



By email

November 14, 2022

Mass Casualty Commission
1791 Barrington Street, Suite 310
Halifax, Nova Scotia B3J 3K9

Dear Commissioners:

**Re: Late disclosure and withholding of relevant documents by the RCMP
New submissions of Cst. Wiley and the National Police Federation**

Please accept the following submissions in response to late disclosure and withholding of relevant documents by the RCMP, new submissions of Cst. Wiley, and new submissions of the National Police Federation (“NPF”).

1. Late disclosure and withholding of relevant documents by the RCMP

1.1. RCMP H-Division’s allegations of criminal conduct and misconduct against the Truro Police Service

In June 2020, according to C/Supt. Chris Leather, the RCMP H-Division learned of allegations of serious criminal conduct and misconduct concerning a municipal police service whose identity the Commission has redacted.¹ It is now a matter of public record that the allegations were against the Truro Police Service.²

Supt. Costa Dimopoulos prepared a two page, situational report, dated 10 July 2020, which summarized the allegations and identified relevant witnesses.³ This was not disclosed to participants until September 16, 2022.

¹ Interview of C/Supt. Leather, 23 September 2022, p. 2 [Exhibit P-005686 / COMM0065199]

² Heidi Petracek, “N.S. Department of Justice will review allegations in RCMP report: Attorney General” CTV News 28 October 2022, online: <https://atlantic.ctvnews.ca/n-s-department-of-justice-will-review-allegations-in-rcmp-report-attorney-general-1.6130364> (citing John Scott, interim director of the Serious Incident Response Team)

³ RCMP Situational Report 10 July 2020 [Exhibit P-005375 / COMM0064752]

The situational report was used to brief RCMP National Headquarters on the matter and a decision was made, in the summer of 2020, at the highest levels of the RCMP, to refer the matter to the Serious Incident Response Team (“SiRT”).⁴ This was not disclosed to participants until October 7, 2022.

SiRT declined to investigate the referred complaint. In a letter dated December 17, 2020, the director of SiRT, Felix Cacchione, explained that SiRT had reviewed the RCMP’s investigation file and interviewed one of the identified witnesses. Mr. Cacchione advised that an investigation would not take place ostensibly because the complaint did not meet SiRT’s mandate.⁵ This was not disclosed to participants until October 7, 2022.

In a subsequent interview with the Commission, however, Mr. Cacchione provided a more candid explanation for SiRT’s refusal to accept the RCMP’s complaint against the Truro Police Service:

Well, there certainly was no love lost between the author of the report ... instead of investigating it themselves they [the RCMP], because of this, as you’ve said, turf war, they wanted us to do it. And I wasn’t prepared to put us in that position. ... It all, it just didn’t smell right to me. And I didn’t want to get into it.⁶

Supt. Dimopoulos (now retired) recently emailed a rebuttal to the current director of SiRT. This email was erroneously shared with counsel for a participant and subsequently disclosed by the Commission to all participants. On November 9, 2022, the Commission advised participants that this correspondence was not subject to any undertaking and would not be shared with the public. Nonetheless, the content of Supt. Dimopoulos’s email is relevant to the Commission’s work. In his email, Supt. Dimopoulos expresses concern that SiRT dismissed a credible complaint of police criminality and misconduct without a proper investigation. He argues this failure to investigate was the result of broken policing relationships in Nova Scotia and indicative of a police oversight system that lacks capacity.

The situational report from 2020 and SiRT’s response should have been disclosed in a more timely fashion. This evidence, including the identity of the municipal police service as the Truro Police Service, is highly relevant to the Commission’s work. It tends to show relationship concerns between RCMP H-Division and the Truro Police Service that may have affected communication, interoperability, and decision-making on April 18-19, 2020. It most certainly will affect the ability of these police services to work together on a forward-looking basis.

⁴ Interview of C/Supt. Leather, 23 September 2022, pp. 2, 6 [Exhibit P-005686 / COMM0065199]

⁵ Letter from Felix Cacchione (director of SiRT) to C/Supt. Leather, 17 December 2020 [Exhibit P-005717 / COMM0065367]

⁶ Interview of Felix Cacchione, 9 September 2022, p. 40 [Exhibit P-006842 / COMM0064899]

The more recent evidence from September and October 2022 is also relevant to the Commission's work. If the situational report from 2020 is credible, SiRT failed to investigate serious allegations of criminality and misconduct against the Truro Police Service. This failure tends to show that police oversight in Nova Scotia is grossly inadequate; it may also impugn the credibility of SiRT's investigation into the officer-involved shooting at the Onslow Firehall. If SiRT's concern about the bona fides of the complaint is credible, RCMP H-Division made a scurrilous referral for potentially improper purposes. This impropriety tends to show misconduct and raises credibility concerns with senior RCMP officers who provided evidence to the Commission; it may also affect the implementation of any recommendations the Commission makes concerning interoperability.

The late disclosure of this evidence has immunized relevant witnesses from being properly and fully questioned. As a result, the Commission's truth-seeking function has been obstructed. This has implications for the completeness and implementation of recommendations about interoperability and police oversight.

1.2. Quintet documents and C/Supt. John Robin e-mails

In a letter dated October 1, 2022 to counsel for the Attorney General of Canada, counsel for the Commission identifies several categories of relevant documents that will not be produced in time for inclusion in the Commission's record, including "Quintet documents" and "C/Supt. John Robin e-mails."⁷

The Quintet documents that have been disclosed revealed material insights from those most senior RCMP members who were involved in the response to the mass casualty.⁸ This included examples of overt hostility towards civilian oversight of police as well as other police agencies.⁹

C/Supt. John Robin (retired) is the spouse of one of RCMP H-Division's senior officers at the time of the mass casualty. He was tasked, at the request of H-Division leadership, to be part of the RCMP's commission "Issues Management Team." He then created false and misleading business cards that suggested he was commission staff, and proceeded to distribute them to members of the public. The conduct was detrimental to the Commission's independence and required the Commissioners to write RCMP Commissioner Brenda Lucki to request that it cease and desist.¹⁰

⁷ Letter from Emily Hill (Commission counsel) to Lori Ward (General Counsel, Department of Justice), 1 October 2022 [**Exhibit P-005688 / COMM0065202**]

⁸ Quintet Consulting Corporation, *Summary Report Wellness Assessment*, un-redacted version (30 September 2021) [**Exhibit P-004609 / COMM0063605**]

⁹ Quintet Consulting Corporation, *Summary Report Wellness Assessment*, un-redacted version (30 September 2021) [**Exhibit P-004609 / COMM0063605**]

¹⁰ Letter from MCC Commissioners to Commissioner Lucki, 11 May 2021 [**Exhibit P-004225 / COMM0061748**]

There is a strong possibility that the withheld “Quintet documents” contain further material insights into the RCMP’s posture toward civilian oversight and other police agencies. There is also a strong possibility that the withheld “Robin e-mails” contain further material insights into the conflicts of interest and questionable conduct of the RCMP “Issues Management Team.”

The non-disclosure of documents within the timeframe needed for the Commission to fulfill its mandate amounts to a withholding of documents. The Commission and the public may never know whether these withheld documents were material to the Commission’s truth-seeking function.

1.3. Finding of RCMP obstruction and drawing adverse inferences

In its Phase 3 submissions, the ECPJS/BCCLA coalition asked the Commissioners to find that the RCMP’s conduct throughout this commission of inquiry has obstructed the fact-finding process. The late disclosure and withholding of documents, discussed above, reinforces this request. Such a finding is important to protect the work of future public inquiries against the type of mischief that has been observed in this commission. A failure to firmly confront this mischief will lead to efforts by state actors to “run the clock” on commissions of inquiry in the future by withholding information until such time as it is too late to be meaningfully acted upon.

The late disclosure and withholding of documents also has implications for how the Commission should approach evidence tendered by Canada and the RCMP. It is well-established that a party who obstructs the fact-finding process may be subject to an adverse inference: *Armory v Delamirie*, [1722] EWHC KB J94. On the basis of this principle, Canadian courts have held that a failure to produce relevant documents or call a material witness may lead to a presumption that the evidence would have been detrimental to the party’s case: *Levesque v Comeau*, [1970] SCR 1010 at 1012-1013; *Tiwari v Chevalier*, 2022 ONSC 3071 at [para 28](#). This requires a contextual inquiry:

Drawing adverse inferences from failure to produce evidence is discretionary. The inference should not be drawn unless it is warranted in all the circumstances. What is required is a case-specific inquiry into the circumstances including, but not only, whether there was a legitimate explanation for failing to call the witness, whether the witness was within the exclusive control of the party against whom the adverse inference is sought to be drawn, or equally available to both parties, and whether the witness has key evidence to provide or is the best person to provide the evidence in issue: *Parris v Laidley*, 2012 ONCA 755 at [para 2](#).

The context of this inquiry is that the RCMP were the sole possessors of much of the relevant evidence that has been presented. In the weeks following the mass casualty, the RCMP quickly became aware of the material ways its conduct may have caused or contributed to the mass casualty. The RCMP was also uniquely aware of relevant documents like the Quintet Wellness Report and the situational report that resulted in a SiRT referral. These were documents that the RCMP had generated and acted upon.

In his sworn testimony to the Commission, C/Supt. Leather acknowledged that he knew documents in the unique possession of the RCMP were relevant and that he had been instructed not to proactively disclose their existence. For example, in the context of the Quintet Wellness Report and a contentious meeting with RCMP Commissioner Brenda Lucki, C/Supt. Leather stated:

During the course of my preparation for my interview with the Mass Casualty Commission Counsel, who examined me yesterday, there were two issues that I wanted to raise and did raise with the Department of Justice counsel, Ward and MacPhee, who are here today, and received advice from them. And the one issue that you're asking me about, as did Ms. Young yesterday, was a part of that discussion. And the advice that I received was not to proactively disclose the conversation and the emails leading up to the meeting on the 28th. I knew from my notes and the emails that I had prepared and submitted that it was obviously relevant to what would become the infamous phone call of April 28th, and the subsequent SECU testimony of various witness and was troubled by that, and wanted their advice, and was advised to take a reactive posture.

C/Supt. Leather then reiterated that Department of Justice counsel, in preparing him for his interview with the Commission, advised him not to raise the issues with Commission counsel unless asked. He admitted that he was aware that the Commission would otherwise not be in possession of this information.¹¹ He felt so uncomfortable with this withholding of information that he sought independent legal advice.¹²

Like the Quintet Wellness report, the RCMP were uniquely in possession of the situational report that was referred to SiRT concerning allegations of criminality and misconduct by the Truro Police Service. The RCMP were also uniquely in possession of the "Quintet documents" and the "Robin e-mails." The late disclosure and withholding of these documents, in the circumstances, warrants a negative inference.

2. Cst. Wiley's Final Submissions

For reasons that are unclear, Cst. Wiley was permitted to file final submissions after the deadline for such submissions and after the deadline for participants to file reply submissions. As such, please accept these submissions in reply to Cst. Wiley.

Cst. Wiley characterizes his relationship with the perpetrator as a "passing professional relationship..."¹³ This does not accord with the record. Both the quantity and quality of his engagement with the perpetrator are inconsistent with a "passing professional relationship."

¹¹ Hearing Transcript (Leather), 28 July 2022, pp. 8-11 [COMM0061295]

¹² Hearing Transcript (Leather), 28 July 2022, pp. 10-11 [COMM0061295]

¹³ Final submissions of Cst. Wiley, 4 November 2022, p. 38

Cst. Wiley contends that Sgt. Poirier's and Ms. Banfield's evidence was "untested" and should therefore be given minimal weight.¹⁴ No party requested or was denied an opportunity to cross-examine Sgt. Poirier. His contemporaneous notes were not "lost" in the shuffle of moves. The notes were corroborated by other testimony, including that of Ms. Banfield. Ms. Banfield's evidence was tested. She did not request an accommodation to avoid testifying in-person before the Commission. Her recollection was firm and she was not combative when asked difficult questions. The record provides a strong basis to prefer the mutually consistent and reliable evidence of Sgt. Poirer and Ms. Banfield over what Cst. Wiley has provided.

Cst. Wiley submits that he required some supervisory tasking or judicial authorization to perform his policing duties and fulfill his obligation to investigate actionable complaints.¹⁵ He provides no authority to explain why this supervisory tasking would be required in the circumstances of receiving an actionable complaint from another police service. He cites *R v Evans*, [1996] 1 SCR 8 for the proposition that police cannot approach a home with the intention of obtaining evidence without sufficient grounds. This ignores case law finding that *Evans* does not prevent police from attending residences in response to public complaints of disturbances: See e.g. *R v Silverfox*, 2022 YKSC 14 at para 54. It also ignores case law establishing that police can obtain warrants based on a complaint that a person possesses illegal firearms and the inference that they keep them at their residence: *R v Kalonji*, 2022 ONCA 415 at paras 28-30. He cites no legal authority to explain why he needed judicial authorization to complete basic investigatory steps like interviewing neighbours of the perpetrator.

3. National Police Federation's comments on Commission Counsel's letter dated October 20, 2022

In their "reply" submissions, the NPF provides several comments in response to an October 20, 2022 letter from Commission counsel to participants. These submissions are new. They are not in reply to Phase 3 submissions of any participants. A brief response is warranted in these circumstances and constitutes permissible "sur reply" if the NPF's comments are considered to properly be "reply" submissions.

The NPF says that it had no notice of the Commission's intention to focus on police oversight and as such was deprived of an opportunity to provide relevant evidence to the Commission on this topic.¹⁶ It cannot be said that the Commission failed to provide such notice.

The Commission has provided and updated a proceedings schedule throughout the inquiry process. On May 24, 2022, the calendar included notice of a week of hearings that would discuss two commissioned reports: *Culture in Police Organizations* and *Discretion and Oversight Within Policing*. On June 30, 2022, the calendar included notice of a roundtable on "Police oversight, supervision, and accountability." On August 22, 2022, the calendar included notice of a roundtable on "Contemporary Community Policing" that would discuss the

¹⁴ Final submissions of Cst. Wiley, 4 November 2022, p. 46-48

¹⁵ Final submissions of Cst. Wiley, 4 November 2022, pp. 51-53

¹⁶ NPF reply submissions, pp. 6-7 [COMM0065737]

aforementioned reports as well as a second roundtable on “Police oversight, supervision, and accountability.” The Phase 2 submissions of the ECPJS/BCCLA also focus explicitly on police oversight.

Throughout the proceedings, the Commission has invited participants to present relevant evidence to the Commission, including in Phase 3. The NPF has been an active participant at all phases of the Commission. They had notice of the Commission’s focus on police oversight and an opportunity to engage on these issues, including by providing evidence they considered was missing from the record. The NPF’s decision not to engage with the police oversight issues raised in this Commission should not prevent the Commission from making recommendations in this area.

The NPF says that the Commission does not have the mandate to explore police oversight.¹⁷ The NPF’s reading of the relevant Orders in Council is selective and unduly narrow. The Commission is empowered to “inquire into ... the causes, context and circumstances giving rise to the tragedy” as well as to “examine issues as they relate to the tragedy in Nova Scotia on April 18 and 19, 2020, including ... contributing and contextual factors”¹⁸ This includes police oversight, particularly where there is evidence that a lack of adequate and democratic oversight was a factor related to the catastrophic failure of policing that contributed to the mass casualty, both on April 18-29, 2020 and in the years before.

The NPF says that the Commission lacks a sufficient record to make recommendations on police oversight.¹⁹ Through its intense work and the contributions of various participants, the Commission has established a massive record on police oversight. This included an extensive environmental scan, several commissioned expert reports, over 30 articles or reports provided by the ECPJS/BCCLA coalition, and three roundtables with leading experts in the field.

Footnotes 48-115 of the ECPJS/BCCLA Phase 3 submissions engage with this extensive record and even then only scratch the surface of the record that is before the Commission. It may be that the NPF has not been able to shape the record on this issue or find experts who could testify that police oversight is working well in Nova Scotia or elsewhere. But this is not a reasonable basis to ignore the extensive record that is before the Commission on the issue of police oversight. In any event, if the NPF thought crucial information was missing from the record, it had sufficient resources to provide evidence to the Commission that would fill these purported gaps.

All of which is respectfully submitted,

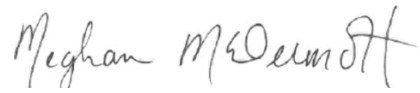
¹⁷ NPF reply submissions, pp. 1-3 [COMM0065737]

¹⁸ OIC 2020-0822

¹⁹ NPF reply submissions, pp. 1-3 [COMM0065737]



Benjamin Perryman
Counsel for ECPJS



Meghan McDermott
Counsel for BCCLA