with senior RCMP staff, to discuss how that should be handled. In his notes he wrote:

*We agreed we will not ask Smyth to do it again. It was traumatic for him to relive it once. Detrimental to ask him to do it again due to our mistake: mental health consequences, PTSD’.*<sup>14</sup>

With all respect to Sgt. Osmond, the primary goal of a thorough and objective investigator is to find out what happened. While the mental health of all parties involved is of course an important consideration, there should have been no hesitation in asking for a second reenactment, in those set of circumstances. This is a homicide investigation that has no witnesses. To his credit, A/Sgt. Smyth agreed to do the second reenactment.

### **Independent Firearms Expert**

The RCMP investigators went to considerable lengths to locate and retain a firearms expert to review the physical evidence relating to the shooting. The expert who was retained worked for the Calgary Police Service, though he was a former RCMP employee. He was asked to determine whether firearms related evidence either supported or refuted the account of A/Sgt. Smyth. While I have no expertise in his field, had I been the lead investigator in this case, I would have concluded that his report appears comprehensive and balanced. I would have no hesitation in accepting his findings.

### **Independent Use of Force Expert**

A serving RCMP officer provided an expert report on whether or not the use of force was justified in these circumstances. In my experience, it is very difficult to find a use of force expert who is not a serving or former police officer. I am not an expert in use of force but

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<sup>13</sup> ibid at p44

<sup>14</sup> Interview of S/Sgt. Osmond by Commission counsel at p306.

had I been the lead investigator assessing his evidence, I would have had no major issues with his report, with the caveat that his conclusions rely almost exclusively upon the account given by A/Sgt. Smyth.<sup>15</sup> If what A/Sgt. Smyth stated is inaccurate, then the opinion is not of much value.

### **ASIRT review**

On January 29, 2016, the Minister of Public Safety asked the Alberta Serious Incident Response Team (ASIRT) to review the RCMP investigation. I assume that this was to inject an element of independent review of the investigative process. I am not sure of when or how the decision was made to ask ASIRT to conduct a review of the investigation, or whether other oversight agencies were considered.

Please note that ASIRT is not a civilian police oversight investigative agency, such as the Special Investigations Unit (SIU) in Ontario or the Independent Investigations Office (IIO) in BC. The latter two are prohibited by Statute from having serving police officers on staff, although both have former police officers employed as investigators, as well as investigators who have no police background. Former officers cannot become involved in investigations involving their former police service.

In contrast, ASIRT is - as it notes in its August 30, 2016 report into the shooting - ‘a **civilian-led** independent integrated investigative unit.’<sup>16</sup> What the report does not mention is that ASIRT has serving police officers on its investigative staff, including serving RCMP officers. It also has retired officers on staff, like SIU and the IIO. The current Director of Investigations is a former RCMP Chief Superintendent.

I do not know if any serving or former RCMP or other police service officers were involved in the ASIRT review in any way.

I want to emphasize that I am not in any way questioning the integrity of the ASIRT review or any ASIRT member involved in it, though my conclusions differ from theirs in several areas. Rather, it is a comment about perception. If the purpose of asking ASIRT to review the investigation was to give members of Mr. Dunphy’s family and the public the notion that an independent civilian investigative agency had conducted the review, then all parties should have been advised that ASIRT is staffed, in part, with serving police officers, including RCMP officers. I do not know if that happened.

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<sup>15</sup> I am not sure how Cpl. Knapman concluded that Mr. Dunphy ‘*was given the opportunity to comply with lawful commands*’ and ‘*pleas to comply*’ (at p18), unless he is referring to the ‘no, no, no’ that A/Sgt. Smyth stated he shouted, as he first saw the barrel of the gun. He also accepted A/Sgt. Smyth’s evidence that he was told by the Dunphy’s that Mr. Don Dunphy ‘*did not have any firearms*’(at p5). He noted that the gun ‘*fell on the floor*’ ( at p15). The scene photographs suggest it did not. It was located against the plastic container, with the stock in the air. None of this undermines his ultimate conclusion, in my view, provided one accepts A/Sgt. Smyth’s account of what happened.

<sup>16</sup> emphasis added

## Communication between the RCMP investigators and A/Sgt. Smyth

There was some communication between the RCMP investigators and A/Sgt. Smyth, outside of the formal interview, re-interview and reenactment processes, as the investigation progressed. As far as I can see it focused around requesting/providing updates on the progress of the investigation, though Cpl. Burke stated he had never done that with the subject of a previous investigation.<sup>17</sup> He also gave A/Sgt. Smyth his cell phone number, which he had also never done previously.<sup>18</sup>

In my experience, direct contact between the lead investigator and the subject officer is highly unusual during the course of an SIU investigation. Normally, any contact would be done through the officer's counsel.<sup>19</sup> Regardless, all contact should be recorded in some form, which appears not to have been the case here. Cpl. Burke referred to telephone calls with A/Sgt. Smyth that may not have been noted.<sup>20</sup>

Other contact was recorded. In an email to Cpl. Burke on July 29, 2015, A/Sgt. Smyth requests an update. A/Sgt. Smyth wrote that 'there have been times when the RCMP have referred to me as 'another victim''

I do not know what A/Sgt. Smyth was referring to. Cpl. Burke stated that he had no knowledge of any RCMP officer saying that A/Sgt. Smyth was a victim, but did not follow up on this.<sup>21</sup> The email also asked about what other investigative steps were being taken. Cpl. Burke agreed that the email was inappropriate.<sup>22</sup>

Cpl. O'Keefe called A/Sgt. Smyth at home on April 10, shortly after A/Smyth sent his email to the RNC email. Sgt. Osmond quite rightly described the call as 'completely inappropriate.'<sup>23</sup> Cpl. O'Keefe does not necessarily agree that the call could raise questions about the impartiality and independence of the investigation, any lead investigator in a police shooting would not have been happy that a call of this kind was made. As Sgt. Osmond himself wrote when he found out about the call on April 14:

*However, I was informed this morning that Trevor also reached out to Sergeant Smyth following the shooting to see how he was doing. I don't know on what day the contact occurred I have directed Cpl. Foote to have Cpl. O'Keefe draft comprehensive notes on that contact as it was not previously known to the investigative team and was not appropriate. I understand we are all human beings*

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<sup>17</sup> Interview of Cpl. Burke with Commission counsel at p393

<sup>18</sup> *ibid* at p396

<sup>19</sup> There were no cases at SIU that I recall where a subject officer was not represented by counsel. There were one or two where an officer would contact me directly. I would always refer them back to their counsel and decline to deal with them directly, except in one instance, at least as far as I can recall.

<sup>20</sup> *ibid* at p392

<sup>21</sup> *ibid* at p398

<sup>22</sup> *ibid* at p399

<sup>23</sup> Interview of Sgt. Osmond by Commission counsel at p319

*with feelings and this was no doubt done with the best of intentions. However the RNC were completely plugged into the MEAP side of things and the optics of a first responder of the file speaking to a person under investigation should have been a common sense issue and should not have been done.*<sup>24</sup>

I understand there was also an issue about information Cpl. O'Keefe may have given to Meghan Dunphy about the circumstances of the shooting.

The bottom line, from an investigative perspective, is that as little information as possible should be shared with anyone outside of the investigative team, particularly in the early stages of an investigation, including parties involved in the investigation. That can be difficult, particularly when the investigation takes a long time, as it did in this case. Lengthy investigations can be very frustrating for all involved. The most an investigator can do is provide very general updates about the process, but not specific detail.

Any information provided should not in any way potentially impact on the integrity of the investigative process, however remote that possibility might be. For example, Cpl. Burke quite rightly declined providing A/Sgt. Smyth with a copy of his statement when he asked for it on June 9, 2015.

The reason is obvious. Information may consciously or unconsciously impact witness accounts, discourage witnesses from coming forward or imply, intentionally or otherwise, that the shooting as was justified or not.

### **Communications with the public**

How an agency responsible for investigating a police shooting communicates with the public about the incident and the investigation can be an indication of the mindset applied to an investigation.

The overriding principle remains this: say nothing that compromises the integrity of the investigation, particularly in the early days of an investigation. That may conflict with the public's right to know and keeping the community as informed as possible, in order to minimize the chances of jumping to unfounded or speculative conclusions. It also may be frustrating for involved parties when there is evidence that would appear to be in their favour that is not disclosed. It can be very difficult for investigators to limit the release of information, particularly when information – accurate or otherwise - from non-police sources, may be spreading like wildfire, as I understand happened in this case.<sup>25</sup>

On April 5, at 6.31 p.m., the RCMP issued a brief media release. It read:

*RCMP Investigating Incident In Mitchell's Brook*

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<sup>24</sup> Email dated April 14 2015 from Sgt. Osmond to S/Sgt. Tiller, read during the interview of Cpl O'Keefe by Commission Counsel at p 194.

<sup>25</sup> See the RCMP email trail relating to the genesis of the press release.

*On Sunday April 5<sup>th</sup> at approximately 2.30 pm, a member of the Royal Newfoundland Constabulary was in the area of Mitchell's Brook conducting follow up inquiries regarding an investigation*

*During that follow up inquiry, a shooting incident occurred and a 59-year-old male is confirmed dead at the scene*

*The Holyrood Detachment of the RCMP, in concert with the Major Crime Unit and Forensic Identification Unit are on site and are processing the scene and conducting the investigation.*

*The identity of the deceased male has not been released pending notification of next of kin. The autopsy is scheduled for tomorrow*

This was an appropriate email release in the circumstances. My only comment is that the authors might have added a line asking anyone with any information about the incident or any event that may be related to it, to please contact MCU, or words to that effect.

The RCMP released an update the following day, confirming that the subject officer was an RNC PSU member along with other information about the investigative process. It too was appropriate in the circumstances.

I understand that the RNC had a brief press conference on April 6. I am not sure what information was released at that event.

At 2.45 p.m. on April 7, 2015, almost exactly 48 hours after the shooting, the RCMP issued the following media release.

*On Friday, April 3rd, a Royal Newfoundland Constabulary officer assigned to the Protective Services Unit was advised of the existence of a social media comment, in the public domain, which was felt to be a concern as it was believed to be directed towards provincial politicians. On Sunday, April 5th., the officer attended a residence in Mitchell's Brook, near Mount Carmel, NL, to investigate the social media remarks.*

*Prior to attending the Mitchell's Brook residence the RNC officer conducted a routine risk assessment within the scope of his duties accessing police databases, discussions with other police personnel, and neighbourhood enquiries.*

*The officer assessed the risk as low, based on all information he received and as such determined that a multi-officer response was not warranted. This included contacting the RCMP detachment at Holyrood, which is the police service of jurisdiction for Mitchell's Brook. The risk assessment process is an ongoing police activity that occurs throughout all aspects of every investigation.*

*To date, the RCMP investigation indicates the investigating officer attended the Dunphy residence, spoke with Mr. Donald Dunphy at the door, the officer was identified as a police officer, and was invited into Mr. Dunphy's home by Mr. Dunphy. Once inside the residence, a discussion unfolded between the officer and Mr. Dunphy over a period of approximately 15 minutes. During this time period there was a sudden and dramatic change in the demeanor of the visit. The police officer was faced with Mr. Dunphy holding a long barrel firearm which was pointed at the officer. Evidence indicates the police officer responded to this threat with lethal force by drawing and discharging his service pistol. Mr. Dunphy was fatally shot and succumbed to his injuries immediately at the scene.*

*Examination of the scene by Forensic Identification investigators has lead to the seizure of a .22 caliber rifle found on the floor of the residence next to Mr. Dunphy. The rifle was determined to be loaded. It has been seized and will be forwarded to a forensic laboratory for examination,*

*This matter remains under investigation by the RCMP.*

*The media are welcome to attend the Holyrood RCMP Detachment at 3:45 P.M. to meet with the below noted media contact on this matter.*

I do not understand why such a media release was issued 48 hours into an unwitnessed fatal police shooting investigation, with so much evidence still to be gathered and assessed. With respect to all involved, there was far too much information included in this release. It is based virtually entirely on A/Sgt. Smyth's account. It also paints a picture of a justified shooting.

The release was issued prior to the analysis (and in some cases the gathering) of potentially crucial pieces of evidence, including:

- any of the physical evidence
- any of the digital evidence
- the post mortem report
- toxicology
- firearms report
- use of force report
- interviews of potentially important witnesses,

Issuing this release, worded as it was, ignored the possibility that other witnesses may come forward, or evidence might emerge that may - or may not - have supported the information set out in the release. From an investigators perspective, it was unfortunate. It tainted the investigation. It telegraphed a conclusion.

That the release may ultimately have proved to be accurate is not a justification, at least in my view.

In Ontario, SIU is restricted by law as to what information it can release during a SIU investigation, as is the involved police service.<sup>26</sup> Its media releases are typically very sparse, and are primarily aimed at appealing for witnesses/information.

SIU has set out its guiding principles for communication with the media on its website, as follows:

*Communication with the media is important in ensuring that the SIU remains responsive, transparent and accountable to the public it serves. The SIU has developed a comprehensive Communications program which aims to foster effective communications with the media while also respecting the integrity of SIU's investigations and the important privacy interests of those involved. The SIU's Communications Coordinator is the Unit's primary spokesperson.*

*The tension between the need for a government agency such as the SIU to share information with the public and the obligation to keep certain information*

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<sup>26</sup> Section 13 of Ontario Regulation 210/67 provides that: The SIU shall not, during the course of an investigation by the SIU, make any public statement about the investigation unless the statement is aimed at preserving the integrity of the investigation. Section 12 sets out the obligations of Chiefs of Police, which reads as follows

#### **Disclosure of information**

12. (1) The police force may disclose to any person the fact that the SIU director has been notified of an incident and is conducting an investigation into it. O. Reg. 267/10, s. 12 (1).

(2) The police force and members of a police force shall not, during the course of an investigation by the SIU into an incident, disclose to any person any information with respect to the incident or the investigation,

- (a) except as permitted by this Regulation;
- (b) except that a police officer appointed under the *Interprovincial Policing Act, 2009* may disclose the information to his or her extra-provincial commander during the course of the investigation; or
- (c) except that the chief of police of the police force of which a police officer appointed under the *Interprovincial Policing Act, 2009* is deemed to be a member may disclose the information during the course of the investigation to,
  - (i) the extra-provincial commander of the officer, or
  - (ii) an appointing official as defined in that Act if the chief of police is not such an official and the investigation relates to the officer. O. Reg. 267/10, s. 12 (2).

*confidential because of legal and policy restrictions is a constant challenge. This requires a balancing act, as the needs and sensitivities of the media, complainants, the community, police and the SIU all have to be considered within a legislative framework. **It is imperative to ensure that the information released is fair, does not prejudice the investigation and does not violate the privacy rights of those involved.***<sup>27</sup>

Here is an example of how these principles were applied in a recent police shooting. On December 23, 2016 officers from the London, Ontario Police Service (LPS) tactical unit went to a house in London to arrest an occupant.

Police shot and killed the man in or very near to the house. Media reports stated that the man was armed with a crossbow and that a LPS officer was injured by a crossbow bolt at some point during the interaction. SIU were called immediately

Here is the SIU press release from later that day, which is similar in tone and content to the initial RCMP release in the Dunphy shooting.

*Mississauga, ON (23 December, 2016) ---*

*The province's Special Investigations Unit has invoked its mandate and started an investigation into the death of a 35-year-old man who was shot by London Police Service.*

*Preliminary information received from the London Police Service suggests the following:*

- *Just after 6:00 a.m. this morning, London Police officers were at a residence on Duchess Avenue near Edward Street.*
- *There was a confrontation with a man.*
- *The man was shot. He was pronounced dead at the scene.*
- *At least one police officer was injured.*

*Five investigators and three forensic investigators have been assigned to investigate this incident.*

*The SIU is urging anyone who may have information about this investigation to contact the lead investigator at 1-800-787-8529 ex. 1935.*

SIU issued a short update about the investigation 3 days later:

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<sup>27</sup> [https://www.siu.on.ca/en/media\\_centre.php?print=y#contentCol](https://www.siu.on.ca/en/media_centre.php?print=y#contentCol) Accessed Jan 28, 2017  
Emphasis added.

**Mississauga, ON** (26 December, 2016) ---

*The province's Special Investigations Unit is releasing the name of the man who died during an interaction with London Police Service officers on December 23, 2016.*

*In accordance with the [SIU name release policy](#) and with the consent of next of kin, the deceased man has been identified as 35-year-old Samuel Maloney.*

*The SIU has also made a number of designations as part of this investigation. At this time, three subject officers and 18 witness officers have been designated.*

*The SIU continues to urge anyone who may have information about this investigation to contact the lead investigator at 1-800-787-8529 ext. 1935.<sup>28</sup>*

At the time of writing, the SIU investigation is ongoing.<sup>29</sup> There have been no other SIU media releases.

### **The role of the Independent Observer**

Retired Justice Riche was the Independent Observer (IO) attached to this investigation on April 8, 2015. I have no particular expertise in working directly with an Independent Observer, so will limit my comments accordingly.

The RCMP Complaints Commission began a programme of attaching IO's to high profile RCMP investigations involving death or serious injury roughly about the time of the Dziekanski incident at Vancouver Airport in 2007. In that case, they assigned an IO to assess the impartiality of the investigation, but not, as far as I understand it, the quality of the investigation itself.

Following the recent introduction of the *Enhancing RCMP Accountability Act*, I understand that the RCMP Complaints Commission – now renamed the Civilian Review and Complaints Commission for the RCMP - has the power to take a more proactive role in conducting investigations, including initiating public interest investigations into

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<sup>28</sup> [https://www.siu.on.ca/en/news\\_template.php?nrid=2926](https://www.siu.on.ca/en/news_template.php?nrid=2926)

<sup>29</sup> There is some background at this link:

<http://news.nationalpost.com/news/canada/who-was-samuel-maloney> Accessed Jan 27, 2017. There have been a number of articles in the press about the incident, including a detailed account from the man's lawyer, who was apparently on the phone with client when the shooting occurred

incidents where the Chair of the Commission feels this is warranted. For example, in October 2016, it began an investigation into an incident involving use of force in BC when a video became public.<sup>30</sup> The use of an IO is still an option available to the Chair.

In this case, the IO appears to have had little or no role in planning and executing the investigation – though he did make several suggestions as to investigative avenues that he believed should be pursued rigorously. Nor was he present at any of the interviews, as far as I am aware, except the two reenactments, which are a form of interview.

On the other hand, the IO was given unfettered access to everything generated in the course of the investigation, as far as I understand it. Mr. Riche injected himself quite forcefully into this investigation on occasion, raising concerns amongst some of the RCMP investigators as to the limits of his mandate. The RCMP challenged some of his conclusions.<sup>31</sup>

The bottom line, at least in my view, is that while an IO is a valuable step in the right direction, an IO is not an independent **investigator**.

## **2 Did the investigators have the training and experience necessary to conduct this particular investigation?**

The investigators assigned to this investigation were experienced officers from the Newfoundland and Labrador Major Crime Unit East (MCU) based in St John's.

Cpl. Burke was the primary investigator. He had been an RCMP officer since 2002 and a member of the MCU since 2009. He advised that he had done several courses relating to major investigations, including a Team Commander course in 2015.<sup>32</sup> The course is designed to train officers to supervise major investigations. He had also completed an investigative interviewing course in 2011.<sup>33</sup>

He has also been trained as a VIP protection officer. It is not clear to me if that training included specific guidance in risk assessment issues that are relevant to this incident, such as the protocol for conducting home visits in circumstances such as this.<sup>34</sup>

Cpl. Burke had been the primary investigator in 2 homicides at the time of Mr. Dunphy's death, one in 2010 and one in 2013. He had also participated in the investigation of 2 other homicides as well as other serious incidents. He had never previously investigated a police shooting.<sup>35</sup>

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<sup>30</sup> <https://www.crcc-ccetp.gc.ca/en/newsroom/crcc-chairperson-initiates-complaint-and-public-interest-investigation-coquitlam-use-force>. Accessed Jan 4, 2017

<sup>31</sup> I have not reviewed Judge Riche's conclusions in any detail.

<sup>32</sup> I am not sure if the course was before or after the incident

<sup>33</sup> Interview of Cpl. Burke by Commission counsel at page 4 onward

<sup>34</sup> *ibid* at p9

<sup>35</sup> At page 22 he notes that he was involved in the investigation of a 'firearms related' incident involving an RNC officer in 2012 or 2013. I am not sure of the details.

Cpl. Henstridge also had significant investigative training and experience. He had been involved in the investigation of 12 homicides, including 3 or 4 as the primary investigator. He had been involved in the investigation of a serious incident involving a police officer.

Both officers were suitably trained and experienced to conduct an investigation of this kind.

Sgt. Osmond was an experienced Team Commander and had investigated numerous homicides. He had not dealt with a police shooting previously.

### **3. Were all potentially relevant issues identified and, where appropriate, pursued?**

A thorough and objective investigator should have quickly identified the primary issue in this case – was A/Sgt. Smyth justified in using lethal force in these particular circumstances. Accordingly, the investigation should have been focused primarily on A/Sgt. Smyth and his actions leading up to and in that house. He is the subject officer.

During the interview of A/Sgt. Smyth the day after the shooting, Cpl. Henstridge, referring to Mr. Donald Dunphy, stated that:

*The biggest jist of the – investigation now is trying to figure out what was happening in his head.”<sup>36</sup>*

With all due respect, the focus of the investigation should have been to find out what was going on in A/Sgt. Smyth’s head, leading up to and at the time he pulled the trigger and look assiduously for evidence that supported or refuted that. Trying to reconstruct Mr. Dunphy’s thought process was important too, but it should not have been the focus of the investigation.

Based on Cpl. Henstridge’s comment and other information I refer to elsewhere in the report, it appears to me that at times the focus of the investigation was not on A/Sgt. Smyth, but rather on Mr. Dunphy, particularly during the crucial early days of the investigation. While Mr. Dunphy’s antecedents, prior conduct, state of mind and so on are of course very important, a thorough and objective investigator would identify that those of A/Sgt. Smyth should take priority, at least until the evidence points otherwise.

#### **Investigation of antecedents**

As in any investigation, background information can be useful to investigators, in varying degrees.

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<sup>36</sup> Interview of A/Sgt. Smyth April 6, 2015 at p61. I am assuming that ‘his’ refers to Mr. Dunphy

In police shooting cases, one of the indications that the investigations has been done thoroughly and objectively is assessing the efforts made to obtain relevant background information about the subject officer(s), as well as other parties, including the person shot.

On April 20, Cpl. Burke received information about an incident involving A/Sgt. Smyth while he was on vacation in 2005, which could potentially reveal a propensity for violence.<sup>37</sup> I am not clear how this information was ultimately used or factored into the final assessment of all the evidence.

He also reviewed A/Sgt. Smyth's personnel and discipline records at an RNC building but did not obtain a copy.<sup>38</sup>

Cpl. Burke made other inquiries on various databases about A/Sgt. Smyth.<sup>39</sup>

The investigators interviewed current and former members of the RNC Protective Services Unit (PSU) who had worked, or were currently working, with A/Sgt. Smyth about a month after the incident.<sup>40</sup> They also interviewed A/Sgt. Smyth's wife.

There appears to have been a reasonably thorough investigation of Mr. Dunphy's background, including interviews with family and friends.

### **Efforts to retrace steps**

I understand that the investigators put a fair amount of effort into retracing Mr. Dunphy's steps prior to the shooting. This included reviewing CCTV video, as well as contacting staff at an RBC branch to track down possible video footage and interviewing wait staff at a restaurant where Mr. Dunphy had been.

I am not sure what efforts the investigators made to retrace A/Sgt. Smyth's steps that day. There is no evidence that I am aware of that the investigators attempted to interview anyone who had had any kind of contact with A/Sgt. Smyth that day, from the point he woke up to the point he spoke to Dick and Debbie Dunphy, other than his wife.

There is information retrieved from A/Sgt. Smyth's cell phone that may have helped the investigators identify who he had had contact with, including a number of calls to Sgt. Tim Buckle made about 1 and ¾ hours before the shooting.<sup>41</sup> I would have expected that investigative avenue to have been pursued.

### **What is policy and practice for solo visits in these circumstances?**

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<sup>37</sup> Daily Task Log at p244

<sup>38</sup> *ibid* at p217

<sup>39</sup> *ibid* at p252

<sup>40</sup> These interviews are discussed in the segment on interviewing, below.

<sup>41</sup> Cell phone record of A/Sgt. Smyth (document 567)

Clearly, one of the issues that is relevant to this investigation is why did A/Sgt. Smyth decide to go alone to the premises. Officer safety is drummed into officers from day one of their police careers, and solo visits to the home addresses of individuals who have made what may be interpreted as threats on social media raises obvious potential officer safety issues. A/Sgt. Smyth's position is, as far as I understand it, that it was not a threat situation, rather it was more informal contact and assessment.

When he informed the Holyrood RCMP detachment that he intended to visit, he declined Cst. Cox's offer to attend with him. His reasoning, as far as I understand it, was that the presence of a uniformed officer might escalate the situation.

I did not see any documentation relating to RNC and/or RCMP policy or practice on this issue in the material I reviewed.

As mentioned the investigators did interview current and former members of the PSU. However, as noted in the segment on interviewing below, the RCMP investigator assigned to conduct these interviews did not pursue this issue in any significant degree with all the officers, at least in my view,

I am not sure if the investigators sought advice on this issue from those working in the VIP personal protection field. I am sure it would have been readily available from RCMP or another police service, such as the Ontario Provincial Police. Such an expert may have been able to provide an opinion on appropriate policy and procedure relating to risk assessment, solo visits to residences in situations such as this and so on. As noted above in the segment on independence, Cpl. Burke had worked on VIP protection. I am not sure whether or not he had the necessary experience and training to deal with this issue.

### **Trickle of blood**

In his final report Cpl. Burke noted with reference to Mr. Dunphy's body at the scene:

*The blood flow from the hole in his temple was not flowing straight down with gravity as is expected but it was flowing on an angle toward the back. This appeared inconsistent with the present position of the deceased.*<sup>42</sup>

He then added as a footnote:

*Cpl. Burke reviewed all statements/notes of those who entered the Dunphy residence before FIS arrived and there is no evidence that the body was moved.*

I am not sure what was done to attempt to follow up with this apparent inconsistency, including perhaps consulting with a forensic pathologist.

### **Other investigative steps**

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<sup>42</sup> RCMP Investigation – Sudden Death of Donald Dunphy (undated) at page 17.

The investigators contacted the RCMP Truth Verification Section to discuss whether a polygraph would be of benefit. It was decided it would not be. A/Sgt. Smyth was not offered an opportunity to take a polygraph test.

Investigators also contacted the Nova Scotia Serious Incident Response Team (SiRT) to determine if they had a checklist for investigating incidents such as this. They did not. SiRT is responsible for investigating serious incidents arising from police activity in the province.<sup>43</sup>

#### **4. Was the investigation sufficiently resourced?**

Generally, investigators need two main resources – enough time to conduct a thorough investigation and enough people to ensure that the evidence can be gathered as quickly as possible.

Evidence, be it witness testimony, digital, documentary or physical can be perishable. Memories fade or are tainted - inadvertently or otherwise, physical, documentary and, perhaps to a lesser degree, digital evidence can be altered, damaged, lost or destroyed. Evidence should be secured as quickly as possible and that requires appropriate resources.

The investigation appears to have been sufficiently resourced.<sup>44</sup> The scene was secured for as long as it was needed. A use of force expert was consulted, as was an external consultant who was commissioned to provide an opinion on the firearms related evidence and create a 3-D reconstruction. The investigators, to their credit, pushed for forensic testing to be completed as quickly as possible.

The investigation took nearly 18 months to complete. That is a very long time and doubtless created significant stress for A/Sgt. Smyth, his family and the Dunphy family<sup>45</sup>. I am not sure of the causes of delay, other than the time taken to obtain expert reports and the ASIRT review, which took from January to August 2016. There was also a delay in having exhibits analyzed at the RCMP lab, which the investigators called unacceptable.<sup>46</sup>

#### **5. Was all potentially relevant digital and physical evidence identified, collected and, where necessary, forensically examined?**

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<sup>43</sup> SiRT currently has four investigators – 2 serving and 2 former police officers. 3 of the 4 are or were RCMP officers. See <https://sirt.novascotia.ca/about> Accessed January 7 2017

<sup>44</sup> Though as noted in the next segment, it would have been proper policy to secure the rear of the premises with an officer. That did not happen, though I understand officers were available.

<sup>45</sup> In September 1996, Andre Marin, the newly appointed Director of SIU, introduced a 30-day deadline for all investigations. The deadline was met in the vast majority of cases. Exceptions were made in cases where witnesses did not cooperate or there was essential forensic testing to be done that would take longer than 30 days. I understand this policy is no longer in place.

<sup>46</sup> Daily Log Report at p391

## **Scene security**

The importance of securing a scene is drummed into every police officer. Except to deal with injury or secure perishable evidence, once a scene is secured nothing goes in and nothing comes out until the lead investigator and/or forensic identification people decide it does.

The reason is obvious. Everyone who goes into a scene brings something with them that was not there previously and then takes something out when they leave.<sup>47</sup> They can also change things when they are in the scene. Possibly vital evidence, such as a fibre from an item of clothing, a footwear impression or blood spatter can be inadvertently – or even deliberately - altered, removed, displaced or destroyed.

The front area of the house and approaches to it from the front, were secured quickly. However, it does not appear that the rear was secured at any point. No police tape was placed, nor was an officer posted there. I do not understand why.

Another aspect was the presence of cats. There were dozens of cats in or near the premises, including in the roof. Officers made attempts to prevent them entering the room where the shooting occurred. Cats constitute a real hazard in this situation. They can move and otherwise disturb things – cartridge cases, dust, blood spatter and brain matter, for example. Cats certainly gained access to the living room, as Cpl. O’Keefe<sup>48</sup> and Cpl. Foote<sup>49</sup> stated. Cpl. Foote saw a cat underneath the chair where Mr. Dunphy’s body was located.<sup>50</sup> What damage they did to the scene is unknown, though Cpl. Foote stated that no cats got into the living room after the forensic identification officers arrived.<sup>51</sup>

Cpl. Foote also took several photographs of the scene on a police issue camera, within 15 minutes of him arriving and prior to the arrival of the forensic identification officers. I have not seen those photographs.

## **Forensic Identification**

The forensic processing of the scene(s) in a case such as this is clearly extremely important. There were no witnesses to the shooting other than A/Sgt. Smyth. Nor was there any CCTV, cellphone or body camera video. Physical and digital evidence gathered at the scene, including evidence in or on Mr. Dunphy’s body, was crucial in assisting investigators corroborate or refute A/Smyth’s account of what occurred.

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<sup>47</sup> Known as Locard’s Exchange Principle, after the French forensic scientist Edmond Locard.

<sup>48</sup> Interview of Cpl. O’ Keefe by Commission counsel at p94

<sup>49</sup> Interview of Cpl. Foote by Commission counsel at pages 32, 42 and 156

<sup>50</sup> *ibid* at p44 and 52 onward. They were ‘relentless’ in trying to get into the living room when shoed away.

<sup>51</sup> *ibid* at p57

I have reviewed the duty reports of Sgt. Saunders and Cpl. Lee, who were the forensic identification officers assigned to this case.

The officers arrived at the scene within a reasonable time. Their initial processing occurred between 8.40 p.m. and 1.50 a.m. the following morning. The processing resumed at 11.45 a.m. on April 6, with the scene being secured in the interim. Their notes and reports are reasonably comprehensive. They sought assistance very quickly from outside sources, including blood spatter and firearms experts.<sup>52</sup> The scene was photographed and videoed. Cpl. Lee attended the autopsy. They consulted with the forensic pathologist about releasing the scene. The rifle was fingerprinted on April 10. They prepared a scene diagram and Cpl. Burke consulted with them about the use of Total Station mapping.

On a slightly negative note, there does not seem to have been a huge amount of information exchanged between the investigators and forensic identification officers, at least as far as I can see in the material provided.

There was a meeting with investigators at 9.30 a.m. on April 6, according to Cpl. Lee's report, though I have not found any other record of this meeting.<sup>53</sup> There may have been other meetings or calls that I am not aware of.

My point is that if there was a lack of communication between investigators and forensic identification officers, it can create problems, at least in my experience. It created at least one in this case. Commission counsel asked about the pen that A/Sgt. Smyth stated he had in his hand when pretending to make notes on the file folder, as the situation escalated. Cpl. Burke agreed that it was a piece of evidence that could have corroborated or been inconsistent with A/Sgt. Smyth's account. He stated, as far as I understand his evidence, that no information about the pen was passed on to the officers processing the scene. It was not recovered.<sup>54</sup>

Cpl. Lee videoed A/Sgt. Smyth's first reenactment, on April 8. It is unfortunate this reenactment disappeared into the ether while being downloaded by Cpl. Lee. There is no evidence of anything nefarious about this happening. Cpl. Lee did what she could to recover the data. Sgt. Osmond made every effort, as soon as possible, to have each person present at the reenactment write down what they recalled. A/Sgt. Smyth agreed to do the reenactment a second time.

Sgt. Osmond and Sgt. Saunders also put in a considerable amount of effort identifying a suitable candidate to put together a 3-D reconstruction. Sgt. Osmond had identified this as

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<sup>52</sup> See Sgt. Saunders' notes re phone calls to the Forensic Assessment Centre and an RCMP bloodstain pattern analyst shortly after midnight on April 6, 2015.

<sup>53</sup> See Cpl's Lee's Ident Consultation Report at p4. There may be other records of this meeting (or similar ones ) but Sgt. Saunders does not mention it, nor is it in the Daily Task Log.

<sup>54</sup> Interview of Cpl. Burke by Commission counsel at p 250 onward.

a potential investigative tool on April 20, when he emailed Sgt. Saunders setting out the purpose of doing this, as follows:

*....do you know of a reputable process, or company, that can take the proven scene facts...trajectories, angles, measurements and blend them with the statement and reenactment of Sgt. Smyth to ensure they are consistent with one another?*

I think this is a good indication of the efforts made to ensure that this aspect of the investigation was thorough and objective. Ultimately they settled on Mr. Barr, for the recreation and for his analysis of the firearms related evidence.

As noted in the segment on issues, above, there appears to have been an issue with DNA testing. Apparently it was not considered until too late in the process, after the rifle had been subject to other tests.<sup>55</sup> This may have been a significant oversight, given the position the rifle was shown in the scene photographs. A/Sgt. Smyth's position, as far as I understand it, is that he did not touch the rifle at any point.

My concern with this is that when the issue came to light after a query from ASIRT in June 2016 about whether there had been DNA testing on the rifle, Cpl. Burke wrote in an email to Inspector Cahill that:

*Rifle fingerprinted but not swabbed for DNA. Nothing visible on rifle and low likelihood to retrieve touch DNA. Lab strategist did not suggest DNA as the rifle was not fired and the owner of the rifle was already established as being Dunphy.*

*I may have other details on the file but this is the best I can do from memory. Basically we were not trying to ID the owner of the rifle.<sup>56</sup>*

With great respect to Cpl. Burke, if I understand his comment correctly, the issue was not just about establishing ownership of the rifle, rather it was attempting to establish whether or not A/Sgt. Smyth had touched it. This is perhaps another indication of a mindset that permeated segments of this investigation, in my view.

Delays in the forensic testing of exhibits can often be a source of frustration for investigators. As mentioned, to their credit the investigators attempted to expedite testing, calling the delays unacceptable. They made a request to expedite through the chain of command. They were unsuccessful.<sup>57</sup>

### **Requesting a voluntary blood sample**

A thorough and objective investigator would attempt to ascertain if impairment was a factor in the shooting. Cpl. Henstridge did meet with A/Sgt. Smyth at the Holyrood

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<sup>55</sup> See email trail in Document 280

<sup>56</sup> Email dated June 3 2016 from Cpl. Burke to Inspector Cahill (Document 1568)

<sup>57</sup> See email trail in Document 265

RCMP Detachment within a few hours of the shooting, which is good investigative practice. He noted A/Sgt. Smyth's physical state. He did not mention any signs of impairment or injury - and nor did anyone else who had contact with A/Sgt. Smyth previously that day, though I have found no record of anyone being asked directly by the investigators.

Cpl. Henstridge did not ask A/Sgt. Smyth to provide - voluntarily - a sample of blood or urine for analysis.

In some US jurisdictions, officers involved in a serious incident are obliged to provide a sample of blood or urine for subsequent analysis, regardless of whether there is evidence of impairment. To the best of my knowledge there is no requirement for any officer to provide such a sample in any jurisdiction in Canada.

When I was an SIU investigator, I made it my practice toward the end of my career to request a sample of blood from subject officers on a purely voluntary basis, even in cases where there was no apparent evidence of impairment. I explained the purpose and that one of the reasons I was asking was to protect the officer against any subsequent allegation of drug or alcohol use being a factor in the incident, for example in cases where steroid use might be potentially alleged. I made these requests through the subject officer's counsel. They all refused to provide a sample.

It was unfortunate that the investigators did not ask A/Sgt. Smyth to provide a sample, prior to him leaving the Detachment on the evening of the shooting.

I understand that toxicology was done on samples taken from Mr. Dunphy at autopsy.

### **Photographing A/Sgt. Smyth and recording the unloading of his firearm**

I agree with the ASIRT reviewer's concerns about the failure to photograph A/Sgt. Smyth and the failure to photograph the rounds taken from the magazine.

### **Position of the gun**

The scene photographs show the gun with the muzzle on the ground near Mr. Dunphy's left foot, propped up vertically against a plastic container, with the stock in the air.

It is in an odd position, given A/Sgt. Smyth's account of what happened.

The first question an investigator would have is how did it end up in such a position, if A/Sgt. Smyth's account of what happened was accurate? I am not sure to what extent this was explored - or indeed could have been explored - by the investigators. The mechanics of rifle (and possibly body) movements in this situation are certainly not within my area of expertise.

A related question was the rifle moved, inadvertently or otherwise, at any point after the shooting and if so by whom and why?

Further, there appears to be some conflicting evidence about precisely where the gun was positioned when first responders and investigators arrived.

In A/Sgt. Smyth's interview on April 6, in reference to the position of the gun when he first sees it immediately after re-entering the room, he stated:

*I don't know what I'm gonna see here. So I face round and I see the gun on the floor. The gun is now in front of the chair”<sup>58</sup>*

He added that ‘ *I can state with pretty (sic) high degree of confidence where you found that gun that's where it fell.*’ <sup>59</sup>

In his notes, which I understand were written on April 6, A/Sgt. Smyth wrote that:

*I observed a long barrel rifle on the floor in front of Dunphy who was seated in the chair not moving.*<sup>60</sup>

In his reenactment on April 10, A/Smyth's description of the position of the gun was consistent with that in the photographs:

*...and I start coming back in the room and I see the firearm on the floor. The firearm is leaned up against....I'm guessing it's...it's...it's this (ahh) green case, albeit I can't ....if it was a box, if it was a Tupperware container, if it was somethin' else...ice-cream bucket...it was leaned up against something in that region. It was not on top of the coffee table and wasn't laid on the floor but that green bucket, from reason, doesn't...doesn't completely resonate with me. But the firearm was there.”<sup>61</sup>*

Later in the reenactment he added that he was ‘*pretty certain that the barrel was pointed up*’. <sup>62</sup>

Cst. Cox, who along with Cpl. O'Keefe were the first people to enter the house after the shooting, noted that the gun was approximately in the position shown in the subsequent scene photographs. <sup>63</sup>

*Cst. COX noted that to the left of DUNPHY's chair there was a blue coloured*

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<sup>58</sup> Interview of A/Sgt. Smyth on April 6 at p15

<sup>59</sup> *ibid* at p48

<sup>60</sup> At p3 of Document 50

<sup>61</sup> *Reenactment between Joe Smyth and Cpl. Steve Burke*, at p14.

<sup>62</sup> *ibid* at p22

<sup>63</sup> See Cst. Cox's supplementary occurrence report entry at 1507.

*Rubbermaid tub on the floor and the rifle was half resting on the side of it and the barrel was pointing down toward the floor to the left of DUNPHY's chair. The rifle was constructed of a brown and what appeared to be wooden stock with a brown barrel.*

Cpl. O'Keefe who was the first RCMP officer to enter the scene along with Cst. Cox wrote in his duty report that he saw that 'A long gun was on the floor at his feet'<sup>64</sup> He repeated this in his interview with Commission counsel:

*...it was on the floor around his feet area, so whether the barrel was facing out towards the living room or out towards the window, I can't recall and I didn't take photos there either.*<sup>65</sup>

Cpl. Foote, who entered the scene at 16.57, also described the gun approximately in the position it was photographed when he entered the scene – '*...sitting on there kind of down partly on the container, partly lodged against the floor.*'<sup>66</sup>

Cpl. Burke, in his notes, observed the gun when he entered the scene at 7.07 p.m., as follows:

*Member observed a long barreled firearm on the floor to the left of the deceased, brown stock and black barrel.*<sup>67</sup>

Mr. Bishop, the civilian paramedic who entered the premises shortly after the first responders, was interviewed by Cst. Nippard on April 8, 2015. Mr. Bishop described the gun as '*laid on the floor.*'<sup>68</sup> Questioned more closely by Cst. Nippard, he described it as follows:

Q: *Okay. Now the gun, was it flat on the floor?*

A: *Ah, no.*

Q: *Okay.*

A: *It wasn't. It was kind of on a - I don't know - I can't really say if it was laid on his foot or laid against the chair that he was sittin' in. I'm - I'm not really sure.*

Q: *So it was kind of resting on something.*

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<sup>64</sup> See Document 4.

<sup>65</sup> Interview of Cpl. O'Keefe by Commission counsel at p95

<sup>66</sup> Interview of Sgt. Foote with Commission counsel at p 50. See also his supplementary occurrence report ( Document 22)

<sup>67</sup> General Report ( General notes of Cpl. Steve Burke) at p2.

<sup>68</sup> Statement of Kevin Bishop at p3

A: *Yes, it was on - resting - probably six, eight inches off the floor.*

Q: *Okay*

A: *Right, you know. I - I - I don't - I can't recall what it was resting on but it seemed like it was, you know, it was kind of pointed up towards him, right.*<sup>69</sup>

In his interview with Commission counsel, Mr. Bishop described the location of the gun as follows:

*There was a long gun on the floor pointing, say toward Mr. Dunphy, to his left, like the chair was here, the gun was more or less pointing to his left.....it wasn't flat on the floor, it was maybe four to six inches of the floor. It was either leaning on Mr. Dunphy's foot or it was against the arm of the chair.*<sup>70</sup>

Later in the interview, Commission counsel showed Mr. Bishop scene photographs, which I understand showed the position of the gun up against the blue tub. Mr. Bishop stated that he did not recall seeing the tub when he was at the scene. He stated while reviewing a photograph that:

*...it's like the barrel of the gun was either laying on Mr. Dunphy's foot or it was against the arm of the chair here, like it was up off the floor. But it definitely wasn't like that.*<sup>71</sup>

He added that he was '100% sure the gun was pointed toward the arm of the chair' with the barrel at a higher elevation than the stock.<sup>72</sup> At one point he stated that the gun was 'definitely not on' the tub though later in the interview he was 'almost sure' the gun wasn't positioned as shown in the photograph, before reverting back to 'it definitely wasn't like that.'<sup>73</sup>

In her interview with Cst. Nippard on April 8, 2015, Ms. Nancy Linehan, a paramedic who entered the scene with Mr. Bishop, mentioned the position of the gun:

Q: *And then the gun was off to his left*

A: *Yeah. I'm not sure if it was - like this way or if it was this way. But I - I - I did see it there because initially when - when I saw that I thought did he do this to himself.*<sup>7475</sup>

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<sup>69</sup> *ibid* at p4

<sup>70</sup> Interview of Kevin Bishop with Commission counsel at 18 onward

<sup>71</sup> *ibid* at p53. The photograph was marked KB2. I have not seen the marked photo(s).

<sup>72</sup> *ibid* at p55

<sup>73</sup> *ibid* at p54, 56 and 57 respectively

<sup>74</sup> Statement of Nancy Linehan at p17

<sup>75</sup> Interviewers using audiotape to record the interview should ask witnesses to describe actions, movements and positions of things for the benefit of the tape. Saying it was 'like

She was not pressed further on the position of the gun.

In her interview with Commission counsel, Ms. Linehan stated that the gun was on the floor but she could not recall if it was propped up against anything.<sup>76</sup>

It is clear that the position of the gun was an issue that was worthy of follow-up and, if possible, resolution. This issue could have perhaps been resolved had all parties who entered the room prior to the photographs being taken been specifically and directly asked about the position of the gun, in particular A/Sgt. Smyth at his first interview. This did not happen.

When asked about this topic by Commission counsel, Cpl. Burke advised that it was not an issue he considered when writing his report.<sup>77</sup>

### **Evidence of contact with the mantel.**

A/Sgt. Smyth stated in his April 6 interview that he:

*'was leaning against – there's like a mantel in the – I think it's a mantel above the fireplace in the living room, right below the TV.'*<sup>78</sup>

This raises the question of whether there was any physical evidence to support or refute that statement? I understand that the house was not well kept and there may have been dust or other material on the mantel that may have shown evidence of being disturbed, although it might have been difficult to prove conclusively that A/Sgt. Smyth was the person who disturbed it. Additionally, that dust or other material, if it existed, could possibly have been transferred to whatever part of A/Sgt. Smyth's clothing came into contact with the mantel.

As far as I am aware, the investigators did not become aware of the contact with the mantel until the first interview, but the scene was still secured at that point. I do not know if the investigators identified this as a viable line of inquiry, nor do I know exactly what communication there was on this topic with the forensic identification officers, if any. I do not know whether the evidence collection process up to the point where the investigators became aware of the contact with the mantel (at about 3.45 pm on April 6) may have altered or changed any such evidence at the scene.

The investigators did have A/Sgt. Smyth's clothing.

### **Folder Drop Test**

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*this way or if it was this way'*, as is the case above, is not helpful to anyone reading a transcript afterward. It is a mistake I have made myself.

<sup>76</sup> Interview of Nancy Linehan with Commission counsel at p45 onward

<sup>77</sup> Interview of Cpl. Burke by Commission counsel at p442 onward

<sup>78</sup> Interview of A/Sgt. Smyth on April 6, 2015 at p12

The investigators attempted to recreate the fall of the folder that A/Sgt. Smyth says he was holding when the incident occurred. Though it ultimately proved to be of very limited value from what I understand, the investigators deserve credit for considering it.

### **Communications tapes / phone calls**

The RCMP obtained the RNC and RCMP communication tapes, along with recordings of several phone calls. These items are important not just for their contents, but also because they give investigators reliable times, upon which to develop a chronology of what occurred.

### **Social media**

Mr. Dunphy's social media activity was a line of inquiry followed up by the investigators, which is the appropriate thing to do, given that the incident originated from a tweet.

I am not sure if the investigators made any attempt to follow up with any social media presence that A/Sgt. Smyth may have had, such as Facebook or Twitter accounts. It was a legitimate line of inquiry, even if it ultimately led nowhere.

### **Cell phone information**

The cell phones of both Mr. Dunphy and A/Sgt. Smyth are obvious sources of potential evidence. Apart from texts and emails, depending on the phone itself, there may be GPS data, photographs, video and/or audio that might be relevant to an investigation.

Information on cell phone bills might also have been of assistance in determining the location of the phone at a given point.

### **Mr. Dunphy's cell phone**

Mr. Dunphy's cellphone was seized by RCMP FIS officers at the scene. I understand that all data was downloaded..

### **A/Sgt. Smyth's cell phone**

I am not sure why A/Sgt. Smyth's cell phone was not seized immediately, either at the scene or at the Holyrood RCMP Detachment.<sup>79</sup> The cell phone was, as far as I know, the property of the RNC. If that was the case, there should have been no issues with it being seized as soon as possible. I do not know if A/Sgt. Smyth also had a personal cell with him at the time or, if he did, whether he was asked for it.

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<sup>79</sup> A/Sgt. Smyth's cell phone was entered as Task # 88 in the Tasking Log, on April 20, 2015. I have found nothing to indicate it was considered as a potential source of evidence prior to that date.

I understand that A/Sgt. Smyth was allowed to retain possession of the cell phone. I cannot find any information about the phone, or consideration about seizing it, until April 20, 2015, when Cpl. Burke wrote that he was '*exploring options of obtaining information from Joe Smyth's cell phone*'<sup>80</sup> A/Sgt. Smyth handed over the phone on April 24. It took about an hour to download. The phone was then returned to him.

I do not understand why there was such a long delay between the shooting and obtaining the phone. The phone could – and indeed was likely to - have contained important evidence. Some cell phone data could have been retrieved from the bill or possibly other records kept by the service provider.<sup>81</sup> Other data could not have been - such as photographs, video and/or audio recordings - should the phone have been lost, damaged or items permanently deleted prior to it being taken into RCMP custody.<sup>82</sup>

There are a number of outgoing and incoming calls/SMS messages on the cell phone data records for April 5, 2015. They begin at 11.14.16 a.m. There are a significant number of calls and messages that occurred during the time A/Sgt. Smyth was in Mitchell's Brook

Once the data was obtained, a thorough investigator would have attempted to ascertain whether these calls and/or messages had any relevance to the issue(s) under investigation. I assume all numbers and other identification data were traced, to the extent possible, for items that may have been relevant to the investigation.

The cellphone data is important in another respect. As noted throughout this report, utterances by key witnesses are crucial in many investigations. The cell phone texts and emails from A/Sgt. Smyth about the incident are utterances of a kind, albeit recorded electronically. They may constitute important evidence that a thorough investigator would want to obtain and assess.

In this case, the texts and emails are consistent with A/Sgt. Smyth's other accounts of what happened. For example, at 3.31 p.m. on April 5, about an hour or so after the shooting and while he was still at the scene, he texted a Brian Marshall advising that '*Guy pulled a gun on me.*' He made similar comments in messages to others.

He also messaged other information that might be relevant, such as:

*' Yeah, I did extensive background checks including interviewing his neighbors (sic). No indication of violence or firearms. A pretty routine file for us.'*

This may have given the investigators insight into why he visited Mr. Dunphy alone and what he recalled the Dunphys telling him about Donald Dunphy's access to firearms.

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<sup>80</sup> Daily Log Report at p242

<sup>81</sup> Cpl. Burke made inquiries with Bell about the cellphone.

<sup>82</sup> I am not an expert in what can and cannot be retrieved from a cellphone.

Other exchanges may raise questions for investigators, including a message that appears on the call log at 9.30 p.m. on the day of the shooting, as follows:

*“ I have got some info rat (sic) you might like to hear. Call me if you want.”<sup>83</sup>*

I have no idea if this is relevant to the issue under investigation but I believe a thorough investigator would have followed up to determine whether or not it was.

There is also an SMS message sent on April 6, prior to A/Sgt. Smyth being interviewed, apparently to a member of the media that reads:

*You should speak to the brother. Lives next door to the deceased.*

Any investigator I know would be less than pleased with a subject of an investigation providing this information to a member of the media about a key witness, at this stage of the investigation, if that was indeed what happened. I would have sought clarification from the subject officer, had it been my case.

As noted below in the segment on interviewing, A/Sgt. Smyth was not asked any detailed questions about any of his cell phone communications for that period (or any other) at a follow-up interview, as far as I am aware.

An investigator may also want to explore why ‘*deleted*’ appears next to some messages, including messages where text is still visible, if there is reason to believe that may be relevant.<sup>84</sup>

## **Timeline**

I have reviewed the timeline prepared by Ms. Richards, as well as a transcript of her interview with Commission counsel.

Other than the times taken from cell phone and RCMP/RNC call recordings, I am not sure what hard data the timeline is based upon. Beyond those times, I do not think the timeline would have been of tremendous use as an investigative aid, had I been the lead investigator in this case.

## **Searching A/Sgt. Smyth’s vehicle.**

The RNC Yukon motor vehicle driven on the day of the shooting by A/Sgt. Smyth is clearly a source of potential evidence. A/Sgt. Smyth spent time in the vehicle prior to and immediately after the shooting.

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<sup>83</sup> See Cell Phone Data at April 5 9.30 p.m. from 24CCECC1 (Document 567)

<sup>84</sup> As noted previously, I have no expertise in extracting cell phone data, including what can and cannot be retrieved. I do not know the significance of the word ‘deleted’ next to some messages in the Cell Phone Data document.

As far as I am aware the vehicle was never searched. I do not understand why, particularly as A/Smyth was in or near the vehicle before and immediately after the shooting and prior to the RCMP arriving at the scene. The vehicle may possibly have had GPS information that might have been helpful supporting or refuting where he was at any given point. A/Sgt. Smyth may have made notes that may have been located inside the vehicle. There may have been other communications devices. The vehicle may have contained other items that may possibly have been relevant to the investigation, such as use of force equipment.

### **Broken glasses**

Ms. Meghan Dunphy advised the RCMP that she had found her father's glasses on the small table in front of him, after the scene had been released. The glasses were damaged. According to her they had not been damaged to that degree previously and this may be evidence of a struggle.

Considerable investigative follow-up was done in respect of this allegation. I agree with Cpl. Burke that the glasses have little apparent relevance as to whether or not the shooting was justified.

## **6. Was all potentially relevant documentation gathered and reviewed?**

Documentation is the life-blood of many investigations and generally plays an important role in the investigation of deaths and serious injuries involving police.

In this case, a thorough investigator would have obtained, reviewed, read, understood and looked for any gaps in documents that may be relevant to the issue under investigation.

The investigators should have obtained, or attempted to obtain, documents in respect of A/Sgt. Smyth, if they may be relevant to the issue under investigation, including but not limited to:

- Relevant RNC policies and procedures
- Training records
- Course content for relevant issues (e.g. solo visits)
- Professional standards / discipline records
- Use of force reports
- Print outs from RNC/RCMP databases that might be relevant
- Relevant medical records
- Any notes or duty statement, or anything else A/Sgt. Smyth may have put into writing, such as his notes, use of force report and/or General Occurrence Report<sup>85</sup>
- Cell phone records/bill
- Emails

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<sup>85</sup> I believe that Document 50 is his notes and Document 51 his General Occurrence Report.

- Any other document that might be relevant

There may be other documents, such as records of previous solo or accompanied home visits previously, that may be relevant.

I understand that the majority of these documents were obtained by the investigators, including, as noted above, A/Sgt. Smyth's use of force training and professional standards file. They were not taken into the possession of the RCMP but were reviewed at an RNC building.<sup>86</sup>

The investigators also obtained considerable documentation about Mr. Dunphy, including over 400 pages of Mr. Dunphy's medical records from Eastern Health and his WCB history.

- 7. Did the investigators identify all persons who may have information relevant to the issue under investigation, did they make justifiable decisions whether or not to interview them and if they did decide to interview them, was that interview thorough and fair?**

### **Investigative Interviewing: General principles**

Good investigators are generally good interviewers. They identify individuals who may potentially have information that is relevant to whatever they are investigating. If it is not possible to interview everyone they identify, perhaps due to sheer numbers, lack of resources or other restrictions, they then use their judgment to determine who it is essential to speak to, and in what order. Normally, the proximity of the person to the incident or issue is a key factor in this triaging process.

Stage one of the investigative interviewing process is determining who may potentially have evidence that is relevant to the issue being investigated.

As is obvious, this investigation was made more difficult because there was only one witness to the actual event under investigation. That said, the potential witnesses that investigators would want to speak to were also obvious.

A/Sgt. Smyth was clearly the most important witness, followed by those who had contact with him immediately before or after the incident – in this case the Dunphys and possibly the Nolans, as well as the EMS personnel and police first responders, plus anyone else who may come forward or whom the investigators might identify as they pursued their inquiries.

Next come witnesses who may speak to the state of mind of the two parties, or may shed light on relevant prior conduct, health issues, training, policy and procedure and so on.

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<sup>86</sup> Daily Log Report at p204

## **Identification of potential witnesses**

An important task was for the investigators to track down anyone who had any contact with A/Sgt. Smyth on the day of the shooting, and possibly before. Those persons may have information about his demeanour, condition, state of mind, impairment, utterances and so on. It is difficult to understate the importance of utterances in an investigation of this kind - a homicide with no witnesses to the death itself. As noted in the ASIRT report: *'as the sole witness to the critical incident, any spontaneous statements made by the subject officer could be of paramount importance.'*<sup>87</sup>

Every effort should have been exhausted to establish what, if any, utterances A/Sgt. Smyth made in the aftermath of the shooting. There are utterances recorded in RCMP first responders' notes.

Overall the investigators did a pretty good job identifying witnesses. They contacted the neighbours, including the Nolans and the Dunphys, though I am not sure of the geography of the area or information about Mr. Dunphy's social networks.<sup>88</sup> I cannot therefore comment on the thoroughness of the witness canvas efforts outlined in Task 5 of the Tasking Report.<sup>89</sup>

The investigators did interview the RNC personnel who met with A/Sgt. Smyth at the Holyrood Detachment. They interviewed the paramedics who attended the scene.

On a broader front they interviewed A/Sgt. Smyth's wife, as well current and former colleagues at the PSU. They conducted interviews with Mr. Dunphy's family and friends,. They contacted wait staff at the restaurant where I understand Mr. Dunphy had lunch with his daughter shortly before the incident.

However, they did not interview, at the time, the officers who had contact with A/Sgt. Smyth at the scene. Those officers potentially had crucial evidence about utterances, demeanour etc. While I understand that the investigators had the benefit of notes and duty reports, they should have formally interviewed the officers.

Nor did they interview anyone who may have had contact with A/Sgt. Smyth when he began duty that day. Contact includes anyone who saw, heard, met, spoke or communicated with him electronically that day.

The same approach applies to identifying witnesses who may information about Mr. Dunphy. Who did he meet, speak to or otherwise communicate with that day?

## **The interviews**

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<sup>87</sup> ASIRT report at p8.

<sup>88</sup> There may have been friends of Mr. Dunphy who potentially had relevant information. I am not sure what efforts were made to track them down.

<sup>89</sup> See Tasking Report at p42 onward

There are 6 basic principles that apply to investigative interviewing. The interviewers should:

- **Be as prepared as possible**
- **Do what they reasonably can to establish a rapport with the interviewee**
- **Be thorough**
- **Be objective**
- **Keep control of the interviewing process**
- **Listen actively**

Below is what I think about whether these principles were applied in the major interviews in this case, in the following order:

1. A/Sgt. Smyth
2. Richard Dunphy
3. Debbie Dunphy
4. Ambulance personnel
5. Other interviews

### **A/Sgt. Smyth**

The primary purpose of the interview of a subject officer in a police shooting is to determine what was going through that officer's mind when he or she made the decision to use lethal force, or when lethal force was used. The only person who can tell the investigator that, at least directly, is the officer.

The officer's evidence can then be tested against other information, in this case primarily the forensic evidence from the scene.<sup>90</sup> The subject officer's evidence is even more important in cases where there are no witnesses to the shooting itself.<sup>91</sup> As Cpl. Burke put it during the first interview of A/Sgt. Smyth: "*You're the only witness, you know what I mean.*"<sup>92</sup>

In short, a tremendous amount depended on the comprehensiveness and credibility of A/Sgt. Smyth's account of events, and by extension the thoroughness and objectivity of the investigators who interviewed him.

### **Obligation to be interviewed**

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<sup>90</sup> As Sgt. Osmond noted '*He's going say to what, what happened..... we gonna decide if the forensic match up with it ....*' Statement of Meghan Dunphy on April 8, 2015 at p92

<sup>91</sup> Cpl. Henstridge stated at the conclusion of the first interview of A/Sgt. Smyth on April 6 that '*..the most important person in this whole picture now is you for sure*' (at p75). I am not sure if he was referring to A/Sgt. Smyth's role in the shooting or as to his welfare ( the context is ambiguous)

<sup>92</sup> Interview of A/Sgt. Smyth at p60

I am not totally clear whether A/Sgt. Smyth was obliged to submit to an interview by investigators, in this particularly situation, possibly as a condition of his employment. I understand that if had he been ordered to speak to an investigator about what happened by a supervising RNC officer and had then refused to do so, he could have been charged with a disciplinary offence – in a situation where the investigating officers did not have sufficient evidence to caution him. If investigators did have sufficient evidence, he should have been cautioned and then was, of course, under no obligation to speak to the investigators.

Had the incident occurred in Ontario, A/Sgt. Smyth would have been deemed by the Director of the SIU as a subject officer, which is defined under the Police Services Act as an officer who had caused a death or serious injury. He therefore would **not** have been obliged to submit to an interview by SIU investigators.

That said, subject officers can agree to be interviewed, if they choose. In my experience, many did. It was extremely rare that a subject officer gave an interview under caution.

As noted earlier, subject officers are required to make notes of the incident, though they are not provided to the SIU without the officer's consent.

It is clear that A/Sgt. Smyth was very cooperative from the beginning of this investigation. It wasn't his fault that the investigators didn't press him to be interviewed immediately. He willingly submitted to several interviews, over the course of several months. He agreed to participate in a reenactment, and did so a second time when requested. He provided his personal clothing. Had he chosen not to cooperate, then this investigation would have been far more challenging.

### **Delay in interviewing**

Generally, anyone who has information directly relevant to an investigation is interviewed as soon as possible after the incident, while the evidence is still fresh in his or her minds. Ideally, they should be segregated before they are interviewed.

The reasons are obvious. If witnesses are not interviewed as soon as practicable, there is a danger that they could receive information that may taint their recollection, inadvertently or otherwise. That information may come from the media, fellow witnesses or other sources.

I understand that Cpl. Burke and Cpl. Henstridge had decided, during a briefing at 5 p.m. on the day of the shooting, that they wanted to interview A/Sgt. Smyth that day. That was a decision that a thorough and objective investigator would have made. Though it is not clear from the Daily Log Report when that statement was to be taken, good investigative practice would have been to take it immediately. In his interview with Commission

counsel, Cpl. Burke he agreed that ‘...the intention at the time was that you were going to interview him that evening?’<sup>93</sup>

At 5.30 p.m., Cpl. Henstridge met with A/Sgt. Smyth. A/Sgt. Smyth was accompanied by several RNC members. A/Sgt. Smyth, while stating that he ‘very much wanted to provide a statement immediately’,<sup>94</sup> told Cpl. Henstridge that, having spoken to Mr. Warren Sullivan, an RNC Association member, he had decided that he did not want to be interviewed until the following day. Mr. Sullivan, who I understand was present during this conversation, stated that he had advised A/Sgt. Smyth to delay “..given the research which showed recall was stronger and more accurate the following day.”<sup>95</sup>

Cpl. Henstridge immediately agreed and ‘advised this would not be a problem.’<sup>96</sup> There was no attempt to persuade A/Sgt. Smyth to change his mind.

When asked at interview by Commission counsel, Cpl. Burke advised that he was not aware of any research that would support allowing a delay, nor had he been trained to do that. He stated that he has never been trained to allow witnesses to have a period of time after a traumatic event before being interviewed, nor does he recall giving the subject of a major criminal investigation time prior to requesting an interview. Nor has he ever given the subject of a major criminal investigation time prior to requesting an interview.

Cpl. Henstridge stated that he had received:

*‘... some training sometime before regarding traumatic event incidents like this and I knew that you tend to get a full picture if you waited awhile.’<sup>97</sup>*

He added that the training was only in reference to police officers and he had been provided this information at a critical incident debriefing he had attended. He stated that he had never given a suspect in a major investigation time before asking for an interview, though he noted that none had ever asked for time.<sup>98</sup>

He also stated that:

*‘I would have preferred to have as much information now and if that, you know, if there was more information to follow later, then of course we could always take another statement’<sup>99</sup>*

Cpl. Burke noted that in this case, A/Sgt. Smyth’s cooperation is voluntary and ‘...we can’t compel him to give a statement.’<sup>100</sup> If he had an obligation to speak if ordered to do

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<sup>93</sup> Interview of Cpl. Burke by Commission counsel at p240

<sup>94</sup> Daily Task Report at p29

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> Interview of Cpl. Henstridge with Commission counsel at p29 onward

<sup>98</sup> *ibid* at p32

<sup>99</sup> *ibid*

so by an RNC supervisor, then that option should have been considered. Regardless, a thorough and objective investigator would have pressed and attempted to persuade A/Sgt. Smyth of the benefits of providing an immediate statement. Given that A/Sgt. Smyth was cooperative, any such attempt may well have been successful.

Sgt. Osmond also noted that *'we couldn't compel a statement from him.'*<sup>101</sup> He added that he was 'torn' about whether or not he would have preferred A/Sgt. Smyth to have given a statement immediately but there was 'prevailing guidance' that officers should wait to give a statement in use of force incidents. He advised that this guidance came from RCMP Staff Representatives.<sup>102</sup> He acknowledged that this was not the practice with suspects in other criminal investigations.<sup>103</sup>

Sgt. Osmond also acknowledged that there was a potential downside to not taking a statement immediately in that *'theoretically, he could have concocted a story.'*<sup>104</sup>

Generally, the best evidence is the freshest. Cpl. Burke appears to agree with that hypothesis.<sup>105</sup> Interviewing witnesses as soon as possible is a good investigative practice that the RCMP appears to follow in other cases.

At about 8.45 p.m. on June 30, 2008, while travelling on Greyhound bus between Edmonton and Winnipeg, Mr. Vincent Li, who was one of approximately 35 passengers on the bus suddenly attacked a young man, Mr. Timothy McLean, who was sitting next to him, with a large knife. Mr. Li ultimately beheaded Mr. McLean, in spite of rescue attempts by the bus driver and two passengers.

The passengers and driver managed to escape and lock Mr. Li inside the bus. They then watched as Mr. Li walked up and down the aisle of the bus, cutting off pieces of Mr. McLean's severed head, reportedly eating some of them. When the RCMP arrived, there was a stand off. Several hours later, Mr. Li was arrested.

As far as I know, there was no consideration given by the RCMP in the Li case to allow the witnesses on the bus a 24 to 48 hours period before they were interviewed. They were taken to a local town and interviewed by RCMP investigators. According to an RCMP press release, it would appear they had all been interviewed by 2 p.m. the following day.<sup>106</sup>

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<sup>100</sup> In some jurisdictions in the United States, collective agreements allow periods of time before officers are obliged to submit to interviews by Internal Affairs. I am not sure if any similar provision exists for RNC members.

<sup>101</sup> Interview of S/Sgt. Osmond by Commission counsel at p132.

<sup>102</sup> *ibid* at p133

<sup>103</sup> *ibid* at p144.

<sup>104</sup> *ibid* at p148. He also noted that the danger of tainting was limited, given that there were no witnesses to the shooting, (at p152)

<sup>105</sup> Interview of Cpl. Burke by Commission counsel at p238 onward.

<sup>106</sup> The RCMP press release read, in part, as follows:

Interviewing witnesses to a serious event as quickly as possible, as appears to have happened in the Greyhound bus case, is consistent with my experience being involved in, or reviewing, investigations of one kind or another over most of the last 35 years. I have never heard of the practice of delaying interviews in any investigation that does not involve a police officer, unless injury or other incapacity is an issue.

In my experience, all parties in a non-police officer involved homicide or similar serious incident are segregated and interviewed as quickly as possible, wherever possible, as indeed were Meghan, Dick and Debbie Dunphy in this particular investigation.

This is the principle that underpins s.6 of Regulation 267/10 of the Police Services Act of Ontario. The Regulation deals with the segregation and interviewing of witness officers in an SIU investigation:

*Segregation of police officers involved in incident*

*6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (1).*

*(2) A police officer involved in the incident shall not communicate directly or indirectly with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (2); O. Reg. 283/11, s. 1.<sup>107</sup>*

Another consequence of delaying interviewing the subject officer in this particular situation is the potential impact it has on processing the scene. A/Sgt. Smyth's account of

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July 31, 2008

14:00 hrs Winnipeg, Manitoba

Re: Homicide on Greyhound Bus near Portage La Prairie, Manitoba

I also want to acknowledge the driver and the other passengers on the bus. What you saw and what you experienced, would shake the most seasoned police officer. Yet I am told that each of you reacted swiftly, calmly and with bravery. We commend you for your level-headedness and strength in the face of truly extreme circumstances.

We also want to thank you for your cooperation with our investigation into this incident. I know that conducting interviews with our officers was very difficult for many of you. If we could do our job without asking you to relive this terrible experience, believe me, we would. However the information that you have provided will be essential to the success of our investigation. Thank you, our thoughts are with you.

<sup>107</sup> Regulation 267/10 of the Police Services Act of Ontario

<https://www.ontario.ca/laws/statute/90p15>. There are provisions in the Regulation for delaying witness officer interviews in certain circumstances.

where he was, what his movements were, what Mr. Dunphy's movements were, the location of the rifle, their relative positions when the shots were fired, what he had contact with while in the room – for example as noted above re the mantel – what he did or didn't move or touch and so on, is information that can greatly assist forensic identification officers to process a scene intelligently.

As mentioned repeatedly, A/Sgt. Smyth's evidence was unique. There was no one else who could give an account of what happened in Mr. Dunphy's living room. For sure, some information could be gleaned from the utterances he had made at the scene, but the more precise and detailed information that could have been adduced during an interview would certainly have been of help to the forensic identification officers as they began their processing of the scene.

Cpl. Burke stated that it may have been helpful to have A/Sgt. Smyth's statement when processing the scene, and that the utterances he had already made were taken into account. Conversely, he then stated that not having A/Sgt. Smyth's story would be a good thing in that forensic investigators process the scene '*without bias*' and that having that information '*they're probably going to narrow their focus of what they assess at the scene.*'<sup>108</sup>

I respectfully disagree with this last comment. In my experience, good forensic identification investigators process a scene with an open mind, not ruling any reasonable possibility in or out. However, normally the first question I was asked by the forensic identification officers I worked with – be they SIU or from a police service - prior to them beginning processing a scene was 'what do we know about what happened?' That helped them focus – and may assist in avoiding overlooking or changing evidence that may potentially be important. While taking this information into account, they still process the scene with an open mind, looking for evidence that covers any reasonable permutation of what may have happened.

An example of this is what happened with the failure to recover the pen, which is discussed in the segment of physical evidence, above.

That said, the scene was indoors and easily contained, once the cat issue had been dealt with, so the risk of physical evidence perishing or being altered was minimized. The scene was still in police custody when the interview was completed, but there is no indication in the material I have read that the investigators factored whether or not it would be into the decision to agree to delay the interview.

I also understand that the autopsy was delayed until the forensic pathologist had the benefit of A/Sgt. Smyth's account of the event, though there is an indication in Sgt. Saunder's evidence that a backlog at the OCME may have been a factor.

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<sup>108</sup> Interview of Cpl. Burke by Commission counsel at p249

To sum up, if A/Sgt. Smyth had an obligation to provide a statement, the investigators should have required him to provide one immediately. If he didn't, they should have tried to persuade him.

## Notes

I am not sure of the RNC policy re officers completing their notes - or creating another written record, such as a duty statement - about events during their tour of duty before going off duty. That is a fairly commonplace requirement in other police services. The Police Services Act in Ontario that officers involved in an SIU incident, including subject officers, must complete their notes in full prior to the end of their tour of duty.<sup>109</sup> As noted above, the subject officer's notes are not provided to SIU without the officer's consent.<sup>110</sup>

Once the investigators agreed to postpone the interview, it is not clear if they asked A/Sgt. Smyth to complete detailed written notes and/or a duty report before going off duty.

## Caution

Regardless of whether A/Sgt. Smyth was compelled to give a statement or whether he chose to give one voluntarily, the issue arises of whether he should have been cautioned prior to the statement being taken. The ASIRT reviewer takes the position he should have been. I respectfully disagree. When an officer is attempting to find out whether or not an offence has been committed, he or she is entitled to question anyone whom he or she believes may have information about whether or by whom an offence has been committed.

It is only if and when an officer has reasonable grounds to suspect that an individual has committed an offence that a caution should be administered. If that suspicion arises at any point during the questioning process, the officer should immediately stop the questioning and caution the individual accordingly, at which point the person can decide whether or not to continue to answer questions.

In this case, had I been the lead investigator, I would **not** have cautioned A/Sgt. Smyth prior to beginning an interview, based on the information that was available at that time. This is consistent with my practice when I interviewed subject officers in Ontario.

I believe that a thorough and objective investigator would have done what Cpl. Burke and Cpl. Henstridge did in this case and not caution A/Sgt. Smyth, prior to any of the

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<sup>109</sup> Regulation 267/10 of the Police Services Act of Ontario, at s 9. There is an exception when an officer is excused by a Chief of Police, at s 9(5)

<sup>110</sup> *ibid* at s 9(3)

interviews that he gave. I agree with Cpl. Henstridge's rationale for not cautioning in these circumstances.<sup>111</sup> The officers did not have sufficient, relevant, credible evidence at that point to suspect that a criminal offence had been committed.

### **The April 6, 2015 interview of A/Sgt. Smyth.**

Cpl. Henstridge and Cpl. Burke conducted the interview. It took place between 3.30 p.m. and 5.06 p.m. It was video and audio taped.<sup>112</sup> I will go through it, based on the principles mentioned above.

- **Preparation**

Investigators in police shootings (or indeed any other major criminal investigation) do not always have the luxury of a lot of time to prepare for an interview, as was the case in the interviews of Dick and Debbie Dunphy. That said, if at all possible, investigators should prepare a game plan for an important interview, including developing questions and question areas that focus on the issue(s) under investigation. That is best practice.<sup>113</sup>

In the SIU cases I was involved in, considerable time was taken to prepare for key interviews when time allowed, in particular subject and witness officer interviews. Normally, we had a fair amount of time, as it was usually days before the officer came in for an interview, always accompanied by counsel. Preparation would often take far longer than the time allotted for the interview, with consultation with the entire team involved in the investigation, review of evidence gathered to date and detailed question areas and specific questions prepared.

The investigating officers, having permitted a delay in conducting the interview, had ample time to prepare. They had visited the scene and were familiar with it. If I have read the forensic identification officer's notes correctly, the scene photographs (and video presumably) were available at 11 a.m. that morning, should the officers have chosen to use them during the interview.<sup>114</sup>

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<sup>111</sup> Interview of Cpl. Henstridge by Commission counsel on Dec 20, 2016, at p116

<sup>112</sup> I have reviewed the transcript but not the video.

<sup>113</sup> The PEACE model of investigative interviewing, which is currently being adopted in modified form by the RCMP, emphasizes planning and preparation – the 'P' in the acronym. Planning and preparation includes segments on venue, research about the person being interviewed and the elements of any potential offence, timing, who is going to be the lead interview and many other considerations.

<sup>114</sup> I am not arguing they should have, rather it was an option that may have been available to them.

The officers had spoken to Dick and Debbie Dunphy. They were aware of what A/Sgt. Smyth had told RCMP first responders.

The focus of preparation should be on the key areas that are relevant to the issue(s) under investigation, in particular any evidence that related to the provisions of s25 of the Criminal Code of Canada, because the key issue was why did A/Sgt. Smyth shoot Mr. Dunphy and was he legally justified doing so?

There were many discrete areas that needed canvassing during the interview to give context to the shooting itself, from training, risk assessment, information received prior to attending Mr. Dunphy's house and so on. These areas should and could have been built into an interview plan.

According to Cpl. Burke, there appears to have been little or no planning put into the interview of A/Sgt. Smyth, beyond asking him a broad open-ended question to begin with.<sup>115</sup> While I agree that this is a very good way to begin an interview, a thorough and objective investigator would have prepared a list of questions areas/questions that would be put to A/Sgt. Smyth, should he not provide a full and complete account of what happened in response to that broad opening question. This appears not to have been done in this instance. Cpl. Henstridge advised that there was no '*formal interview plan*.'<sup>116</sup>

- **Rapport**

Building a rapport with an interviewee is very important, as Cpl. Burke rightly states.<sup>117</sup> Generally, if interviewees do not like the interviewer, or feel that he or she is not empathetic, then the interviewee will likely react by clamming up. Given that the whole point of an interview is to gather information from the interviewee, this is the last thing an interviewer wants.

Both Cpls. Burke and Henstridge certainly build up a strong rapport with A/Sgt. Smyth. They let him postpone the interview. They were courteous and considerate. They expressed concern for his welfare.

Unfortunately, in the process of building a rapport, the interviewers may have undermined their real and perceived objectivity. There is a difference between being appropriately empathetic and being inappropriately supportive.

As discussed below, in this case the interviewers were over-friendly and they provided the interviewee, A/Sgt. Smyth, with information that would likely have not have been provided to anyone else involved in a similar situation who was not a police officer.

- **Thoroughness**

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<sup>115</sup> Interview with Commission counsel at p290 onward

<sup>116</sup> Interview of Cpl. Henstridge with Commission counsel at p107 onward

<sup>117</sup> Interview of Cpl. Burke at p324 onward

A thorough and objective interviewer asks all relevant questions, however difficult that may be on occasion. He or she does not shy away from hard or sensitive questions. He or she also probes sufficiently deeply to obtain as full a picture as possible as to what actually happened.

In this particular case, a very thorough interview was clearly required.

My first concern is the length of the interview, at about 96 minutes. Much of the last 1/3 or so of the interview - from about page 58 onward - is given over to the interviewers responding to A/Sgt. Smyth's questions and has little to do with the circumstances of the shooting itself. I also understand that there may have been a break at some point, to consult on what information the officers could provide to A/Sgt. Smyth about whether the gun was loaded.<sup>118</sup>

Given the breadth of the issues, the length of time the incident occurred over and the fact there were no witnesses, I would have expected the interview to be significantly longer. I recall interviewing subject officers for considerably longer periods when I was an SIU investigator, even in cases where there were witnesses to the actual shooting.

In terms of length, the transcript of A/Sgt. Smyth's interview is 75-pages long. The transcript of Meghan Dunphy's interview on April 8 is 94-pages long.<sup>119</sup> Ms. Dunphy was not present at the shooting. To be fair, a proportion of the transcript is the RCMP Team Commander, Sgt. Osmond, explaining to Ms. Dunphy the key points of A/Sgt. Smyth's account of what happened, and there are other people present who speak, but given the circumstances, the interview of A/Sgt. Smyth should have been far lengthier than that of Ms. Dunphy.

Had I been in Cpl. Burke's shoes I would have put on the record, at the beginning of the interview, any prior relationship between any of the investigative team and the subject officer. In this case, as mentioned above, Cpl. Burke had worked for a period of time with A/Sgt. Smyth. This should have been made clear.

A/Sgt. Smyth should also have been asked at the beginning of the interview whom he had spoken to and/or what information he had received about anything relevant to the investigation, between the time of the incident and the start of the interview. He was not - though Cpl. Burke agreed that it would have been a good question to ask him.<sup>120</sup>

As noted above, a thorough and objective investigator would have prepared a list of question areas and questions for A/Sgt. Smyth. While A/Sgt. Smyth did give a detailed account in his opening monologue, there were numerous areas that were directly relevant to what happened that were not covered in the amount of detail I would have expected.

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<sup>118</sup> Interview of Cpl. Henstridge by Commission counsel at p121

<sup>119</sup> Her first interview, on the evening of the shooting, was 27 pages long. I am not sure about spacing and words per page.

<sup>120</sup> Interview of Cpl. Burke by Commission counsel at p285

Some of the answers he did provide raised more questions – as is normal in any investigative interview - and required more drilling down – for example his rationale for going there or precisely what he did in the aftermath of the shooting.

### **Possible question areas**

Here are a few possible question areas / questions that the investigators could, and in my view should, have raised during the interview. I have of course had the luxury of reviewing a lot of information that the investigators did not have available to them and a lot of time to review it. That said, I do not think any of the question areas/questions are particularly difficult to come up with, knowing what the investigators knew at that time. They are also far from exhaustive.

### **Training**

- A/Sgt. Smyth's training in use of force and de-escalation
- Policy and procedure in these circumstances, including risk assessment, calling beforehand and so on
- Criteria used for visiting persons of this kind, including when officers are justified attending alone

### **Background**

- Previous history that might be relevant to the issue, including any complaints, conduct or discipline matters. In his evidence to Commission counsel Cpl. Burke agreed that question about any prior incidents of inappropriate use of force or other violent incidents would have been relevant to the investigation and should have been asked.<sup>121</sup> Certainly, given the depth the investigators quite rightly explored Mr. Dunphy's background, a thorough and objective investigator would have paid similar attention to the subject of the investigation.

### **Activity that day**

- His movements that day – when he came on duty, where he went?
- Who he had contact with?
- His physical condition –was he ill, had he consumed alcohol, drugs or anything else that might be relevant?
- What other cases did he work on that day?

### **The decision to conduct a solo home visit**

- Why did he choose to visit Mr. Dunphy at that time and date?
- What else did he have on his plate?
- Why was this a priority?

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<sup>121</sup> ibid at p 344

- What is policy and procedure in situations like this?
- Prior examples of solo visits, with specifics?
- Could this have been handled by phone?

### **Prior knowledge**

- Prior knowledge of or dealings with any party involved

### **En Route**

- Did he stop?
- Did he speak to anyone, in person or otherwise?

### **What did he have with him?**

- Communications equipment
- Use of force options
- RNC cell
- Personal cell

### **Events at Dick and Debbie Dunphy's house**

A very important question area was to establish exactly what the Dunphys said to A/Sgt. Smyth, in particular re the possible presence of firearms in Don Dunphy's house. There is a discrepancy, on the face of it, between what A/Smyth said he was told (*Don had no firearms*)<sup>122</sup> and what both Dick and Debbie had told the officers the previous evening, which was that Debbie told A/Sgt. Smyth that *'well we didn't know if he had a gun or not.'*<sup>123</sup>

Mr. Dick Dunphy, also interviewed the same day as the shooting, stated that he was asked by A/Sgt. Smyth if Don had a gun in the house, he replied *"...sort of a thing but I – I – I said I didn't know and didn't think he would have."*<sup>124</sup>

Cpl. Henstridge agreed that, while this did not strike him as a huge inconsistency at the time that, *'..in retrospect now I would say that would be something that I would probe for sure.'*<sup>125</sup>

### **Events at Mr. Donald Dunphy's house**

As far as I understand it, A/Sgt. Smyth was directly outside or inside Mr. Dunphy's house for a lengthy period of time – about 15 minutes or so prior to the shooting, then an

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<sup>122</sup> Interview of A/Sgt. Smyth on April 6, 2015 at p7 and p26

<sup>123</sup> Statement of Debbie Dunphy at p4

<sup>124</sup> Statement of Dick Dunphy at p8.

<sup>125</sup> Interview of Cpl. Henstridge with Commission counsel at p88 onward

unspecified period in between the shooting and notifying the RCMP and about 28 minutes after notifying the RCMP, prior to the arrival of the first RCMP officer, including the time spent outside near his vehicle.

The interviewer could have broken those periods down, possibly in the following categories:

- **events outside the house**
- **events inside the living room prior to the shooting**
- **the shooting**
- **events after the shooting up until calling the RCMP**
- **events prior to RCMP arrival**

They would then have asked A/Sgt. Smyth to walk them through each segment in as much detail as possible.

To be fair to Cpls. Henstridge and Burke, A/Sgt. Smyth did provide a very significant amount of detail in his opening monologue, in particular about the mechanics of the shooting itself. They asked him specifically if he had touched the rifle, or moved anything else, which is very important. They walked him through his movements from the point he saw the barrel to exiting the door.

Some of the answers A/Sgt. Smyth provided raised further questions, including how the rifle ended up where it did, as noted in the issues segment of this report. A/Sgt. Smyth stated that '*I can state with a high degree of confidence where you found that gun that's where it fell.*'<sup>126</sup>

He was not pressed on what is, at least to me, the odd position the gun was found in. A thorough and objective investigator would have wanted to pursue that area, perhaps by asking questions such as 'describe the final resting place of the gun?', 'can you help us understand how it got there?' and/or 'you were in the house for a period of time after the shooting, did you note anything about the position of the gun during that period? There are many other potential questions along similar lines.'<sup>127</sup>

Nor was A/Sgt. Smyth asked about items he might have seen on any furniture – in particular the cartridge that was subsequently located on a table. Other areas that should have been pursued include whether A/Sgt. Smyth was also getting agitated, his exact position and precise movements, why he didn't see the gun in such a small room - given his line of sight from the mantel and the short distance, which perhaps included the right

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<sup>126</sup> Interview of A/Sgt. Smyth on April 6 at p48

<sup>127</sup> A/Sgt. Smyth discussed the position of the gun during the reenactment on April 10. It was consistent with where the scene photographs show it to be. I have not had an opportunity to review the notes made by participants at the April 8 reenactment.

side of the chair (or parts of it), more detail about the notes and the pen, and so on and on.<sup>128</sup> He may not have been able to recall, but he should have been asked.

### **Cell phone usage**

I appreciate that the investigators did not have A/Sgt. Smyth's cell phone data available to them until a considerable period after the event. That said, there was nothing stopping the investigators asking A/Sgt. Smyth about his cell phone use prior to and at the scene, at that interview.

Once the interviewers had the cell phone data, they may have wanted to drill down on some of the information obtained, including:

- Who A/Sgt. Smyth called, emailed or texted in the period from leaving St. John's to the point he arrived at the Holyrood RCMP Detachment (or even beyond that period, if the officers thought that might be relevant), or received calls/emails/texts from?<sup>129</sup>
- What information was exchanged during those calls?
- Did he use his phone to take photos, video or an audio recording at any point during his time there?<sup>130</sup>

I understand that A/Sgt. Smyth made several calls at some point just before the shooting. He was not asked about them in any of his interviews, as far as I know. Nor did A/Sgt. Smyth volunteer that information during any of his interviews, as far as I am aware.

### **What happened after the event**

Given that A/Sgt. Smyth was allowed to postpone the interview, the interviewers should have asked whom, if anyone, he had spoken to, or had spoken to him, about the incident in the interim period. This could have been canvassed toward the beginning of the interview, depending on the interview plan.

### **Undertaking**

A final point about thoroughness is a failure by the investigators to ask A/Sgt. Smyth not to discuss the interview or the incident itself with anyone, other than counsel, until the

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<sup>128</sup> See photograph 44, which I believe was taken at or near the mantel, though it does not necessarily reflect A/Sgt. Smyth's exact position at the time he says he first saw the barrel of the gun.

<sup>129</sup> Given that they had not seized A/Sgt. Smyth's cell phone by that point, it would not have been possible to ask him about the specific numbers set out in the call logs.

<sup>130</sup> As previously mentioned, I am not an expert on data retrieval from cell phones and I do not know if photos, video and audio files etc, would have been automatically downloaded when the phone was handed over to the RCMP.

investigation was concluded. If I am reading Ms. Meghan Dunphy's April 8 statement correctly Sgt. Osmond, at the conclusion of the interview, asks her to keep what she has been told confidential.<sup>131</sup>

It was my normal practice as an SIU investigator to request both involved police officers and civilian witnesses not to discuss anything about the interview and/or the investigation with any party until the investigation was concluded, including the reasons why. Information being shared may adversely impact the integrity of an investigation, even when done in good faith, as any law enforcement officer knows. While there is little an investigator can do to enforce any such request, should it come to the investigators attention that information has been shared, then that may impact how much weight the investigator gives to the evidence of a particular witness.

In this case, A/Sgt. Smyth shared the information that there was a round in the chamber of the gun found in the room less than 2 hours after leaving the interview, according to his cell phone data.. Sharing information of this kind is not a good thing, from an investigator's perspective, as mentioned above.<sup>132</sup>

- **Objectivity**

A thorough and objective investigator would not have been as friendly with A/Sgt. Smyth during the interview. He or she would not have given away as much information during the course of the interview as the RCMP investigators did, where the only apparent purpose, as far as I can see, was to provide solace to A/Sgt. Smyth, as opposed to a legitimate investigative purpose. They told him that:

- that the gun found next to Mr. Dunphy was loaded.<sup>133</sup>
- that there was '*nothing*' in the video cameras located at Mr. Dunphy's property<sup>134</sup>
- that Mr. Dunphy '*had been busted before.*'<sup>135</sup>
- that Mr. Dunphy had smoked '*a lot of pot*'<sup>136</sup>
- that '*nothing else has come to light*' when A/Sgt. Smyth asked about anything else being found in the house, including any other weapons.<sup>137</sup>

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<sup>131</sup> Statement of Meghan Dunphy on April 8, 2015, at p91.

<sup>132</sup> As noted above, the information was released to the public by the RCMP on April 7, 2015.

<sup>133</sup> Cpl. Burke stated during his interview with to Commission counsel that while he had never provided a subject of an investigation with critical information at such an early stage of an investigation previously, he did not do so because A/Sgt. Smyth was a police officer (at p307 onward). He also stated, as far as I understand the transcript, that there was no investigative purpose in providing this information ( at p315). In contrast, when Ms. Debbie Dunphy asked Cpl. Henstridge if Don had a gun, he declined to answer to ' maintain the integrity of the investigation'. Statement of Ms. Debbie Dunphy, April 5, 2015 at p7

<sup>134</sup> Interview of A/Sgt. Smyth at p60

<sup>135</sup> *ibid* at p63

<sup>136</sup> *ibid*

<sup>137</sup> *ibid*

- that *‘the public doesn’t really understand the pressure we are under’* when discussing shooting.<sup>138</sup> The use of the word *‘we’* is itself troubling, from an objectivity perspective.

There is no issue about being empathetic with a witness during an interview, as long as it is done in an objective manner, for a legitimate investigative purpose. However, it is not good investigative practice to share information that may impact the integrity of a homicide investigation with the subject of that investigation, at that stage of an investigation. It gives the subject an opportunity to amend or alter his or her story. It also increases the risk of evidence being shared. The investigators lose control of information, including how it is disseminated and how it is used strategically. That is a bad thing, from an investigators perspective.

It appears that the investigators had formed some kind of conclusion, at least based on my reading of the transcript. An example of this is at page 58 of A/Sgt. Smyth’s statement where Cpl. Henstridge, in response to a question about whether the gun was loaded, stated that: *“You saved your life.”*

With all due respect to Cpl. Henstridge, this was not an appropriate comment, as Cpl. Burke himself later acknowledged.<sup>139</sup> It goes beyond telling the officer that the gun was loaded. It implies that Mr. Dunphy was going to use it and that A/Sgt. Smyth’s actions were justified.

Words to the effect of, or implying that *‘it’s a clean shoot’*,<sup>140</sup> should never be said to anyone involved in a situation such as this until the conclusion of an investigation, even if the evidence may be pointing that way. A thorough and objective investigator would not do that, however frustrating it may be on occasion.

Another example of questionable objectivity in the interview is when Cpl. Henstridge tells A/Sgt. Smyth that: *“I will say that I don’t think you need to second guess anything that happened in that room. I don’t know if I am supposed to say that or not, Steve....”*<sup>141</sup>

With the greatest of respect to Cpl. Henstridge, a thorough and objective investigator would not have said that, in these circumstances. That he may ultimately have been right is not an excuse, at least in my view.

A/Sgt. Smyth appears to have left the interview feeling that the investigators were on his side. Shortly after the interview concluded, he sent messages from his cellphone, which may suggest that he had been, or felt he had been, given a clean bill of health by the investigators.

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<sup>138</sup> *ibid* at p69

<sup>139</sup> Cpl. Burke’s interview with Commission counsel at p330, though to be fair he also states that it was not said because A/Sgt. Smyth was a police officer.

<sup>140</sup> *‘Clean shoot’* is police parlance in Ontario and other jurisdictions for a police shooting where the officer is justified in shooting.

<sup>141</sup> Statement of A/Sgt. Smyth at p66

He sent an SMS message about 20 minutes after the interview that read as follows:

*“ Thanks Bernie, let anyone know that I just finished my interview with the RCMP who were fully supportive of the action taken”* <sup>142</sup>

At 7 p.m., there were a series of SMS messages between A/Sgt. Smyth to a friend, which read as follows:

*Interview go OK?*

*Yup, veery (sic) well , they were perfect actually and very supportive*

*Excellent, very glad to hear*

*Were very complimentary of how I did things. Said I was by the book. Was settling for sure.*

A few minutes later A/Sgt. Smyth messaged the same friend, in response to a message he had received from that friend:

*Thanks man! Monty confirmed he had a round in the chamber too. Pretty unsettling* <sup>143</sup>

Later that evening he sent another SMS message to someone:

*Yeah for sure, the whole thing sucks but its starting to set in that the Fucker Tried to shoot me. Especially when rcmp confirmed he had a round in the chamber.’* <sup>144</sup>

The tone of the interview drew some criticism from Sgt. Osmond. During his interview with Commission counsel, Cpl. Burke advised that Sgt. Osmond told him immediately after the interview that “*we may have been too friendly with Joe Smyth.*”<sup>145</sup> This was not documented anywhere, as noted elsewhere in this report.

To sum up. Perception is crucial. As noted at the beginning of this report, Cpl. Henstridge rightly stated during the interview when discussing public and media perceptions about the shooting:

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<sup>142</sup> I do not know who Bernie is.

<sup>143</sup> The use of Cpl. Henstridge’s first name may raise an eyebrow. Not a big thing, but I cannot imagine any subject officer calling an SIU investigator by his or her first name in these circumstances. That a subject officer feels comfortable enough to do so may feed into the perception of an over-friendly relationship between the investigators and the subject officer.

<sup>144</sup> Cell Phone Data April 6 8.41 pm with 709 589 8463

<sup>145</sup> Interview of Cpl. Burke by Commission counsel at p300

*‘....you are with the RNC and we are with the RCMP so there’s – there’s a big cover up or whatever. That’s what people say.’<sup>146</sup>*

A thorough and objective investigator should have recognized that an over-friendly approach be it during an interview or during an investigation, may feed into that perception.

- **Keep control of the process**

To the greatest extent possible, a thorough and objective investigator should keep control of the interviewing process. That includes when and where it takes place, and who is present, how long it lasts for, how it is recorded and so on.

Other than the delay in conducting the interview where, as mentioned above, the RNC Association appear to have been allowed to determine when their member would be interviewed, the investigators did a good job in this respect. Virtually all interviews were audio recorded and A/Sgt. Smyth’s were also videoed, as were his reenactments.

- **Active listening**

It is not unusual for interviewers not to listen to what they are being told. In this case, the interviewers were certainly listening to what A/Sgt. Smyth was saying.

### **Further interviews**

There is nothing wrong with conducting follow-up interviews, as several of the RCMP investigators noted in their interviews with Commission counsel. Generally, the purpose of such interviews is to address inconsistencies and/or seek clarifications, as opposed to rehashing the entire event again.

A/Sgt. Smyth was interviewed on several further occasions, as noted elsewhere in this report. As far as I can see, he was not asked about anything substantively new. For example, I have not found any record of him being interviewed about information found on his cell phone, including the numbers called while he was at the scene.

The reenactments also constitute interviews. I have read the transcript of the second reenactment. A/Sgt. Smyth went into detail about what happened.

A/Sgt. Smyth was interviewed by Saskatoon Police Service officer(s) who conducted an internal investigation on behalf of the RNC in June 2015.

A/Sgt. Smyth was also interviewed on August 11, 2015 to clarify the use of the word ‘couch’ in the April 6 statement, after concerns raised by the Independent Observer. He was also interviewed on September 14, 2015, after clarification was requested by the

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<sup>146</sup> Interview of A/Sgt. Smyth April 6 2015 at p71

RCMP Use of Force expert, as to the placing of shots. The expert had noted in an e-mail that investigators had not explored this avenue.’<sup>147</sup>

### **The interview of Mr. Dick Dunphy**

Cpl. Henstridge interviewed Mr. Dick Dunphy at 7.45 pm, roughly 5 ¼ hours after the shooting. The interview took 16 minutes. Cpl. Burke was also present.

The interviewers did not have a lot of time to prepare. Unfortunately, the interview was not thorough, for the following reasons;

- Given the importance of the witness – one of the two individuals who last had contact with A/Sgt. Smyth before the shooting – it was very brief.
- The focus of the interview was almost exclusively on Don Dunphy.
- Virtually no questions were asked about relevant areas concerning A/Sgt. Smyth, including his demeanour, exactly what he said, exactly what he was told, whether there were any signs of impairment, whether he had a radio/cell phone with him and used either while he was with them plus anything else that might be relevant to the shooting.
- The important discrepancy over who said what about whether Mr. Dunphy may have access to firearms (didn’t know whether he had a gun / didn’t think so versus A/Sgt. Smyth’s stating that Mr. Dunphy told him that he did not have a gun - see above for details ) was not followed up on. To be fair, it is not clear if the interviewing officers were aware of A/Sgt. Smyth’s position re what the Dunphy’s told him the gun at that point, but if not it should have been followed up on as soon as the investigators became aware of it.

The second interview took place on September 4, 2015 by Cst. Nippard. It was brief. It covered whether Mr. Dunphy had called anyone after the officer left his house, as well as issues relating to Donald Dunphy and firearms.

### **The interview of Ms. Debbie Dunphy**

Ms. Dunphy was interviewed shortly after her husband. Apparently they were not in earshot when the interviews occurred. That is good investigative practice. Her interview began at 8.02 p.m. and was shorter than her husband’s.

Unfortunately, the interview has the same flaws as her husband’s interview. It is far too brief, focused almost exclusively on her brother in law and not on the officer and does not address the discrepancy as to who said exactly what about a gun.

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<sup>147</sup> See email at Doc 623

## **The Paramedics**

A thorough and objective investigator would quickly have identified the two paramedics who attended the scene - Ms. Nancy Linehan and Mr. Keith Bishop - as potentially very important witnesses. They had arrived at the Dunphy house very shortly after the first RCMP responders and were the first non-police witnesses to have direct contact with A/Sgt. Smyth. One of them also medically examined A/Sgt. Smyth twice, as well as Mr. Dunphy. Both had entered the scene – they were the 3<sup>rd</sup> and 4<sup>th</sup> persons to do so, by my calculation. They stayed outside the Dunphy house for about 90 minutes. Ms. Linehan had also previously worked with Meghan Dunphy.

## **The interview of Ms. Nancy Linehan**

Cst. Nippard interviewed Ms. Linehan on April 8, 2015. The interview took 24 minutes. Given the amount of evidence that Ms. Linehan could potentially offer, it was quite brief.

The interview did cover how Ms. Linehan touched Mr. Dunphy but otherwise did not disturb anything. However, the interview is deficient in some important ways. There is insufficient detail about:

- A/Sgt. Smyth's condition – including clothing, demeanour and any evidence of impairment, particularly as she medically assessed him on 2 occasions, including taking his blood pressure
- Exact times and notations on her medical report (though it is unclear to me if she had the report with her at the time of the interview)
- What utterances A/Sgt. Smyth made, if any
- What else she observed at the scene – not just inside but also while waiting outside
- Who else had any interaction with A/Sgt. Smyth
- Where was he located
- Was he on a cell phone
- Did he use anyone else's cell
- What else she saw in the room – while some areas were well covered, others were not. For example, did she see the folder on the table?
- Clarification on the position of the rifle, as discussed above

During the interview, Cst. Nippard questioned her about her examination of A/Sgt. Smyth. He stated that “ *Ah, I don't wanna (sic) get too much into his medical cause that's – that's private to him, right.*”<sup>148</sup>

With respect to Cst. Nippard, in a homicide investigation there is very little that is private, especially the medical condition of the subject of that investigation, less than an hour after the shooting occurred, as provided by an independent witness who has expertise in assessing medical conditions.

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<sup>148</sup> Statement of Nancy Linehan at p23.

## **The interview of Mr. Keith Bishop**

Cst Nippard also interviewed Mr. Bishop on April 8, 2015. The interview lasted 14 minutes. It is not detailed. He is not asked about any utterances A/Sgt. Smyth may have made or anything else that may have happened in relation to A/Sgt. Smyth during the time they were there.

His evidence about the position of the gun is discussed above.

I am not sure if there is any significance to Mr. Bishop stating that an officer told him:

*‘leave the scene as if you are going to another call. Like leave your lights on just as if you’re going to another call.’<sup>149</sup>*

That line of questioning/investigation was not pursued, to my knowledge.

## **Other interviews**

- **PSU members**

As mentioned above in the segment on issues, visiting the home address of a person in these circumstances raises obvious questions about policy and procedure, in particular about risk assessments and officer safety.

The RCMP interviewed current and former members of the PSU who had worked with A/Sgt. Smyth.

The 13-minute interview of **Cst. Madden** is not thorough in some respects. The investigator did not drill down into policy and practice re situations similar to what occurred in this case, even though the officer volunteered she had done a couple of home visits. It did however, adduce evidence of what A/Sgt. Smyth told her at the airport on a flight to Florida at some time between April 8 and May 5 about what had happened. His account was consistent with all his other accounts about what had happened in the room.

RCMP **Cpl. Noel** did give an example where he did a home visit. That was the one time he had done this since joining the unit in December 2014. The interviewer did a good job pressing Cpl. Noel about what A/Sgt. Smyth had said about the incident itself (again the account was consistent). To his credit, the interviewer returned to the topic of risk assessment later in the 12-minute interview but the area was not fleshed out in sufficient detail, at least in my view.

RCMP **Cst. McEntegart** worked with A/Sgt. Smyth on the PSU between May or June 2012 and November 2013. She spoke of following up on people who were possible

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<sup>149</sup> Statement of Kevin Bishop at p10.

threats or whom she described as making ‘*harsh comments*’<sup>150</sup> She also mentioned an incident where another officer (Cst. Benoit) was intending to visit a person in the Trinity Conception area. A/Sgt. Smyth called her on her day off and asked her to accompany Cst. Benoit. She also mentioned a case where A/Sgt. Smyth and herself went ‘*to one here downtown.*’<sup>151</sup> It is unclear to me if she went to any home addresses on her own.

The interviewer did not dig any further about the circumstances of those visits. However, he asked if there was a policy that set out whether officers should pair up. There was not one she was aware of, though Cst. McEntegart did tell him that ‘*we usually tried to do 2 people.*’<sup>152</sup>

My concern with this interview is the same as the others - brevity and failure to dig down in a lot of depth. More concerning however is the synopsis of the statement that appears in the Daily Log Report.<sup>153</sup> It is fairly comprehensive - except that it does not contain the information about usually trying to go with 2 people or A/Sgt. Smyth asking her to accompany Cst. Benoit.

If I have read the transcript correctly, it might be that these were the only two times she went to a persons house where there was an issue of a threat of some kind, as she could not ‘*remember any other specific ones.*’<sup>154</sup> To be fair, he does note that she stated she ‘*Was with Joe when visiting a residence in the city.*’

Arguably, some of this information was not helpful to A/Sgt. Smyth. I do not know why it was not included in the synopsis.

**Cst. Benoit** of the RNC was interviewed on May 6, 2015, between 3.11pm and 3.23 pm. He had worked on the detail between May 2012 and February or March 2014. He recalled making home visits ‘*maybe half dozens times.*’ The investigator asked about the policy for 2 officer visits. Cst. Benoit replied that it was done on a case-by-case basis. This was not followed up.

Retired RCMP **Cpl. Anstey** worked with A/Sgt. Smyth from November 2013 to December 201. The investigator again did a good job covering what A/Sgt. Smyth had told him about the shooting.

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<sup>150</sup> Interview of Cst McEntegart at p4

<sup>151</sup> *ibid* at p9

<sup>152</sup> I am not sure if that should be read in conjunction with the previous sentences, which read as follows: *It was just kind of feel it out and, you know, if you -the background checks revealed anything maybe we should go with two people.*” at p6 of Cst. McEntegart’s interview. Whether the ‘usually’ referred only to cases where background checks warranted or any check is not clear, at least to me.

<sup>153</sup> At page 316.

<sup>154</sup> Interview of Cst. McEntegart at p9

Cpl. Anstey advised that home visits could occur ‘ *maybe three or four times a year or it could be more.*’ They also spoke to individuals by phone. He was also asked about A/Sgt. Smyth’s use of force and his temperament, as well as details about what A/Sgt. Smyth said to him about what had happened, in a call 2 days after the incident.

The interview ends with, as far as I can understand the transcript, Cpl Anstey stating that he went out knocking on doors ‘ *blind*’ – without doing CPIC checks. He talks about ‘ *making numerous blind house calls*’. Cpl. Anstey was not asked to provide specific examples. Toward the conclusion of the interview, the interviewer stated that ‘ *(a)nd I know if I would have done it I probably wouldn’t have done the checks that he did*’, which is not an appropriate comment, given the circumstances. It has a whiff of the ‘there but grace of God go I’ mentality that I believe is evident at times elsewhere in the investigation.

- **The follow-up interviews of Cst. X and Cpl. O’Keefe**

Cst. X’s evidence was potentially important. He transported A/Sgt. Smyth from the scene to the Holyrood RCMP Detachment, a 30-minute or so journey. As noted repeatedly, utterances are important in any investigation. This is what Cst. X wrote in his duty report about that journey:

*SMYTH at one point stated. "no matter how confident you are about diffusing a situation it happens". " Only had time to say no, no, no, and that was it".*

*Writer quickly diverted the conversation away from the comments and back to years of service.*<sup>155</sup>

Sgt. Osmond took that view that allowing A/Sgt. Smyth to continue to talk about the incident in these circumstances may have raised Charter issues. I find that a little difficult to follow. Cst. X was not actively questioning A/Sgt. Smyth. He was listening to spontaneous utterances.<sup>156</sup> Other officers at the scene, including Cst. Downey, properly recorded what A/Sgt. Smyth told them. I am not aware of any evidence that any of these officers diverted the conversation away from the shooting.

I cannot think of another situation where a police officer would intentionally divert the subject of a homicide investigation away from discussing what happened at the time of the shooting, in these circumstances.

Upon receipt of the ASIRT report, which noted that Cpl. O’ Keefe’s notes were inadequate and that there were no notes from Cst. X, the RCMP conducted follow-up interviews with both officers. These interviews took place on August 31, 2016 and Sept 1, 2016.

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<sup>155</sup> Supplementary Occurrence Report of Cst. X dated April 4. The date is clearly wrong.

<sup>156</sup> Interview of S/Sgt. Osmond by Commission counsel at p112 onward

I have not seen transcripts of the interviews, if they exist. I have reviewed the notes of the RCMP interviewer.

According to the interviewing RCMP officer's notes, the interview of Cst. X took 3 minutes. I have never heard of a 3-minute interview in a police-involved death or serious injury investigation previously, even a follow-up one. As far as I can see the interview did not deal with the one key question – why did Cst. X '*quickly diverted the conversation away*' from discussing the shooting, as he had written in his original duty report.

### **8. Was the analysis of the evidence gathered during the investigation objective and based solely on the facts?**

A thorough and objective investigator will set out his or her rationale for reaching a conclusion in an investigation based solely on an objective assessment of the evidence. He or she will explain his or her rationale for accepting some evidence and not accepting other evidence. The investigator cannot just ignore evidence that may not support their ultimate conclusion(s), rather they must explain why they prefer other evidence. Not everyone may agree with them – reasonable people can reasonably differ, as the old adage goes – but the reasoning must be clear.

I have reviewed the firearms experts report and the use of force expert report. Both set out a detailed rationale for their conclusions. Both conclusions are premised on accepting A/Sgt. Smyth's version of events and the forensic evidence from the scene.

I reviewed Cpl. Burke's final report. I do not whether or not he consulted with Crown counsel. He sets out the evidence in some detail. He did not deal with the discrepancy between what Dick and Debbie Dunphy said they told A/Sgt. Smyth about the possibly of Don having access to a firearm and what he says he was told. He simply accepts A/Sgt. Smyth's version in his analysis, writing that '*...they specifically said he had no firearms on his property.*'<sup>157</sup> To be fair, he includes what they actually said earlier in his report,<sup>158</sup> but does not explain why he prefers A/Sgt. Smyth's version. He also does not deal with Cst. McEntegart's evidence or the position of the gun. The trickle of blood issue is mentioned but left hanging.

### **Conclusion**

No investigation is perfect. I have certainly never done one, nor seen one. As the ASIRT report noted, it is not difficult to find things in an investigation of this nature that should have done differently.

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<sup>157</sup> *RCMP Investigation – Sudden Death of Donald Dunphy*, at p33

<sup>158</sup> *ibid* at pages 22 and 23

That said, given the stakes, an investigation into a police shooting has to be of the highest quality. As the ASIRT report also noted, *'These investigations are always sensitive, high-profile, potentially complex and important not just to the individual case but also to the maintenance of public confidence in policing.'*<sup>159</sup> Investigations of allegations of police shootings that are - or appear to be – less than thorough and objective, do no one any favours, even though they may reach a correct result. They leave families distraught and suspicious, the public and media skeptical and the police community defensive.

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.

In particular, I do not think the investigation gave the appearance of being impartial in several areas. From Cst. X discouraging A/Sgt. Smyth from talking, to unquestioning acceptance of the rationale for the delay in conducting the interview, as well as the failure to probe and the inappropriate sharing of information during the interview when it did occur, the initial reluctance to request the second reenactment and the inappropriate April 7 media release, for example. There is evidence that the investigators were overly empathetic and that they had made up their minds about whether this was a clean shoot, before they had gathered all the evidence.

That said, the investigation did ultimately cover the vast majority of bases. The investigators had the luxury of a very cooperative subject officer, albeit a luxury that they did not take full advantage of. The processing of the scene was thorough, notwithstanding the subsequent issues over scene security, the glasses, the pen and the cartridge that was found. The reenactment was a very good idea. The investigation was reasonably well documented. Family liaison was good. The appointment of an I/O and asking an outside agency to review the investigation were good ideas. The use of experts was good. Many investigative avenues were identified and pursued.

Any flaws in the investigation do not necessarily mean that the investigation came to the wrong conclusion. A flawed investigation can reach the right outcome. However, 'no harm, no foul' is not the standard that a thorough and objective investigator would want to be applied to his or her homicide investigation.

The more thorough and objective an investigation of lethal use of force by police officers, the more faith all involved will have in the outcome. The families can take comfort that the relevant facts have been gathered, as can the public. An officer, if cleared, can then hold their head up high in the community, confident that they have been exonerated as

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<sup>159</sup> ASIRT report at p9

the result of a painstaking, objective, professional investigation that has left no reasonable stone unturned and was conducted without fear or favour.

**Note**

Please do not hesitate to contact me if you have any questions. As noted, I have not read, listened to or viewed all of the material you provided, because of the volume and my time constraints. Should I appear to have missed any material facts that may impact on any of my opinions and/or conclusions, I would be grateful if you could point me to them and I will re-assess my opinions accordingly.

Submitted

Gareth Jones  
February 7, 2017