

SiRT

SERIOUS INCIDENT
RESPONSE TEAM

Summary of Investigation

SiRT File # 2015-034

Royal Newfoundland Constabulary

Referred November 12, 2015

Ronald J. MacDonald, QC

Director

June 1, 2017

Introduction:

As of November 12, 2015, I agreed to investigate complaints made against senior members of the Royal Newfoundland Constabulary (RNC). I was assisted greatly by two members of the RCMP from Ontario who were seconded to me for this investigation. They each have experience in the investigation of complaints against police officers, and over 30 years of service with the RCMP.

This matter followed a process similar to most SiRT investigations. My role was to provide ongoing direction and oversight, while the investigators carried out the investigative work. This was done with regular reporting to and consultation with me. Working as a team, we have conducted what we believe to have been a thorough and complete examination of the issues before us. This included several trips to St. John's by all members of the team. I personally sat in on some of the more significant interviews.

The matter under investigation related to a very serious criminal investigation being carried out by the RNC (the RNC investigation). Given the nature of that investigation, this report is unable to disclose certain facts as to do so could negatively impact important police work or disclose certain techniques used during the RNC investigation. In addition, I have a legal obligation to protect privacy interests and the identity of persons involved in the matter. This report will also not identify the specific offences relevant to the RNC investigation as to do so could disclose the types of information that needs to be protected.

The allegations we examined related to decisions made and directions given by RNC supervisors to front line officers during the RNC investigation. Eventually some RNC members grew concerned about the directions, which eventually led to a complaint alleging the actions of the senior officers amounted to an obstruction of justice.

During the SiRT investigation, we took the following steps:

- Interviews were conducted with 14 witness police officers.
- An interview was conducted with two civilians.
- The three officers deemed to be the subject of the SiRT investigation were interviewed. These interviews were conducted near the end of 2016. Like any person investigated for a criminal offence, they were under no obligation to give a statement. However, all three officers participated in full interviews and provided relevant documentation.
- A thorough and lengthy review of relevant RNC file information was carried out. This included thousands of pages of documentation.
- Legal research was conducted and legal advice was sought to address important legal issues presented by the case.

Timeline of the SiRT investigation:

In any matter of this nature, the goal is to conduct a thorough and complete examination of the issue in a timely fashion. In this case, the investigation lasted almost 18 months. Usually one would hope to complete the matter in less time. However, several factors impacted our timeline:

- This investigation was not part of the primary responsibilities of either myself or my two investigators. It was therefore necessary to carry out our work when we could identify suitable opportunities.
- The investigation was carried out far from our usual workplaces, requiring travel that added to time commitments.
- The matter involved a unique and complex set of facts.
- Significant documentation had to be obtained from the RNC in relation to the investigation. That process was not straightforward, and involved important legal issues that required careful consideration by both parties. That process took several months.
- The investigation proceeded in stages. Initial interviews outlined the general concerns of the complainant and others. Follow up interviews with many officers outlined the factual background to those concerns. A thorough review of RNC file materials was then required. This was followed with further interviews, including the interviews of the officers who were the subjects of the investigation.
- In the end, the investigation focused on the actions of two supervising officers, Officer 1 and Officer 2. These individuals were primarily responsible for the decisions most relevant to the complaints received. The other officer who was a subject of the investigation, Officer 3, did not play a critical role.

I can say that throughout the individual officers involved were cooperative with the investigation.

Legal Issues:

The essential issue in this matter is whether senior officials of the RNC obstructed justice. It was alleged that those senior officials improperly directed front line officers not to arrest, investigate, or charge an individual who was seen as important to the RNC investigation.

It is well accepted that police are entitled to exercise discretion in the performance of their duties. For example, sometimes police may charge a person for a small theft. Other times they may be prepared, because of certain circumstances, to deal with the matter without charges. That discretion can be exercised in a wide variety of factual and legal circumstances. As a result, it is difficult to develop clear tests for when it is appropriate and when it is not.

Members of the RNC have a legal duty to enforce the criminal law. If an RNC officer fails to meet that duty, or orders another officer to not enforce the law, they may be guilty of the offence of obstruction of justice.

Nevertheless, where a police officer has grounds to believe a person has committed an offence, or has grounds to conduct a more thorough investigation that might give grounds for a charge, they may exercise their discretion not to do so, depending on the circumstances. However, that discretion is not absolute. A police officer cannot do whatever they want, but instead must be able to justify their decisions rationally. The officer must also exercise their discretion honestly and transparently, and on the basis of valid and reasonable grounds. It can not be based on favouritism, or cultural, social, or racial stereotypes.

To justify the decision objectively, an officer must consider the material circumstances. This would include the seriousness of the offence. The more serious the offence the less likely that it would be okay to exercise discretion not to charge or investigate. Similarly, the justification for the exercise of discretion must be proportionate to the seriousness of the conduct. In the end, **it must be clear the discretion was exercised in the public interest**. Thus, while some exercise of discretion is routine and obvious, where it is not it will require the police officer to explain the decision in greater detail.

If an officer has not exercised their discretion appropriately, the next question is whether that decision actually obstructed the course of justice. In addition, to be an offence it must also be shown the officer specifically intended to obstruct justice. Thus, even where the exercise of discretion was wrong and an obstruction of justice has occurred, if the officer made an error of judgement, acting in good faith, they will not be found to have committed the offence.

Sometimes these tests might be easily met. Consider a case where a police officer stops a good friend who clearly is drinking and driving. If the officer failed to investigate just to help his friend avoid that serious offence, it would be quite easy to show an offence of obstruction of justice had been committed. Simply put, there is little public interest in not charging a person just to protect your friend.

Other times, however, the situation might well be much more complex. This case was exactly that.

The Facts:

Well prior to making of the allegations of obstruction of justice, the RNC had received information about serious and significant organized criminal activity. This included the possibility for ongoing harm. The RNC investigation was opened into that activity. It was complex, and involved an examination of many people and leads. It continued to evolve and grow over a period of several months. Given the investigation's significance various units in the RNC assisted, and the matter was closely supervised by senior officers of the RNC.

At one point, Officers 1 and 2 became concerned about the progress of the RNC investigation. They did not believe sufficient steps were being taken to move the file forward to a successful conclusion. They held several meetings with investigators. While our investigation suggested the RNC investigation was moving forward in a reasonable fashion, Officers 1 and 2 were anxious to obtain successful results more quickly, and felt not enough was being done by investigators to reach that result. Indeed, they felt opportunities had been missed. Unfortunately, it seemed that Officers 1 and 2 tended toward a management style that was top down in nature. As a result, they did not benefit from listening carefully to the positions of the investigative teams, and did not communicate effectively with their officers.

However, the fact was that the RNC investigation had not reached a conclusion, and it was reasonable to believe it was not near a successful conclusion. There is no doubt, based on all the evidence, that Officers 1 and 2 were very concerned about this, and very anxious to see matters move along with more dispatch. In their view, it was their duty to ensure that as much as possible was done to have the RNC investigation proceed successfully and quickly. They can not be faulted for having that point of view.

It is with that background that the actions of Officers 1 and 2 must be assessed. They each had a good faith belief that significant action was needed to solve a very serious case. They believed that the steps they were to take in this matter were needed to help resolve this significant file.

During this time, the RNC became aware of an individual who might be able to assist with the investigation. Officers 1 and 2, along with other senior members of the RNC, determined that attempting to gather further information about and from this person could be beneficial. In addition, advice and approval was sought from the Public Prosecutions Division of Justice and Public Safety before any steps were taken.

One of the approved techniques utilized in relation to this person (the Subject) was to conduct surveillance of the Subject's movements. This continued for many weeks, carried out by trained members of the RNC.

During this time, these officers carefully observed the movements of the Subject. While doing so, they observed what they believed to be several examples of criminal or quasi-criminal behaviour:

- a) Driving behaviour: During the early part of the surveillance, the Subject was observed on several occasions committing serious driving offences. However, these officers did not take steps to stop or arrest the Subject, as they had received direction they were not to intervene. It appears that direction came from one of the main investigators in the RNC investigation, Officer 3. Intervention had the potential to disclose the surveillance of the Subject, which would have negatively impacted the usefulness of the Subject to the RNC investigation.

Eventually steps were taken by the RNC to eliminate the driving risk. In the view of Officer 2, this eliminated any risks to the public. Indeed, during the remainder of the period that the Subject was being watched the Subject was not seen driving again.

- b) Theft and other offences: The Subject was a suspect in a few minor theft and other low end offences. During the period of observation the Subject was not charged for these offences, and subsequently no charges were laid. Officers 2 and 3 were involved in these decisions.
- c) Serious Property Offences: The police officers tracking the Subject observed the Subject as a party to two serious property offences. Nevertheless, no police officers intervened given the prior instruction they had received. This caused concern for the officers who were following the Subject. As a result, a meeting occurred where the concerns of these officers were discussed by several supervisors. The meeting included Officers 1, 2, and 3. Officer 2 reviewed the files in question. He concluded the information on file did not implicate the Subject. More importantly, the meeting concluded that given the seriousness of the offences involved in the RNC investigation, the RNC investigation took priority over "property offences". They determined non-violent offences would be tolerated, but if the Subject were to do anything violent that officers should intervene. Again, their view was that an intervention could disclose the surveillance of the Subject which might eliminate the ability to obtain evidence from the Subject.

Our review of the evidence shows that in fact there was evidence from the officers watching the Subject that implicated the Subject in these two serious property offences. This information does not appear to have been on the files when reviewed at the meeting noted above. Unfortunately, it would appear that Officers 1 and 2 did not engage effectively with those front-line officers, either to receive or give information. In this

circumstance, this engagement would have better informed the supervising officers, and would have also enabled the supervising officers to better inform those being supervised.

Instead, the officers responsible for observing the Subject simply received the order to only intervene where public safety was at risk, but not for property offences. This did nothing to quell the significant dissatisfaction those several officers felt about what was occurring. If they had been given a better understanding of all the circumstances behind the decision, it is very likely they would have at least appreciated that there was a rationale behind the order given.

It should also be noted that two days after this meeting, Officer 3 received conclusive information that the Subject was involved in these two serious property offences. However, this information does not seem to have been passed along to Officers 1 and 2 for their consideration.

- d) The Third Serious Property Offence: About two weeks after the meeting above, the Subject was definitively identified as committing a third serious property offence. This was reported by the officers observing the Subject. However, Officer 1 ordered that the Subject not be charged, consistent with the previous order that property offences would be tolerated.

Again, there was no discussion with the officers who observed the Subject's behaviour to explain why charges were not laid or pursued.

As discussed, these decisions by Officers 1 and 2 led to a great deal of dissatisfaction among certain officers within the RNC. Simply put, they observed an individual committing criminal offences and they were being told not to investigate or intervene.

Better communication about the decision-making process and the rationales involved would have resulted in a better understanding and appreciation for the direction the front-line officers were receiving. After all, it is very unusual for police officers to be told not to act when they observe an offence being committed. In that type of situation, it would be beneficial to ensure everyone impacted by such a decision had as much information.

Conclusions:

- 1) Was the decision by Officers 1 and 2 not to investigate or charge the Subject in relation to the various offences an appropriate exercise of discretion?

The RNC was facing an investigation involving organized criminal activity that had already lead to very serious offences. Officers 1 and 2 felt pressure to ensure the RNC

investigation reached an early and successful conclusion to both solve the outstanding matters and to avoid any further serious offences.

Based on evidence gathered in the SiRT investigation, it could be argued that in fact the RNC investigation was progressing well, and that no extraordinary steps were needed. Poor communication between senior officers and the investigative team impacted the effective sharing of that information.

However, even if that is the case, I have concluded that Officers 1 and 2 honestly held their views about the potential for the Subject to provide very useful evidence during the time the Subject was being watched by RNC officers. Based on the information gathered in our investigation, I have also concluded that it was reasonable for them to hold those views. This decision cannot be judged by whether or not this investigative step was successful, but only by whether it was reasonable in the circumstances facing the RNC at the time. I find that it was.

However, the decision whether there was an appropriate exercise of discretion is not answered just by this finding. All the circumstances must be carefully considered.

Essentially Officers 1 and 2 decided that if the Subject was arrested or charged for the potential offences it would eliminate the avenue of investigation they had embarked on. They wanted to avoid that from happening.

In this case, there were a variety of offences to be considered:

- a) Driving offences: These matters had the potential to cause injury to innocent third parties. For that reason, they might be considered similar to personal injury offences. However, the risk was all but eliminated by specific steps taken by the RNC. In that situation, the decision not to arrest made sense.
- b) Theft and other minor offences: These offences were relatively low end matters. The decision not to proceed on these matters in the hope of obtaining evidence to solve the RNC investigation also made sense.

At this point it may be fair to ask whether charges might have been pursued after the investigative technique that included surveillance had run its course, as it did after about two months.

While this seems sensible, it misses the fact that it is not possible to know what could happen next in the RNC investigation. Similar techniques might have been needed again. In addition, the laying of charges would necessarily disclose that the surveillance had been used. This too could have compromised investigative avenues, and thus made the subsequent laying of charges an impractical option.

Overall, therefore, the exercise of discretion in relation to the driving offences and thefts and other minor offences was appropriate. The next offences require additional consideration.

- c) **Serious Property Offences:** Observations were made of the Subject being involved in three serious property offences. These offences were not personal injury offences. However, they could turn into a personal injury offences should there be an encounter with an owner or other person associated with the property. This requires that a decision to not investigate or lay charges must be carefully thought out and considered.

My assessment of the evidence suggests that the review carried out of the first two serious property offences was superficial, and did not carefully consider what those who observed the actions of the Subject had to say. In addition, and more importantly, Officer 3, who had some input into the decision, later learned specific and direct evidence that confirmed the Subject's involvement with those two offences.

The decision regarding the third offence, which occurred a few weeks after the first two, was made quickly, and seemed to be based primarily on the previous decision that the Subject would not be arrested for property offences.

Thus, there is a real question whether it was a proper exercise of discretion to permit the Subject to commit serious property offences to ensure that surveillance could continue.

As noted above, this question comes down to whether the discretion was exercised in the public interest, and was reasonable. In answering this question, one must consider the fact that the decision was not made for an improper purpose: the goal was not to favour Officer 1 or 2 or someone they knew, nor was it made based on racial or other grounds of discrimination. Rather, the decision was made on the hope and expectation that serious crimes would be solved.

In addition, one must look at the trade offs that were made. Police were prepared to ignore serious property offences in exchange for the possibility they would receive important evidence allowing much more serious organized criminal activity to be solved and stopped.

Such decisions are difficult to judge after the fact. The benefit of hindsight was not available for Officer 1 and 2. At this point, it is necessary to keep in mind the situation facing the RNC at the time. As well, they had good reason to believe their technique would provide the evidence needed to solve the matter. Whether the technique actually proved useful is not the issue.

In this case, Officers 1 and 2 balanced very serious offences against property offences. This is an understandable trade off. However, it is clear that the number of serious property offences is still relevant. Thus, it is easier to accept turning a blind eye to one such offence, but many and frequent offences would likely not be acceptable. In this case there were three. That is concerning. However, I find it cannot be said to have reached a point of unreasonableness. In this case, although perhaps a close call, it cannot be said there was an inappropriate exercise of discretion to not properly investigate and charge the Subject with these offences.

The bottom line is that in police work there can be a variety of ways to deal with similar situations. Thus, the test for judging those decisions is not whether the decision was right or wrong, but whether the decision fell within a reasonable range of decision making. In this case, while this may not be the decision that everyone would have made, it can not be said it was unreasonable. Thus, this was a proper exercise of discretion.

- 2) If not, did the decision of Officers 1 and 2 have the effect that the course of justice was obstructed or defeated?

If I had found that there had not been a proper exercise of discretion, I would still not be able to conclude that those actions constituted an obstruction of justice without first considering whether the decision to not investigate or charge the Subject had the effect of obstructing justice.

In this case, these decisions led to an individual not being held to account for their criminal offences. Police officers have a duty to investigate and charge in such circumstances. Thus, had I found that the exercise of discretion was inappropriate, I would have found that the course of justice was obstructed by the actions of the police.

- 3) If yes, was it the intent of Officers 1 and 2 to obstruct justice, or were their decisions made in good faith and simply an error of judgement?

However, even if the course of justice was obstructed, I must still consider whether it was the intent of the officers to obstruct justice, or if they had a different intent.

In this case, the intent of Officers 1 and 2 was not to allow the Subject avoid criminal prosecution, but rather their intent was to gather evidence to solve very serious crimes, much more serious than those for which the Subject was not prosecuted. They did this in good faith, believing that was necessary to solve these serious crimes.

Thus, even if I was to find that Officer 1 and 2 had inappropriately exercised their discretion to not investigate or charge the Subject for the serious property offences, their

mistake was just that, an error, and it was an error made in good faith. Thus, their actions would still not constitute an obstruction of justice.

Therefore, having considered the actions of Officers 1 and 2 carefully and completely, the evidence demonstrates that they did in fact order front line officers to not investigate, arrest, or charge the Subject for the serious property offences. However, in these circumstances those decisions were made in an effort to solve much more serious organized criminal activity. Their decisions fell within the appropriate range of reasonableness, and in any event, were made in good faith for the purpose of solving serious crimes. Overall they were in the public interest.

Thus, I have found no grounds exist to consider any charges against Officers 1 or 2.

A handwritten signature in blue ink, reading "Ronald J. MacDonald", is written over a horizontal line.

Ronald J. MacDonald, QC
Director

