

RELEASE DATE: August 22, 2012



Manitoba

**THE PROVINCIAL COURT OF MANITOBA**

**IN THE MATTER OF:        *The Fatality Inquiries Act C.C.S.M. c. F52***

**AND IN THE MATTER OF: An Inquest into the death of:**

**NATHAN MICHAEL BORYSKAVICH  
(DOD: November 29, 2008)**

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**Report on Inquest and Recommendations of  
Judge Lawrence Allen  
Issued this 17th day of August, 2012**

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**APPEARANCES:**

MR. MARTIN MINUK, Inquest Counsel

MR. MARK MASON, Counsel for the RCMP

MS. CYNTHIA FLEMING, Sister of the Deceased



**Manitoba**

***THE FATALITY INQUIRIES ACT, C.C.S.M. c. F52***

**REPORT BY PROVINCIAL JUDGE ON AN INQUEST INTO THE DEATH OF:**

**NATHAN MICHAEL BORYSKAVICH**

Having held an Inquest respecting the said death on January 16, 17, 18, 19, 20, 23, 24, 25, 26, 27 and March 1, 2012, in The Pas and Winnipeg, Manitoba, I report as follows:

The name of the deceased is: NATHAN MICHAEL BORYSKAVICH

The deceased came to his death on the 29<sup>th</sup> day of November, 2008, at the Town of The Pas, in the Province of Manitoba.

The deceased came to his death by the following means:

Acute basal subarchnoid hemorrhage as a consequence of traumatic disruption of his right vertebral artery.

I hereby make the recommendations as set out in the attached report.

Attached hereto and forming part of my report is a list of exhibits required to be filed by me.

Dated at the City of Winnipeg, in Manitoba, this 17th day of August, 2012.

*“Original signed by”*

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Judge Lawrence Allen

Copies to: Dr. T. Balachandra, Chief Medical Examiner  
Chief Judge Ken Champagne, Provincial Court of Manitoba  
The Honourable Andrew Swan, Minister of Justice  
Mr. Jeffrey Schnoor, Deputy Minister of Justice  
Mr. Larry Hodgson, Acting Director of Regional Prosecutions  
Mr. Martin Minuk, Inquest Counsel  
Mr. Mark Mason, Counsel for the Royal Canadian Mounted Police  
Ms. Cynthia Fleming, Sister of the Deceased.



**Manitoba**

***THE FATALITY INQUIRIES ACT, C.C.S.M. c. F52***

**REPORT BY PROVINCIAL JUDGE ON AN INQUEST INTO THE DEATH OF:**

**NATHAN MICHAEL BORYSKAVICH**

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**INTRODUCTION:**

[1] By letter dated January 18, 2010, the Chief Medical Examiner, Dr. Thamburajah Balachandra, directed that an Inquest be held into the death of Nathan Michael Boryskavich for the following reasons:

- (i) To fulfill the requirement for an Inquest as defined in section 19(3) of *The Fatality Inquiries Act*;
- (ii) To determine the circumstances relating to Mr. Boryskavich's death; and
- (iii) To determine what, if anything, can be done to prevent similar deaths from occurring in the future.

[2] Section 19(3) of *The Fatality Inquiries Act* reads as follows:

19(3) Where as a result of an investigation, there are reasonable grounds to believe

- (a) That a person while a resident in a correctional institution, jail or prison or while an involuntary resident in a psychiatric facility as defined in *The Mental Health Act*, or while a resident in a developmental centre as defined in *The Vulnerable Persons Living With a Mental Disability Act*, died as a result of a violent act, undue means or negligence or in an unexpected or unexplained manner or suddenly of unknown cause; or
- (b) That a person died as a result of an act or omission of a peace officer in the course of duty;

The Chief Medical Examiner shall direct a Provincial Judge to hold an Inquest with respect to the death.

[3] Nathan Boryskavich died in The Pas Hospital after having been taken there by Royal Canadian Mounted Police ("RCMP") officers who had dealt with him pertaining to a call to a domestic disturbance. Evidence indicated that Mr. Boryskavich went into medical distress after being arrested and detained by the attending RCMP officers. As it would appear his death resulted from an act or omission of a peace officer in the course of duty, the calling of an Inquest is mandatory under Section 19(3)(b) Bystanders.

[4] On May 14, 2010, a Standing Hearing was held. Counsel for the RCMP were granted standing. The family of the deceased also requested standing. Ms. Cindy Fleming, the deceased's sister, was given standing to represent the deceased's family.

[5] The Inquest hearing had been scheduled to commence early in 2011, but resulting from matters extraneous to the Inquest, it was agreed by all parties to adjourn. A new commencement date was set for January 16, 2012.

[6] Evidence was heard January 16-20, January 23-27 and March 1, 2012, at which time the Inquest was adjourned for my written report. The report is to set out when, where, and by what means the deceased person died, the cause of death, the name of the deceased person, and the material circumstances of the death. The report may recommend changes in the programs, policies or practices of the government and the relevant public agencies or institutions or in the laws of the province where the judge is of the opinion that such changes would serve to reduce the likelihood of deaths in circumstances similar to those that resulted in the death of Mr. Boryskavich (*The Fatality Inquiries Act*, section 33[1]).

## **REPORT**

[7] The deceased person is known as Nathan Michael Boryskavich and according to the autopsy report (Exhibit 1, Tab 7), he was pronounced dead at 12:15 P.M. on November 29, 2008. The cause of death is noted as being “acute basal subarachnoid hemorrhage due to the consequence of traumatic disruption of right vertebral artery”.

[8] An Inquest respecting the death of Nathan Michael Boryskavich took place in The Pas, Manitoba, commencing on January 16, 2012.

[9] I hereby report as follows.

[10] The name of the deceased is Nathan Michael Boryskavich.

[11] The deceased came to his death as a result of an altercation with RCMP officers who had attended at the residence of the deceased’s ex-domestic partner, Lorna Fitzner. In the course of dealing with the domestic dispute, Mr. Boryskavich became combative with police. As a result of the physical altercation with police, Nathan Boryskavich was rendered unconscious. He was rushed to The Pas Hospital where it was later diagnosed that he had suffered a tear in his vertebral artery (the major artery running up the neck into the skull and delivering blood from the heart to the brain). This tear resulted in a significant subarachnoid hemorrhage and Mr. Boryskavich’s subsequent death.

## **SUMMARY OF THE EVENTS OF NOVEMBER 28, 2008**

[12] At approximately 8:27 a.m. on November 28, 2008, RCMP in The Pas were called to attend to a domestic matter at 377 Keewatin Street. The address is that of a side-by-side family residence in a residential neighbourhood of The Pas, Manitoba.

[13] Police were called by Lorna Fitzner, the renter at the location in question. Ms. Fitzner lived in the side-by-side with her 12-year old daughter, Cheyanne. In September of that year, Ms. Fitzner had contacted Nathan Boryskavich, her former domestic partner and the father of her daughter, to come to The Pas to temporarily assist with the care of their child. Mr. Boryskavich arrived in The Pas on November 11, 2008, and had lived in the Fitzner residence continuously until the date police were called.

[14] On the morning of November 28, Mr. Boryskavich had become enraged at Lorna Fitzner and she was concerned for her physical safety as she had experienced numerous, previous incidents of domestic assaults involving the deceased. She called police to have Mr. Boryskavich removed from her home.

[15] When police arrived, Ms. Fitzner was waiting outside the dwelling. In total, five RCMP officers arrived and entered the residence. Cheyanne Boryskavich, her 12-year old daughter, was also in the home.

[16] Police initially tried to speak to Mr. Boryskavich, who was seated inside the residence's kitchen with his back to the wall. Throughout this period, the child was screaming at police, demanding that they leave.

[17] While interacting with the attending officers, Mr. Boryskavich became increasingly agitated. This accelerated temperament eventually resulted in his throwing a punch at one of the officers. The officers very quickly forced the combative subject to the kitchen floor and attempted to put him into handcuffs. This was not easily done, as he was refusing to produce his arms and was kicking and bucking his body in an attempt to fight the officers. In order to subdue the subject, he was pepper sprayed and kicked twice in the mid-body area. Additionally, one officer admitted administering a glancing foot strike to the head area of the prone subject. At some point, Mr. Boryskavich was raised to his feet, at which time he kicked out at Corporal Gabe Simard, the most senior of the officers present.

[18] There is some discrepancy from the evidence at the Inquest as to the details of the struggle to restrain and detain Mr. Boryskavich, but he was either taken down and "proned out" two or three times, possibly one of those occasions being outside on an attached, snow-covered patio. There is also some discrepancy as to whether Mr. Boryskavich slipped and fell on the patio, whether he was dropped or whether he was placed down. There was also discrepancy as to how he was taken from the elevated patio down to the yard and eventually through the yard to the police truck, which was parked at the back of the residence.

[19] It is fairly certain that sometime after he was moved off the patio, he was noted to be unconscious and not breathing. From this point, he was rushed to The Pas Hospital. At the hospital, he was dealt with by paramedics and doctors who endeavoured to save his life.

[20] Dr. Gillian Kumka told the Inquest that Mr. Boryskavich was not breathing when he arrived at the hospital. She felt that there must be an inter-cranial problem and she ordered a CT scan. The scan indicated a significant subarachnoid hemorrhage. His family were contacted and indicated that they did not want him air-lifted to Winnipeg in light of the medical indications as to the brain damage he had suffered.

[21] Mr. Boryskavich died the next day. A subsequently conducted autopsy revealed that he had suffered a vertebral artery break. One of the conducting physicians, Dr. Mark Del Bigio, said that his injury would most likely have resulted from either a twisting of the neck or a kick to the neck.

### **WITNESSES APPEARING AT THE INQUEST**

#### **Brian Harder (Corporal RCMP)**

[22] Corporal Harder is an officer in the Forensic Section of The Pas detachment of the RCMP. He presented Exhibit 1, Appendix 13, a book of photographs taken of the exterior and interior of 377 Keewatin Street in The Pas, as well as photos taken of RCMP truck C29 showing three areas of blood staining in the rear seat.

#### **Melanie Snow-Woods, Regional Manager of Medical Records for The Pas Hospital**

[23] She brought with her all medical records pertaining to the admission of Nathan Boryskavich. These records became Exhibit 5 in the proceedings.

#### **Lorna Fitzner**

[24] Ms. Fitzner is the former common-law partner of the deceased. She testified that she met him in 1994 and they had a child together, Cheyanne, in 1996. She also said that she stopped living with Nathan Boryskavich in 2001 and subsequently moved to The Pas in 2006.

[25] Ms. Fitzner testified that as a result of behaviour issues with her daughter, she contacted Nathan Boryskavich in September, 2008, and asked him to come to The Pas to temporarily live with them and to help with the child. As a result, Nathan Boryskavich arrived in The Pas on November 11, 2008, and stayed with them until the incident on November 28, 2008.

[26] Ms. Fitzner told the Court that Nathan Boryskavich was becoming increasingly difficult for her to cope with and that prior to November 28, she had asked him to leave, but that he was refusing to do so. On the morning of November 28, Nathan Boryskavich became considerably agitated with Ms. Fitzner, demanding \$200.00 from her. Irene Fleming, the deceased's mother, testified that because her son was on a disability allowance and he lived with her, she received money for his room and board. She further stated that she had

sent \$200.00 of that money to Lorna Fitzner to cover her expenses while her son, Nathan, was living with Ms. Fitzner. Apparently, the deceased believed that this money should be provided to him. On the morning of November 28, he demanded of Ms. Fitzner that she immediately provide \$200.00 to him. When this was not immediately forthcoming, he became aggressive and threatening to his ex-partner.

[27] Ms. Fitzner testified that in the past, Mr. Boryskavich had regularly been physically violent towards her and that on several occasions, she had called police to deal with him. On the morning of November 28, she felt he was escalating to the point of violence and accordingly called police to ask that he be removed from her home. She told police dispatch that he was being violent and throwing things in the house. Ms. Fitzner waited outside her residence and met with three RCMP officers who arrived in the back in two vehicles. She was instructed by police to remain outside the house while the officers entered.

[28] She stated that from her position just beside the residence, she could hear RCMP talking to Nathan Boryskavich. Sometime later, two additional officers arrived and also went into the residence. She said that she heard a “rumbling” sound in the house and then decided to enter the residence from the front. At that point, she tried to comfort her daughter, Cheyanne, who was in the residence and screaming at police. She heard one of the RCMP members tell the girl that if she did not behave, she would be taken in as well. Ms. Fitzner said that she only briefly observed police struggling with Nathan Boryskavich in the kitchen of her home, but she did see one officer with his foot on Mr. Boryskavich’s head. She also said some of the officers had their knees on him and that he was asking them to “quit spraying me”.

[29] Lorna Fitzner also said that although she did not see how police took Nathan Boryskavich out of the house, she did see him on the ground at the foot of the deck stairs and that some officers were on top of him on the ground.

[30] Lorna Fitzner told the Court that a pool of blood was left on the floor of her kitchen and in the snow where he was lying at the foot of the stairs.

[31] Ms. Fitzner estimated that the total elapsed time police were in her house was approximately 30 minutes. Additionally, she told the Court that Constable Ballantyne, one of the original attending officers, returned to her residence approximately five to ten minutes after Nathan Boryskavich had been taken away to take a statement from her. She said that she had also received further calls from police asking as to his medication, but that at no time was she ever told that Mr. Boryskavich was in critical condition.

[32] Ms. Fitzner expressed significant unhappiness that she only found out several hours later from a relative, that Nathan Boryskavich was on life support in the hospital and not expected to survive.

[33] Ms. Fitzner said that later on the 28<sup>th</sup>, she was advised by Constable Ballantyne that she could clean her residence. She told the Court that five walls of her kitchen had stains from what she believed to be pepper spray. She pointed out that one of those stains was visible in photograph 21 from the book of photographs of the scene.

[34] She also testified that on the approximately five or six earlier times she had required police assistance to remove Nathan Boryskavich, he had never left willingly and had always fought with police.

### **Cheyenne Boryskavich**

[35] Cheyenne is the 15-year old daughter of the deceased and Lorna Fitzner. She testified that she and her mother were joined by Nathan Boryskavich on November 11 and that from the time of his arrival, her mother and father had regularly argued.

[36] She testified that Nathan Boryskavich had had six beers the night before.

[37] Cheyenne also testified that on the morning of November 28, her parents were fighting and her mother called police. She said that she was in the living room when the police arrived and that her father was angry that the police had been called. She told the Court that she viewed the fight between her father and the police from an area at the end of a hallway leading to the kitchen, only a few feet from where the altercation was taking place. She described what happened as the police "jumping" her father. She said she was "telling them to stop" while police were kicking him and holding him down with their feet. Ms. Boryskavich said they were kicking him in the head and kneeling on him. When asked to elaborate, she said that it was either one or two policemen who were kicking Nathan Boryskavich. She said after he was handcuffed, he was dragged out of the house and thrown into the back of the police truck. She also said that from the time they picked him up in the kitchen to put him in the vehicle, his head was hanging as if he was unconscious. Ms. Boryskavich also testified that there was a loud noise when her father was taken down the deck stairs, as if he had fallen down the stairs.

### **Irene Fleming**

[38] Ms. Fleming told the Court that she is Nathan Boryskavich's mother and that her son had been living with her in Belmont, Manitoba, for a number of months prior to his arrival in The Pas. She told the Court that his source of income was a welfare allowance arising from a mental health disability. She further stated that her son at the time of death, was taking two medications related to his mental health issues.

[39] Ms. Fleming told the Court that Nathan Boryskavich had consumed alcohol to excess "since he was a little kid", and that his drinking had escalated in

recent years. She also said that throughout his life, he frequently stated that he wanted to kill himself and that he regularly threatened to do so. She testified that at some point, he had phoned her from The Pas and told her that he was going to kill himself. When she asked him how he would do that, his reply was that “maybe he would get the cops to do it”.

[40] Ms. Fleming told the Court that her son clearly hated police and had been in many violent situations with police and others. She told the Court of an incident only three weeks before his death when Nathan Boryskavich was in a bar fight with three people, knocking two out and biting the third.

[41] Ms. Fleming also said that she had received a phone call while Nathan Boryskavich was in The Pas, from her son’s doctor. The doctor told her that her son had terminal liver disease and only months to live. Ms. Fleming said that on hearing this news, she was afraid that this would make her son even more “off the wall”.

[42] Ms. Fleming related that the last time she heard from her son was the morning he died. He had called at approximately 7:00 a.m. to tell her that he had a horrible headache and that Lorna Fitzner had taken his money. She said he regularly complained of serious headaches.

### **Cynthia Fleming**

[43] Cynthia Fleming, Nathan Boryskavich’s sister, testified that her brother had been assaultive and self-consumed all his life. She stated that she believed that he had serious mental health problems which were not being managed properly. She said that when her brother drank, it took him to a point of “not coming back”, and that his hatred of police was reflected in all his dealings with them. She also said that it was her observation that when he fought “he fought like crazy”. She said that she had seen him fight on possibly ten occasions and “he fought like an animal”.

[44] Ms. Fleming also said that she believed he had tried to kill himself approximately five times.

[45] She said that the only improvement she ever saw in his character and behaviour took place for a short while after he got out of jail. She attributed that to better nutrition in jail and the fact that he was regularly and appropriately medicated in jail with medication which was not affordable when he got out. She felt that this improvement would have had a better chance of lasting if he had transitioned out of jail into a half-way house.

[46] Ms. Fleming was very concerned that RCMP had not made sure that Cheyanne and Lorna Fitzner were out of the house when the arrest was made. She felt that it was very much something that a 12-year old child should not have been exposed to. She said her brother was a troubled man who was “going to

find death as he found it". She was not surprised that he put himself in a position to be hurt by police.

**Dr. Mark Del Bigio, Neuropathologist**

[47] Dr. Del Bigio testified that he attended the autopsy of Nathan Boryskavich on December 1, 2008, and examined the head and neck (but not the scalp) of the deceased. He concluded that Mr. Boryskavich suffered an acute subarachnoid hemorrhage resulting from a tear in the vertebral artery.

[48] Dr. Del Bigio testified that his exam showed no evidence of pre-existing artery disease or aneurism. There were no bruises found on the surface of the brain.

[49] The doctor testified that he found a small tear in the vertebral artery which transports blood to the brain. This blood is at high pressure due to its proximity to the heart and even a small opening can result in a significant quantity of blood escaping into the area around the brain. Asked how long Mr. Boryskavich would have retained consciousness after this injury, the doctor stated that period would be somewhere between a few seconds and several minutes.

[50] The doctor stated that the most likely cause of a vertebral tear is a forced twisting of the neck, but it could also be caused by a blow to the neck. In this case, his intuitive thinking was that the cause was a twisting of the neck.

[51] One of the reasons why Dr. Del Bigio did not feel that the injury resulted from a kick to the head is because he has examined many brains from people who have been kicked in the head and they are normally badly bruised.

[52] The doctor also said that violently resisting being restrained, weight from others on the subject's back, etc. could increase the strain on the neck. He said that it is also possible that by "thrashing about", an individual could produce this injury on their own.

**Corporal Gabe Simard**

[53] Corporal Simard told the inquiry that he commenced service with the RCMP in The Pas in 2001, became a corporal in 2008 and was re-posted from The Pas in 2010.

[54] Corporal Simard testified that he was working in The Pas detachment on the morning of November 28 when the call was received from dispatch in Winnipeg concerning Lorna Fitzner's 911 call that morning. The officer explained that a 911 call from The Pas is initially received at the call centre in Brandon, Manitoba, relayed to Winnipeg (as Winnipeg is the call centre for The Pas) and then to the detachment in The Pas.

[55] Corporal Simard parked behind Ms. Fitzner's residence at 377 Keewatin Street after going there in police truck C29. He said he was aware that RCMP Constables Lenartowich and Rollins were en route and that they actually arrived just before he did.

[56] He told the Court that the Fitzner residence was a side-by-side duplex with attached deck at the back that is accessed by eight stairs. He said that as he approached the residence, he noticed a computer tower and a coffee cup apparently randomly thrown in the snow near the deck.

[57] At this point, he was approached by Lorna Fitzner, who had been waiting for police outside to the east side of the residence. Ms. Fitzner told him that Nathan Boryskavich was inside, that he had been violent towards her in the past, that he was threatening to take pills and that he was upset and distressed.

[58] Corporal Simard told the Court that he had received information from the RCMP dispatcher that there was a 12-year old child in the residence. Upon entering the house, the girl was screaming expletives at police, demanding that they leave.

[59] Corporal Simard told the Court that quite soon after entering the residence, he told Nathan Boryskavich that he was under arrest for breach of the peace. He said that he informed him that Ms. Fitzner wanted him to leave. Corporal Simard went on to say that the deceased became increasingly agitated when told he was being arrested and informed officers that he had Hepatitis C and third stage liver disease. The discussion between the deceased and police took place with Mr. Boryskavich seated in a kitchen chair, with his back against the east wall, close to the entrance patio doors.

[60] At some point, Nathan Boryskavich told police that he was not prepared to leave with them and he did not care if he was hurt by police. While the officers were trying to reason with the subject, he stood up and grabbed for a prescription pill bottle which was near him on the kitchen table. Corporal Simard took the bottle away from Mr. Boryskavich and this resulted in his bringing his elbow back into the face of Constable Rollins. Other officers then tried to restrain Mr. Boryskavich, who began punching, kicking and strenuously fighting back.

[61] Corporal Simard related that Mr. Boryskavich was taken to the floor by all five officers and eventually handcuffed behind his back. While on the floor of the kitchen, the subject fought police by kicking, refusing to provide his hands for the handcuffs, and trying to spit at the attending officers.

[62] Corporal Simard said that during the melee, he applied two "foot strikes" to Mr. Boryskavich's hip area and one in a glancing blow to his head. He testified that he applied the foot strikes as a "pain compliance technique", suggesting that the pain of the kick to the body would produce compliance. Corporal Simard

claims that he saw blood in Mr. Boryskavich's spit, and because of the earlier claim as to Hepatitis C and liver disease, he was fearful for his own and the other members' safety. The Corporal also related that he was aware that at some point, one of the members had deployed pepper spray.

[63] After Nathan Boryskavich was finally handcuffed, members brought him up onto his feet. Corporal Simard says that at this point, Mr. Boryskavich kicked out at him, hitting him in the groin. The officers then took their suspect to the floor again in a "hard, fast, take-down" to gain control. This witness then told the Court that four of the attending officers carried the subject out of the house and down the outside deck stairs. Once outside, Corporal Simard realized that the subject was gasping for air and the decision was made to put him in the back seat of the police truck and rush him to hospital. At the point where he was placed in the vehicle, the subject had lost consciousness.

[64] Corporal Simard said that he did not attend to the distraught 12-year old, nor have her removed because his focus was on Nathan Boryskavich. The Corporal agreed with Cheyanne Boryskavich's contention that she watched most of the altercation which took place between police and her father.

[65] Corporal Simard testified that he did not check CPIC (criminal records check data bank), nor had police dispatch alerted him to any details of Nathan Boryskavich's past dealings with police. Corporal Simard acknowledged that the information from CPIC would have not only shown that Mr. Boryskavich had many previous convictions for assaults and assaults against women, but also assaults and difficulties with police officers. Additionally CPIC featured several cautions about Mr. Boryskavich, notably that he is a violent individual and that Lorna Fitzner had a court order that he not be in her company.

[66] The Corporal told the inquiry that he and his crew were in the Fitzner house for approximately eight to nine minutes and that the child, Cheyanne, was basically screaming the entire time. He agreed that her behaviour may have escalated her father's agitation and that if he had this scenario before him again, he would arrange for one of the other members to get the child out of the house.

[67] Corporal Simard said that when he notified Nathan Boryskavich that he was under arrest and that he had to come with the officers, the subject refused to co-operate and refused to leave. When the Corporal suggested that he did not want him to get hurt, Mr. Boryskavich said "I want to get hurt".

[68] In summarizing, Corporal Simard conceded that he and his crew erred in the following ways:

- a) not arresting Nathan Boryskavich as quickly as they should have;
- b) not removing the daughter from the scene;
- c) not checking CPIC as to Mr. Boryskavich's criminal history;

- d) perhaps seeing the situation as presenting concern for grievous bodily harm when the risk was in reality not to that level;
- e) the crew did not adequately protect Nathan Boryskavich's head and neck;
- f) perhaps should have administered CPR immediately on realizing that Nathan Boryskavich was unconscious;
- g) that their procedure in taking him down the patio stairs may have resulted in "losing him" on the stairs.

[69] Corporal Simard testified that he is unaware of any specific training provided by medical professionals to the RCMP as to caring for heads and necks.

### **Dr. Gillian Kumka**

[70] Dr. Kumka testified before the inquiry that she was working as an emergency room doctor on November 28, 2008, when Mr. Boryskavich was brought to The Pas Hospital. She said that the deceased was not breathing when he arrived at the hospital. She said that he had scratches on his face and was bleeding from his ear. She thought the blood may have been from earrings having been torn from his earlobe. She said that he had no other open wounds and his scratches seemed superficial. She further observed that Mr. Boryskavich's pupils were dilated and that, to her, indicated reduced brain activity. She felt that he had some form of an intracranial problem and accordingly, ordered a CT scan. This test revealed a subarachnoid hemorrhage. The doctor made efforts to arrange neuro-surgical treatment for Mr. Boryskavich in Winnipeg, but after discussion with Cindy Fleming, who represented the deceased's family, it was concluded that he would remain in The Pas, being kept as comfortable as possible.

[71] The doctor said she noticed that Mr. Boryskavich smelled of alcohol and that a blood alcohol reading was done and that test revealed the alcohol in his blood was about 15% over the legal allowable limit to drive. She was not aware of extensive marking or injuries on his face or body. She told the Court that the only area from which bleeding may have happened was his ears.

### **Dr. T. Blachandra**

[72] Dr. Balachandra reported that he conducted an autopsy on Nathan Boryskavich in Winnipeg on December 1, 2008.

[73] In this endeavour, he was assisted by Dr. Mark Del Bigio, who examined the subject's head and neck. Dr. Balachandra testified that he was unable to find any external injuries to the scalp, lip or tongue, but that Mr. Boryskavich had minor injuries below the mid-line of the body. The doctor did note bruises on the

right side of the deceased's forehead, at the root of his nose, on his cheek, and a small abrasion on his ear lobe.

[74] The doctor commented on the linear marks on the deceased's neck and suggested that these marks, in his opinion, were likely made by fingers grabbing at the deceased's skin.

[75] Dr. Balachandra said that he found no evidence of pulmonary embolism or blood clots. The doctor stated that the deceased suffered a tear of a vertebral artery which resulted in extensive bleeding within his skull. He provided his opinion that this tear likely resulted from a sudden hyper-extension or torsion of his neck. It was the doctor's opinion that this kind of injury can result from direct trauma, but that because the tear was relatively high on the artery and actually up within the protective confines of the skull, he felt it more likely resulted from torque.

[76] Dr. Balachandra also stated that because the deceased had a relatively high blood alcohol reading, he may have been more susceptible to an injury of this nature. Dr. Balachandra said that all of the injuries he found on Nathan Boryskavich's body were consistent with a person who was trying to break away from those who were trying to subdue him. The doctor also reported that from the instant of a vertebral tear, the time lapse before becoming unconscious would be somewhere from immediate to two to three minutes.

### **Arlene May Moore**

[77] The next witness before the hearing was Arlene May Moore of The Pas. Ms. Moore testified that she lived in the connected side-by-side dwelling at 375/377 Keewatin. She was home on November 28, 2008, when the police were called next door.

[78] She said that she initially heard loud noises coming from the Fitzner side of the building sometime between 8:30 and 9:30 in the morning. She said it sounded like a brawl was taking place. She could also hear a young girl screaming. Ms. Moore said this "ruckus" lasted for approximately 15 minutes at the end of which she looked out the back window of her residence into the shared back yard. At this point she said she saw two RCMP officers carry a man out "head first" and then drop him in the snow. She said the man was handcuffed with his hands behind his back and he was not struggling. She said the man's eyes were open and his lips were moving as if he was speaking. Ms. Moore said that she had seen this same man carrying beer into the residence the night before.

### **Professor Rick Parent**

[79] Former police officer, Rick Parent, testified before the inquiry. Professor Parent, in addition to 30 years as a police officer, has obtained a PhD in Police Studies. He has testified in multiple other jurisdictions as a "use of force expert".

[80] Professor Parent told the Inquest that police have an ethical, legal and moral obligation to use the least amount of force possible.

He said that the RCMP utilize a use of force model which is essentially a “rapid decision making elevator which goes up and down depending on the circumstances”. He said that the order of escalation for police involvement is:

- i) Presence – the fact that they are there tempers most volatile situations;
- ii) Dialogue and communication – apparently 97% of all incidents are resolved at this point;
- iii) Empty-hand compliance – this use of force is employed when the accused is not co-operative or refuses to move as directed.

[81] Professor Parent also testified about other police tools and techniques, such as the use of pepper spray and tasers. He said pepper spray (also known as OC or bear spray) can only be used at close quarters and its use presents the risk of disabling police officers as well as the subject of police attention.

[82] Professor Parent told the Court that tasers are not standard issue RCMP equipment and are not normally useful in close quartered situations. He did say that the RCMP have available a “touch stun” taser which when touched to an individual, temporarily disables the person touched. He said that that weapon may have been of value in getting handcuffs on Mr. Boryskavich.

[83] In assessing the RCMP response to the call from Lorna Fitzner, Professor Parent said that safety is the number one consideration of policing, which includes safety of all the involved parties, including police officers. To that end, he said it is paramount that officers know as much about what they are getting into as possible. Officers need to know who they are dealing with and whether firearms, etc. are present. Professor Parent expressed significant surprise that the officers who responded to Ms. Fitzner’s call did not have background information and minimally CPIC information as to the alleged perpetrator of the disturbance. He indicated that the dispatcher should have provided this information to the attending officers and if this was not done by dispatch, it should have been requested by the officers.

[84] Professor Parent testified that the first issue that should have been dealt with by the officers at the scene was the removal of Ms. Fitzner’s teenage daughter from the residence. This should have happened firstly for officer safety, as her yelling and becoming upset interfered with the work of the officers. The behaviour of the child may have been a further accelerant to the already emotionally charged atmosphere. Additionally, it is obviously far less than ideal that this adolescent witnessed the takedown and detention of her father.

[85] Professor Parent felt that attending officers did not follow recognized “best practices” in the following ways:

- i) After engaging Nathan Boryskavich in a dialogue, that dialogue should have been kept brief and he should have been taken almost immediately to the door. Professor Parent said Nathan Boryskavich should have been given only about 60 seconds to comply with police orders and if he did not, he should have been arrested and hustled out. In this case, Nathan Boryskavich was evidencing pre-assaultive clues and these should have been a trigger to the officers that continued conversation was only allowing Nathan Boryskavich “to pump himself up” and to “feel out the police as to their strengths and weaknesses”. Professor Parent said that when dealing with individuals in situations like this, you first ask them to leave and if they don’t, you tell them to leave. If they still don’t leave, you make them leave;
- ii) Any form of engagement should have taken place outside of the residence and definitely not in a kitchen area;
- iii) Nathan Boryskavich should not have had his shoes provided to him as his subsequent kick at Corporal Simard was with a shod foot as opposed to a bare foot;
- iv) Nathan Boryskavich provided clues that he was prepared to be aggressive and these clues should have been acted upon sooner;
- v) Rather than refusing to allow Nathan Boryskavich to pick up his pill container, which was the precipitating event to the altercation, he should have been allowed to take his medication and it could have been removed from him after he was secured;
- vi) Kitchen towels were visible in the photographs of the scene. Officers should have placed a towel in front of Nathan Boryskavich’s face to stop him from spitting, rather than twisting his head and directing his mouth to the floor;
- vii) Although several of the officers testified that they feared grievous bodily harm, Professor Parent did not agree that this situation met that standard. He felt that grievous bodily harm required a “much higher level” of concern.

[86] In concluding his testimony, Professor Parent believes that the RCMP need more training opportunities for officers both at the RCMP depot when recruits are being trained and afterwards, when they are actively deployed. He also feels this training should be conducted in mock situation settings and that the force needs to do more training as to physical skills.

[87] Additionally, he suggested that in the Nathan Boryskavich situation, although there were five officers in attendance, all of them, with the possible exception of the corporal, were quite inexperienced. Professor Parent suggested at the Inquest that the ratio of experienced officers to those with little experience should be higher.

[88] Finally, he suggested that experiences like this one with Nathan Boryskavich should be used by the RCMP for training purposes. He felt that each of the five involved officers should have been extensively de-briefed as to what happened and how procedures may have been improved.

### **Constable Brad Ballantyne**

[89] Constable Ballantyne was one of the attending RCMP officers. He testified at the Inquest that when he arrived at the Fitzner residence, he went inside and saw Corporal Simard and Constable Rollins standing in the kitchen area with an upset, agitated individual. He noted "they were having no success dealing with him".

[90] Constable Ballantyne also noted that the angry individual, Nathan Boryskavich, told police that he had Hepatitis C and a liver disease.

[91] Further, Constable Ballantyne said that Mr. Boryskavich grabbed for his pill bottle and this resulted in Corporal Simard and Constable Rollins grabbing him. "He then pulled away and raised his right arm as if to punch. I grabbed him and ended up on the floor. I was on top of him on his back. My body on his upper back".

[92] Constable Ballantyne testified that he sprayed pepper spray directly into Nathan Boryskavich's eyes while holding him on the floor. He also said that blood was coming from Nathan Boryskavich's mouth area. He does not remember him spitting.

[93] Constable Ballantyne testified that over the course of the interaction with police, Nathan Boryskavich was taken down to the floor three times. He said that after Mr. Boryskavich was taken out of the house, he slipped on the snow-covered patio and went down. Eventually, Constable Ballantyne took him down the patio steps by himself while holding his arm, and it is possible that Constable Simard was holding his feet. Constable Ballantyne put him down in the snow at the bottom of the steps. At this point, Nathan Boryskavich "was breathing hard and his eyes were closed".

[94] Constable Ballantyne confirmed that he had no information whatsoever about Nathan Boryskavich prior to attending at the call. He said this was not unusual. "Many times we don't get much information. Half the time, we get no information".

[95] Constable Ballantyne did not see any of the other officers kick Nathan Boryskavich.

[96] When asked if he felt that he had received adequate training, Constable Ballantyne stated that "I don't think we get enough training (as to dealing with) emotionally disturbed people".

### **Corporal Colby Argue**

[97] Corporal Argue was not one of the attending officers, but at the time of the events which are the subject of the Inquest, he was an investigative officer with the RCMP. He also provided a list of qualifications which included certification as a public police safety course instructor and an instructor in IM/IM, which is the RCMP's model for police response to high stress apprehensions.

[98] Corporal Argue was asked about RCMP training. He stated the following:

- i) New recruits are trained at the Regina depot for 24 weeks and receive training in driving, police tactics and firearms;
- ii) Once posted, new members are trained for six months in a field-coaching program;
- iii) RCMP members are required to attend the Regina depot for "block training" every three years;
- iv) IM/IM (Incident Management Intervention Model) training is provided at the depot, is part of all block training, is part of all other training, and is "constantly reinforced".

[99] Corporal Argue testified that learning background information as to a subject is the officer's responsibility. He also agreed that by not doing a CPIC search, the attending officers did not realize that Lorna Fitzner had a Protection Order against Nathan Boryskavich and that he was breaching that Order by being in her house.

[100] Corporal Argue testified that in his opinion, the attending officers erred in that they had not discussed a plan as to how to deal with the situation they faced.

[101] Corporal Argue also agreed that the scene of the altercation should have been better documented after the fact. Photographs of blood on the kitchen floor and measurements should have been taken.

[102] Additionally, he conceded that some investigative personnel should have interviewed Lorna Fitzner's neighbours as to what they saw or heard.

[103] Corporal Argue testified that the "foot strikes" administered by Corporal Simard are not part of RCMP protocol for dealing with spitting. He said RCMP have extensive training as to dealing with spitting, but it does not include foot strikes.

[104] Corporal Argue told the hearing that proper police procedure involves holding onto one arm of a handcuffed prisoner while he is being moved. He agreed that earlier testimony which said that no officer was holding Nathan

Boryskavich as he went out the door is inconsistent with proper procedure. He also said that officers are trained to try to have apprehended individuals walk down stairs and if they have to be carried, then someone should be controlling the feet.

[105] Corporal Argue also said that Ms. Fitzner's 12-year old daughter, in his opinion, should have been removed from the scene and a member should have been posted to keep her out.

### **Constable Sheldon Patrick Beaton**

[106] Constable Beaton testified that he was partnered with Constable Ballantyne of The Pas RMCP on the day they were called to the home of Lorna Fitzner.

[107] He entered the residence and quickly realized that Nathan Boryskavich seemed upset. At some point, a struggle broke out and Nathan Boryskavich was taken down to the floor. He was "proned out". The officer stated that it "took all of us to get control of him". After Mr. Boryskavich was brought to his feet, he "took a kick at Corporal Simard". He was then taken outside and carried down the stairs by Constable Ballantyne holding him by the arm. His feet "clunked down the stairs". The officer noted that their subject was limp at the bottom of the stairs.

[108] Constable Beaton does not recall Nathan Boryskavich spitting at the officers while being apprehended.

### **Constable Ian Lenartowich:**

[109] Constable Lenartowich provided similar testimony to other RCMP witnesses in terms of the general nature of the incident. He told the Inquest that at the time of the incident, he had just over three years of service. He said that after Nathan Boryskavich was prevented from access to his pills, he was grabbed and taken to the floor by all the attending officers. Mr. Boryskavich was on his front with his arms pinned underneath. He said that one or more of the other officers put their knees on the subject's back to hold him down.

[110] After getting Nathan Boryskavich out of the house, he was taken down on the deck. He said "I don't know if he fell or if we took him down". He was then taken down the patio stairs by Constable Ballantyne and at that point, Constable Lenartowich said he noticed that the subject had gone limp. He also said that "he may have hit his head on the stairs".

[111] This witness testified that he was unaware of pepper spray being used. He also did not see blood on the floor, but did note a bit of blood on Nathan Boryskavich.

[112] Constable Lenartowich said that he never was de-briefed about this incident by anyone involved with the RCMP.

### **Constable Brad Rollins**

[113] Constable Rollins testified that on the day in question, he was partnered with Constable Ian Lenartowich. He told the Court that Nathan Boryskavich was “very agitated from the time we got there”.

[114] Constable Rollins testified that the subject was told he was being arrested for breach of the peace. The officer said that policy frequently results in individuals in similar situations being arrested even though they may not subsequently be charged.

[115] Constable Rollins told the Inquest the onus is on the investigating member to request a CPIC check, but that more recently RCMP dispatch has been “better at giving the history of the subject”.

[116] Constable Rollins acknowledged that upon being told that he was being arrested, Mr. Boryskavich immediately clenched his chair and gave off aggressive indications. He said that the subject seemed to be listening and responding appropriately to officers until he was told he was being arrested. After that, his behaviour changed. After Mr. Boryskavich started punching at officers, “we took him down fast”. Rollins reported that Mr. Boryskavich had blood on his lips and he was spitting at the officers. He said that all the involved officers were holding him down on the floor in the kitchen area and that “I think Gabe Simard was holding his head down”. Constable Rollins’ testimony was that all officers managed to get the subject out of the residence and then again took him down face first onto the patio deck.

[117] Constable Rollins remembers Corporal Simard having given the subject foot strikes to the body, but not to the head.

[118] After being picked up from the patio, the subject was carried from the patio and again put down, this time in the snow on the ground. At this point, he was no longer struggling. Constable Rollins testified that Mr. Boryskavich was put into the police vehicle face first on his stomach. He noted that he appeared to be bleeding from his mouth.

[119] Constable Rollins conceded that Mr. Boryskavich had “been taken down hard” and that he may have hit his head on the deck.

### **SUMMARY OF THE EVIDENCE**

[120] The deceased, Nathan Boryskavich, died as a result of a physical altercation with five RCMP officers. He was in that altercation because of his threatening abusive behaviour to his ex-domestic partner and his refusal to leave her home.

[121] Mr. Boryskavich initiated the physical confrontation with police after making it clear to them that he would not comply with their request to leave the premises. Unfortunately, the physical altercation that ensued ended in the death of Nathan Boryskavich and took place in front of his 12 year old daughter.

[122] In terms of understanding what went wrong on November 28, 2008, in The Pas, it is important to look at who Nathan Boryskavich was.

[123] Evidence from his ex-partner, mother, sister and his criminal record, indicates that he was a man who frequently and regularly became involved in assaultive behaviour and assaultive behaviour with police.

[124] The deceased's sister, Cynthia Fleming, testified that she had on several occasions witnessed her brother fighting with police. She also told the Court that he suffered from mental illness and had an active hatred for police. The deceased's mother confirmed her son's assaultive personality and his hatred for police. She told the Inquest that only shortly before coming to The Pas, he had been in a fight with three people, knocking two unconscious and biting the third. She also said that when she was packing her car to drive her son to The Pas, he had packed a home-made weapon, a cane with a blade. He said he "would need it".

[125] She said talking about suicide was a running thing with him, that he spoke of it almost constantly. She also said that in the preceding months, he had been drinking alcohol heavily. She said he was under psychiatric care and had been prescribed two psychiatric drugs. He had gone so far as to say to her that maybe he would let the police kill him. His mother said he had a lifetime of difficulties with the police.

[126] On the day of Mr. Boryskavich's death, he presented as a mentally ill, violent man with a longstanding propensity for violence to others and to police. He had an extensive criminal record relating to assault convictions.

[127] His mother said he "would sooner punch police than talk to them". If the police wanted to talk to him, he got extremely agitated and aggressive. If they touched him, then he would get physical and "all hell would break loose". On one occasion as a 12-year old when he had thrown a butcher knife at his sister, five officers were almost not able to restrain him.

[128] In addition to all of the above, Lorna Fitzner had an existing Protection Order against Nathan Boryskavich at the time of his death.

[129] Additionally, his mother testified that just before his death, Nathan Boryskavich would have been told that he had terminal liver disease and a short time to live.

[130] While there is no way that police could have known about Mr. Boryskavich's drinking or his health situation, they could have and should

have known about his criminal record and his history of physical altercations with police.

[131] Information from all of the RCMP officers indicated that prior to attending calls when the parties names have been provided, as they were in this case, it is normal practise to run a CPIC search and possibly a PIRS search. PIRS is an internal RCMP data base with information on previous offenders. CPIC is a national recording database of criminal records. Additionally, PIRS searches can be done from a cruiser car or by dispatch. These were done after the fact by the RCMP as to Nathan Boryskavich and revealed that he is a violent individual who has a history of violence with police.

[132] It is clear that the failure of the involved officers to access this information prior to interacting with Nathan Boryskavich, contributed to the problems that followed. It is also clear from the testimony of the various officers and notably Corporal Argue who was not involved in this incident, but is a member of The Pas RCMP and has received certification as a trainer for the RCMP, that RCMP training requires that this kind of information is to be accessed in these situations. This was not done. Obviously, the RCMP needs to take whatever steps necessary to get this across to officers that these checks must be done.

[133] Once on the scene, all involved officers became aware of the deceased's 12-year old daughter who was in the home screaming expletives at them. At one point, she grabbed a telephone and cocked her arm preparatory to throwing it at police. This act resulted in one of the officers moving towards her and taking the phone from her. This distraught child did not contribute to any hope of de-escalating the situation. Additionally, in the end, she witnessed the altercation which resulted in the death of her father.

[134] RCMP policy, if not common sense, would dictate this child should have been removed. Once again it is hard to understand why at least one of the five attending officers would not have removed the child from this situation at the outset, particularly as they were aware that Ms. Fitzner, who called in the police request, had stated that Nathan Boryskavich could be violent.

[135] The RCMP once in the residence, tried to negotiate with Nathan Boryskavich despite the fact that he was telling them he would not leave and his body language was showing indications that he was preparing to be physically combative. Professor Rick Parent testified that in his opinion, they should have had a plan going in and should have moved Nathan Boryskavich out of the house faster.

[136] Once the altercation ensued, there is conflicting evidence from all the parties as to what actually transpired. Mr. Boryskavich was taken to the floor and he was restrained by all five officers, some of whom appeared to have been kneeling on his back. Clearly, he was pepper sprayed. No explanation was ever

provided by police for Ms. Fitzner's evidence that pepper spray was found on five walls of her house. It is clear that one of the officers kicked the deceased twice in the hip area and once with a glancing blow to the side of his head. Much of the evidence from the five officers disagreed with other evidence from the other officers. Frequently, the Inquest testimony of the individual officers differed from the statements they provided to investigators after the fact. Obviously an Inquest being held over three years later, does not assist accurate memory.

[137] It is unclear as to how many times Nathan Boryskavich was "taken down" to either the floor of the Fitzner kitchen or the patio deck adjoining the house. It is clear that Mr. Boryskavich would have added to the torque on his neck and body by thrashing and kicking both on the floor and while standing while under restraint. It is also clear that Corporal G. Simard used both his foot and his hands to turn Mr. Boryskavich's head away from officers to avoid being spat upon. Some officers say the deceased was spitting blood, others did not see spitting. Several witnesses say that there was blood on the kitchen floor. Photographic evidence as to the interior of the RCMP truck which transported Mr. Boryskavich show blood smeared along the front edge of the vehicle's bench seat. This evidence also shows blood high on the back of the bench seat. These blood locations are not consistent with the testimony of the officers as to how the subject was loaded into the vehicle or transported.

#### **SUBMISSION BY LORNA FITZNER**

[138] Exhibit 10 is a letter/submission from Lorna Fitzner. In several places in her submission, she suggests that the RCMP behaved with "brutality". She particularly objects to her 12-year old daughter watching while her father was "brutally beaten by the RCMP".

[139] There is no evidence to indicate that Nathan Boryskavich was brutally beaten by police. The autopsy report indicated that while he had multiple bruises on many areas of his body, none of them were particularly deep or life-threatening. The original attending doctor, Dr. Kumka, testified that she did not notice any untoward marks on Mr. Boryskavich when he was admitted to hospital. Dr. Balachandra, who conducted the autopsy, did note bruising, but made it clear that Mr. Boryskavich did not die from the bruising and that any injuries, aside from the fatal injury, were consistent with the physical altercation as described by police.

[140] It is also worth noting that attending officers asked only that the deceased leave the home, the same request that Ms. Fitzner had repeatedly made with the same negative response from the deceased.

[141] To some extent, it is possible that Ms. Fitzner is reacting to the evidence of her daughter who initially told police that her father had been "jumped" and that he had been beaten while handcuffed to a chair. The child also said in her statement that he was being repeatedly kicked in the head by multiple officers.

At the Inquest, when questioned by Mr. Minuk, counsel to the hearing, she said that he was being beaten while handcuffed. When later questioned about this by Mr. Mason, counsel for the RCMP, the child responded "I'm pretty sure he was handcuffed", which later became, "it looked like it". In her statement to police she said her father was "tackled". Asked at the Inquest what that meant, she said it meant "pushed".

[142] As well, the daughter stated in her initial police interview, that officers were "stomping on his face". However, when questioned at the Inquest, she said she wasn't sure if it actually happened, and later modified this comment to "one had part of his foot on his head".

[143] When asked at the Inquest to explain her statement to police that a couple of the police were punching and kicking him, she said that she doesn't know what she saw, but the previous statement is not accurate.

[144] She also said in her statement to police, that one of the officers kned her father in the head. Asked about this at the Inquest, she said "that was only by one officer. I don't think they got him though".

[145] It is quite clear that when Cheyanne Boryskavich was interviewed shortly after the traumatic events of November, 2008, she depicted those events in a more dramatic manner than when questioned three years later at the Inquest. Unquestionably, she should not have been exposed to what she saw. Even if the arrest had been without incident, she should not have been exposed to her father's detention, let alone what actually did transpire. Aside from that issue, there is really no evidence to conclude that Nathan Boryskavich was brutally assaulted.

## **RECOMMENDATIONS**

### **Preliminary Investigative Information:**

[146] If the attending officers had accessed the CPIC report on Nathan Boryskavich, they would have seen the four "cautions" directed to police. These are: violent, mental instability, suicidal tendencies and family violence. They would have seen an individual with 14 previous convictions for assaultive behaviours, two previous convictions for resisting arrest and one for assaulting a police officer. On 15 other occasions, he had been charged with assaultive behaviour, but charges were stayed. They would have seen that there was a Protection Order in place prohibiting his contact with Lorna Fitzner (Exhibit volume #1, Tab 2).

[147] The RCMP Operational Manual 2.4 "Violence in Relationships" Exhibit 7, says the following:

2.1 Prior to arrival on the scene except in exigent circumstances

2.1.2 Request or conduct CPIC, local indices and firearms possession checks and

2.1.3 Obtain as much information as possible from the OCC and other sources.

[148] It is clear that the attending officers in this case did not follow the RCMP policy manual as to conducting a CPIC check. It is also clear that pursuant to 2.1.3, they did not obtain as much information as possible from the OCC (Operational Control Centre), nor from “other sources”, which could have included Lorna Fitzner. It is entirely possible that quick, relevant questioning of Ms. Fitzner, could have provided background about the deceased’s tendency to violence, his past history of violent confrontations with police, his absolute refusal to “go with police” and the fact that when he resisted, he did so strenuously with extreme aggression. All of this information would have been available to the officers if Ms. Fitzner had been questioned.

[149] All of the officers who testified at the Inquest acknowledged that they were aware that the primary responsibility is on the attending officers to obtain all relevant information. This requirement is already in the RCMP Operational Manual. Corporal Argue testified that this responsibility is emphasized at the training sessions provided to new recruits. He also said that this is further covered at “block training” sessions which each officer is required to participate in every three years.

[150] Clearly, the RCMP must do something different to emphasize the importance of following their own Operational Manual. Five officers were involved in this incident and none of them sought additional information to better prepare themselves to deal with the situation at hand. Whether this means the RCMP need to schedule refresher training more frequently, or whether there should be better monitoring of best practises compliance, is difficult to say, but clearly performance in this area must improve.

### **Experience Level of RCMP**

[151] Professor Parent testified that frequently the RCMP officers working at regional circuit locations are relatively inexperienced. The regions are considered to be where young members go to gain experience before moving into larger centres. Conversely, some of the smaller northern centres are some of the busiest postings on a per member basis of all the detachments in Canada. In this case, all five officers were relatively inexperienced. One officer had four years on the job, two had five, one had six and the Corporal had eight.

[152] Perhaps members with more experience would have handled this situation differently. Once again, it is difficult to contemplate suggesting to the RCMP that the proportion of experience to inexperience in their detachments

should be altered. I suspect they would prefer more experience in their active ranks, but that is undoubtedly not necessarily easy to control.

### **Removal of the Child**

[153] The RCMP Operational Manual section 2.4 Violence in Relationship (exhibit 7) says:

2.2 Upon arrival at the scene:

2.2.3 locate and separate the disputants.

[154] Upon entry to the Fitzner residence, all officers became immediately aware of the screaming, crying 12-year old daughter of the deceased and the complainant caller. She told the Inquest that at one point, she was in the kitchen in the immediate area with her father and the police. At a slightly later point, she threatened to throw a phone at officers and one officer testified that he interceded to stop her from doing so. The girl screamed expletives at the officers throughout their time in the home.

[155] Even Mr. Mason, counsel to the RCMP, conceded in his submission to the Inquest that the above actions qualified the daughter as a “disputant” as per section 2.2.3 of the RCMP Operational Manual.

[156] RCMP training officer Corporal Colby Argue, who was not at this incident but was fully aware of it, was very clear that “the girl should have been removed and an officer posted to keep her out”. Professor Parent also stated that she should have been removed. Once again, the attending officers did not comply with the Operations Manual.

[157] One wonders if this non-compliance is a factor of inexperience or of poor or inadequate training.

### **Foot Strikes**

[158] Testimony from various attending RCMP officers and more specifically Corporal G. Simard himself, described his application of two foot strikes to the hip area of the subject when he was down on the kitchen floor and one to the head area. Corporal Simard said that the strike to the head was a glancing blow used to maneuver Mr. Boryskavich’s head because he was spitting. At the Inquest,

Corporal Simard said he gave the foot strike to the right side of Nathan Boryskavich’s facial area. When he gave his statement to the Winnipeg based investigators immediately after the incident, he said he struck the left side of the head. Bruising found on the skull of Nathan Boryskavich at the autopsy was consistent with a forceful glancing blow to the left side of the head.

[159] There is no medical evidence to establish what caused the vertebral tear that killed Nathan Boryskavich. It could have been torque resulting from the above discussed strike to the head. It could have been Nathan Boryskavich's own thrashing motions while restrained on the floor. It could have been torque to his neck when he slipped on the outdoor stairs.

[160] Corporal Argue testified that RCMP officers do receive some training and there is some emphasis placed on the importance of protecting the head and neck. He also testified that kicks to the head are not taught as a pain compliance technique and in his opinion should only be used in a situation where the subject was going for a weapon and presented as a serious threat. Professor Parent also said the use of a foot to the head is not a maneuver which is normally taught. Corporal Argue, Professor Parent and Dr. Balachandra each spoke to the use of a towel or jacket as a preferable method of negating spitting.

[161] Perhaps it may be appropriate that the RCMP reinforce in their training and/or add a clause to their Operations Manual which specifically details that foot strikes are not to be used to the head except in emergency situations wherein the subject presents as an imminent threat to officers or bystander safety.

### **Training:**

[162] As earlier stated, the Inquest heard from Professor Rick Parent, who was called as an expert in the use of force. Amongst other recommendations he made was the suggestion that our national police force needs more training opportunities for members and that there should be more training in fact-based scenarios. When this suggestion was put to Corporal Argue, he agreed that ideally there should be more training. He stated "If members could do one week (of scenario based training) it would be the ideal situation and maybe they would retain more".

[163] Counsel for the RCMP has submitted that subsequent to this incident on November 28, 2008, RCMP members now have more frequent access to training. This contention is largely based upon the fact that "block training" in 2008 was only a test program, whereas now it is required. Corporal Argue testified that "block training" requires that every officer go to the training depot in Regina for one week every three years. Amongst other areas, that week reinforces training in IM/IM or crisis management. Corporal Argue was asked what other training is available regularly and he provided the following information:

- That each year one day of training is provided with one-half day working on IM/IM and one-half day at the gun range working to establish firearm proficiency. If the member is certified for conductive energy weapons (tazer), then there is a yearly one day re-certification seminar. One-half of that day is scenario oriented.

[164] If the members are trained in Immediate Action Rapid Deployment (IARD), then there is a one-day re-certification training each year. Corporal Argue indicated that approximately eight members in The Pas have that training.

[165] Of the three days of block training, some of the issues covered are use of pepper spray, carotid control and use of the baton.

[166] So if a particular member qualifies, the total training each year is one day (IM/IM and guns), plus one day (tasers) and one day IARD, for a total of three days. If they are not qualified in IARD (only eight Pas RCMP are) or taser, then their yearly training is only one day.

[167] It is noteworthy that mandatory training for the Winnipeg Police Service (WPS) consists of:

- Firearm and electronic control device (taser) re-certification conducted annually for every member, one day in duration
- Police vehicle operations conducted every two years for every member, one day in duration;
- Use of force training conducted every two years, one day in duration;
- First aid every three years for every member, one day in duration;
- Mental health training initially conducted in Recruit Class in two sessions totalling one day, and thereafter every three years by way of on-line training sessions.

[168] Additionally, the WPS offers a course calendar for in-service training and members are invited to request permission to access whatever on-going training they wish from a wide grouping of courses. Significantly, the WPS provides two days of training (and one of those deals with use of force issues) every two years for every member.

[169] For a job with as many complicated best-practises and with consequences as significant as those that flow from policing, the RCMP training schedule does not appear adequate. RCMP cadets receive an initial 24 weeks of training. That in itself is not a significant period for a job as complex and important as policing. It is not enough to have these recruits return for a one-week session only every three years. Accordingly, I recommend that the RCMP make one-week training blocks mandatory every year for all members with less than three years service, and for all others, every two years.

[170] Additionally, it is concerning that the RCMP do not appear to have a mechanism in place whereby incidents such as this are examined and de-constructed for the training benefits that could result.

[171] Although Corporal Argue stated that he believed that there would be an administrative review of this incident, it does not appear that if such a review was conducted, it involved the attending police officers. Several of the officers were asked at the Inquest if they had been de-briefed about the incident or if they had been contacted by trainers or supervisors as to discussing how these events transpired. None of the members questioned said that had taken place.

[172] Corporal Argue said that he, as a Corporal, is designated as a “watch commander”. He said that he informally on his own initiative, de-briefs other officers on his watch from time to time on an informal basis. He does this because he is trained as an instructor and is personally inclined to do so, but that it is not a required procedure within the police service. It seems to me that de-briefing of members should be the rule, not the exception. It would also appear beneficial that when an event as significant as that which resulted in the death of Nathan Boryskavich takes place, some kind of retrospective review involving the participants should be mandatory. Common sense would suggest that if this event had been de-constructed for these officers, much like Professor Parent de-constructed it for the Inquest, that would be a significant learning tool for the five officers involved.

### **RCMP External Investigation**

[173] In this case, the investigators interviewed the various parties and arranged for photographs to be taken of the scene. They were unable to photograph some relevant parts of the scene because, as previously stated, Ms. Fitzner had cleaned it.

[174] For some reason, known only to themselves, the investigators did not interview neighbours, nor conduct an enquiry as to whether there may have been other witnesses. At the request of the Court, Inquest counsel located a witness who lived in the adjoining unit to Ms. Fitzner’s side-by-side dwelling. This witness was at home when the altercation with Mr. Boryskavich took place and had pertinent evidence for the hearing. Additionally, the witness had seen Nathan Boryskavich coming into the residence the night before carrying alcohol and this reinforced other relevant evidence.

[175] Arguably, the interrogation conducted by the investigators could be categorized more as friendly interviews, rather than the normal interrogations the criminal courts see from any professional police force.

[176] Aside from the issue of the investigation itself, it is also not ideal that the RCMP should be investigating themselves.

[177] RCMP Operational Manual 54.1, provided by counsel for the RCMP [Exhibit 7(b)], details procedures dealing with external review. That policy requires that where there is a death of an individual that involves an RCMP employee, the RCMP, under Section:

- 2.3: “Will request an external law enforcement agency or other duly authorized investigative agency to conduct an investigation (independent external investigation) that the RCMP would otherwise conduct.
- 2.4: If an independent external investigation is not feasible or appropriate due, for example, to the lack of available external investigative resources, an RCMP division other than the one where the incident occurred will conduct the investigation.
- 2.6: In all cases where the RCMP is conducting an investigation pursuant to this policy an independent third party observer will be requested to assess the impartiality of the investigation.
- 2.8: In all cases where the RCMP has completed or is in the process of conducting an investigation pursuant to this policy, an independent review will be requested from an external law enforcement agency or a federally, provincially or territorially established investigative agency (independent external review) to assess the adequacy of the investigation.”

[178] The above quoted policy is as amended November 29, 2011, and it is my understanding from Mr. Mason that no similar policy governed the actions of the RCMP in November, 2008. Presumably, if such a policy had existed, the circumstances of Mr. Boryskavich’s death would have (pursuant to section 2.3) triggered an external review. As it happened in November of 2008, the circumstances of Mr. Boryskavich’s death while in custody was reviewed by the RCMP itself, albeit by a pair of officers from the Major Crimes Unit in Winnipeg.

[179] The resulting investigation was lacking in several regards. Firstly, the scene of the incident was not preserved. RCMP officers permitted the homeowner to clean her house and as a result, valuable evidence was lost. Ms. Fitzner, the resident and a witness to what happened, claimed that there were pepper spray stains on five walls of her residence. Only one of these stains was ever photographed and presumably after cleaning they were no longer available for documentation.

[180] There was a dispute between the evidence of the police officers, Ms. Fitzner and her daughter, as to how much blood was left on the kitchen floor and where it was placed. The placement of the blood may have been significant as it would have assisted in placing the struggle in the residence and may have also assisted as to how many times Mr. Boryskavich was “taken down”.

[181] The quantity of blood may have been significant because it may have assisted in assessing the repeated claim of Corporal Simard that he believed that the situation presented a threat of grievous bodily harm as a result of the presence of blood. He claimed justification for accelerated aggressive response by way of foot strikes as an appropriate response to the perception of grievous

bodily harm. The availability of evidence as to quantity and placement of blood would have been of value in assessing the appropriateness of that member's response.

[182] One set of the photographs which were taken of the scene were originally presented as not viable. They were double-exposed such that they were basically of no value. At the end of the hearing, they were produced in a usable fashion. The Inquest was told that there was blood in the snow where Mr. Boryskavich had been put down by officers. This was never measured, nor adequately photographed.

[183] Additionally, as mentioned earlier, the investigation that was done did not include interviewing neighbours and in the case of the adjoining resident, she was an eye witness to what happened.

[184] The interrogation that was done with the attending officers was not consistent with "normal" policing interviews. The subjects were not pushed at all. No follow-up or hard questions were asked and in some cases, the deponents were literally sympathized with as they gave their explanation.

[185] Amongst questions that were not asked of the officers:

- Why did you not consult CPIC or other available information before dealing with this matter?
- Why did you not ask for more detail from the caller (Lorna Fitzner) who met you before you entered the residence?
- Are you aware of the RCMP policy manual as to accessing all available information in advance and as to separating the disputants?
- Why did all or some of the officers involved not discuss a plan of action before proceeding?
- Why was the screaming child not removed from the scene pursuant to RCMP policy?
- Why was it necessary to apply body and head foot strikes to the subject when there were five officers present? (This was discussed with some officers, but it was not pressed and the nature of the discussion was only to provide Corporal Simard with an opportunity to explain why he did this.)
- Why was a foot strike to the head used to control spitting as opposed to a jacket or kitchen towels (which were clearly visible close at hand in photographs filed at the Inquest)?
- Why was the subject provided with foot wear despite the fact he was showing signs of aggressiveness and resistance?

- Why was the subject not controlled while going out the door such that he fell or slipped onto his front shortly after leaving the house?
- Why did each officer disagree as to who was involved in carrying Mr. Boryskavich down the patio stairs?
- How did blood get on the seat of the police truck in several very different planes of the seat?
- How is it possible that of the five officers, only one had any semblance of an explanation as to the location of the blood stains in the transport vehicle?
- Why did hospital personnel report that a police officer had stated when asked what had happened “we took him down hard”, yet no officer was asked by interviewers if he had made such a statement at the hospital? Even if that information was not available at the time the Winnipeg investigators spoke to the officers, one would expect that they might have asked whether they had said anything about what happened to hospital personnel.
- How is it possible that some officers stated that the deceased was spitting blood, when the attending doctor and the autopsy found no cuts of any kind on his face, lips, nose or in his mouth?
- Why was dispatch personnel not questioned as to why they did not provide background information as to Mr. Boryskavich when they dispatched the officers?
- Why, once it was realized that Nathan Boryskavich had lost “consciousness and was unresponsive”, was CPR not started immediately?
- Despite the fact that in his police interview, Corporal Simard says that he feared “grievous bodily harm” on approximately six occasions, he was never asked to elaborate as to what his criteria for that determination was, nor was he questioned as to whether his determination in that regard was appropriate.
- Although they asked if members had a taser, they did not ask why they did not have a taser with them at the scene.

[186] These are only some of the questions that may have been addressed. While some of these areas may have been referred to by the officers involved, never were they pressed or probed by investigators as would be expected as part of regular interrogation procedure. In short, the questioning was not what

one would have expected if police were interviewing members of the public involved in incidents attracting police attention.

[187] One also wonders why follow-up interviews were not conducted once additional information was received and once all the initial interviews were completed and it was clear that there was significant discrepancy between the statements of the various attending officers.

[188] Counsel for the RCMP stated at the end of the hearing, that RCMP administrators as a result of the Inquest, are now aware that the immediate neighbours had not been interviewed and they are concerned about that omission.

[189] This information leaves open the question as to why these administrators are only now finding this out and it further indicates that RCMP administration are not reviewing the work that is done, or in this case not done, in the field.

[190] All of which suggests that this investigation should more appropriately have been handled by a police agency other than the RCMP itself.

[191] One would hope that the previously mentioned policy 54.1 from the RCMP Operational Manual, will now result in situations like this being investigated by independent police services.

[192] At the outset of this section, I indicated that although the investigation bears on the evidence available to the Inquest, it is not strictly speaking, within the ambit of this matter. Were that not the case, I would have recommended that when death occurs with individuals under apprehension by police agencies, the investigation as to what transpired should be conducted by a separate police service.

## **SUMMATION**

[193] Nathan Boryskavich died after a violent confrontation with police. This was a confrontation that was entirely initiated and sustained by the deceased.

[194] The incident which led to Mr. Boryskavich's death involved his interaction with five members of the RCMP. It is clear from evidence received, that in several key areas, the officers involved did not follow either a common sense approach to the situation, nor did they follow the RCMP Policy Manual. Most certainly in significant areas such as planning, gathering information, managing the parties, managing the environment, preserving the scene and note-taking, these policemen did not follow recognized best practices.

[195] It is impossible to point to any one event or one moment in the morning's events that caused the death of Mr. Boryskavich. At some point in his interaction with police, his neck was distorted in a manner which resulted in the fatal injury.

There is no specific failure on the part of attending officers which can be said to have produced this result. Mr. Boryskavich put himself in great jeopardy by violently resisting the attending officers. Evidence at the Inquest indicates that he had done this on numerous previous occasions.

[196] The RCMP officers could have handled this situation in a manner more closely approximating their training and the “best practices” of policing. They did not. But it is not possible to say that any commission or omission on the part of the RCMP caused his death.

[197] As to why the officers involved did not follow their own agency protocol, one can only assume that their training is in some way deficient or of insufficient frequency. Accordingly, the only recommendation I make is as stated earlier, that training of young members be considerably increased and training of more experienced officers be somewhat increased.

[198] The attending officers were not good witnesses. In many instances, their testimony at the Inquest contradicted what they had said to investigators at the time of this fatality. In many cases, their testimony contradicted that of other members. In some cases, their only answer to relevant questions was that they did not know or could not remember. Obviously fuller, more detailed notes should have been taken.

[199] In his submission, Mr. Minuk, counsel for the Inquest, suggested that if these officers had been testifying at a trial of an accused, that accused would have been acquitted as a result of their inconsistencies and failings of the police testimony.

[200] I point this out only to suggest that the RCMP consider tightening up procedures in a situation like this. Once it is clear that there is a “use of force” situation, the scene should be preserved and involved officers should be required to carefully and completely detail their involvement. Independent investigators should be engaged and the scene should be maintained for extensive photographs to be taken.

[201] All of the above should be done because an Inquest should have the best available evidence, the family of the deceased are entitled to see that the incident has been scrutinized in an independent and thorough manner and the medical examiner is entitled to have his initiating questions about the death answered in a manner that is as complete and effective as possible.

Dated at the City of Winnipeg, in Manitoba, this 17th day of August, 2012.

*“Original signed by”*

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Judge Lawrence Allen



**Manitoba**

***THE FATALITY INQUIRIES ACT, C.C.S.M. c. F52***

**REPORT BY PROVINCIAL JUDGE ON AN INQUEST INTO THE DEATH OF:**

**NATHAN MICHAEL BORYSKAVICH**

**EXHIBIT LIST**

**Description**

1. Compilation of materials filed by Inquest counsel:

VOLUMES 1 and 2:

- Appendix 1: The Pas Detachment PROS file 2008- 1453284
- Appendix 2: CPIC, PROS & PIRS reports for Nathan BORYSKAVICH
- Appendix 3: D Division OCC Dispatch / Brandon 911 Transfer to 201
- Appendix 4: Consent for Release of Medical Information
- Appendix 5: The Pas General Hospital Medical Reports
- Appendix 6: Preliminary Report of Death and Advanced Report of Death
- Appendix 7: Autopsy Report and Medical Examiner's Report
- Appendix 8: C – 414, PROOF, Toxicology Request
- Appendix 9: RCMP Forensic Laboratory Reports
- Appendix 10: RCMP Forensic Identification Section Reports
- Appendix 11: Winnipeg Police Service Forensic Identification Report
- Appendix 12: Autopsy Photographs
- Appendix 13: Scene Photographs and Planned Drawing
- Appendix 14: Consent Search
- Appendix 15: Exhibit Reports
- Appendix 16: Notes written by Nathan BORYSKAVICH
- Appendix 17: Transcript of argument caught on answering machine

- Appendix 18: Detachment Shift Schedule
- Appendix 19: The Pas Detachment Unit Supplements
- Appendix 20 Detachment Training Log
- Appendix 21: Employee Training Profile (HRMIS Report) Corporal Gabe SIMARD
- Appendix 22: Employee Training Profile (HRMIS Report) Constable Brad ROLLINS
- Appendix 23: Employee Training Profile (HRMIS Report) Constable Brad BALLENTYNE
- Appendix 24: Employee Training Profile (HRMIS Report) Constable Ian LENARTOWICH
- Appendix 25: Employee Training Profile (HRMIS Report) Constable Sheldon BEATON
- Appendix 26: Incident Management Intervention Model (IM / IM)
- Appendix 27: In Custody Death Report
- Appendix 28: Briefing Notes
- Appendix 29: Media Advisory
- Appendix 30: Weather Climate Data

WARNED STATEMENTS:

- Appendix 31: Corporal Gabe SIMARD – Recorded Statement x 2, and notebook entries
- Appendix 32: Constable Ian LENARTOWICH – Recorded Statement, and notebook entries
- Appendix 33: Constable Brad BALLENTYNE – Recorded Statement, and notebook entries
- Appendix 34: Constable Brad COLLINS – Recorded Statement, and notebook entries
- Appendix 35: Constable Sheldon BEATON – Recorded Statement, and notebook entries

WITNESS STATEMENTS:

- Appendix 36: Statement of Lorna FITZNER x 2
- Appendix 37: Statement of Cheyanne BORYSKAVICH
- Appendix 38: Statement of Cynthia FLEMING
- Appendix 39: Statement of Patricia Robin FITZNER
- Appendix 40: Statement of Kathy FRASER
- Appendix 41: Statement of Irene FLEMING
- Appendix 42: Statement of Dr. Gillian KUMKA
- Appendix 43: Statement of Dr. Ali OLIEAI
- Appendix 44: Statement of Lyla HUCULAK
- Appendix 45: Statement of Pinky CRUZ
- Appendix 46: Statement of Debbie PATENAUDE
- Appendix 47: Statement of Stu CARUTHERS
- Appendix 48: Statement of Barry EARLY

MEMBER NOTES:

- Appendix 49: Notes of Cst Jerry NUTBROWN
- Appendix 50: Notes of Cst Wes DYKUN
- Appendix 51: Notes of S/Sgt Dave MANCINI
- Appendix 52: Notes of Sgt Rob GERVAIS
- Appendix 53: Notes of Corporal Sean FARRELL
- Appendix 54: Notes of Corporal Jamie DeWIT
- Appendix 55: Notes of Constable Dino BAIROS
- Appendix 56: Notes of Constable Yvette ALARIE
- Appendix 57: Notes of Constable M. O'ROURKE
- Appendix 58: Notes of Constable Sean GRUNEWALD

VOLUME 3:

- Tab 1: Memo from OIC Criminal Operations
- Tab 2: Tasking Log
- Tab 3: Activity Log
- Tab 4: Task Summaries

- Tab 5: Members Rough Notes from witness statements
  - Tab 6: Photos of Nathan BORYSKAVICH in hospital
  - Tab 7: CD of audio recorded statement of Lorna FITZNER
2. "Use of Force Report", filed by Professor Rick Parent
  3. Medical Report from Dr. Mark Del Bigio
  4. Photo packet and diagrams
  5. Medical Records pertaining to Nathan Boryskavich
  6. Intervention Module (IM/IM) provided by RCMP
  7. Excerpts from the RCMP Operation Manual:
    - a) 2.4 Violence in Relationships; and
    - b) 54.1 External Investigation or Review
  8. CPIC Criminal Records Search for the criminal record of Nathan Boryskavich
  9. Photographs taken at 377 Keewatin Street, The Pas, Manitoba
  10. Letter from Lorna Fitzner
  11. Letter from Cindy Fleming
  12. Submission by Mark Mason, counsel for the RCMP