In the Matter of
The Joint Federal/Provincial Commission into the April 2020 Nova Scotia Mass Casualty,
established by the federal and provincial Orders-in-Council
P.C. 2020-822 and 2020-293
("The Mass Casualty Commission")

FINAL SUBMISSIONS ON BEHALF OF CONSTABLE GREG WILEY

Peter Thorning
Brauti Thorning LLP
161 Bay Street, Suite 2900
Toronto, Ontario, M5J 2S1
Tel: 416.362.4567
Fax: 416.362.8410
Email: pthorning@btlegal.ca

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Introduction

1. Constable Greg Wiley offers his deepest sympathies to families, persons and communities affected by the tragedy that occurred on April 18th, and 19th, 2020 as well as the family and loved ones of Susan Butlin.

2. This tragic loss of life must not be repeated in Canada. This Commission was created to examine the **events** that led to this incident and to "*provide meaningful **recommendations** to help make communities safer in the future*".

3. The significant amount of material and evidence collected by the Commission has been supplemented and coalesced by the Submissions made on behalf of the affected parties and stakeholders.

4. It is abundantly clear from all this material, that there is no "*through-line*", no single factor, or failing, that can account for the mass casualty. Constable Greg Wiley respectfully asks this Commission to make this fact clear in its Final Report.

5. Constable Wiley did not mislead the Commission or any of its parties. At all times, Constable Wiley acted within the law and RCMP policies. Any perceived gaps in his evidence can be accounted for by the peculiarities of human memory, and the passage of time. There was no dereliction of duty.

6. A careful examination of the material before this Commission reveals no meaningful inconsistency between Constable Wiley's evidence and other evidence that the Commission may accept. All this evidence supports the conclusion that Constable Wiley was never tasked or confronted with any criminal investigation into the perpetrator.

7. Constable Wiley provided two lengthy statements and subsequent testimony to this Commission. After providing the statements and his testimony, independent counsel was appointed to make submissions on his behalf. These are those submissions.

Background

8. Constable Wiley graduated from cadet training and received his badge February 27th, 2006. He has 16 years of service to the public. Constable Wiley was 42 when he joined the RCMP. Prior to joining, Constable Wiley had been a schoolteacher.

9. Constable Wiley was posted to Bible Hill in Colchester County, Nova Scotia, on February 27th, 2006, and he remained at that Detachment for just over 5 years until August 8th, 2011, when he was transferred to Parrsboro in Cumberland County.

10. Constable Wiley was transferred back to Bible Hill on June 20th, 2017, and subsequently transferred out to Ontario just over one year later, on June 27th, 2018.

11. Constable Wiley would have first met the perpetrator in 2007 or 2008 and had brief interactions with him for 4 years up to the end of 2011, or early 2012. Constable Wiley may have about 15 to 16 total interactions with the perpetrator. After that time, Constable Wiley would have only seen the perpetrator briefly, once, by chance after 2012, in 2017.

12. Constable Wiley did not have any meaningful or relevant conversation with the perpetrator from 2011 to 2018 when he left Nova Scotia.

> See *Public Hearing Transcript*, September 6th, 2022, pg.69, line 1 and following Statement #1

13. On April 25th, 2020, Constable Wiley was interviewed by Corporal Foster "*relating to any interactions or any relationship or knowledge*" that he had regarding the Perpetrator.

14. Constable Wiley explained that after training at the Depot was complete, he was stationed in Colchester County District in Nova Scotia and that he serviced the community from the Bible Hill Detachment.

15. In 2007 or 2008, Constable Wiley responded to a complaint made by the perpetrator that someone had stolen his tools from his residence located at 200 Portapique Beach Road in Portapique, NS. Based on information provided by the perpetrator, the RCMP managed to identify the person who committed the theft and some of the tools were returned to the Perpetrator.

16. Given the location of Portapique to a thoroughfare, and in order to follow up and to develop and maintain community contacts Constable Wiley would occasionally stop at the Perpetrator's home and have conversations.

17. Constable Wiley advised that RCMP officers were instructed to connect with members of the community and that he connected with other members of other communities.

See *Public Hearing Transcript*, September 6th, 2022, pg.70
See *Transcript of Recorded Statement of Greg Wiley*, April 25th, 2020, pg2, line 43.

18. Constable Wiley advised that he may have attended at the Perpetrator's home two to three times a year and likely only on weekends.

See April 25th, 2020, Statement, pg.2, line 52, line 69.

19. Constable Wiley advised that he may have seen the Perpetrator between 10-20 times over the years he was stationed at the Bible Hill Detachment.

See April 25th, 2020, Statement, Line 319 and following.

20. Constable Wiley recalls spending between 5 minutes to up to 30 minutes on each occasion where he maintained his community contact.

See April 25th, 2020, Statement, pg.3 (PDF)

21. Constable Wiley was occasionally inside the perpetrator's home, but only in the kitchen and living room.

See April 25th, 2020, Statement, pg.3, line 103 and following

22. Constable Wiley did not see the garage door up, other than once when dealing with the theft of tools.

See April 25th, 2020, Statement, line 293 and following.

23. The perpetrator did not show any inordinate or piquing interest in Constable Wiley's police gear, equipment, or vehicle.

See April 25th, 2020, Statement, pg.3 (bottom) to 4 (top); line 634

24. Constable Wiley drove a Chevrolet Tahoe SUV, and not the type of vehicle in which the perpetrator ultimately obtained.

25. Constable Wiley described his relationship with the perpetrator as cordial and friendly. Constable Wiley did not abandon his professionalism at the perpetrator's door. Constable Wiley was observant and continually assessing. As he stated at line 132:

> Cst. WILEY: I don't really care. I – I don't really care that you're a cop, like you're just a guy I know that stops by in the neighborhood. It so happens you're a cop. That's the feeling I would've had. So there was no curiosity. Carrying it further, even his house; and I'm observant, like we're all trained to be observant; and I notice when I go in and take statements from people or go in to investigate things, when I go into a place, if there's anything to do with police, any force, quite often (clears throat), almost always, almost invariably; I would say, "Oh that's an interesting commemorative plate" or something like that or a - a mug or whatever.
>
> Cpl. FOSTER: Uh-huh.
>
> Cst. WILEY: "Did – do you have a family member that served or something?" like, uh even in the military, I'll ask about the military because it's a nice ice breaker and people can tell you about their uncle Bob or whoever and it makes them relax around you and feel more connected and it gets things rolling, and I never saw anything in his place to indicate any interest in police. No coffee table book, no anything.

See also, line 374.

26. Respectfully, it would be an error to characterize Constable Wiley as a "*friend*" of the perpetrator. Being "*friendly*" with members of the policed community is the *sine quo non* of good police work. It is simply incompatible with Community Policing initiatives to be confrontational or immediately outwardly suspicious of members of the community.

27. The relationship between Constable Wiley could not, therefore accurately be characterized as "*friends*". Constable Wiley responded to a report of stolen goods and maintained friendly but observant and infrequent contact with the complainant. They did not see each other outside of his employ or position as a Constable with the RCMP.

> started thinking, well how –how – how well did I know this guy, like this happened and – and you knew him and you had like a familiarity; that's how I would uh describe it. Wasn't a friend of mine, and I'm

28. It is in this context that Constable Wiley disputes that he ever used the word "friends" to describe his relationship with the perpetrator. Constable Wiley notes that Sgt. Poirier's notes do not purport to be verbatim. Moreover, neither Sgt. Poirier or Constable Wiley were asked about their understanding of basic police operational Rules designed to avoid a conflict of interest.

29. That the perpetrator showed no interest in Constable Wiley's police gear or was cordial with Constable Wiley is not inconsistent with the perpetrator's ultimate choice of vehicle or inconsistent with his treatment of males, particularly those who he did not perceive as potentially undermining his self-absorbed interests.

See generally, Foundational Document Perpetrator's Violent, Behaviour Towards Others

30. Constable Wiley, testifying from memory, in 2021, relating to information that may have been received more than a decade before that, said that he had become aware of a family dispute relating to property. Constable Wiley recalled that prior to his transfer to Cumberland, he had some knowledge of this fact and that the perpetrator did not react or behave unusual in discussions about this issue.

See April 25th, 2020, Statement line 364 and following.

31. Any verbal excessiveness exhibited by Constable Wiley are more likely borne out of shock and despair than an intention to mislead.

Statement #2

32. On Friday June 11th, 2021, Constable Wiley was interviewed in Toronto, by Stephen Henkel. Trish MacPhee was virtually present at the interview as well. Constable Wiley was informed that "*this [wasn't] a criminal investigation…and that this was a public inquiry and that's why we're here for an interview*."

33. Constable Wiley was advised that the Commission was there to provide recommendations to make the country safer…and that they would "*pick his brain on that*".

34. Constable Wiley was informed that they were not there to assign **any** type of blame, "***civil liability, criminal liability or anything like that***."[1]

35. Constable Wiley spoke about the sparse training he received for servicing the public in a rural setting, warrant training (pg.37), and that he had a coach officer for maybe six weeks.

MCC Recorded Interview, ppg.9 and 10.

36. At the Depot, Constable Wiley was instructed on, *inter alia*, community-based policing as well as legal concepts; intimate partner violence; and use of the internal record-keeping programs. Constable Wiley also spoke about his ongoing training

MCC Recorded Interview, pg.23

37. Constable Wiley advises that in his 12 years in Nova Scotia he had responded to many calls relating to domestic violence as well as firearms investigations, including seizures.

38. Constable Wiley discussed the staffing challenges at the Bible Hill Detachment:

> **Stephen Henkel** [01:44:06] So on paper, what would you say the complement to the staffing model is there?
>
> **Greg Wiley** [01:44:10] There's there's supposed to have, I believe it was either 20 or 20 constables working on four shifts, on four watches you'd have, I think, five constables per watch and a corporal per watch, but. It was not unusual when I was there that there were three members on for the county.

...

[1] Constable Wiley acknowledged that he had spoken to counsel. Independent legal counsel was not provided to Constable Wiley until after his testimony.

> **Stephen Henkel** [01:46:05] OK, civilian members like how many support members would actually be available?
>
> **Greg Wiley** [01:46:11] Let me count the desks in my head there mate, one, two, three, maybe three in at a Bible Hill, possibly four.
>
> **Stephen Henkel** [01:46:29] And what about senior officers or like sergeants?
>
> **Greg Wiley** [01:46:33] Yes, you have your your four corporals that would be on the roster, so five constables or per shift. So 20 constables, four corporals, one for each of those watches or watches, a sergeant, which would be your ops NCO and then the NCO in charge would be a staff sergeant.

June 11th, 2021, MCC Recorded Interview, ppg. 30-31

39. Constable Wiley advised that Bible Hill did not have any "roll calls" or "parades" and that he would sign in through a police computer and radio. Pg.33. Information sharing regarding problems in a specific community would come via other members or an email.

MCC Recorded Interview, pg.34, and 35, and pg.44

40. The problems in staffing were compounded by the fact that many calls for service did not relate to criminal activity.

MCC Recorded Interview, pg.38.

41. Constable Wiley again explained his professional dealings with the Perpetrator.

MCC Recorded Interview, ppg. 45 and 46-7

42. Constable Wiley did not see a decommissioned police vehicle on his property.

MCC Recorded Interview pg.47.

43. Constable Wiley told the investigators that he had similar professional relationships in other communities as well.

MCC Recorded Interview pg.49.

44. Constable Wiley told investigators that he believed he might have been at Parrsborro when he reviewed a general email (like the kind referred to above), that related to some generalized threatening behaviour or conduct, and that the Perpetrator was disgruntled about some property dispute.

MCC Recorded Interview, pg.49.

45. Constable Wiley was not shown any email by the Investigators to refresh his memory about an email that was sent more than 10 years before he was asked to recollect its contents.

46. Constable Wiley advised Investigators that prior to receiving this email, he recalls having some conversation with the Perpetrator about this property dispute.

47. The Commission will recall Constable Wiley's first statement wherein he indicated that the Perpetrator did not appear to have an unusual affect when discussing this property dispute.

48. At this point in the interview, Constable Wiley is shown, for the first time, an occurrence from the Halifax Regional Police authored by Sgt. Poirier to assist in "jogging" his memory.

49. Constable Wiley's visceral reaction is to question the accuracy of Sgt. Poirier's use of the term "*friend*".

MCC Interview, pg.58

50. Constable Wiley later states that he never socialized with the perpetrator while off duty and he never contacted him by telephone.

MCC Interview, pg.59

51. Without time to prepare any response, Constable Wiley is then advised that the Poirier Report contains information from Constable Wiley that he has never seen firearms at that location and that Sgt. Poirier's was concerned about the presence of firearms and the necessity that they would have to be seized under a "public safety" warrant.

MCC Interview, pg.53

52. It is not known precisely what is meant by a "*public safety*" warrant. The perpetrator "*did not have, and never applied for, a firearms licence*." See Firearms Foundational Document, pg.10. Any possession of a firearm would have been unlawful and, if grounds existed, a warrant could have been obtained pursuant to s.487 of the *Criminal Code*, or, in circumstances of exigency, without a warrant.

53. Sgt. Poirier acknowledged that he was aware that there was "*no registered weapons to*" the Perpetrator.

> **Cordell POIRIER** [00:07:53] He saw me ... so, yeah, so, and I told him I wanted to talk to him face to face. He wouldn't admit or deny making the threat to his uncle, but he was going to be away for the next month at the college and possibly a trip to New England States. When I told him, we needed to talk face to face, he became confrontational and he told me the only weapons that he had in the house was a pellet gun and two antique muskets, both non-functional. And, as I said, he was getting confrontational, and basically, that conversation ended with him saying, "Look, if you're going to charge, charge me," and he hung up, so. So, I checked with a Dennis Desveaux from Firearm Registry, police helpline, who confirmed that there were no registered weapons to Wortman, to Gabe Wortman.

Interview of Cordell Poirier, Retired Halifax Regional Police Officer, on January 22nd, 2022, at pg.7

54. Constable Wiley is then advised for the first time that Sgt. Poirier reports that he communicated with the Sgt. Poirier and told him that he had not yet spoken with the perpetrator.

MCC Interview, pg.53

55. Constable Wiley advises that he had no dealings with Duty Supervisor John McMinn to whom the May 4th, 2011, CISNS Bulletin was addressed.

MCC Interview, pg.56

56. Constable Wiley then described that the last time he saw the perpetrator was a brief encounter occurring off an ATV trail and was merely by chance.

MCC Interview, pg.70

Testimony

57. On September 6th, 2022, Constable Wiley testified at a public hearing of this Commission. Constable Wiley had not been provided with Independent Legal Advice prior to testifying.

Public Hearing Transcript, September 6th, 2022

58. Constable Wiley testified that he may have had up to five other community contacts in the County of Colchester.

59. Constable Wiley then described that the last time he saw the perpetrator was a brief encounter occurring off an ATV trail and was merely by chance.

Public Hearing Transcript, Pg.70

60. Constable Wiley testified that he did not have any specific recollection of speaking with Sgt. Poirier, and further explained that given his shift schedule, and the weekend attendance of the perpetrator in Portapique, he would have only had the opportunity once every month to visit the perpetrator at his Portapiquie home.

Public Hearing Transcript, pg.80

61. Constable Wiley did not have a specific recollection of attending at the perpetrator's home and being shown a deactivated (filled with wax) gun and a pellet gun. Regarding his power to have conducted a search of the perpetrator's home, Constable Wiley testified:

> But the -- as I sort of listened to and sort of studied the statement of Ms. Banfield, the thing that people need to understand, even if I was there to casually sort of ask preliminary -- in a preliminary sense about firearms, we're not there to search. Like when she's saying I attempted -- did any search anywhere else and stuff, did he look around more, I don't have the right to do that. I don't have a search warrant.
>
> I need judicial authority to do that. Public Hearing Transcript, ppg.86 (bottom) and 87 (top)
>
> …

> The thing, I guess, to bear in mind is, to the best of my recollection, I was never officially tasked to investigate the perpetrator of the Portapique incident in any way, shape, or form with him as a suspect.[2]

62. In cross-examination, Constable Wiley reiterated that he had never been tasked with investigating the perpetrator.

> **CST. GREG WILEY:** Email bulletin? I never -- I wasn't conducting an investigation into the email bulletin. I was never a conducting a formal investigation.
>
> The only investigation I was ever involved in with the perpetrator was when I investigated the break and enter that he reported to us, where he was the complainant and the victim in it. I never formally investigated. I have no recollection of being involved in any investigation or being officially tasked to ever investigate him for anything.
>
> Public Hearing Transcript, pg.112 line 27 and following.

63. Constable Wiley testified that he had no recollection of working with Constable MacMinn and he would have been transferring out of the Detachment in May 2011.

> Public Hearing Transcript, pg.92 line 17

64. Constable Wiley testified regarding the Butlin matter, that he had a recollection of that conversation and that she, or he, could advise the offender not to contact her.

65. In cross-examination, Constable Wiley stated that the absence of details in his notes is not unusual and that he had time to think about his conversation.

66. Constable Wiley further testified in cross-examination that he never saw the perpetrator under the influence of alcohol.

> Public Hearing Transcript, pg.124, line 18.

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[2] Constable Wiley does not agree with counsel's characterization that Sgt. Poirier's report was a "complaint about a firearm. Pg.88, line 7. Nor was it a "weapons complaint". See pg.107 line 19, or a "weapons investigation." Pg.110 line 28.

67. In responding to the concern about his response to the allegation of a death threat, Constable Wiley testified:

> **CST. GREG WILEY:** --- talking about is could I go and see if there was -- see about firearms or whatever. To me, -- and I don't -- again, if this was a very high risk and high intensity thing, I think -- I would think that it would have been more -- it would have come to management right at my office and we would have been -- somebody would have been assigned a file on it to action it. And that's why I'm saying. I was never officially tasked in any investigation of the perpetrator ever.
>
> Public Hearing Transcript, pg.129, line 25.

68. Constable Wiley further testified that he was not tasked with investigating the possession of firearms and not asked to interview the perpetrator's neighbours in this regard.

> Public Hearing Transcript, pg.134, line 8.

Submissions

69. In the following submissions Constable Wiley will more specifically address the issues raised by the evidence heard by this Commission relating to:

1) Constable Wiley's notetaking, notebook retention, and security of notebooks was in accordance with RCMP policy;
2) Constable Wiley's actions in respect of complaints made about the perpetrator in 2010 and 2011,;
3) Constable Wiley's response to a complaint of criminal harassment made by Susan Butlin in 2017;
4) Constable Wiley's statements regarding the seriousness of threats and complaints; and
5) Constable Wiley's statements about systemic racism.

Constable Wiley's notetaking, notebook retention, and security of notebooks was in accordance with RCMP policy

70. In short, it is the Constable Wiley's position that his notebook retention and security were in accordance with the relevant RCMP policy. He did not take notes of his professional but benign contacts with the perpetrator, or other community contacts (unless relevant) because they did not relate to a particular complainant or investigation and there has never been a legal requirement that memo-book notes contain a moment-by-moment accounting of an officer's professional activities.

Public Hearing Transcript, pg.119, line 17 and following.

71. When asked in 2021 for the whereabouts of his memo book notes relating to his contacts with the perpetrator during his time at Bible Hill more than a decade before in 2010 and 2011, Constable Wiley advised that he could not locate his memo book notes. See for e.g., Public Hearing Transcript, pg.121, line 21 and pg. 137, line 23 and following.

72. A member's notebook is the property of the RCMP, subject to audit and evaluation by supervisors, subject to disclosure and may be exhibited in court. Operation Manual, 25.2 Investigator's Notebook 1.1., dated, 2006-01-1.

73. Notebooks must be kept for a minimum of: i) two years from the date of the last formal request for access under the *Privacy Act* or *Access to Information Act*; ii) two years from the last entry; iii) the conclusion of all civil, criminal actions and appeal; iv) the file purge date of the most serious offence contained in the notebook; or, v) the expiration of limitation of action, whichever is greater. Operation Manual, 25.2 Investigator's Notebook, Item 6.

74. Importantly, RCMP members are expected to retain and safely store the notebooks, and only destroy them with the authorization of the appropriate commander. There is no requirement

that the notebooks be stored at a RCMP operated facility. See Operational Manual, 25.2 Investigator's Notebook, supra, Item, 6.2.

75. In this case, Constable Wiley complied with the requirements of the Operational Manual. The fact that the notebooks cannot be located is unfortunate, but not necessarily a violation of any RCMP Policy.

76. Constable Wiley submits that any assessment of the adequacy, contents, and whereabouts of Constable Wiley's 2010 and 2011 notebooks by this Commission must have regard to the relevant RCMP policy **that was in place at the time the notebook entries were made** and not against a policy that may have post-dated the entries. See for example, Operations Manual Investigator's Notes, ch.25.2, policy included in the Butlin Report at pg.221, which was amened in 2017-07-05.

77. Constable Wiley's notes as they related to the Butlin matter, were sufficiently detailed to achieve their purpose, namely, to refresh his independent recollection of the events. Any suggested difference between the notes and the testimony is of no moment.

Memo-Books are a Testimonial Aid – Not Evidence

78. In the September 6th, 2022, cross-examination of Constable Wiley, 2022, it was suggested that his memo book notes contain a less detailed account of his interaction with Ms. Butlin than his testimony did. (MCC Testimony, at pg.122, line 26 PDF).

79. It is Constable Wiley's position that the notes, fairly considered, do, in fact, support his testimony. Moreover, there has never been a legal requirement that an officer's notes be a proxy for testimony.

80. For these purposes, the Occurrence Details are considered "notes" for the purpose of refreshing memory. There could be no doubt that Constable Wiley would be permitted to rely on the Occurrence Report made within 6 hours of the conversation:

In *R. v. Fliss*, 2002 SCC 16 (CanLII), [2002] 1 S.C.R. 535, the court stated at paragraph 45:

> There is . . . no doubt that the officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence. This is because it is his recollection, not the stimulus, that becomes evidence. The stimulus may be hearsay, it may itself be largely inaccurate, it may be nothing more than the sight of someone who had been present or hearing some music that had played in the background. If the recollection here had been stimulated by hearing a tape of his conversation with the accused, even if the tape was made without valid authorization, the officer's recollection – not the tape – would be admissible.

81. Butlin calls the RCMP to report harassing communications on August 26th, 2017, at 6:37 a.m. The details reported by S. Butlin to the RCMP call-taker are about communications received by her on August 25th, 2017, between 9:15 p.m. and 11:55 p.m.

82. Butlin's discussion with Constable Wiley occurs at about 7:03 a.m., on Saturday, August 26th, 2017. The Occurrence is updated by Constable Wiley at just after 12:15 p.m. on the same day, August 26th, 2017. The Occurrence and the memo-book notes are created proximate to the events that they describe.

83. It is a misconception that officer memo book notes must contain a word for word accounting of conversations or interviews. An officer's notes are drafted merely for the purpose of refreshing their memory. Notes are not meant to be a verbatim account of their investigations, duties and any inquiry made. This well-known concept in criminal law was commented on by Justice Durno in *R. v. Brown*, 2014 ONSC 1383 (CanLII):

> [22] With respect to those who hold a different view, the absence of notebook entries should not result in the automatic rejection of the evidence. A blanket, "*if it is not in the memo book*" it is either inadmissible or not worthy of belief goes too far.[1] No doubt, it is a significant factor to be assessed on a case-by-case basis by the trial judge in light of the explanation for the omission, the

significance of the omission and other evidence. While officers' notebook entries are now part of disclosure, to suggest that there is now a constitutional obligation on officers to include each and every piece of information that they will testify to in examination-in-chief and cross-examination is to put a mandate on the police that is not supported by any binding authority. **It would also remove any consideration for the officer's independent recollection of the events**. If that were the law, if an officer testified to events that were not noted in his or her notebook but were assistance to an accused in his or her *Charter* application or trial defence, would that mean it would have to be ignored?

[23] In *R. v. Taylor*, 2013 SCC 10 (CanLII), [2013] 1 S.C.R. 465, the Supreme Court of Canada considered whether the trial judge erred in rejecting the appellant's son's exculpatory evidence as a fabrication partly because he had not come forward previously. The Court adopted the dissenting reasons from the Newfoundland Court of Appeal that held:

> … if a witness gives unexpected evidence in circumstances where that evidence could reasonably be expected to have been disclosed earlier, he runs the risk of it being considered to be recently fabricated.

[24] While the comment occurs in a case that did not involve an officer's notebook or a witness who was obliged to keep notes, the same principle applies when officers give evidence that they have not previously noted.

[25] I addressed the issue of officers' notebooks in *R. v. Machado* (2010), 72 M.V.R. (5th) 58 as follows:

> 121 While officers' notes are provided as part of disclosure, **there is no law that I am aware of that an officer must record everything he or she did or saw in their notebook** to comply with the Crown's disclosure obligation. While some … have attempted to elevate the judgment in *R. v. Zack*, [1999] O.J. No. 5747 (O.C.J.) to a statement that if an event or observation is not in the notes, that it did not occur, that is not what the judgment says. Indeed, there are numerous authorities where events or observations that are not noted have been accepted: *R. v. Thompson* (2000), 2001 CanLII 24186 (ON CA), 151 C.C.C. (3d) 339 (Ont. C.A.); *R. v. Bennett* [2005] O.J. No. 4035 (S.C.J.).
>
> 122 I agree with the following comments of Garton J. in *R. v. Antoniak*, [2007] O.J. No. 4816:
>
> > 24. **It should be remembered that an officer's notes are not evidence, but are merely a testimonial aid**. Trial judges routinely tell officers on the witness stand that they may use their notes to refresh their memory, **but that they must also have an independent recollection of the events**. To elevate the absence of a notation to a mandatory finding that the event did not occur would eliminate the officer's independent recollection from the equation. The notes would become the evidence.

> 25 The significance of an omission in an officer's notebook, just like the significance of an inconsistency in a witness's testimony, must be determined by the trier of fact on a case-by-case basis.[3]

84. Operations Manual, ch.25.2 Investigator's Notes, Directive Amended: 2017-07-05 clearly reflect these legal principles:

> 1. General
>
> 1.1 Investigator's notes serve to refresh memory, justify decision made, and record evidence.
> …
>
> 1.6 Contents of forms, either written or electronic, which are not made contemporaneously to an event, are not considered notes and are not a substitute for an investigator's notebook.
>
> 3. Forman and Content of Notes
>
> 3.1 Investigator's notes should thoroughly describe the details of the occurrence and answer: who, what, when, where, why, and how.
>
> …
>
> 3.3 Notes should be factual and descriptive enough to explain decisions made.

85. The fact that police memo book notes are a testimonial aid will also be addressed in the submissions relating to Sgt. Poirier's characterization of the relationship between Constable Wiley and the perpetrator.

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[3] See also *R. v. A.G.B.*, 2011 ABPC 190 (CanLII): [30] No evidence was presented to me relating to the policy or operational guidelines of the R.C.M.P. relating to the preparation and preservation of police notes. On the basis of the foregoing, however, it is reasonable to assume that police officers would (and should) appreciate the value of notes as part of the criminal investigation process. What cannot safely be assumed are the precise contours of that appreciation. In this proceeding, the Applicant appears to be of the view that police officers are required to memorialize everything of relevance encountered by a police officer during the course of a criminal investigation. For the reasons to follow, and with respect, I do not share that view.

86. Constable Wiley's testimony regarding S. Butlin is largely sourced from his notes/Occurrence Report. In his testimony, at pg.94 of the MCC Transcript of Testimony, Constable Wiley stated:

Testimony	**Source/Explanation**	
	Memo book Notes	**Occurrence Report**
There was discussion about the perpetrator being charged with sexual assault, subsequently clarified, that he had not been charged	"felt" she was sexually assaulted	Perpetrator upset because she "accused" him of sexual assault
Discussion about text messages which were read to him and whether they could be considered threatening	"text from [perpetrator] → not threats → more he will say things about her character	Butlin described the threats – made no threats of a criminal nature, only that he would tell people about her on Facebook.
Constable Wiley is advised that S. Butlin had not advised the perpetrator to cease communication	"→ she has not told them to stop"	"Writer asked if she had asked [perpetrator] not to communicate with her – she had not done so directly…Butlin had not asked [perpetrator] not to communicate
Constable Wiley advises her that he could communicate with the perpetrator via phone or in person		Butlin just wished to document last night's communication and wait for Peace bond to be put in place
Call the police if things change		
Discussion about the peace bond, gave her the file number and to share this information at the peace bond hearing	→Butlin in the process of getting Peace Bond →this Wednesday will be before judge	Butlin will block [perpetrator's #], until Peace Bond is in place, this week…only started the Peace Bond process.
Questioned whether she was concerned about her safety or the safety of anyone she knew		

87. In the call made to the RCMP, Butlin states that her call was not an emergency, but that she had called the Bible Hill Detachment and left a message for a "lady officer" who had not called her back.

> …I tried…I left a message at bible Hill yesterday that I wanted to speak to the, umm…lady officer that came to seem on the initial…um, my call. And…I haven't heard from her yet.
>
> …
>
> but anyway…I tried to get a hold of her yesterday because it's just continuing…

88. The call corroborates Constable Wiley's recollection that the messages were not criminally threatening. In the call, Butlin states that the perpetrator indicated that he was going to get a lawyer to "go to the authorities"

OCC CALL TAKER:	Can you tell me exactly what the text message says?
Susan BUTLIN:	It just say..... uh... he accuses me because I have some umm, exchange students coming, ah, next.. well, Sept 5th. He's just saying that I groped him, I did all this stuff over the years, and I did something to some Irreleva kid that I don't even know what's he's talking about, and...
OCC CALL TAKER:	OK.
Susan BUTLIN:	and my actions at the fire hall C5 – Graphic Images or Potentially Harmful Information was improper with... he's just trying to bring all this.... (inaudible).
OCC CALL TAKER:	OK, so they're like, they're harassing text messages.
Susan BUTLIN:	Yeah. And he said after we go to Court for the Peace Bond I'm seeking legal counsel...
OCC CALL TAKER:	OK.
Susan BUTLIN:	... to go to the authorities to discriminate my name against ever having exchange students, and god forbid should I ever have boy exchange students, and all this stuff...

89. Constable Wiley's recollection that Butlin had not told the perpetrator to cease communication is not contradicted by the contents of her call. Given that the messages are reported to have come in late at night, (Butlin said that she was "*home…in bed*" when she received them) and were not reported until early morning, before work, it is conceivable that she received a series of messages and did not respond by telling him to stop.

OCC CALL TAKER:	OK, and have you asked him t stop texting you?
Susan BUTLIN:	I told them, I said I don't want anymore communications after this. I had... I talked to his wife yesterday and felt bad he was in the hospital,
	and showed some sincerity, but I said after last night I don't, you know, I don't... I don't wanna hear from you guys no more.

90. The only evidence not directly or indirectly referred to in Constable Wiley's notes, or occurrence, is: i) the reference to asking her whether she was concerned about her safety, and, ii) that he provided her with his file number.

91. In relation to asking her if she was concerned about her safety, given that the occurrence report (made proximate to the conversation) and the originating call (which according to Butlin was "*not an emergency*") do not reveal evidence of a criminal threat, and that Butlin only wanted to "*document last night's communication*", it follows, that Constable Wiley asked, and was not advised that there was a concern for anyone's personal safety.

92. In relation to giving her a file number, given that there was detail in Constable Wiley's notes about the Peace Bond process and ***when*** it was going to begin, it is not unreasonable to assume that Constable Wiley provided her with his file number during this conversation.

93. For reasons to be developed below, Constable Wiley's notes of his discussion were reasonable having regard to the content of their discussion. This interaction was not a report of criminal harassment, or a request to order the offender to cease communication. Constable Wiley was entitled to rely on prior decisions made by his colleagues.

Memory Generally

94. It is respectfully submitted that the Commission should accept that Constable Wiley was doing his utmost best to provide honest and credible evidence.

95. The determination of any witness's credibility cannot be exclusively judged by how well a witnesses version fits the expectations of the fact finder(s). Rather, a witness's credibility must be based on a complex of factors including, but not limited to, the passage of time; motivation; internal and external consistencies.

96. In this regard, Constable Wiley submits that any "*gap*" in his recollection is not premised on any intention to deceive, but the reality that the passage of time has both a corrosive and explosive effect on human memories.

97. In *R. v. Sanichar*, 2012 ONCA 117 (CanLII), the Court of Appeal granted a new trial, where the trial judge failed to properly assess the reliability of the complainant in a historical sexual assault case. It is submitted that the concerns and direction provided by the Court of Appeal are appropriate here. As stated by the Court:

> Reliability
>
> [30] Although the trial judge alluded at the outset of his reasons to the importance of being satisfied about the reliability, as well as the credibility, of the complainant's testimony, ultimately he did not undertake a proper reliability assessment. The focus of his reasons was on credibility in the sense of sincerity and believability.
>
> [31] There can be no doubt – as Ms. Bartlett-Hughes reminds us – that findings of credibility and reliability are peculiarly within the domain of the trial judge and only rarely overturned on appeal. As this Court noted in *R. v. R.W.B.* (2003), 2003 CanLII 48260 (ON CA), 174 O.A.C. 198, at para. 9:
>
> > The role of a trial judge as a listener and observer of the evidence cannot be overstated. The trial judge is in the best position to make findings with respect to the credibility and reliability of the witness and therefore appellate courts must be deferential to the assessment of credibility made at trial.

[32] See also *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at paras. 10-12.

[33] The deference that follows from this notion is premised on the proper application of the relevant legal principles, however.

[34] Even if the complainant appeared to be "*sincere*," "*truthful*," and "*honest*" – as the trial judge noted several times throughout his reasons – and even if the complainant believed what she was saying, it does not follow necessarily that what she was saying was reliable. Credibility alone, in this sense, is not enough. This is particularly important where the accused is facing charges based entirely on allegations of historical physical and sexual abuse, and where also -- as here – there were serious reliability issues.

[35] **Memory is fallible. Courts have long recognized that even an apparently convincing, confident and credible witness may not be accurate or reliable and that it is risky to place too much emphasis on demeanour alone where there are contradictions and inconsistencies in the evidence**: see *R. v. McGrath*, [2000] O.J. No. 5735 (S.C.), at paras. 10-14; *R. v. Stewart* (1994), 1994 CanLII 7208 (ON CA), 18 O.R. (3d) 509, at pp. 515-18; *R. v. Norman* (1993), 1993 CanLII 3387 (ON CA), 16 O.R. (3d) 295, at pp. 311-15. As Finlayson J.A. noted in *Stewart*, at pp. 516-17:

> It is evident from his reasons that the trial judge was impressed with the demeanour of the complainant in the witness box and the fact that she was not shaken in cross-examination. I am not satisfied, however, that a positive finding of credibility on the part of the complainant is sufficient to support a conviction in a case of this nature where there is significant evidence which contradicts the complainant's allegations. We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, **may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive**. The issue, however, is not the sincerity of the witness but the reliability of the witness's testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record: see *R. v. Norman* for a discussion on this subject. [Citations omitted, emphasis added.]

[36] Here, a regular theme in the trial judge's acceptance of the complainant's testimony was that she was "*sincere*," she was "*honest*," she was "doing her best to be truthful." But he does not appear to have focussed on whether her testimony was reliable or accurate. David M. Paciocco and Lee Stuesser describe the distinction between "*credibility*" and "*reliability*" in this context as follows in their text, The Law of Evidence, rev. 5th ed. (Toronto: Irwin Law, 2010), at p. 29:

> "*Credibility*" is often used to describe the honesty of a witness. "*Reliability*" is frequently used to describe the other factors that can influence the accuracy of testimony, such as the ability of the witness to make the relevant observation, to recall what was observed, and to communicate those observations accurately.

[37] The allegations in this case relate to events that occurred many years before the trial, when the complainant was a little girl and a teenager. She was 36 when she testified.

[38] In such cases – cases evolving out of allegations of distant events, including allegations involving historical acts of physical and sexual abuse – particular caution and scrutiny are called for in approaching the reliability of evidence. Rosenberg J.A. highlighted the need to be cautious about relying upon adult memories of childhood impressions in *R. v. M.(B.)* (1998), 1998 CanLII 13326 (ON CA), 42 O.R. (3d) 1 (C.A.), at p. 29. Memories become increasingly frail over time. Evidence

that might have existed had the matter been dealt with earlier may have disappeared. Or it may become contaminated. Life experiences can colour and distort the memory of what occurred.

[39] Minden J. discussed these cautionary considerations in *McGrath*, at paras. 11-14:[2]

> Much of the author's focus is on the need for a particularly rigorous approach to issues of reliability given the frailties of memory of distant events: see: *R. v. S.(W.)* (1994), 1994 CanLII 7208 (ON CA), 90 C.C.C. (3d) 242 (Ont. C.A.). The trier of fact's experience and knowledge about human nature and memory may serve to betray rather than guide in cases of this kind: see also *R. v. M.(B.)* (1998), 1998 CanLII 13326 (ON CA), 130 C.C.C. (3d) 353 (Ont. C.A.). Accordingly, careful scrutiny must be paid to the evidence: see *R. v. Norman* (1993), 1993 CanLII 3387 (ON CA), 87 C.C.C. (3d) 153 (Ont. C.A.).
>
> In that regard, a number of factors should be kept in mind. A witness' difficulty in recollection due to the passage of time must not lead to an "undiscriminating acceptance" of his or her evidence. A trier of fact must pay particular attention to serious inconsistencies in the account, as well as to significant inconsistencies between present testimony and prior accounts. Such inconsistencies may disclose unreliability: see, for example, *R. v. G.G*. (1997), 1997 CanLII 1976 (ON CA), 115 C.C.C. (3d) 1 (Ont. C.A.). There must be a rigorous analysis of whatever independent, extrinsic evidence still exists.
>
> A trier of fact must be aware that an apparently honest, confident or convincing witness may not necessarily be an accurate witness: see *R. v. Norman*, *supra*. Nor does an abundance of detail in the recounting of an event necessarily imply an accurate memory. As well, a trier must bear in mind the "*subtle and not so subtle influences*" that may have over time distorted memory.
>
> The influences upon the life of a witness over the course of many years also make it difficult to fairly assess an apparent lack of motive to fabricate. In this context, the trier must be particularly vigilant to ensure that the burden of proof is not shifted to the accused. A trier of fact must be alive to the fact that passage of time provides more opportunities for collusion or contamination between multiple complainants. This must be kept in mind when assessing the probative value of similar act evidence.

[40] Following that review, Minden J. concluded, at para. 15:

> Finally, in the overall assessment of the evidence, there is a special need to self-instruct on the frailties of evidence concerning events from the distant past. Trials concerning distant events may call for a direction to proceed cautiously before acting on unconfirmed evidence, even in a case in which the particular circumstances do not otherwise mandate a special warning. In the application of the reasonable doubt standard, a trier of fact must be especially mindful of the absence of evidence that might have been available had the matter been prosecuted at an earlier date.

[41] I agree. The idea that trial judges should consider the "*need to self-instruct on the frailties of evidence concerning events from the distant past*" is a sensible one for all of the reasons summarized in *McGrath*. Each case will depend upon its own circumstances, and I do not mean to suggest that some type of formal instruction need necessarily be given. Where, however – as here, and in this type of case generally – there are objective reasons to scrutinize carefully the reliability of a witness whose testimony is central to the proof of guilt, the trial judge's reasons should

> demonstrate that he or she is alert to the frailties of, and the risks associated with, such evidence, and to the need to address it with that careful scrutiny.
>
> [42] In underscoring these considerations, I am not seeking merely to duplicate the principles that apply to the assessment of the evidence of an adult witness testifying about events that occurred when the witness was a child. Those principles – as articulated by the Supreme Court of Canada in *R. v. W.(R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, at pp. 133-34 – were properly addressed by the trial judge. But they do not speak to the reliability concerns that arise due to a significant passage of time between experience and testimony in cases involving historic allegations. *W. (R.)* is focussed on the need to consider the evidence of the adult testifying as to childhood events "*in the context of the age of the witness at the time of the events to which she is testifying*": see para. 26. **The *McGrath* cautions deal with a broader worry: the inherent frailties attaching to evidence that attempts to reconstruct distant events through the prism of memory that may be coloured or distorted by the erosive impact of time and life experience.**

98. Constable Wiley also commends the Commission to Justice Charron's (as she then was) seminal decision in *R. v. Miaponoose*. The comments made in *Miaponoose* are directly apposite here:

> Eyewitness testimony is in effect opinion evidence, the basis of which is very difficult to assess. The witness's opinion when she says "that is the man" is partly based on a host of psychological and physiological factors, many of which are not well understood by jurists. One example is pointed out by the Commission (at p. 10):
>
> > Simply by way of illustration, psychologists have shown that much of what one thinks one saw is really perpetual filling-in. Contrary to the belief of most laymen, and indeed some judges, the signals received by the sense organs and transmitted to the brain do not constitute photographic representations of reality. The work of psychologists has shown that the process whereby sensory stimuli are converted into conscious experience is prone to error, because it is impossible for the brain to receive a total picture of any event. Since perception and memory are selective processes, viewers are inclined to fill in perceived events with other details, a process which enables them to create a logical sequence. The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus the final recreation of the event in the observer's mind may be quite different from reality.
> >
> > Witnesses are often completely unaware of the interpretive process whereby they fill in the necessary but missing data. They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes. Thus, although most eyewitnesses are not dishonest, they may nevertheless be grossly mistaken in their identification.

99. Constable Wiley provided a credible response as to why his memory about his conversation with Susan Butlin was more extensive with his notes. As he testified:

> Now, people can sit back and wonder, "How the heck can this guy 6 have such a clear memory of this conversation?" The night that her life was taken, I was on shift, on night shift, and as things started coming in, and names, and addresses, it rang a bell in my head, I realized it was this woman, and I realized that the man in question was the subject of the complaint in my file and in the other sexual assault investigation, I -- that was the last shift I worked. I'd had vacation time scheduled, and for the next couple of weeks while I was on my regularly scheduled vacation, I can tell you as a human being and as a -- as a police officer that I ran my phone call with Ms. Butlin through my head innumerable times asking myself if there was anything I could have done more, did I ask her this, did I do that.
>
> When you run it through your head, something like that, that many times, it's branded in your memory forever. That was the extent of my contact with Ms. Butlin.
>
> And I'm sorry for the loss. My testimony today for both of these incidents, something I want to make clear is yes, I'm appearing in front of an official inquiry and Commission or whatever it's called to look at police practices and to look at everything to see what could be done better. I'm fulfilling that by giving my testimony, but I'm also here to be full, frank and fair and honest, total honesty, with my -- my actions in these incidents and my knowledge of these people and that my testimony here today is to provide some clarity. If my interaction in each one of these -- with these people in each one of these incidents is a piece of the puzzle in it, I'm hoping that the families and friends of the victims of these crimes get clarify from at least what I have to say today as much as I can provide. See page 95 (PDF)

100. Having regard to how memory works, the purpose of memo-book notes and his response, this Commission should accept Constable Wiley's evidence on this point. There is no good reason to disregard it or find it incredible.

101. For example, Constable Wiley has asserted that, after not seeing the perpetrator for years, he had a brief unexpected encounter with him in 2017. This additional benign detail shows an absence of artifice and a willingness to provide complete and accurate evidence.

Constable Wiley's response to a complaint of harassing communications made by Susan Butlin in 2017

102. Constable Wiley first saw the Butlin Independent Officer Review days before his testimony before this Commission. Constable Wiley was not aware of the existence of the Review and was not asked to provide a statement for the preparation, or in response to any issue raised by the Review.

103. This one-sided approach can be acceptable where no finding of misconduct may be made, or disciplinary action taken as a result of findings by the Independent Review. On the other hand, where a finding of misconduct may be made, or disciplinary action taken, basic procedural fairness requires, at a minimum, that the subject be permitted to provide a response.[4]

See also, pg.141, MCC Testimony

104. The basic principles of fundamental justice include, *inter alia*, the right to know the case against you, and to make representations. As stated in *R. v. McDonald*, 2018 ONCA 369 (CanLII):

> (1) Fundamental Justice
>
> [37] Fundamental justice in Canadian law is the fairness underlying the administration of justice and its operation. The principles of fundamental justice are specific legal principles that command "significant societal consensus" as "fundamental to the way in which the legal system ought fairly to operate": *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113. The more a person's rights or interests are adversely affected, the more procedural or substantive protections must be afforded to that person in order to respect the principles of fundamental justice: see *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 25.
>
> [38] Procedural fairness speaks to the principle that persons affected by the proceedings should have the opportunity: (i) to present their case fully and fairly, and (ii) have any decision affecting their rights, interests, or privileges made using a fair, impartial and open process: see *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at pp. 837-841. As the Supreme Court emphasized in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 118, "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*."
>
> [39] The greater procedural protections just referenced can include the right to an oral hearing, where questions can be answered and submissions made in open court, "with an opportunity for

[4] For instance, Constable Wiley may not have been permitted to accept "screen shots" of the text messages to his phone given OM – ch. 25.2 Investigator's Notes, Amended 2017-07-5, 4. 1. 11. The use of personal wireless communication devices for the purpose of note taking and/or as an investigational tool, e.g. audio taping of statements, video recording, picture taking,Is not permitted, in accordance with SM ch. 4.1.

NOTE: Where circumstances dictate and Issued equipment Is not available, electronic notes may be made on a personal wireless communication device and must be transferred into an operational RMS as soon as practicable. See sec. 4.1.9.

those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": *Baker* at p. 837. In *Singh v. Canada (Minister of Employment and Immigration*), 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at para. 58, Wilson J. commented that where physical liberty is at stake "it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing". This view – that where the stakes are serious enough an opportunity for oral submissions must be given — is in keeping with recognition that there are cases where the demands of natural justice can require an oral hearing: see *Baker*; Re Spalding, (1955) 1955 CanLII 418 (BC CA), 16 W.W.R. 157 at 169; *Joly v. Canada* (Attorney General), 2014 FC 1253, 471 F.T.R. 190; *Patchett v. Law Society of British Columbia*, [1979] B.C.J. No. 1097.

105. As noted in *Canada (Attorney General) v. Krever*, 1996 CanLII 11757 (FC), s. 12 and 13 of the *Public Inquiries Act*, RSC 1985, c.I-11 codifies these basic rights:

f) Sections 12 and 13 of the *Inquiries Act* and the Common Law

Sections 12 and 13 of the Inquiries Act codify certain elements of the common law duty of procedural fairness: the right to counsel and *audi alteram partem*.

All of the Applicants have had the right to counsel throughout the course of the Inquiry. The Applicants, if they choose to respond, have been offered a full opportunity to be heard and there is clearly no evidence that they have been deprived of such opportunity. Section 13 of the *Inquiries Act* contains no requirement that the Notices provide details of the evidence supporting the possible findings; only that notice of the potential findings be given. As I noted earlier, the record of the tribunal's proceedings has been made available to all parties and is available to the public.

The Supreme Court of Canada has held that fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved. The characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine the extent of the right.[5]

The procedural rules of litigation do not apply to an inquiry.

The Law Reform Commission of Canada has recommended the following procedural safeguards, noting that some are at the discretion of the Commissioner

> What safeguards are necessary? It is imperative that all those appearing before a commission have the right to be represented by counsel. One who appears as a witness before an investigatory commission should have the right to be heard concerning any matter raised at the hearing that may adversely affect his interests, and, at the commission's discretion, to call, examine or cross-examine witnesses personally or by counsel. The commission's discretion regarding the calling and examining of other witnesses should be exercised having regard to the importance of the interest affected and the need to proceed expeditiously with the work of the

[5] *Irvine v. Canada* (R.T.P.C.), 1987 CanLII 81 (SCC)

> commission. Those who did not appear initially as witnesses, but who have been commented on adversely in the testimony of others, should have the opportunity at the discretion of the commission to appear as witnesses (with the right to counsel and cross-examination) should they wish to do so.[6]

106. The Independent Review was requested only to review certain incidents and the use of force "*as it aligned with training*". Constable Wiley was not interviewed, questioned, or asked to comment on the comments in the Report. As stated in the Report:

> It should be noted that the review relied solely on investigative materials that were available in relation to these files -**involved members were not interviewed in relation to their actions/involvement in the files**, and no investigative materials were utilized from either the homicide or Si RT investigations.

107. As Constable Wiley was not interviewed or permitted to comment on the contents of the Review, and the Review only had access to limited materials – the spectre that Constable Wiley's actions contributed to the subsequent tragic events must be dispelled.

108. Constable Wiley does not, currently dispute the authority or reasonableness of any independent review of the actions of an RCMP member. In this case, there were no finding of misconduct, nor could any be made in the absence of basic procedural fairness.

109. It is this absence of procedural fairness in the construction of the Independent Review which should give this Commission pause before accepting its contents and conclusions. To accept the comments and conclusions of this Independent Review would effectively circumvent the basic demands of procedural fairness and usurp the deliberative and adjudicative functions of this Commission.

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[6] Law Reform Commission of Canada, Working Paper 17, Commissions of Inquiry: A New Act (1977), at p. 34.

110. Constable Wiley submits that:

a. He did take the harassment investigation "seriously" – and that this qualitative assessment was not warranted on the facts. It is illogical to assume Constable Wiley's state of mind with any supposed failure in the investigation of the harassment complaint, and particularly unfair in the absence of a direct question to him.

b. It is an unfair singular characterization of Constable Wiley given that the "Early Case Closure" designation would have been reviewed and approved by Constable Wiley's supervisor. See Butlin Report, pg.9, Roles and Responsibilities".

c. Constable Wiley was entitled to reasonably rely on the conclusions of other members that no sexual assault offence had been committed; *R. v. McComber* (1988), 1988 CanLII 7062 (ON CA); *R. v. Johnson*, 1995 NSCA 83 (CanLII); *R. v. Hall*, 2006 SKCA 19 (CanLII). Constable Wiley reasonably concluded that his colleagues did not possess reasonable grounds to believe an offence had taken place.

d. It must be remembered that peace bond proceedings are preventative in nature. Section 810(1) of the *Criminal Code* is premised on the fact that no crime has occurred, only that a person reasonably fears a personal injury or damage to property. As made explicit in *R. v. Penunsi*, 2019 SCC 39 (CanLII):

> B. Peace Bonds and the Criminal Power
>
> [12] The peace bond is an instrument of preventive justice. The prevention of crime is a well-recognized purpose of the criminal law. As Locke J. explained in *Goodyear Tire & Rubber Co. of Canada v. The Queen*, 1956 CanLII 4 (SCC), [1956] S.C.R. 303: "The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime" (p. 308; see also *R. v. S. (S.)*, 1990 CanLII 65 (SCC), [1990] 2 S.C.R. 254, at p. 282).

> [13] In *Mackenzie v. Martin*, 1954 CanLII 10 (SCC), [1954] S.C.R. 361, Kerwin J. (as he then was) wrote that a peace bond delivers preventive justice by "*obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour*" (p. 368, citing W. Blackstone, Commentaries on the Laws of England (16th ed. 1825), at p. 251, cited in *R. v. Parks*, 1992 CanLII 78 (SCC), [1992] 2 S.C.R. 871, at p. 911, per Sopinka J.).
>
> [14] *R. v. Budreo* (1996), 1996 CanLII 11800 (ON SC), 27 O.R. (3d) 347 (Ont. Ct. Gen. Div.) ("Budreo S.C."), dealt with a constitutional challenge to the peace bond under s. 810.1 of the *Criminal Code*. Then J. referred to the preventative nature of the peace bond:
>
> The court in considering what constitutes fundamental justice in a liberal society must refer to the history of a particular power and the policy rationale behind it. Preventive justice is the exercise of judicial power not in order to sanction past conduct but to prevent future misbehaviour and harm. The exercise of this power is justified by the risk of harm or dangerousness posed by certain individuals . . . . [pp. 368-69]
>
> This was echoed by Laskin J.A. in his decision affirming the reasons of Then J. (*R. v. Budreo* (2000), 2000 CanLII 5628 (ON CA), 46 O.R. (3d) 481 (C.A.) ("Budreo C.A."), leave to appeal dismissed, [2001] 1 S.C.R. vii):
>
> > The criminal justice system has two broad objectives: punish wrongdoers and prevent future harm. A law aimed at the prevention of crime is just as valid an exercise of the federal criminal law power under s. 91(27) of the *Constitution Act*, 1867, as a law aimed at punishing crime. [Footnote omitted; para. 27]

e. It is an essential element of the offence of criminal harassment that the accused "know" or was "*wilfully blind or reckless*" as to whether the complainant was harassed. In this case, Constable Wiley was advised that the offender had not been told to cease communication. See s.264(1) of the *Criminal Code*.

f. There is no legal requirement that the target of a peace bond have knowledge that his behaviour has caused another person to reasonably fear personal injury or property damage for the peace bond to be ordered.

g. The fact that a peace bond proceeding is underway does not make it more likely that the offender was aware that his conduct was harassing, particularly, when the subject of complaint was not advised to cease communication.

h. Constable Wiley: i) gave her advice how to end communication and what to say; ii) confirmed that she understood how to block him; iii) advised her that he offered to speak to the perpetrator, which she declined; iv) discussed the Peace Bond hearing and how this information may be of assistance; v) advised her to speak to police if anything changed; and, vi) asked her whether she had any concern for her or anyone else's safety, to which she said "No".

i. In the circumstances Constable Wiley was entitled to conclude that no criminal offence had been committed and that a legal process was underway that could enjoin the offender to "*keep the peace and be of good behaviour*" or other such conditions that the Court considered advisable. See s.810 of the *Criminal Code*.

j. Again, all of Constable Wiley's decision-making on this file was reviewed and approved by his Supervisor. See Butlin Report, pg.9 and 10.

Constable Wiley's statements regarding the seriousness of threats and complaints

111. Constable Wiley's statements regarding the seriousness of threats and complaints should not be understood as trivializing any community member legitimate concerns.

112. In Constable Wiley's June 2021, statement, he spoke of the challenges posed by staffing shortages at Bible Hill:

> Stephen Henkel [01 :15:28] And if you wanted to become a coach officer, what's the is there a prerequisite or ..
>
> Greg Wiley [01 :15:35] Management will tap you on the shoulder? It'll be I think it worked out were when when I was working at Bible Hill, there were enough other coach officers around always. And I've worked on different shifts, like they shuffled our deck a little bit now and then that it just never worked out. As a former teacher, it probably wouldn't wouldn't have been a bad fit for me. So but to be honest, it's it's it's a lot of work doing it. And I found I was busy enough as it was just doing my put my own police work.

> Stephen Henkel [01 :44:06] So on paper, what would you say the complement to the staffing model is there?
>
> Greg Wiley [01 :44:10] There's there's supposed to have, I believe it was either 20 or 20 constables working on four shifts, on four watches you'd have, I think, five constables per watch and a corporal per watch, but. It was not unusual when I was there that there were three members on for the county.
>
> You were .. Bible Hill was busy. It was fast like and it was fast, not in terms of like compared to like what a city here would be, or Halifax where you could get 25 calls in a shift. Bible Hill, if you got ten, ten calls and they were spread out. You were driving and all over the place, like your shift could just get sucked up like that where you didn't even have a chance to do any paperwork. And so you've got to pick your spots. You're trying to manage. It's all about time management.
>
> Greg Wiley [02:07:54] Some of those things and this was this was the thing and I don't want this taken the wrong way. It's the way it's the way things had to be done there and it was. And I said sometimes we felt like we were short on the shift, like three people or whatever. But even when you had four on five on on a shift, you were busy and I had a sergeant early on when I was there.

113. In the context of being asked questions to "pick his brain", Constable Wiley was simply expressing his frustration that he did not have enough time, nor was there a sufficient law enforcement complement at Bible Hill to address all the concerns that the community had, and as a result he tended to prioritize more serious criminal matters over others.

Constable Wiley's Statements about Systemic Racism

114. Constable Wiley made some remarks about racism and systemic racism. These remarks have been unfortunately grossly misunderstood. Constable Wiley was not attempting to undermine any person's experiences or suggest that racism does not exist.

115. Constable Wiley's or anyone else's personal experiences are not necessarily relevant to the existence of systemic racism. A personal acknowledgement that one has not seen racism does not speak to broader institutional or social issues. The Canadian Human Rights Tribunal understands that these are complex issues:

> During the presentation, the RPP team shared that research has shown that in comparison to other types of discrimination cases, race-based cases often revolve around circumstantial, rather than direct evidence. As a result, it is necessary for those involved in the examination of such cases to focus on the subtle ways racism can exist. For

> example, there are situations where policies which may appear neutral actually have negative impacts on racialized groups. Allegations of racial discrimination are particularly complex and difficult to prove due to the evolving nature of prejudiced attitudes and discriminatory behaviour in Canada. While overt forms still exist, racial discrimination often occurs through subtle and subversive forms of differential treatment or disparate impact, which can only be detected by examining the relevant circumstances of a case. Seemingly neutral policies, practices and behaviours can produce or reinforce racial disadvantage. All the more, individuals who truly believe that they are not prejudiced can treat Black and racialized people differently based on biases which they may not be consciously aware of. This creates a complex landscape from which to identify and assess complaints of discrimination on the basis of race, colour, national or ethnic origin.
>
> …
>
> It was observed that there is a loose understanding of "systemic discrimination", and that the term is not well-defined. When "systemic discrimination" is being discussed, often people are not talking about the same thing. So one of the biggest needs is to better comprehend what the term means, what types of systemic racial discrimination there are, what kinds of tools can be used to identify it in different contexts, and what kind of remedies should flow.
>
> Canadian Human Rights Commission Dialogue, Session with Representatives from Racialized Communities on Advancing Racial Equality in Canada, 2020 CanLIIDocs 3537

114. Constable Wiley was attempting to articulate that the manner in which these vexing and troublesome matters are addressed institutionally may result in more division than unity.

115. Respectfully, this Commission is not equipped with the evidence or input from the relevant stakeholders to negatively comment on this aspect of Constable Wiley's statements or testimony and should refrain from doing so.

Constable Wiley's Actions in respect of Complaints about the perpetrator were Reasonable and Lawful

116. In this section Constable Wiley will firstly address the uttering threats allegations and submit that he was never asked or directed to conduct a criminal investigation into the perpetrator. Secondly, Constable Wiley will submit that Banfield's unchallenged recall is not reliable evidence. Ultimately, Constable Wiley had not been advised that any officer possessed reasonable grounds

for arrest. The direct and circumstantial evidence heard and submitted to this Commission overwhelmingly support the conclusion that Constable Wiley had only a passing professional relationship with the perpetrator.

The Uttering Threats Investigation

117. This incident began on June 2nd, 2010, with Sgt. Poirier being advised of a death threat made by the perpetrator to family members in Moncton. The threat was reported to have been made to a family member residing in Edmonton, Alberta about the perpetrator's family in Moncton. Once they learned about the threat, they called the Codiac, NB, RCMP, who in turn contacted Sgt. Poirier through a non-emergency line.

See Statement of Cordell Poirier at page 5

118. On June 1st, 2010, Sgt. Poirier spoke to Lisa Banfield at 193 Portland Street about the perpetrator. She advised him the Sgt. that the perpetrator was passed out from drinking and that he started drinking when he received some bad news about a property. Ms. Banfield did not confirm or deny the allegation that a threat had taken place. When asked how she seemed, he stated "well, I can't really remember, but I don't think there was anything really there at that time.

Statement of Cordell Poirier, pg.6

119. To understand what occurred following the receipt of this information. It is important to understand the charge of uttering threats, the concept of reasonable grounds; conflicts of interest; and an officer's right to search and seize.

120. Once these concepts are properly understood and applied, it will become apparent that Constable Wiley's conduct was above reproach.

121. Uttering threats is an offence contrary to s.264.1 of the *Criminal Code*. To prove the offence beyond a reasonable doubt in this context the Crown must demonstrate that a threat was made; that the threat was to cause death; and that the perpetrator made the threat, knowingly, meaning he intended that the complainant be intimated by the threat or that the threat be taken seriously. As stated in *R. v. O'Brien*, 2013 SCC 2, [2013] 1 S.C.R. 7.

> Speaking for the Court in *R. v. Clemente*, 1994 CanLII 49 (SCC), [1994] 2 S.C.R. 758, at p. 763, Cory J. stated:
>
> > Under the present section the *actus reus* of the offence is the uttering of threats of death or serious bodily harm. The *mens rea* is that the words be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously. [Emphasis deleted.]
>
> …
>
> [11] As Cory J. explained in *Clemente*, at p. 762:
>
> > . . . the question of whether the accused had the intent to intimidate, or that his words were meant to be taken seriously will, in the absence of any explanation by the accused, usually be determined by the words used, the context in which they were spoken, and the person to whom they were directed.
> >
> > …
> >
> > [13] I agree with the Crown that it is not an essential element of the offence under s. 264.1(1)(*a*) that the recipient of the threats uttered by the accused feel intimidated by them or be shown to have taken them seriously. All that needs to be proven is that they were *intended by the accused to have that effect*.

122. The fact that the threat was not communicated directly to the Moncton family is of no moment in determining whether a criminal act occurred, nor is the fact that the perpetrator had the means or weaponry to carry out the threat relevant in determining liability under s.264.1 of the *Criminal Code*

> *R. v. Clemente*, 1994 CanLII 49 (SCC)

123. What is required for proof of a threat beyond a reasonable doubt is not what is required for an arrest to have occurred, rather, all that was required for an arrest, is the presence of reasonable grounds to believe that a threat occurred. *R. v. Storrey*, 1990 CanLII 125 (SCC)

124. Reasonable grounds is a well known concept to law enforcement. It relates to a reasonable probability that an offence has occurred. Police do not need proof beyond a reasonable doubt to make an arrest. In *R. v. Bush*, 2010 ONCA 554 (CanLII), [2010] O.J. No. 3453 (CA), Justice Durno wrote:

> Reasonable and probable grounds have both a subjective and an objective component. The subjective component requires the officer to have an honest belief the suspect committed the offence: *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 S.C.R. 254 at para. 51. The officer's belief must be supported by objective facts: *R. v. Berlinski*, 2001 CanLII 24171 (ON CA), [2001] O.J. No. 377 (C.A.) at para. 3. The objective component is satisfied when a reasonable person placed in the position of the officer would be able to conclude that there were indeed reasonable and probable grounds for the arrest: *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241 at p. 250.

125. Assuming Sgt. Poirier was aware of what is required to prove a count of uttering threats and the standard for arrest, it must be also assumed that the information he received from New Brunswick RCMP did not supply Sgt. Poirier with reasonable grounds for the arrest of the perpetrator.

126. Sgt. Poirier did not obtain a warrant for arrest, nor did he attend at the perpetrator's residence for the purpose of conducting an arrest.

127. Sgt. Poirier had a brief conversation with Ms. Banfield that resulted in Sgt. Poirier leaving the premises without speaking to the perpetrator. When he eventually contacted the perpetrator, he didn't receive much cooperation other than to learn that he possessed a pellet gun and two non-functional muskets. See Transcript of Recording, Sgt. Poirier, pg.7 of 16.

> **Cordell POIRIER** [00:07:53] He saw me ... so, yeah, so, and I told him I wanted to talk to him face to face. He wouldn't admit or deny making the threat to his uncle, but he was going to be away for the next month at the college and possibly a trip to New England States. When I told him, we needed to talk face to face, he became confrontational and he told me the only weapons that he had in the house was a pellet gun and two antique muskets, both non-functional. And, as I said, he was getting confrontational, and basically, that conversation ended with him saying, "Look, if you're going to charge, charge me," and he hung up, so. So, I checked with a Dennis Desveaux from Firearm Registry, police helpline, who confirmed that there were no registered weapons to Wortman, to Gabe Wortman.

128. The fact that the perpetrator did not fully cooperate with Sgt. Poirier's investigation did not supply the necessary grounds for the arrest. Sgt. Poirier's notes do not include any statement that he disbelieved the perpetrator.

129. Sgt. Poirier also did not receive any cooperation from the potential complainants and, so ultimately, Sgt. Poirier rightfully concluded he did not possess reasonable grounds to arrest the perpetrator. As stated by Sgt. Poirier:

> **Cordell POIRIER** [00:09:32] I might have just assumed it was Glynn. But anyway, I have Glen, G-L-Y-N-N and ... and that would be the uncle in Edmonton. I made several calls to him, but the phone just kept going to an answering machine. And but I did get in touch with Paul Wortman, who's Gabe Wortman's father, and we had a lengthy conversation. He's ... he was convinced that Gabriel was still in possession of several serious weapons as he called them, pistols and long barreled guns because ... but he hasn't seen him in over five years, so he can't say for sure if he still had them. Let's see, I was also advised by Paul that his brother, Glynn's in Edmonton, has taken sides with Gabriel and will not cooperate with police and I figured well, that's obviously why he wasn't answering the phone, or his brother. And so, I advised Paul that without Glynn's cooperation, basically the threat file is not going to be able to go anywhere unless I get some cooperation from the complainant. So, I left him my name and my card ... or, name and number rather, if he had any questions in reference to what's ... what we discussed. And then I have it here in my notes that I did speak again to Greg Wiley, RCMP Bible Hill. And he told me that he was a good friend of Gabriel, and he will attempt to find out if, in fact, he does have any weapons in possession at the cottage in Portapique. And that was a conversation, I had him on day shift, and I ended my shift at about 6:30 that night, so. And then that was pretty well the end of it. There was ... I felt there was no grounds really at that time to follow up or lay a threat charge against Gabe Wortman in relation to that. So, I was hoping that with the information I'd given the RCMP, they would be able to find something out on their end. And so, that's kind of the way I left it at that time, right.

130. Given Sgt. Poirier's experience, he would have known that the perpetrator's possession of firearms was irrelevant to whether the perpetrator was arrestable on a charge of uttering threats.

131. Constable Wiley testified that he was not tasked with investigating the possession of firearms and not asked to interview the perpetrator's neighbours in this regard. Public Hearing Transcript, pg.134, line 8.

132. There is no independent evidence that Constable Wiley was ever assigned to or tasked with any investigation into an uttering threats investigation.

133. Having regard to the Sgt. Poirier's conclusion that no reasonable grounds existed for the arrest of the perpetrator, Constable Wiley's evidence on this point should be accepted. However, that is not the only reason to conclude that Constable Wiley was not tasked with conducting a criminal investigation into the perpetrator.

The Power to Seize Firearms and the Avoidance of Conflicts of Interest

134. Sgt. Poirier retired in 2016 with 35 years experience as a police officer. Constable Wiley submits that Sgt. Poirier would be aware of the desire of his Police Service or any other Police Service to avoid the appearance of a conflict of interest.

135. Every Police Service in Canada has rules or guidelines designed to avoid the appearance of conflicts between the investigator and a potential accused. Members are instructed to not assume conduct of, or have any direct involvement in the investigation, other than as a potential witness.

136. If Constable Wiley told Sgt. Poirier that he was "*good friends*" with the perpetrator or otherwise communicated to Sgt. Poirier that had anything other than a professional relationship, Sgt. Poirier would have undoubtedly made this known to RCMP senior command or simply made a request of another officer to conduct any criminal investigation that was required to determine whether the perpetrator had access to firearms.

137. In addition to Constable Wiley's categorical rejection of the assertion that he was "*good friends*" with the perpetrator, the evidence that Constable Wiley did identify himself as such is not on solid footing.

138. There is no suggestion in Sgt. Poirier's notes that the "*good friends*" reference was verbatim. It is not in quotations as statements purporting to be verbatim are, and he was not asked in his interview, whether it was verbatim. Instead, he was told that "*he didn't have to an independent recollection*."

> **Will CREWS** [00:02:59] When they start asking the dispatcher what they should be doing. Okay, if we can ... and again, we're here to talk about the incidents, but not ... not about the incidents of 2020, in April, but I guess your dealings prior to that. And I guess if we can just start going through that and we'll go from there and ask some questions at the end.
>
> **Cordell POIRIER** [00:03:20] Okay. Well, I'm sure you can appreciate I definitely had to access my notes.
>
> **Will CREWS** [00:03:25] Yes. Yeah, for sure, yeah.
>
> **Cordell POIRIER** [00:03:26] I ... I had ... you know, some of the memory was there, but until I actually looked at the notes and started looking at actual detail, then things started coming, "Oh, yes, okay, now I remember," blah, blah, so.
>
> **Will CREWS** [00:03:38] Yeah. We're ... we don't have to have an independent recollection.

139. Sgt. Poirier did not really remember his conversation with Constable Wiley in part because of his own acknowledgement that he had little information. Sgt. Poirier stated:

> **Will CREWS** [00:12:02] Now, your ... your conversation with with Wiley, do you recall anything about that?
>
> **Cordell POIRIER** [00:12:06] No, I really can't remember because it was ... it would have been a short conversation, just based ... and I never had really a lot of information, right.

140. When asked a second time about his conversation with Constable Wiley, Sgt. Poirier changed his evidence about the number of times he spoke with Constable Wiley:

> **Will CREWS** [00:18:00] Yeah. So, just going back, just to the phone calls with Bible Hill. So, you called originally, and you spoke, I guess, with Wiley on one occasion?
>
> **Cordell POIRIER** [00:18:14] Yes, Wiley, and then MacMinn.
>
> **Will CREWS** [00:18:17] And you ... did you speak with Wiley on two occasions, or just on the one occasion?
>
> **Cordell POIRIER** [00:18:20] Ah, two.
>
> **Will CREWS** [00:18:21] Two occasions?
>
> **Cordell POIRIER** [00:18:21] Two occasions.

141. Sgt. Poirier was again clear that he could not recall the substance of the conversation with Constable Wiley:

> **Will CREWS** [00:18:32] And ... and there is no indication that there were any firearms, or he had no indication that there were any firearms?
>
> **Cordell POIRIER** [00:18:38] No. Again, going from my notes, not memory.

142. Sgt. Poirier then goes on to discuss only a single call with Constable Wiley and second call to Acting Supervisor Cst. MacMinn.

143. In this matter, Sgt. Poirier had no independent recollection of his conversation with Constable Wiley, instead he relied on his testimonial aid. His choice of words designed to refresh his memory should not be elevated or understood as a verbatim account.

144. Sgt. Poirier was not subjected to cross-examination on the contents of his notebook. It would be unfair to Constable Wiley to base any conclusion about his professional relationship with the perpetrator in the absence of any cross-examination on memo-book notations constructed as a testimonial aid.

145. There is no independent evidence that Constable Wiley was ever tasked with or assigned to a firearms related investigation of the perpetrator.

146. The BCCA-ECPJS brief comments that the lack of cross-examination will negatively impact fact-finding. They write:

> The concrete result of the Commission's trauma-informed accommodation process was that key state actors were not subjected to the same degree of scrutiny as they would have been in a traditional public inquiry process. The evidence of key witnesses often went untested or was tested only through constrained questioning. As a result, there is a real risk

> that state actors avoided or evaded accountability for their conduct in pursuit of being "trauma-informed".
>
> The Commission's approach to being "trauma-informed" negatively impacted its truth-seeking function. This cannot be undone. **At this stage, all that can be done is to approach the evidence of witnesses who were granted accommodations with some degree of caution on the basis that their evidence was not subjected to complete and normal cross-examination processes**.

147. An entirely even application of the above principle should compel the Commission to reject the subsequent CCA-ECPJS submission that:

> The reliability of Sgt. Poirier's contemporaneous notes and Lisa Banfield's testimony, when compared with Cst. Wiley's lack of recollection, provides sufficient reason to conclude, at the very least, that a complaint was transmitted to Cst. Wiley and not investigated.

148. Constable Wiley submits that it would not be warranted or fair for the Commission to make any finding of misconduct on the untested evidence of Sgt. Poirier or Lisa Banfield. The absence of cross-examination, or even more pointed examinations cannot, in law, be the basis upon which such findings can be fairly made. This concept is fundamental to our legal traditions whenever there is a contest of facts:

> **58** The principle is succinctly stated in Halsbury's Laws of England, 4th edition, Volume 17 (London: Butterworths, 1980), at page 193. At paragraph 277, the editor writes:
>
> > Any party is entitled to cross-examine any other party who gives evidence and his witnesses, and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.
>
> The editor cites a number of authorities. It is sufficient to refer only to Allen v. Allen, [1894] P. 248 (C.A.). At page 253, Lopes L.J. wrote:
>
> > ... It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination. ...
>
> **59** The consequence of denying a party its right to cross-examine any other party who gives evidence was considered by the English Court of Appeal in Blaise v. Blaise, [1969] 2 All E.R. 1032. At page 1036 Lord Justice Sachs wrote:
>
> > ... As a matter of first impression it seemed to me - and I had no hesitation on this point - to lead to the conclusion that where a party is denied the important right to cross-examine a

> witness whose answers on cross-examination might affect the result, that constituted both a substantial wrong and a miscarriage of justice. ...

Lord Justice Fenton Atkinson expressed it slightly differently, but to the same effect, when, at page 1038, he wrote:

> ... In my judgment there was on the facts of this case a substantial wrong or miscarriage of justice because the husband was not allowed to develop his full case and evidence which might have led to a different decision was shut out. In other words, as it seems to me, he lost a chance of success which was fairly open to him.
>
> …
>
> **61** Courts in Nova Scotia take a similar position.
> …

Similar views were expressed by the British Columbia Court of Appeal in Rheault v. Rheault (1988), 27 B.C.L.R. (2d) 138, and Balla v. Fitch Research Corp., [2000] B.C.J. No. 1540, 2000 BCCA 448.

62 In Innisfil (Township) v. Vespra (Township), [1981] 2 S.C.R. 145, the Court addressed the issue in the context of a refusal by an administrative tribunal to allow cross-examination of the author of a letter tendered in evidence. Estey J. discussed the application in administrative tribunals of the principles of natural justice applied in the courts. At pages 166 to 167 he wrote:

> It is within the context of a statutory process that it must be noted that cross-examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. Indeed the adversarial system, founded on cross-examination and the right to meet the case being made against the litigant, civil or criminal, is the procedural substructure upon which the common law itself has been built. That is not to say that because our court system is founded upon these institutions and procedures that administrative tribunals must apply the same techniques. Indeed, there are many tribunals in the modern community which do not follow the traditional adversarial road. On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination. In Wigmore on Evidence (Chadbourne Rev. 1974) vol. 5, p. 32, para. 1367, the following analysis of the role of cross-examination appears:
>
> > For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.
> >
> > Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in

> more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.
>
> .....
>
> If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.

Rees v. Royal Canadian Mounted Police, 2005 NLCA 15, 246 Nfld. & P.E.I.R. 79, at para. 31, leave to appeal refused, [2005] 2 S.C.R.

149. Constable Wiley does not at this time quarrel with the procedure adopted by this Commission in finding facts. Constable Wiley, does submit, in relying on our basic legal traditions that this procedure must not be the basis upon which a finding of misconduct can be made.

150. Constable Wiley was not given the opportunity to confront or ask pointed questions of Sgt. Poirier on: what concrete steps were taken to ensure a criminal investigation of the perpetrator was undertaken by anyone at the Bible Hill Detachment; when his notes were made and whether they were verbatim and his understanding of the desire to avoid conflicts of interests.

151. Similarly, Constable Wiley was never permitted to press Lisa Banfield about her memory of Constable Wiley's presence at the perpetrator's home at Portapique, or to even object to the procedure by which Ms. Banfield was led by counsel in her examination.

The Lisa Banfield Statement

152. Constable Wiley has no recollection of attending at the home of the perpetrator and inquiring about a firearm or being shown a pellet gun. See Public Hearing Transcript, pg.86, line 12 and following.

153. The lack of recollection is consistent with their being no "complaint" and no requirement to conduct a criminal investigation.

154. Surely, Sgt. Poirier would not have simply closed a firearms investigation because there had not been timely follow-up. Sgt. Poirier's notes indicate his awareness that fresh information from the complainants were required to pursue a search warrant.

155. Moreover, and with respect, Ms. Banfield's evidence on this point is patently unreliable. Ms. Banfield was led by counsel's questioning that the Officer who was present was in fact, Constable Wiley. As noted in her April 6th, 2022, recorded interview:

> Gillian HNATIW [02:00:21] You know, were there people that you socialized with as a couple? No. You're shaking your head? That's why I'm saying, for the record ...
>
> Lisa BANFIELD [02:00:29] Oh sorry.
>
> Gillian HNATIW [02:00:29] ... because people ... no that's OK. You're doing great. There was a Constable Wiley, do you remember his first name, Liz?
>
> Elizabeth MONTGOMERY [02:00:38] Greg Wiley.
>
> Gillian HNATIW [02:00:39] Greg Wiley. Did you ever meet him?

156. Ms. Banfield's recollection of the visit by the Officer is not detailed or reliable:

> Elizabeth Montgomery: …Do you have any other information as it relates to him and Gabriel's friendship? Was it a close friendship? Did they see each other often?
>
> **Lisa BANFIELD** [01 :30:44] **I have no idea. I only met him twice**, I think it was, and that was one time Gabriel and I were on a drive and Gabriel seen him and they stopped and said, **"Hi," or whatever**. That was it. And then when he came to the cottage the time that Gabriel threatened to kill his parents.
>
> Elizabeth MONTGOMERY [01 :31 :04] That you saw? Okay. Did Gabriel ever talk about him? Like ... like that they had a closer relationship?
>
> Lisa BANFIELD [01 :31 :16] He said ... he said he knew him, but I never asked how. I just assumed because he knew him from the neighbourhood.
> Transcript of Recorded Interview, May 17th, 2022

157. This hearsay statement by Ms. Banfield is not reliable for numerous reasons: 1) it is dated; 2) Ms. Banfield is not an accurate historian; and, 3) it relies on the truth or reliability of the perpetrator statements.

158. Constable Wiley indicated that he met a female **at the perpetrator's Portapique address** at least twice, and he was never asked, nor did he state that he saw the perpetrator and Ms. Banfield, as she stated: "*while out on a drive"*.

See MCC Interview Transcript at [1:0:15]

159. Returning to the April 6th, 2022, interview, it is clear that Ms. Banfield does not have a good recollection of these events.

> Lisa BANFIELD [02:01 :35] He came in, and I think **Gabriel and I were in the bedroom** at the time and he came in and Gabriel is like, oh, this is the gun I have, it's a pellet gun. It looks like a handgun, but it's silver, but it's a pellet gun. So he said, this is what I had, you know, I was only joking around. **That's what I think he said to the guy that I can remember it's such a long time ago. But it was as quick as that and he was gone. So it wasn't. .. nothing that really stands out that**.
>
> Elizabeth MONTGOMERY [02:02:00] So you don't recall, he asked some, a lot of questions related to any kind of firearms or access to ...
>
> Lisa BANFIELD [02:02:07] I don't remember any of that.
>
> …
>
> Gillian HNATIW [02:03:23] Did he ask you any questions directly?
>
> Lisa BANFIELD [02:03:31] Not that I remember him asking me anything.
>
> Gillian HNATIW [02:03:31] Did did he talk to you separately? Like, did ... did at any point he take you in another room and ask you questions?
>
> Lisa BANFIELD [02:03:36] No, and I don't know if Gabriel walked him out or something. **I couldn't tell you.**
>
> Gillian HNATIW [02:04:48] OK. And nobody asked you about that.
>
> Lisa BANFIELD [02:04:53] **Not that I remember anybody asking me.**

Gillian HNATIW [02:04:55] OK. Yeah.

Lisa BANFIELD [02:04:57] **If <u>they</u> did, I don't I don't remember <u>them</u> asking me.**

April 6th, 2022 Transcript of Recorded Interview.

160. Ms. Banfield's evidence is undeniably equivocal as to whether one or more officers attended Portapique following the uttering threats allegation and/or whether they asked her about the presence of any other firearms.

161. Ms. Banfield's evidence is also inconsistent with Constable Wiley in that Constable Wiley did not ever indicate that he was ever in the perpetrator's bedroom as she suggested, or that he ever went to the perpetrator's residence with another officer.

162. As stated above, it is submitted that the fact that the perpetrator may have possessed firearms is irrelevant to a charge of uttering threats, and the fact that Constable Wiley was asked to speak to him about a firearms issue is some evidence that Sgt. Poirier **<u>did not</u>** reasonably believe that **<u>any type</u>** of crime had occurred.

163. In the absence of prior judicial authorization, or exigent circumstances, Constable Wiley did not have the power to attend at the perpetrator's home for the purpose of conducting a criminal investigation. As stated in *R. v. Evans,* 1996 CanLII 248 (SCC):

> 9 In the present case, I am of the view that the actions of the police went beyond the forms of conduct permitted by the implied licence to knock. Although I accept that one objective of the police in approaching the Evans' door was to communicate with the occupants of the dwelling in accordance with the implied licence to knock, the evidence makes it clear that a subsidiary purpose of approaching the Evans' door was to attempt to "get a whif [sic] or a smell" of marijuana. **<u>As a result, the police approached the Evans' home not merely out of a desire to communicate with the occupants, but also in the hope of securing evidence against them. Clearly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them. Any "waiver" of privacy rights that can be implied through the "invitation to knock" simply fails to extend that far. As a result, where the agents of the state approach a dwelling with the intention of gathering evidence against the occupant, the police have exceeded any authority that is implied by the invitation to knock</u>**.

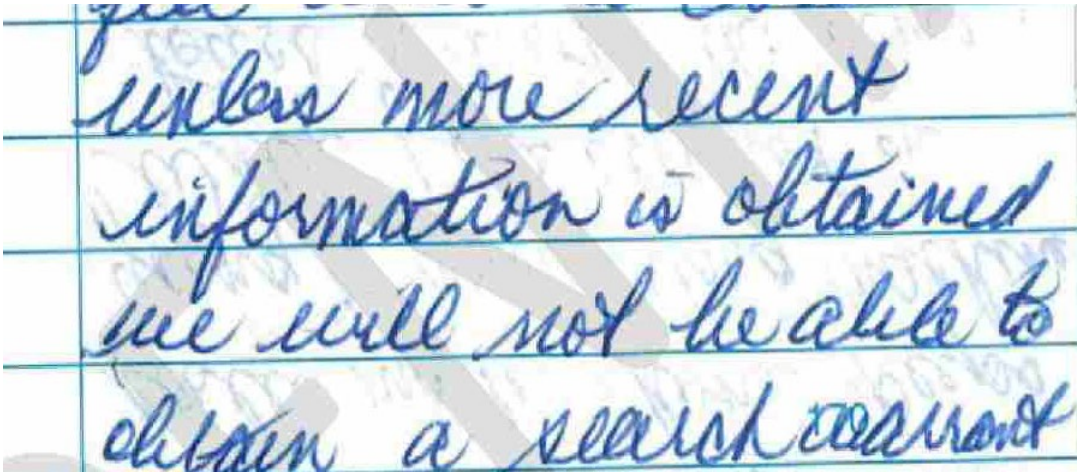
> 10 As noted above, my colleague Major J. would hold that the conduct of the police in the present case did not constitute a search within the meaning of s. 8 of the *Charter*. In his view, the police were merely acting on the implied invitation to knock when approaching the Evans' door for the purpose of seeking evidence against the appellants. In Major J.'s opinion, the fact that the police intended to "sniff" for marijuana once the Evans' door was opened does not affect the validity of the officers' conduct. Simply put, Major J. would hold that the underlying purpose or intent of the police in approaching the Evans' door "does not affect the right to knock on the door".
>
> 11 Despite the difficulties involved in proving police "intention" when they approach a person's home, I disagree with Major J. that the intention of the police is irrelevant in assessing the legality of their actions. **As stated above, the implied licence to knock extends only to activities for the purpose of facilitating communication with the occupant. Anything beyond this "licensed purpose" is not authorized by the implied invitation**. In my view, an analogy can be drawn between the present case and the decisions of this Court in *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30, and *R. v. Wiggins*, 1990 CanLII 151 (SCC), [1990] 1 S.C.R. 62. In those cases, it was held that "participant surveillance" through the electronic recording of a private conversation constitutes a "search" within the meaning of s. 8. According to the majority in *Duarte* (at p. 46), "*privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself*". Thus, while an individual may explicitly "invite" another to engage in private conversation, the invitation cannot be extended to authorize an activity with a different purpose, namely, the surreptitious recording of what is said. Where the person purporting to act on the "*invitation to converse*" exceeds the bounds of that invitation, the activity in question may constitute a "search" for constitutional purposes. **Similarly, where the police, as here, purport to rely on the invitation to knock and approach a dwelling for the purpose, *inter alia*, of securing evidence against the occupant, they have exceeded the bounds of any implied invitation and are engaging in a search of the occupant's home**. Since the implied invitation is for a specific purpose, the invitee's purpose is all-important in determining whether his or her activity is authorized by the invitation.

164. In this case, it is not suggested that there were exigent circumstances. In this context, exigency means the immediate need to protect public safety. At a minimum, in the absence of reasonable grounds to believe that the perpetrator committed any criminal offence – there could have been no exigency.

> See *R. v. Paterson*, 2017 SCC 15 (CanLII).

165. If the police reasonably believed that the perpetrator was in possession of any type of firearm, he would be arrestable because he had no license to possess any type of firearm. In such a case, the police would have to obtain a warrant pursuant to s.487 of the *Criminal Code*.

166. Sgt. Poirier was aware of this fact. In his notes he claims that unless he received recent information the police "*will not be able to obtain a search warrant*."


unless more recent
information is obtained
we will not be able to
obtain a search warrant

167. There has been suggestion of a public safety warrant. It is not known precisely what is being referred to, but it must be remembered that the perpetrator was not a person permitted to possess a firearm. The legal mechanisms to seize firearms lawfully in the possession of an individual may follow a different process which would not have been appropriate here.

See s.117.04 *Criminal Code*

168. Constable Wiley further testified that he was not tasked with investigating the possession of firearms and not asked to interview the perpetrator's neighbours in this regard. See pg.134, line 8.

The CISNS Bulletin

169. It is Constable Wiley's position that he had never seen this Bulletin at all. As he testified:

CST. GREG WILEY: You're speaking to the CISNS bulletin?

MS. GRACE MacCORMACK: Yes.

> CST. GREG WILEY: I don't recall seeing that, no. Like I said, my only recollection of any communication to do with the perpetrator was -- and I just, it's a vague thing in my head, was of like an email going out and it was that he was being investigated for -- there was a threats complaint originating in New Brunswick and that he lived in, like, a rural area and members should be aware. That's my recollection. A vague communication like that. Not anything like the CISNS bulletin where it was saying he was looking to kill a cop or anything like that.

170. The email regarding the threat to officer safety was not raised with him, nor was there any investigative task he was ever given in relation to this email. As he testified:

> MS. GRACE MacCORMACK: So that was the end of your investigation into this email or bulletin?
>
> CST. GREG WILEY: Email bulletin? I never -- I wasn't conducting an investigation into the email bulletin. I was never a conducting a formal investigation.

171. The fact that he had some knowledge of the contents of email generally distributed to all RCMP members could not reasonably lead to the conclusion that Constable Wiley was asked to do anything about its contents.

172. The email was delivered around the time of Constable Wiley's transfer to another Detachment. In these circumstances it would make not good sense to task Constable Wiley with any investigation relating to it.

173. According to the Bulletin, Cpl. Densmore received information that the perpetrator wanted to kill a police officer and that he was both transporting firearms and in possession of firearms in Portapique.

174. This information came from "*an unknown individual*". At para.69 of the Firearms Foundational Document, it states:

> In a subsequent report after the events, Cpl. Densmore wrote that the information leading to the bulletin came from an unknown individual who approached him during the course of his duties.

175. The record is silent as to what steps if any were taken to discover and/or cultivate the source of this information or what steps were taken to ascertain its reliability or veracity. One could

reasonably conclude, that while the information (in the form it was received) was compelling, but not credible, reliable, or corroborated to justify taking any further investigative steps.

CONCLUSION REQUESTED

176. It is respectfully submitted that the Commission find the following in relation to Constable Wiley:

1) Constable Wiley's notetaking, notebook retention, and security of notebooks was in accordance with RCMP Policy. The notes were properly prepared to achieve their purpose, to refresh memory. There is no evidence of any violation of Policy.

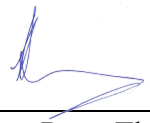
2) Constable Wiley's actions in respect of complaints made about the perpetrator in 2010 and 2011 were reasonable and lawful. Constable Wiley was not ever tasked with conducting a criminal investigation of the perpetrator, and if Sgt. Poirier's notes are taken for their truth, nor would he be. There were no reasonable grounds to conclude that the perpetrator had committed an offence.

3) Constable Wiley's response to a complaint of criminal harassment made by Susan Butlin in 2017 was reasonable and lawful. Constable Wiley's notes were made promptly and achieved their purpose. There were no reasonable grounds to conclude an offence had taken place. Constable Wiley's recollection of his conversation is not so different than the written record and was come to after considered reflection.

4) Constable Wiley's statements regarding the seriousness of threats and complaints were acceptable. Constable Wiley's statements must not be taken out of context and were not meant to undermine any member of the public or tarnish the repute of the Service.

5) Constable Wiley's statements about systemic racism were within the boundaries of acceptable debate. Constable Wiley was speaking plainly about his own experience, and simply stating that the manner in which these issues are addressed ought not to engender division. These issues are complex.

Dated this 4 day of November 2022.



Peter Thorning
Brauti Thorning LLP
161 Bay Street, Suite 2900
Toronto, Ontario M5J 2S1
Tel: 416.362.4567
Fax: 416.362.8410
Email: pthorning@btlegal.ca