

September 12, 2016

Heather M. Jacobs, QC
Department of Justice and Public Security
Government of Newfoundland and Labrador
4th Flr, East Block, Confederation Building
St. John's, NL A1B 4J6

Via Email

Dear Madam:

Re: ASIRT File No. 2016-04(N) – Review – Out of Province
Officer Involved Shooting Fatality: April 5, 2015
Affected Person: Donald Dunphy
Subject Officer: Royal Newfoundland Constabulary (RNC) Acting Sgt. Joseph Smyth
RCMP Investigation: 2015376186

Further to your request for a report on the Alberta Serious Incident Response Team (ASIRT) review of the Royal Canadian Mounted Police (RCMP) investigation into the death of Mr. Donald Dunphy, I can share with you the process and results of our review. I would note, however, that this would not be standard practice or protocol in Alberta, where the investigating agency would be charged with the public release of information.

On April 5, 2015, Donald Dunphy, hereinafter referred to as the affected person for the purposes of this review, a resident of Mitchell Brooks, NL, was shot and killed in his own home by Acting Sgt. Joseph Smyth, a member of the Royal Newfoundland Constabulary (RNC). At the time of the incident, A/Sgt. Smyth, hereinafter referred to as the subject officer, was on duty as an assigned member of the Protective Services Unit (PSU) which is responsible for providing protection services to the Premier of Newfoundland and Labrador.

The subject officer was conducting an investigation into some allegedly troubling social media comments purportedly posted on April 3, 2015 by the affected person to determine whether he was a potential threat to the Premier, the Office of the Premier, and/or any

other member of the Members of the House of Assembly (MHA) of Newfoundland and Labrador. On April 5, 2015, the subject officer was conducting a voluntary interview with the affected person at his Mitchells Brook residence when a confrontation occurred that resulted in the affected person being shot and killed.

The Alberta Serious Incident Response Team (ASIRT) operates as a civilian led independent integrated investigative unit as part of the Alberta Justice and Solicitor General - Public Security Division. In Alberta, pursuant to the provisions of the *Police Act* and the *Police Service Regulations*, and an existing MOU with the RCMP, ASIRT has jurisdiction over all police officers within the province. ASIRT's mandate is the investigation of incidents involving Alberta's police that have resulted in serious injury or death to any person, as well as serious or sensitive allegations of police misconduct. That involvement can take many different forms:

- ASIRT might be directed to have primary responsibility for the investigation of any incident or allegation.
- ASIRT might be directed to *oversee* the investigation of an incident or allegation conducted by another police service. This would entail ASIRT essentially directing the course of the investigation being conducted by another service.
- ASIRT might be directed to *review* another police service's completed investigation into a particular incident or allegation.

Most commonly, ASIRT is either directed to have conduct of the investigation or to review the investigation of another agency.

On occasion, at the request of Alberta's other provincial government partners, ASIRT has been involved in the investigation and/or review of incidents in British Columbia and Manitoba, and has a standing agreement with the Yukon to investigate, oversee or review incidents where the conduct of police may have resulted in serious injury or death or where there are serious allegations of police misconduct.

On January 29, 2016, as a result of a request from the Honourable Minister of Justice and Public Safety, and Attorney General Andrew Parsons of the Government of Newfoundland and Labrador that ASIRT conduct an independent external review of the Royal Canadian Mounted Police (RCMP) investigation into this incident, the Honourable Ms. Kathleen Ganley, Minister of Justice, Attorney General and Solicitor General of Alberta, agreed to authorize ASIRT's involvement in a review capacity.

It is important to understand the nature and scope of a review. The overarching purpose of a review is to provide an objective, independent critical examination and assessment of

an investigation to confirm that it was properly conducted using best practices and that all appropriate investigative steps were taken in the circumstances so that the public can have confidence in both the investigation and the consequences flowing from it. A review is also meant to carefully assess an investigation with a view to identifying any evidence of bias, tunnel vision or a lack of objectivity. Having carefully reviewed the investigation in its entirety, ASIRT may make recommendations as to what, if any, additional specific investigative steps might be necessary to perfect an investigation. ASIRT may also make recommendations regarding the development of best practices going forward for the purposes of similar future investigations.

It is equally important to understand that a review should not be construed as a second or separate investigation into the circumstances of the incident itself, nor is it generally within the scope of a review to make a determination on the issue of whether the subject officer acted lawfully during the course of an incident or whether there are reasonable grounds to believe an offence has been committed by the subject officer. In this case, you will not find a detailed examination of the social media posts purportedly authored by the affected person or a determination as to whether the posts could constitute a criminal offence. For the purposes of the review, the posts are only relevant to provide context for the steps the subject officer took to investigate, which ultimately led to the death of the affected person. As well, ASIRT has not been asked to provide an opinion on whether the subject officer was lawfully placed at the time of the incident and/or acting in the execution of his duties. This determination is more appropriately made by those with the primary responsibility for the investigation. Lastly, ASIRT has not been asked to provide an opinion on whether the use of lethal force was appropriate in the case. Again, this determination is more appropriately made by those with the primary responsibility for the investigation. On a review, the focus is on the quality of the investigation into an incident, not the incident itself.

It should be noted that where ASIRT makes recommendations, they are exactly that... *recommendations*. ASIRT has no jurisdiction to direct or order the RCMP in Newfoundland and Labrador or the Royal Newfoundland Constabulary to take certain steps or consider new policies or alternative best practices.

The Investigation

A careful review of the completed investigation confirms that it was thorough, complete and conducted in a manner consistent with current investigative standards. Principles of Major Case Management were followed including the use of an electronic major case management program. The RCMP Investigative Report is comprehensive and contains a detailed summary of the entire investigation. The report provided was organized, logical, professional and in easily searchable electronic format.

Given the sensitivity of the matter under investigation, the RCMP Command Triangle properly limited internal access to the electronic file to maintain the confidentiality and integrity of the investigation. The final report was organized by identifying or categorizing components of the investigation. The investigative mandate was clearly articulated and the final report systematically and factually examined the evidence collected.

ASIRT carefully scrutinized the investigation for evidence of investigational bias, tunnel vision, and/or a lack of objectivity. There was no evidence to support a conclusion or even a suspicion that any of these identified risks manifested themselves in this investigation. Based on our review, no obvious personal or professional bias was demonstrated. Steps were taken to identify any RCMP or RNC police officer who had a personal and/or professional relationship with the subject officer. The recognition of the potential conflict and the steps taken to isolate the impact of that conflict were noteworthy and demonstrative of an intent to maintain the integrity of the investigation. Aspects of the investigation that were pursued demonstrated the willingness of the RCMP MCU team to explore all avenues of investigation. They were also very receptive to inquiries from the family and took additional investigative steps to address some of those concerns raised.

While ASIRT has some minor observations and recommendations regarding aspects of the investigation, it is our opinion that none of the issues identified rise to a level of seriousness that would bring into question the integrity or validity of the investigation or would impact any conclusions reached based on the evidence. The investigation more than provides sufficient evidence to allow a person properly informed with respect to the law in this area to be able to clearly assess whether the conduct of the officer caused the death of the affected person (as in most officer involved shootings, this question is easily answered) and, more importantly, whether the conduct could constitute a criminal offence. The investigation allows for informed decision making.

The goal of the review was to identify if the investigating agency has completed the investigation in a manner consistent with the level of investigative excellence that maintains ASIRT's objective to maintain public confidence in policing. These investigative standards were pursued and attained in this case.

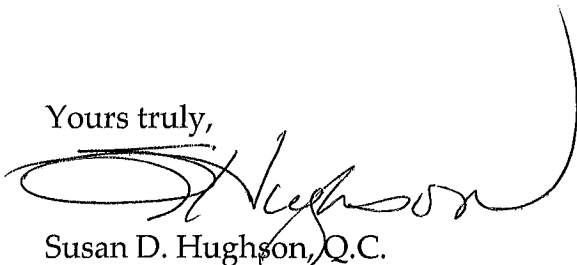
As one considers the above, it should always be kept in mind that with the benefit of hindsight it can be easy to point out in any review how something might have been handled differently. A review has the benefit of time, distance and independence to examine an investigation and identify what might have been done better. As such, the mere fact that issues are identified should not be construed as compromising the entire investigation. The question remains whether the issues, alone or in combination, are such that the quality of the investigation is contaminated.

I would once again confirm that this investigation was done well, following best practices and major case management principles. While some minor shortcomings were identified, when viewed in the context of the investigation as a whole, they do not taint the overall quality of the investigation and the reliability of the evidence obtained. ASIRT has very carefully reviewed the RCMP investigation into the circumstances surrounding the officer involved shooting that resulted in the death of the affected person. The investigation was thorough and provides sufficient context to make a determination, based on evidence, as to whether the subject officer was lawfully placed, and to assess whether the use of force was authorized in law. The investigation reflects an intention to be objective and fair and was reported in an organized, logical, professional, and understandable manner.

These cases are very serious and always very difficult for the family of the person who has died. ASIRT has offered to be of assistance in explaining our process or our findings to the family so that any questions that they have about ASIRT's involvement or findings might be answered.

I trust that you will find the above information clear and sufficient. If you have any questions or concerns, please do not hesitate to contact me at your convenience.

Yours truly,

A handwritten signature in black ink, appearing to read "S. Hughson", with a large, sweeping flourish extending from the end of the signature.

Susan D. Hughson, Q.C.
Executive Director
ASIRT

SDH/lw