

# Decision of March 9, 2022 with respect to proposed witnesses by Participants relating to the Portapique Foundational Documents

## OVERVIEW

1. The Commission has used its subpoena power to compile, coordinate, and to present publicly what it has learned so far about the perpetrator's initial rampage in the community of Portapique. Having presented the first three Foundational Documents to the public, in order to transparently build a shared understanding of the facts regarding Portapique on April 18-19, 2020 from our independent investigation, we have asked Participants to identify further gaps, errors or important context that can best be addressed by oral evidence.
2. Participants made submissions in the public proceedings in early March about 27 proposed witnesses from whom they suggest we should hear regarding these first three Foundational Documents. Today we are sharing our decision on what we heard. We address each of the proposed witnesses and where we agree that their testimony will be of assistance, we direct that they be subpoenaed to appear either as individual witnesses or as a witness panel. This means that they will provide sworn testimony subject to questioning.
3. For the reasons set out in the decision, we have determined the following:

The Commission will hear from five witnesses by way of sworn testimony in relation to the three Portapique Foundational Documents. They are:

- Cst. Stuart Beselt
  - Cst. Aaron Patton and
  - Cst. Adam Merchant.
4. These officers will be called together in a witness panel, in accordance with the Commission's Rules. Additionally, subpoenas will be issued to:
    - Cst. Vicki Colford and
    - civilian witness Deborah Thibeault.

5. The Commission will hear from five witnesses during the time set aside to present the information included in the Foundational Document about the command post, operational communications centre and command decisions (the “Command Decisions Foundational Document”) currently scheduled for the second half of May. They are:
  - S/Sgt. Steve Halliday
  - S/Sgt. Brian Rehill
  - S/Sgt Addie MacCallum
  - Sgt. Andy O’Brien and
  - S/Sgt. Jeff West.
  
6. The Commission expects to hear from four witnesses at a later date to be determined:
  - Cst. Wayne Bent
  - Cst. Nathan Forrest
  - Cpl. Jared MacDonald and
  - Lisa Banfield.
  
7. Following the applications of Participant counsel, two witnesses who have information to provide the Commission have scheduled interviews. The transcripts of the interviews will be shared with Participants and the issue of whether they should provide oral evidence can be revisited after that process is complete. These witnesses are:
  - Peter Griffon and
  - Bjorn Merzbach.
  
8. There are two witnesses who may have specific additional information to provide the Commission and we direct that this further information be requested from:
  - Cst. Chris Grund and
  - Donnalee Williston.
  
9. Applications were made to hear from two witnesses who cannot be subpoenaed because they reside outside Canada. We direct our investigators to continue to attempt to collect information from:
  - Sean Conlogue and
  - Angel Patterson.

10. We have decided that there are two witnesses from whom at this time the Commission does not require further information. They are:
  - David Faulkner and
  - Cst. Dave Lilly.
  
11. The Commission has determined that the following witnesses need not be called to provide oral evidence with regard to the three Portapique Foundational Documents, but the Commission will revisit the need for their oral evidence at a later date:
  - Brenda Forbes
  - Cst. Jeff MacFarlane
  - Cpl. Tim Mills and
  - Cpl. Dion Sutton.
  
12. A telecommunication engineer retained by the Commission is currently providing information about cell phone location data. Once the sworn affidavit is complete, we will assess whether further evidence is required.
  
13. Additionally, while not the subject of applications from Participant counsel, the Commission has determined it will hear from the following institutional witnesses later in its proceedings:
  - Chief Supt. Chris Leather
  - Supt. Darren Campbell
  - Asst. Commissioner Lee Bergerman
  - Commissioner Brenda Lucki.
  
14. As we continue to share our understanding of the facts in further Foundational Documents and proceedings, we will also continue to provide opportunities for Participants to provide us with their input as to other witnesses from whom we should hear.

## **PROPOSED WITNESSES**

15. We offer some general comments before we turn to the reasons for our decision about the 27 witnesses currently proposed by various Participants as they relate to the first three Foundational Documents.
  
16. A great deal of the factual record will be established through the use of Foundational Documents. In addition to the three already presented, there are at least 27 more Foundational Documents to be presented to the public in the coming weeks and months. The Commission

wants to ensure that when witnesses are heard from there is a full and shared basis of information and evidence so that we can benefit from their testimony.

17. Additionally, we intend to hear oral evidence when it will add to the factual record in a meaningful way. Sometimes the best evidence about an event is provided by recorded, reliable sources such as radio transmission transcripts and 911 calls. Recollections two years after the fact by people who were under extreme stress at the time (and may still be experiencing the effects of trauma that impact the ability to recall clearly or fully or to testify at all) may not be better evidence than almost contemporaneous statements. However, creating space for hearing from people who were present who have now had the opportunity to reflect on their experience can provide important information on the lessons we may all learn from their experience in order to form the basis of recommendations that are pragmatic and implementable to help prevent such things in the future. That is why we will hear more witness testimony in later phases of this inquiry.
18. For some of the subpoenaed witnesses, we may have to consider applications for accommodation under Rule 43. If it becomes apparent that any of them are too unwell to appear, we will make every effort to offer accommodations and find a way to hear from them and have Participant and the Commission's questions answered.
19. If there are gaps or conflicting areas in the Foundational Documents, oral testimony may be of assistance. This decision deals with the current list of 27 proposed witnesses involves only the first three Foundational Documents with many more to come. This means there are additional witnesses from whom we may well want to hear, for example, in relation to the command decisions as well and public communications. Further, there may be questions that Participants want to ask some of the proposed witnesses that may arise from these additional Foundational Documents. However, in our process we determine witnesses on a rolling basis. We do this by inviting feedback from Participants on draft Foundational Documents and, once we have incorporated that feedback, identifying gaps, errors or areas requiring important contextual information that oral evidence can address.
20. Not all of the proposed witnesses are necessary to establish the facts about what happened in Portapique as the facts required by the Commission in pursuit and fulfillment of its mandate. The relevant Foundational Documents in minute by minute detail set out the facts as we know them to date. The Foundational Documents also provide links to the source material that was relied on in the Foundational Documents and disclosed by the Commission.

21. Many of the gaps identified in the various submissions from Participants are either already addressed in the relevant source material, capable of being addressed in other ways, without the need of compelling the proposed witness to testify orally or better heard from in concert with future Foundational Documents. This latter scenario does not preclude questions being put to them on previous Foundational Documents if gaps or errors remain in the factual record at that point.
22. We can produce a full, comprehensive and effective final report without the need to call every witness for oral testimony. As Participant counsel has noted, the Commission is able to determine when and how best to hear from witnesses and that subpoenas are not the only way to get evidence. We will hear from people for different purposes over the course of the inquiry, in ways appropriate to the purpose.
23. We now turn to the proposed witnesses for the first three Foundational Documents, which we will categorize first as (a) civilian and then (b) first responder.

## **PROPOSED CIVILIAN WITNESSES**

### *Lisa Banfield*

24. Lisa Banfield was the perpetrator's common law spouse at the time of the mass casualty. Counsel for the participant families did not have to convince us that Ms. Banfield has important evidence to give regarding the Portapique Foundational Documents. It has never been a matter of "if" the Commission wants to hear from Lisa Banfield but rather how and when we can best do so. She also has important evidence to give regarding the presentation of an upcoming Foundational Document dealing with the perpetrator's violence towards her and others.
25. Ms. Banfield is facing criminal charges, and to date she has declined the Commission's requests for interviews because of the legal jeopardy she faces. This week, through her counsel, she has agreed to meet with the Commission immediately. Therefore, we understand that she will meet with the Commission for the first of several interviews later this afternoon.
26. We anticipate that we will hear from her (under subpoena as with all other witnesses) to address remaining questions, or to provide important context, later in our process. As with any other witness, being heard from later in the process does not foreclose the opportunity to ask questions still outstanding at that point, including questions from the first three Foundational Documents we have already presented.

*Sean Conlogue and Angel Patterson*

27. Mr. Conlogue and Ms. Patterson live in the United States and are long-time friends of the perpetrator. Ms. Banfield, in three of her statements to the RCMP, reported that she and the perpetrator had a virtual social engagement with Mr. Conlogue and Ms. Patterson on the evening of April 18, 2020. Ms. Banfield left the call abruptly because she was upset by a comment made by Ms. Patterson. Shortly after this, the events of the mass casualty began to unfold.

28. Both the FBI and the Commission have interviewed only Sean Conlogue and the statements have been just recently shared with the Participants. The Commission is continuing to make attempts to locate Ms. Patterson. We cannot compel them to testify before us because our ability to subpoena extends only to witnesses within Canada. That said, should they cooperate, we would be pleased to collaborate with the Participants in order to have any pertinent follow-up questions answered.

*David Faulkner*

29. Mr. Faulkner is a witness who drove out of Portapique on the night of April 18, 2020. He has provided an interview to the Commission. At this time, we are not persuaded that it is necessary to hear further from Mr. Faulkner in public proceedings. If additional information is required from him, we direct that it next be sought in a further interview.

*Deborah Thibeault*

30. Ms. Thibeault is a resident of Portapique and a Participant in these proceedings. She has offered to provide relevant information regarding the gate to the “blueberry field road” and the apparent discrepancy between her statement and that of Staff Sergeant Carroll about the condition of the barrier at the exit of the ‘road’. We direct that a subpoena be issued. Commission counsel and counsel for Ms. Thibeault should make arrangements for her to appear as an individual witness to provide sworn testimony to address her knowledge of this aspect of her statement when we resume proceedings in late March.

*Peter Griffon*

31. Mr. Griffon had previously not accepted the Commission’s invitations to be interviewed. He has recently been interviewed (March 5, 2022). Once the Commission has had the opportunity to review and share his statement with Participants, we will seek their feedback on whether they have remaining questions and reassess the need to hear from him in oral proceedings.

*Brenda Forbes*

32. Ms. Forbes has given interviews to the RCMP and to the Commission, which have been shared with Participants. Her information is relied on in two forthcoming Foundational Documents, one of which has been shared with Participants in draft form and another that will be shared soon. Once the draft Foundational Documents are revised based on Participant feedback and questions, we will assess the need to hear from her in oral proceedings. In any event, any further evidence she could offer beyond the interview already provided to the Commission is inextricably linked to the information contained in the two Foundational Documents: Perpetrator's Violence toward Common-law Spouse and Perpetrator's Violence toward Others. Therefore, any need for oral evidence from her will be assessed when those Foundational Documents are addressed, currently scheduled for July, 2022.

*Bjom Merzbach*

33. Mr. Merzbach has not been interviewed by the Commission, however, an interview is currently being scheduled. Once the Commission has had the opportunity to review and share his statement with Participants, we will seek their feedback on whether they have remaining questions and reassess the need to hear from him in oral proceedings.

*Cell phone expert*

34. The National Police Federation requested that the Commission obtain expert evidence to advise on the proper interpretation of GPS location data derived from Lisa McCully's cellular phone.

35. The Commission is pursuing further information in this regard. The Commission previously retained a telecommunication engineer with experience on the workings of mobile cellular networks and cell phone location-based services. This expert is preparing an affidavit in relation to the location data available from Ms. McCully's cell phone. Upon its completion, the Commission will provide this affidavit to the Participants and assess whether additional evidence is required.

**PROPOSED FIRST RESPONDER WITNESSES**

36. Where we direct that a subpoena be issued, we will expect that the testimony be directed toward clarifying a dispute in the evidence that will be material to the Commission's work in Phases 2 and 3, to filling a material gap in the evidence, and to providing important context.

37. All witnesses will be heard from as individual witnesses providing sworn testimony, except for one group of three who will provide their sworn testimony as a witness panel (described further below).
38. As we explained in an earlier ruling, we do not need expert testimony to conclude that RCMP officers responding to this casualty may, to varying degrees, be suffering the effects of their experiences. Being trauma-informed does not mean not hearing from a person; it does mean thinking carefully about how we hear from a person. A trauma-informed approach does not automatically excuse someone from testifying, but rather seeks to create conditions in which testifying will be less traumatic. This is accomplished by giving clear direction about what is being asked, a respectful environment, the possibility of taking breaks, etc. It may also mean seeking accommodations such as Participant counsel suggested, insofar as a person's testimony may be gathered in ways other than through subpoena (such as written questions, sworn affidavits, appearing by video, etc.). This is done in order to create conditions in which it is more likely to get the best, most reliable evidence from individuals who are experiencing or have experienced trauma.

*Csts. Stuart Beselt, Adam Merchant and Aaron Patton*

39. At the outset, we advised Participant counsel that we would hear from the first three officers to arrive at Portapique on April 18, 2020; namely Csts. Beselt, Merchant and Patton.
40. Before the public proceedings began, we informed the Participants that while we viewed the facts to be sufficiently clear from the contemporaneous evidence assembled in the Foundational Documents, we anticipated hearing from these three officers with respect to important context they could provide to the facts as set out in the Foundational Documents. Helping us understand their experience of first responders would assist us in making sense of the causes, context, and circumstances of the mass casualty and especially in making implementable recommendations for first responders in future mass casualty situations in a rural setting.
41. However, we have listened carefully to counsel for the family Participants and note that although many of their questions are indeed answered in the Foundational Documents, what they are really asking is for an understanding of why the first responders did what they did. We emphasize that the second half of May will be spent focused on the



command decisions that occurred on April 18-19, 2020, and after, and that we will expect to hear from senior officers during that time to answer for the orders given, not given, or the policy and other frameworks that governed first responder actions that night.

42. Nonetheless, given that these three officers were the first to arrive at Portapique that evening and because their roles were so central, we are persuaded that we should hear from them at an earlier opportunity. We will therefore issue subpoenas to them to appear on March 28, 2022 when we resume proceedings. We direct that they will testify under oath together at the same time on a witness panel. This is a practice often used in public inquiries. Witness panels are effective ways to draw out facts and experiences of a group of people who shared a common experience. It is also an effective approach since questions are organized by Commission counsel in order to avoid multiple lawyers asking the same questions of witnesses in succession.

43. Since these witnesses will be heard regarding a mixture of fact and experience, they will be questioned pursuant to the process set out in the Commission Rules. Our Rules provide for the list of questions for witnesses to be developed consultatively and collaboratively to the extent possible. Commission counsel will canvass Participant counsel for their questions, in addition to those raised in their recent submissions. Commission counsel will compile all the questions, many of which are the same. Additionally, we direct Participant counsel to provide any further questions they wish posed to these witnesses to Commission counsel by March 16, 2022. Once Commission counsel leads the witness through their questions, they will caucus with Participant counsel to see if any further questions remain. As demonstrated by the example of the first technical witness on 911 call centre operations on March 1, 2022, when Participant counsel have additional questions to ask that the Commissioners determine are germane to the mandate, the Commissioners will direct how the questions will be asked. The Commissioners appreciate that several Participant counsel suggested on the record in their submissions in early March that they would be sensitive to the risks of re-traumatizing witnesses as they considered the questions for the witnesses.

44. We now address the remaining eight proposed officers following orders in Portapique.

*Cst. Vicki Colford*

45. Cst. Colford was one of the first members to Portapique on the night of April 18, 2020. The Commission has already indicated an interest in hearing from Cst. Colford,

specifically regarding containment. We direct that a subpoena be issued. Commission counsel will make arrangements for her to appear as an individual witness to address her knowledge of this aspect of her involvement at Portapique when we resume proceedings in late March.

*Cst. Chris Grund*

46. We were not persuaded, at this stage, that the questions asked by Participant counsel merit Cst. Grund appearing in public proceedings. We do however have further questions with respect to his engagement on the evening of April 18-19. We direct Commission counsel to gather the questions from Participants, as well as our own, and seek further information from Cst. Grund. We note that counsel for the Attorney General Department of Justice (Canada) and the National Police Federation have offered that all first responders will make themselves available to answer further questions. Once the Commission has had the opportunity to review and share his further statement with Participants, we will seek their feedback on whether they have remaining questions and reassess the need to hear from him in oral proceedings. In addition, we anticipate that the orders made to Cst. Grund with regard to his extraction of the children will be the subject of proceedings related to RCMP command decisions, currently scheduled for the last two weeks in May.

*Sgt. Dave Lilly*

47. We were not persuaded, at this stage, that there are any material gaps in the factual record that merit Sgt. Lilly appearing in public proceedings.

*Cpl. Dion Sutton*

48. We were not persuaded, at this stage, that there are any material gaps in the factual record that merit Cpl. Sutton appearing in public proceedings. However, we note Participant counsel's submission that it would be of assistance to have further information on Cpl. Sutton's containment efforts, given that he was carbine trained and had night vision technology. Any further evidence he could offer beyond the interview already provided to the Commission is inextricably linked to the information contained in the Emergency Response Team Foundational Document. Therefore, any need for oral evidence from him will be assessed when that Foundational Document is addressed, currently scheduled for May 16, 2022.

*Csts. Wayne Bent, Nathan Forrest, and Cpl. Jared MacDonald*

49. We acknowledge there is currently a lack of information in the Foundational Documents regarding the residents of Cobequid Court, as addressed in the submissions of Participant counsel. Unlike other aspects of what happened in Portapique on the night of April 18, we do not have contemporaneous records such as radio transmissions and 911 calls that assist us with establishing the facts for the families of Cobequid Court. The Next of Kin Notifications to Families Foundational Document includes some information about the troubling gaps in evidence related to Cobequid Court residents. After Participants' counsel have had the opportunity to review that draft Foundational Document, we expect that time should be scheduled in public proceedings to address the questions raised about the evacuation plan in Portapique and the delay in locating these victims. We anticipate that we will want to hear from these three officers, by subpoena, in relation to this aspect of the factual record.

*Cst. Jeff MacFarlane*

50. We agree with Participant counsel that it would be of assistance to have further information from Cst. MacFarlane. We direct that an interview be sought and anticipate that the evidence he could offer to the Commission is inextricably linked to the information contained in the Foundational Document about the decommissioned replica cruiser RCMP vehicle. Therefore, any need for oral evidence from him will be assessed when that Foundational Document is addressed, currently scheduled for April 26, 2022.

*Donnalee Williston*

51. We note that Ms. Williston provided an interview to the Commission and the contemporaneous call log has been disclosed to Participants. We agree that there are specific questions about the information Ms. Williston received during the 911 call with Jamie Blair and what information was passed on to dispatch. We direct that Commission counsel and counsel for Ms. Williston arrange to have these additional questions addressed by sworn affidavit.

*S/Sgt. Steve Halliday, S/Sgt. Addie MacCallum, Sgt. Andy O'Brien, S/Sgt. Brian Rehill, and S/Sgt. Jeff West*

52. As noted during public proceedings, the Commission has determined it will hear oral evidence from these officers. These witnesses will have information related to all of the

Foundational Documents that relate to the timeline of April 18-19. Therefore, we anticipate hearing from them in relation to the Command Decisions Foundational Document (and potentially other Foundational Documents) in the second half of May. They will be heard as individual witnesses and, as with the other witnesses appearing under subpoena, the Commission's Rules with respect to questioning of witnesses will apply. Again, as with any other witnesses, being heard from later in the process does not foreclose the opportunity to ask questions still outstanding by that point.

*Cpl. Tim Mills*

53. We agree with Participant counsel that it would be of assistance to have further information from Cpl. Mills. Any evidence he could offer is inextricably linked to the information contained in the Emergency Response Team Foundational Document. Therefore, any need for oral evidence from him will be assessed when that Foundational Document is addressed, currently scheduled for May 16, 2022.

54. Finally, although not the subject of the Participants' applications, we advise that we expect certain senior officers to appear as institutional witnesses in order to answer publicly on behalf of the RCMP the significant questions arising from decisions made in relation to the mass casualty. However, we intend to share with the public our understanding of the facts before hearing from those witnesses in order that we have the benefit of that factual foundation to ask all of the relevant questions. In this category, we anticipate issuing subpoenas to:

- Commissioner Brenda Lucki
- A/Commr. Lee Bergerman
- Chief Supt. Chris Leather and
- Supt. Darren Campbell.

55. They will be called as individual witnesses once the Foundational Documents and supporting source materials relevant to matters such as command decisions, public communications, emergency alerting and oversight and accountability are in evidence.

56. Going forward, we will provide Participant counsel with the names of additional witnesses relevant to Phase 1 Foundational Documents and continue to invite Participants' suggestions for witnesses from whom we should hear in Phase 1.