

Release Date: January 27, 2005



Manitoba

**THE PROVINCIAL COURT OF MANITOBA**

IN THE MATTER OF: *THE FATALITY INQUIRIES ACT*

AND IN THE MATTER OF: DONALD LORNE MILES

**APPEARANCES:**

Mr. Douglas N. Abra, Q.C., Counsel for the Crown  
Ms Kim Carswell, Counsel for the Winnipeg Police Service  
Ms Rhoda Redhead and Ms Sarah Redhead, Sisters of the Deceased

**RELEASE DATE: January 27, 2005**



**Manitoba**

**THE FATALITY INQUIRIES ACT  
REPORT BY PROVINCIAL JUDGE ON INQUEST**

**RESPECTING THE DEATH OF: DONALD LORNE MILES**

Having held an Inquest respecting the said death on February 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup>, 2004 and August 12<sup>th</sup> and 13<sup>th</sup>, 2004 at the City of Winnipeg, in Manitoba, I report as follows:

The name of the deceased is: DONALD LORNE MILES

The deceased came to his death on the 5<sup>th</sup> day of November, 2001 at 11:00 p.m. at the Health Sciences Centre, in the City of Winnipeg, in the Province of Manitoba.

The deceased came to his death by the following means:

As a result of gunshot wounds inflicted by a member of the Winnipeg Police Service in the course of his duties, which occurred about one hour earlier on the parking lot of the Shell Service Station at the northeast corner of Mountain Avenue and Salter Street in the City of Winnipeg. The cause of death was hemorrhage as a result of transection of the right femoral artery and vein caused by a gunshot wound.

Preliminary matters and an overview of the evidence at this Inquest are set out in Schedule 1 to this Report.

The material circumstances of this death are set out in Schedule 2 to this Report.

Expert evidence on the use of force by police officers is set out in Schedule 3 to this Report.

I hereby make the recommendations set out in Schedule 4 to this Report.

A schedule of exhibits required to be filed by me is set out in Schedule 5 to this Report.

Dated at the City of Winnipeg, in Manitoba, this 24<sup>th</sup> day of January, 2005.

*Original signed by Wesley H. Swail*

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Wesley H. Swail  
Provincial Judge

copies to: Dr. T. Balachandra, Chief Medical Examiner (2)  
Dr. C. Littman, Medical Examiner  
The Honourable Raymond E. Wyant, Chief Judge, Manitoba Provincial Court  
The Honourable Gordon Mackintosh, Minister of Justice  
The Honourable Bruce MacFarlane, Deputy Minister of Justice  
Mr. Brian Kaplan, Director of Regional Prosecutions  
Mr. Douglas N. Abra, Q.C., Counsel for the Crown  
Ms Kim Carswell, Counsel for the Winnipeg Police Service  
Ms Rhoda Redhead and Ms Sarah Redhead, Sisters of the Deceased



Manitoba

THE FATALITY INQUIRIES ACT  
REPORT BY PROVINCIAL JUDGE ON INQUEST

RESPECTING THE DEATH OF: DONALD LORNE MILES

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## SCHEDULE 1

### PRELIMINARY MATTERS

#### **CALLING OF THIS INQUEST**

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

##### **Inquest mandatory**

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

(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.

[2] Accordingly, the Chief Medical Officer for the Province of Manitoba, Dr. Balachandra, directed in a letter dated October 9<sup>th</sup>, 2002 (which letter is at Tab 1 of the Book of Documents, Exhibit 1) that an inquest into the death of Donald Lorne Miles be held.

#### **MANDATE OF THIS INQUEST**

[3] Section 33(1) reads in part as follows:

##### **Duties of provincial judge at inquest**

**33(1)** After completion of an inquest, the presiding provincial judge shall

(a) make and send a written report of the inquest to the minister setting forth when, where and by what means the deceased person died, the cause of the death, the name of the deceased person, if known, and the material circumstances of the death;...  
and 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 presiding provincial 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 that is the subject of the inquest.

[4] Subsection 2 of section 33 specifically provides that a provincial judge:

(b) shall not express an opinion on, or make a determination with respect to, culpability in such manner that a person is or could be reasonably identified as a culpable party in respect of the death that is the subject of the inquest.

[5] It will be seen that in the end result this last requirement of *The Fatality Inquiries Act* is effectively irrelevant insofar as it will be seen that my

conclusions on the material circumstances surrounding the death of Donald Lorne Miles indicate that none of the police officers involved in the incident which resulted in Mr. Miles' death, including the officer who fired the fatal shot, did anything improper or beyond what they were required to do by virtue of their sworn duty as police officers.

## STANDING

[6] *The Fatality Inquiries Act* provides in section 28(1) that a person who “is substantially and directly interested in the inquest” may attend in person or by counsel and may examine or cross-examine the witnesses called. At a “standing” hearing on June 26<sup>th</sup>, 2003, Mr. Abra, counsel for the Crown, advised that he had contacted Mr. Keith Labossiere, counsel for the Winnipeg Police Association, and Mr. Hymie Weinstein, who had represented an officer at an internal police inquiry into the shooting of Mr. Miles. Apparently Mr. Labossiere did not respond to Mr. Abra's question as to whether or not the Winnipeg Police Association wished to have standing at this Inquest, but Ms Carswell advised that she had had discussions directly with the Association. She said that the Association did not have an adverse position from hers representing the Winnipeg Police Service, and she had heard nothing further from them. Mr. Abra further advised that Mr. Weinstein had, on the occasion of a subsequent casual contact with Mr. Abra, indicated that his client would not be seeking standing at this Inquest.

[7] Mr. Abra further advised that he had contacted Rhoda Redhead and Sarah Redhead, who are the sisters of the deceased, both of whom are residing at Shamattawa, Manitoba. These two sisters asked that they be given standing at the Inquest, and I directed that they would, indeed, have standing at the Inquest.

[8] At my request, Mr. Abra wrote to the Manitoba Justice Department on July 2<sup>nd</sup>, 2003 requesting funding for counsel to represent Rhoda and Sarah Redhead at this Inquest. A copy of that letter is attached as Appendix “A” to this report. Unfortunately, financing was not provided for this purpose by the Justice Department.

[9] The Government did, however, pay travel expenses for Rhoda and Sarah Redhead to come to Winnipeg for the sittings connected with this Inquest in February of 2004. Unfortunately, the deceased's sisters only attended these proceedings on February 9<sup>th</sup> and the morning of February 10<sup>th</sup>, 2004.

[10] Unfortunately, due to unavoidable circumstances, this Inquest had to be adjourned from February, 2004 to August 12<sup>th</sup> and 13<sup>th</sup>, 2004. On being advised that Rhoda and Sarah Redhead had not been advised of the continuation dates for this Inquest, I requested that Mr. Abra make efforts to contact Rhoda and Sarah Redhead by telephone to Shamattawa. Mr. Abra did attempt to do this, but was not successful in speaking directly to either Rhoda or Sarah Redhead. He did, however, leave messages for them and did not receive any further response. I do not have specific knowledge as to why the deceased's sisters' participation at this Inquest was so limited. As will be seen, Sarah Redhead testified herself on February 9<sup>th</sup>. Her evidence was very valuable in putting the circumstances of the deceased's confrontation with, and ultimate shooting by Winnipeg Police officers, into some sort of context. Ms Sarah Redhead did ask one question of Constable Carlson, who was the officer who actually shot Mr. Miles.

[11] During the course of her attendance at the Inquest, I did try to encourage Ms Redhead to put any questions she might have to any and all of the witnesses called. Her very limited participation in questioning witnesses can no doubt be attributed at least in part to the fact that she did not have legal counsel representing her. In this respect, the refusal of the Justice Department to provide funding for counsel to Rhoda and Sarah Redhead at this Inquest is regrettable.

[12] Although such a recommendation would not strictly fall within the type of recommendation referred to in subsection 1 of section 33 of *The Fatality Inquiries Act* referred to above, I would urge the Government of Manitoba that where members of the immediate family of a deceased person are granted standing by the judge conducting the deceased's inquest and are unable to pay such costs themselves, that the Government of Manitoba pay:

- (a) the necessary travel expenses of such family members who reside at a location in Manitoba distant from the location where the deceased's inquest is to be held; and
- (b) for legal representation of such family members at the deceased's inquest.

### **OVERVIEW OF THE EVIDENCE**

[13] On November 5<sup>th</sup>, 2001 Donald Lorne Miles was drinking heavily. This fact is ascertained from the observations of Mr. Miles' sister, Sarah Redhead;



the observations of the police officers he became involved with; and from blood tests and other forensic evidence obtained at his autopsy the next day.

[14] Around 10:00 p.m. on November 5<sup>th</sup>, 2001, Mr. Miles' sister, Sarah Redhead, saw Mr. Miles get into some sort of a confrontation with an individual who apparently had taken some stereo equipment that Mr. Miles had put on the sidewalk on Mountain Avenue across from Ms Redhead's house, and which the other individual carried away up the street as Mr. Miles was speaking to someone in a cab parked at that location.

[15] After this confrontation, Ms Redhead saw her brother go into her house, apparently arm himself with two knives and a table leg, and then run out on the street. She thought that he might be pursuing the individual he had previously confronted about taking his stereo equipment.

[16] Almost immediately that Mr. Miles left Ms Redhead's house, he was observed by two City of Winnipeg policemen who were travelling down Mountain Avenue in a police cruiser. They initially thought that Mr. Miles might be hiding something stolen under his jacket. Once they got close enough to Mr. Miles to attract his attention, he virtually immediately began wielding both the table leg and one long knife in a threatening manner at the police.

[17] Mr. Miles ran into traffic at the intersection of Salter Street and Mountain Avenue, and after a brief confrontation with the two police officers there he ran towards a convenience store at the Shell service station located on the northeast corner of Salter Street and Mountain Avenue. One of the constables called to people near the entrance to the convenience store, and in the convenience store, to get in and lock the door. This was accomplished successfully, and although Mr. Miles tried to get in the store he was unable to do so.

[18] A further confrontation with the original police officers and others who were summonsed to the scene took place on the lot of the Shell service station. Throughout this confrontation police officers virtually constantly yelled at Mr. Miles to drop his knife. Mr. Miles refused to do this, and continued to wield his knife and table leg in a threatening manner toward the police officers. After having been pepper-sprayed three times, he chased and lunged at one of the Winnipeg Police officers with a knife. Fortunately, Mr. Miles was not successful in stabbing the police officer. Instead, what happened was that another officer on the scene fired his handgun at Mr. Miles twice, hitting him both times. The officer Mr. Miles had lunged at with the knife also fired his handgun three times, but missed with all three shots. One of his shots,

however, ricocheted off the parking lot pavement and hit another City of Winnipeg police officer in the leg. Mr. Miles died about one hour later from the two gunshot wounds he received. The injured police officer ultimately recovered from the ricochet gunshot wound to his leg.

[19] The Winnipeg Police called an ambulance which arrived on the scene at 10:13 p.m. Mr. Miles was transported to the Winnipeg Health Sciences Centre and arrived there at 10:36 p.m. Unfortunately, Mr. Miles was pronounced dead at the hospital at 11:00 p.m. on November 5<sup>th</sup>, 2001.

[20] A detailed review of the evidence of the four Winnipeg Police officers who became directly involved with Mr. Miles indicates the following:

1. In confronting Mr. Miles in the way that they did, the Winnipeg Police officers involved were acting in accordance with their sworn duty to preserve the peace. During the course of their contact with Mr. Miles, the police did not in any way act improperly. All of their actions were in accordance with Winnipeg Police policy and, in particular, in accordance with the approved Winnipeg Police “force continuum”.
2. At no time throughout the course of the confrontation between the Winnipeg Police and Mr. Miles did Mr. Miles discontinue or in any manner step back from his threatening attitude and approach to the Winnipeg Police, and in particular he never gave any indication that he was prepared to relinquish the weapons he was using to threaten the police officers. In fact, he never even responded verbally to demands made on him by the police to drop his weapons.
3. Mr. Miles’ conduct throughout his contact with members of the Winnipeg Police Service can only be described as irrational.
4. Despite the unfortunate result of the Winnipeg Police confrontation with Mr. Miles, it appears clear that the Winnipeg Police actions, and in particular Constable Michalyshen calling out to the people at the door of the convenience store to get inside and lock the door, preserved the safety of a number of innocent members of the public who were put in jeopardy by Mr. Miles’ actions.

[21] In Schedule 3 to this Report is a summary of the evidence of Patrol Sergeant Jeffrey James Quail, the Officer Safety Coordinator of the Winnipeg Police Service, and of Sergeant Joel Johnston who from 1990 to 1998 held the position of Control Tactics Coordinator for the Vancouver Police Department which was effectively the same position as that presently held by Sergeant Quail with the Winnipeg Police Service. Sergeant Johnston is presently a squad leader with the Emergency Response Team for the Vancouver Police Department which was sometimes referred to as a swat team. Both Patrol Sergeant Quail and Sergeant Johnston were qualified at these proceedings as experts in the area of the use of force by police officers. Their evidence analyzes the actions of the Winnipeg Police officers who were in any manner directly involved with the death of Donald Lorne Miles. In the opinion of both those experts, the Winnipeg Police officers who were so involved conducted themselves properly. I agree with this opinion.

## **SCHEDULE 2**

### **MATERIAL CIRCUMSTANCES OF THE DEATH**

[22] The material circumstances of the death of the late Donald Lorne Miles were established at this Inquest through the evidence of a number of eyewitnesses; two forensic experts; and the autopsy reports of Drs. Balachandra and Littman. I have concluded that the combined evidence of five of the eyewitnesses, in the persons of Donald Miles' sister, Sarah Redhead, and the four Winnipeg Police officers who were most closely involved in the last few minutes of Donald Lorne Miles' life, correctly sets forth how Mr. Miles came to his death. The evidence of these five eyewitnesses can be summarized as follows.

#### **Evidence of Sarah Redhead**

[23] The deceased's sister, Sarah Redhead, says that her brother was living with her at her home at 455 Mountain Avenue, in Winnipeg in early November, 2001. She says that on the evening of November 5<sup>th</sup>, she and her mother went out to play bingo at the St. Joseph's Hall which is about a block away from her residence, on the next street. She says that she, her mother, and her sister-in-law, Kilda, were walking home from bingo at 10:15 p.m. when she saw a cab stopped on Mountain Avenue directly across from her house. It is probable that Ms Redhead is mistaken in saying that what happened at this time occurred at 10:15 p.m., and that the correct time might actually have been shortly before 10:00 p.m. As will be seen, paramedic Raymond Rempel's evidence is that he arrived on the scene at 10:13 p.m. in response to police calls for an ambulance to attend the Shell service station lot at Mountain and Salter.

[24] She says that her brother Donald was taking two pieces of stereo equipment out of the trunk of the cab. He put the stereo components on the sidewalk and went back to the cab and started talking to someone in the vehicle. Ms Redhead says that she, her mother and Kilda were watching from across the street, and that Donald was talking to someone in the cab for a period of about three minutes. She says that a man walking from the west towards Main Street stopped and looked at Donald's two stereo pieces on the sidewalk and picked them up and started walking away. She said he began walking towards Main Street. She says that she saw the cab driver gesture to Donald who turned and saw the man walking away with his stereo components. She says Donald started running after the man, and stopped him. She said they were facing each other but she didn't hear what they were saying. She, her mother and Kilda

then went inside her house. She says that Donald returned to the house. She says she didn't actually see him coming in but he went straight to the back of the house and then ran from the back of the house out the front door. She says he was carrying what she first described as a stick and then clarified was a brown table leg which had been in her house. She then identified as items taken from her house Exhibits 33, 32 and 42 which were identified by the police respectively as being the stick, a kitchen knife and a paring knife which had been in the possession of Donald Lorne Miles at the time of his confrontation with members of the Winnipeg Police Service.

[25] At the time Mr. Miles ran out the front door of the house, Ms Redhead only saw him carrying the table leg. She did not see either of the two knives. After he ran past her, she called out to him. He didn't reply and he didn't stop. Sarah Redhead says she was worried that Donald was going to fight the man who had taken his stereo equipment. She says she went out and stood on the sidewalk on Mountain Avenue but she didn't see Donald. She says she looked towards Salter Street and saw:

people just all over at Salter and Mountain. And I seen lights.

She recognized those lights as the lights of a police car. She said she then heard:

at least four shots going off.

She went down to the corner of Salter and Mountain and:

I seen the ambulance there, I seen my brother lying on the cement.

She says she recognized her brother's boots. She says that she also recognized his jean jacket when they picked him up. She said the police came the next morning and told her that her brother had died.

[26] Sarah Redhead was asked whether or not she had seen her brother drinking that day. She said that she had not seen him drinking, but she knew that he was:

under the influence.

Ms Redhead says that Donald Miles was usually quiet, but that he was not quiet that night. She said she knew he had been drinking:

'cause I seen before. I know how he is when he, when he drank.

She agreed that he seemed drunk that night.

[27] Ms Redhead was asked about her brother taking drugs. She said that she never saw him taking drugs but that she had heard about him smoking marijuana.

[28] Ms Redhead agreed that it appeared that Donald and the man he was speaking to appeared to be having an angry discussion. She agreed that Donald would have been angry that this person was trying to take his stereo equipment. She says it was very shortly after that discussion that Donald came into the house. Ms Redhead said that the table leg had been in the storage room at the back of the house where Donald went when he came back into the house. She says that he had to go through the kitchen to get to that storage room and that the kitchen was where the knives she had identified as being from her house were kept. She says that Donald was only in the house for about a minute before he ran out. Ms Redhead says that when Donald ran out of the house he was staggering. Ms Redhead agreed that Donald could be violent when he was angry and acknowledged that she had had difficulty with him previously being violent.

[29] Ms Redhead said she went to Mountain and Salter when she saw the commotion. She heard a lot of sirens. She says that when she got there an ambulance was already there:

and there were a lot of cop cars there.

She thinks it only took her about one minute to walk from her house to Mountain and Salter. She says that she went to the hospital later that night and that she spoke to the police there.

[30] Ms Redhead says that Donald had been drinking at her home before she went to bingo and that he had been drinking wine and:

some rye

with her father before she went to bingo at 6:00 p.m. She says that Donald and her father had been drinking for about two hours before she went to bingo. In her opinion, when she left to go to bingo Donald would have been:

feeling high.

### **Evidence of Constable Jacek Kapka**

[31] Constable Jacek Kapka has been a member of the Winnipeg Police Service for 17 years. In November, 2001 he was assigned to Division 13 at 260 Hartford Avenue in the north end of the City of Winnipeg. At approximately 10:00 p.m. on the evening of November 5<sup>th</sup>, 2001, he was on routine patrol with his partner, Constable Jason Mervyn Michalyshen, in a Winnipeg Police cruiser car.

[32] Constable Kapka was driving. He turned off Main Street west onto Mountain Avenue and travelled just past, or to the west of, the intersection of Salter Street and Mountain Avenue. Constable Kapka saw an individual subsequently identified as Donald Miles running south:

from between the houses

on the north side of Mountain Avenue. Constable Kapka says that:

once he reached the sidewalk, he looked east and I assumed he must have seen our cruiser car and he came to a stop.

It may or may not be that this was the point at which Sarah Redhead says that Donald Miles ran out of her home at 455 Mountain Avenue, as that residence is indeed on the north side of Mountain Avenue not far west of the intersection of Mountain Avenue and Salter Street.

[33] Constable Kapka says:

I saw that he was holding something in his hand and he put this object underneath his jacket.

Constable Kapka thought that this individual might have committed a robbery. He says that he therefore pulled into the north curb lane and stopped just before Power Street on Mountain. He says he watched Mr. Miles cross from the north to the south side of Mountain, and told his partner, Constable Michalyshen:

that we have to speak to him.

When traffic cleared, he made a U-turn into the south curb lane of Mountain heading east. He says that he stopped the police cruiser car three to four metres behind Mr. Miles. He says that both he and Constable Michalyshen got out of the police car.

[34] Constable Michalyshen was on the sidewalk behind Mr. Miles, and Constable Kapka yelled out to Mr. Miles something to the effect:

Hey, it's Winnipeg Police. We want to talk to you.

He says he yelled this out a few times but that Mr. Miles kept walking. Constable Kapka quickly went back to the cruiser car while Constable Michalyshen continued to follow Mr. Miles on foot.

[35] Constable Kapka says:

As I was sitting in the cruiser car, I observed Mr. Miles raised his right hand above his head and I saw that he was holding a knife with 30 centimetres long blade.

Mr. Miles then stepped off the sidewalk into the vehicular traffic on Mountain Avenue. Constable Kapka says that it was at that point:

I saw that he was holding another object in, in the other hand which would, would have been left hand which appeared to be either a metal bar or wooden stick approximately 30 to 60 centimetres long.

He says that his partner, Constable Michalyshen, followed Mr. Miles off the sidewalk but

...Mr. Miles was walking between the cars and Jason was almost hit by one of the cars. It was a maroon K-car. And Mr. Miles was heading towards the middle of the intersection.

Constable Kapka says as Mr. Miles was walking towards the intersection he held the knife up approximately shoulder high and was waving it back and forth.

[36] Constable Kapka managed to get the police cruiser into the intersection. He says:

I positioned the cruiser car facing northeasterly direction and Mr. Miles was, at this point, in the west lanes of Mountain east of Salter. Jason was instructing him to drop the knife, which he didn't comply.

He says that Constable Michalyshen was yelling at Mr. Miles to drop the knife and that he, Constable Kapka, could clearly hear what Constable Michalyshen was yelling from about six or seven feet away.



[37] Constable Kapka advised the dispatcher of their location and the situation. He then got out of the cruiser car, drew his pistol and walked in front of the cruiser car. He says:

At this point, Mr. Miles, who was facing west, was slowly going sideways towards the south sidewalk of Mountain so I positioned myself two, two to two and a half metres west of him, facing Mr. Miles and I was paralleling him with my pistol pointing at him and instructing him to drop the knife.

[38] Constable Kapka was pointing his pistol at Mr. Miles with his right arm extended. Because Mr. Miles was not complying with Constable Kapka's demands that he drop his knife, Constable Kapka decided to use his "OC", or pepper spray. He says he:

...reached into my OC spray pouch which was on my service belt and with my left hand, I removed my OC spray. I raised my left arm to the eye level and started spraying Mr. Miles -- in the, in the face area.

He says that Mr. Miles was walking very slowly southward and that he was following Mr. Miles. He says they were still on Mountain just east of Salter.

[39] Constable Kapka says that the pepper spray didn't appear to have any effect on Mr. Miles. He says that he continued to pepper spray Mr. Miles and to instruct him to put the knife down. He says that:

At one point, he put his two arms in front of his face as he was trying to block the, the steady stream of pepper spray.

He says that Mr. Miles had both hands up with his fists clenched in front of his eyes. Mr. Miles had the knife in his right hand and a piece of wood in his left hand. Constable Kapka says that:

He then made a step or two backwards and then turned north and proceeded to run towards the Shell gas station which is on the, on the corner of Mountain and Shell -- and Salter, on the northeast corner.

Constable Kapka thinks that by this time he had emptied his canister of pepper spray on Mr. Miles.

[40] Constable Kapka was momentarily impeded by a mist of pepper spray that had got in his own eyes. He says:

I had to close my eyes for a split second.

He says he saw his partner, Constable Michalyshen, running after the male who was getting closer to the entrance to the Shell gas station convenience store. He says that Constable Michalyshen yelled out to a woman who was just going into the store, telling her to lock the door. Apparently the woman was successful in getting into the store and getting the door locked because Constable Kapka saw Mr. Miles run up to the door and kick it once or twice. Mr. Miles then turned around, facing in a southeasterly direction. Constable Kapka then radioed this information to his dispatcher from the radio attached to the collar of his shirt.

[41] Constable Kapka says that Constable Michalyshen positioned himself about three metres south of Mr. Miles while Constable Kapka went past Constable Michalyshen and positioned himself just a little bit north of Mr. Miles who was still by the door and was waving the knife from side to side in a threatening manner.

[42] Constable Kapka says he had his gun pointed at Mr. Miles and that both he and Constable Michalyshen instructed Mr. Miles numerous times to put his knife down. When asked whether either of the police officers said anything else to Mr. Miles, he responded that it was just:

Everything's going to be okay, just put the knife down.

Mr. Miles didn't say anything to the police officers and he didn't put his knife down though apparently at one point Mr. Miles dropped the knife on the ground at his feet. Constable Kapka says:

At that point, I sort of thought about charging at him and pushing him away from the knife. I moved my upper body slowly forward at, at which point he started brandishing with the stick he had in his left hand. I hesitated for a second or so which was enough time for, for him to grab the knife from the ground and again, he was motioning with the knife -- in a threatening manner.

[43] Constable Kapka estimated that both he and Constable Michalyshen were about ten feet away from each other and from Mr. Miles. Constable Kapka says that both he and Constable Michalyshen continued to tell Mr. Miles to drop his knife. He says:

...There was no response from him and at one point I, I saw Constable Carlson, Darren Carlson and just a split of a second I saw Michael, Michael Lockington. They were, they were a metre or so away from Jason Michalyshen.

He says that:

Darren kept his gun pointed at Mr. Miles and again, he also told him numerous times to drop the knife down. Mr. Miles at one point put the knife, which he held in his right hand, to his neck and made a motion up and down as he was trying to cut his neck.

He says:

We yelled out to him to stop doing it and I, I saw Darren pepper spraying Mr. Miles. Again, it had no effect on, on him and, and after a few seconds he again, he, he was motioning with his knife in a threatening manner and I thought Darren emptied his OC spray canister, so I moved to Jason and asked him to hand his canister to me. He handed over to me his pepper spray canister and I, and I started spraying Mr. Miles.

He says that he was, at this point, approximately ten feet or so from Mr. Miles.

[44] Constable Kapka says:

At this point I, I observed that Mr. Miles looked at me. He was sort of focusing at me for a few seconds and all of a sudden, he started charging at me. He was running directly at me with his knife pointed high up. It just stunned me. I honestly didn't expect that.

[45] Constable Kapka was asked about the manner in which the knife was being wielded by Mr. Miles. Constable Kapka said that he couldn't:

-- really recall. What I, what I saw was this big body mass coming at me with a knife all of a sudden, like someone flicked the light off and everything became dark. I saw him coming at me, he's coming closer and closer. At this point, I started backing -- moving backwards as I was trying to get away from him and I still had my arm extended with the pistol sort of pointing at him but everything is sort of wobbling and as I'm trying to get away from him, I saw for some reason, I'm not really sure why but I saw two females with their faces stuck to the window. They were inside the Shell gas station, so they were watching us and you know as he's coming closer to me, I felt that my life is being threatened by, by him. I -- his intentions were quite obvious to me that he either wants to inflict some serious bodily harm to me or even death. At this point, I instinctively fired a shot, fired the gun. However, he was still coming at me like a train. He was --

[46] The following exchange then occurred between Mr. Abra and Constable Kapka:

Q Did you shoot it at him?

A You know what, I just shot.

Q Okay.

A I, I cannot say. I...

Q Do, do you recall at all what general direction your firearm was pointing?

A Well my, my arm was extended in general in -- towards him.

Q Okay.

A There -- but there was no aiming or anything. He was still coming at me. At that point I, I felt that I have to get away from his path and I ducked. I lower my head because I thought he was going to stab me in my upper body so I ducked and decided to go to the north-west, north-west corner of the, of the store. As I'm running there, I felt him behind me. I didn't hear him, but I felt him behind me. I looked to my right and I -- in my, in my mind he was very close. Excuse me. So I decided to get away from him as, as much as possible because he was so close. I even arched my upper body forward, trying to increase this distance and at this point, I saw this metal post by the north-west corner of the gas station, and I saw the fence and I thought I was trapped. I basically had nowhere to go and I felt him so close and I thought he was going to stab me in my, in my shoulder.

[47] Constable Kapka says that at that point he made a 180-degree turn and fired two shots. He says:

I saw him go down and all of a sudden like someone clicked this light on and, and everything is clear.

He says he saw his partner at the south end of the store collapsing to the ground. He also saw Mr. Miles lying on the ground with a big pool of blood around his stomach area and with Constable Esther Schmieder checking on him. She told Constable Kapka that Mr. Miles was conscious. Constable Kapka says that he advised dispatch by radio that there was an officer down and a suspect down and that an ambulance was needed. Constable Kapka says that he then went to the store and told the two women he had seen at the window of the store not to leave as they were witnesses to the incident.

[48] Constable Kapka says that when he saw his partner, Constable Michalysen, collapsing he recognized that Constable Michalysen must have been hit by one of the shots which he (Constable Kapka) had fired.

[49] Constable Kapka says that during the course of this whole incident Mr. Miles did not say a word although the officers had been yelling at him repeatedly to drop the knife. Constable Kapka also said that he fired his gun on the two occasions (apparently a total of three shots fired):

because I felt that Mr. Miles wanted to either seriously harm me or kill me.

He also advised the Court that if it had not been for:

Darren's quick action and decisive action, there is no doubt in my mind that I would have been injured, if not killed.

[50] Constable Kapka was asked about his comment that when Mr. Miles came at him with the knife, it was:

...like someone flicked the light off and everything became dark.

The following exchange occurred between Mr. Abra and Constable Kapka:

Q Now, you made a comment about the lights going out --

A Yeah.

Q -- in your testimony. Now, were you using that as a figure of speech for your own mind --

A It was a --

Q -- or did the lights actually go out in the parking lot?

A You know --

Q Or do you know?

A When I, when I was pepper-spraying him, the area, the area of, of the Shell gas station is very well lit and I'm pepper-spraying him. I see him very clearly. I see, I see Darren. I see Jason and the area is still very -- lit very well. As I'm backing up, sort of knowing the threat he's posing to me, everything becomes dark. Not that someone turned off the lights, it just in my mind the way I saw it, it's just I didn't see anything but him. Everything's very, very dark.

Q Okay. You could see him?

A I, I saw a big mass --

Q Okay.

A -- coming at me.

Q So when you used the term the lights went out, you're talking about your own perception, really.

A That's correct, sir. Yeah.

### **Evidence of Constable Darren Carlson**

[51] Constable Darren Carlson has been a member of the Winnipeg Police Service for seven and a half years. On the evening of November 5<sup>th</sup>, 2001, he and Constable Lockington were on duty in a police cruiser car on Salter Street near Dufferin Avenue in the City of Winnipeg. They heard a radio transmission from officers at Salter and Mountain, and immediately radioed that they would attend there. He says they activated their emergency equipment, and evidently arrived on the scene at Salter and Mountain very quickly. They pulled their vehicle onto the Shell service station parking lot on the northeast corner of Salter and Mountain.

[52] Constable Carlson says that Mr. Miles was backed up against the window of the convenience store facing Constables Kapka and Michalyshen who were approximately ten feet away from him near the gas pumps. He says that Mr. Miles was making stabbing motions in the air with his knife. Mr. Miles also had a stick in his other hand.

[53] Constable Carlson, who had been driving the police vehicle, said he got out and drew his service pistol and started giving commands to Mr. Miles to drop the knife. He says that he was immediately to Constable Michalyshen's right. He wasn't sure whether Constables Kapka and Michalyshen had their firearms out. They were, however, commanding Mr. Miles to drop his knife and get down on the ground. He says that Constable Michalyshen did have his ASP baton in his right hand, extended, ready to strike.

[54] Constable Carlson says he heard Constable Kapka ask Constable Michalyshen for his pepper spray, and at that point Constable Carlson took his pepper spray out and waited for a chance to spray Mr. Miles. He says that he did spray Mr. Miles from a distance of about six feet. He says Mr. Miles put the knife to his own throat and was making a "sawing action" against his throat. He says:

That's when I stepped in to pepper spray him.

but

He just shook his head and blinked and that was it.

Constable Carlson said:

I didn't empty the canister but I probably gave him approximately a three-second blast of pepper spray.

Constable Carlson says that Mr. Miles began swinging the knife in front of himself again and Constable Carlson raised his gun again. He says:

Then mere seconds after that he (Miles) started to advance towards Constable Kapka.

He says that, while he was advancing towards Constable Kapka, Mr. Miles continued to swing the knife and make stabbing motions until Constable Kapka was up against the fence and had nowhere to go. He says:

At that point, Constable Kapka fired at him.

[55] Constable Carlson says that this didn't have any effect on Mr. Miles. It:

Didn't slow him down. Didn't stop him. He didn't fall. He didn't drop any of his weapons. Constable Kapka took a step towards the building, gave himself a few more feet to back away but the male, at that point, he lunged at him with his knife.

[56] Constable Carlson said:

At that point, I shot him.

[57] Constable Carlson says he fired twice and that Mr. Miles dropped to the ground. He says that he only heard Constable Kapka fire once. Constable Carlson assumed that he had himself hit Mr. Miles with both rounds that he fired. He says that after Mr. Miles fell he went over to him and kicked his knife away. He says the knife was lying on the ground about one foot in front of Mr. Miles. He says at this point blood was beginning to pool in front of Mr. Miles who was on his side facing Salter Street. He says at this point other officers arrived on the scene and he turned his firearm over to Patrol Sergeant Swan.

[58] Constable Carlson indicated that when Constable Kapka was chased by Mr. Miles to the fence at the north end of the Shell service station parking lot, Constable Kapka was backpedaling. Constable Carlson says that he followed with his service revolver pointed at Mr. Miles. He says that he (Carlson) had to

move to his right so that Constable Kapka would not be in his “backdrop” and that this placed him closer to the pay phones on the west wall of the Shell convenience store. He says that this is when Constable Kapka fired his first shot.

[59] Constable Carlson says that he was about six to ten feet from Mr. Miles when he fired the two shots. He says he did not at that point feel he himself was in imminent danger. He says:

The time I fired I felt Constable Kapka was in risk of grievous bodily harm or death.

He says at that point Mr. Miles was approximately six feet from Constable Kapka:

He’s in a lunging motion, moving towards him.

[60] Constable Carlson was in police uniform although he was not wearing a hat. Similarly, Constables Kapka and Michalyshen, and Constable Carlson’s partner, Constable Lockington, were in police uniform.

[61] Constable Carlson says that from the point that he arrived on the scene, all four officers:

...were giving the male commands to drop his knife.

[62] He says that these commands were constant right up to the time Mr. Miles fell to the ground, and that they were yelled at Mr. Miles. He says Mr. Miles never said anything in response. He says that when Mr. Miles put the knife to his throat he said to Mr. Miles:

Let us help you.

[63] Constable Carlson says that after he pepper-sprayed Mr. Miles:

He just shook his head and blinked his eyes and looked right at Constable Kapka and from my view, from that point, he never took his eyes off Constable Kapka and there was a brief pause of a mere couple of seconds and then he started to advance on him.

[64] Constable Carlson was asked where the knife was as Mr. Miles advanced towards Constable Kapka. He said:



It was continually out in front of him and the, the same motions he had been making while he's up against the windows, the stabbing motions and waving it around in front of him.

[65] Constable Carlson says that Mr. Miles cornered Constable Kapka (who had been backpedaling as Mr. Miles came towards him) against the fence at the north end of the Shell service station parking lot.

[66] Constable Carlson says that when Mr. Miles lunged at Constable Kapka he raised the knife:

and as he lunged, he was bringing it down in a stabbing motion towards Constable Kapka.

Constable Carlson had no doubt in his mind that Mr. Miles was trying to stab Constable Kapka. He says that his action in shooting Mr. Miles was instinctive. He was trying to protect Constable Kapka from Mr. Miles.

[67] Constable Carlson says that another officer asked who had fired and he identified himself as the officer who had fired his handgun. He says he knew, by virtue of police service policy, that the officers would be separated and he did not discuss the incident with anyone. He says that he was charged and cautioned "as per policy". Constable Carlson says his shots were "simultaneous" and he doesn't know which round he fired actually struck Mr. Miles.

### **Evidence of Constable Jason Mervin Michalyshen**

[68] Constable Michalyshen has been a member of the Winnipeg Police Service for about four years. On the evening of November 5<sup>th</sup>, 2001, he was partnered with Constable Kapka. He says that as Constable Kapka drove their police vehicle in a westerly direction on Mountain Avenue, Constable Kapka told him that he had seen a male acting suspiciously. Constable Michalyshen did not see the individual at first; then he did spot the male walking east on Mountain on the south sidewalk towards Salter. He says at that point he didn't notice the male carrying anything. He did, however, note that the male appeared to be distraught and staggering. He says that Constable Kapka made a U-turn and headed back east on Mountain towards Salter. He says that Constable Kapka stopped the police cruiser by the curb behind the male. Constable Michalyshen jumped out, followed the male and yelled at him to stop and speak to him. He identified himself as a police officer. He was, in any event, in uniform with no jacket or hat. He says that he was initially 20 to 25

feet behind the man, and that they were both on the south sidewalk of Mountain Avenue heading east towards Salter.

[69] Constable Michalyshen says that there was no response to his request to Mr. Miles that he stop and talk to him. He says that just before the intersection of Salter, Mr. Miles walked into the traffic on Mountain Avenue. Constable Michalyshen followed him but had to stop abruptly to avoid being hit by a car. He says the traffic was fairly heavy at the intersection of Mountain and Salter at that time. Apparently when they got into the intersection, Constable Michalyshen saw a stick in Mr. Miles' hand. He wasn't sure which hand he had it in and he asked the male if he needed any help. There was no response as Mr. Miles continued to walk into the intersection. Constable Michalyshen says that he had to step in front of a car and yell at it to stop so neither he nor Mr. Miles would get hit. At this time, Constable Kapka had not been able to get the cruiser into the intersection. He says that he and Mr. Miles got to the:

middle of the intersection facing one another again. I think initially the range...the distance between the two of us certainly ranged from time to time but initially, at that point, say approximately 20 feet...I was facing him from a southeast direction. He was facing me in a northwest direction.

Constable Michalyshen saw that Mr. Miles had a wooden stick in his hand, so he extended his ASP baton in his right hand, and also held his OC canister in his left hand.

[70] He says that Constable Kapka then pulled the cruiser into the intersection with the emergency lights flashing. He says that when Constable Kapka pulled up he saw Mr. Miles pull a large kitchen knife from somewhere:

...on his person.

He says that it appeared to come:

from the jacket area.

He says that Mr. Miles was being:

very threatening with both the knife and the stick towards me...just prior to Constable Kapka exiting the cruiser car and assisting me.

He yelled to Constable Kapka that the man had a knife. Constable Michalyshen then put away his baton and OC spray and drew his firearm. He says that Constable Kapka joined him in the intersection and drew his gun also.

[71] Constable Michalyshen says that as soon as he saw Mr. Miles draw the knife he ordered him to drop it numerous times. He says:

I even at some point expressed that he go to the ground.

[72] Mr. Miles did not respond to his commands. Constable Michalyshen says that he continued to command Mr. Miles to put down the knife over and over again. He says Mr. Miles did not comply and that he appeared very intoxicated and:

possibly even very stoned-like.

Mr. Miles became aggressive with the knife and:

at one point, I believe the stick is placed within his jacket and he only does have the knife in his right hand. From that point on, he continues to lunge forward in our direction on several occasions.

[73] Constable Michalyshen says that at one point Constable Kapka attempted to close the 15 to 20-foot gap between himself and Mr. Miles and pepper-sprayed him. Constable Michalyshen says:

There was very little effect on him whatsoever,

and that at one point Mr. Miles protected his face from the pepper spray with the sleeve of his jacket. He says that Mr. Miles then turned and ran towards the Shell station convenience store. Constable Michalyshen says that he ran after him because it appeared that Mr. Miles was trying to get in the store entrance. He says he saw several onlookers in the parking lot near the entrance to the store and he yelled at them to get into the store and:

I know I screamed on a couple of occasions to lock the door.

He says that he saw someone making attempts to lock the door and that he believed they were successful in doing so.

[74] Constable Michalyshen says:

...My, my biggest concern, I did not want the male to enter into the store. I was very concerned for an armed and barricaded type of situation so I was making -- I was hoping that the male would not make attempts to get into the store and, and hopefully not successfully get into the store.

[75] Constable Michalyshen says that he saw Mr. Miles pull on the door a couple of times but he was unable to open it. He says Mr. Miles then kicked at

the lower portion of the door. He says that he and Constable Kapka then confronted Mr. Miles who had his back to the door of the convenience store.

[76] Constable Michalyshen says that he and Constable Kapka, who was to his left, were in the vicinity of the gas pumps, and were facing Mr. Miles. He says at this point he and Constable Kapka were slightly closer to Mr. Miles than they had been previously. He says that Mr. Miles continued to be threatening with the knife and lunged at them on a number of occasions. He also continued to ignore the police commands to drop the knife. Constable Michalyshen says that both he and Constable Kapka had their firearms out.

[77] Constable Michalyshen says that Constable Kapka asked him for his pepper spray. Constable Michalyshen says that it appeared to him that Mr. Miles was:

becoming a little bit more aggressive towards specifically Constable Kapka based on where he was in conjunction with me. I think they were maybe facing each other, maybe a little bit more so...

[78] Constable Michalyshen says that he did pass his pepper spray to Constable Kapka with his left hand. He wasn't sure if Constables Carlson and Lockington had arrived by that time and he did not recall seeing Constable Carlson pepper-spray Mr. Miles. He says, however, that Constable Kapka did pepper-spray Mr. Miles at this point and again it had no effect on Mr. Miles. He says that they continued to tell Mr. Miles to drop the knife, and when Mr. Miles put the knife to his own neck Constable Michalyshen told him they were there to help him. He says he said this to Mr. Miles several times. He said that Mr. Miles continued the sawing motion with the knife on his own neck, however Constable Michalyshen thinks that Mr. Miles had the dull side of the knife to his neck.

[79] Constable Michalyshen says that Mr. Miles then dropped his knife accidentally. He says that he then grabbed his ASP baton with his left hand and moved towards Mr. Miles. Constable Michalyshen still had his gun in his right hand. Mr. Miles, however, picked the knife up quickly and pointed it towards the officer. Constable Michalyshen says:

That's when I pulled back again.

He says that Mr. Miles appeared to be becoming more agitated and aggressive, inching towards the police. He says that it also appeared that Mr. Miles:

...was focusing in on Constable Kapka...

[80] Constable Michalyshen says that because of Mr. Miles' increased aggression he (Michalyshen) was moving backwards:

and just instantaneously I felt or I, I observed something hit the ground in front of me and I immediately had a kind of very sharp kind of discomfort in my, in my left thigh.

The “sharp discomfort” Constable Michalyshen referred to evidently was the bullet which had been fired by his partner, Constable Kapka, which ricocheted off something and hit him. Constable Michalyshen said that he did not see (or evidently hear) any of the other officers discharge their firearm at that time.

[81] Constable Michalyshen says that it was at the point that he saw Mr. Miles lunging forward towards Constable Kapka that it was:

At that instant moment that I had that burning sensation in my leg.

[82] Constable Michalyshen says that he did not see Mr. Miles down on the ground until after he (Constable Michalyshen) had made his way to a nearby cruiser car. He says he was already on the ground when he looked over and saw Mr. Miles on the ground.

[83] Constable Michalyshen was transported by ambulance to the hospital where a small portion of the bullet which had hit him was removed from his leg. He was off duty from the night of the incident until January 15<sup>th</sup>, 2002 when he returned to “light duties”, and he was not back to full duties until March 6, 2002.

[84] Constable Michalyshen was unable to say how many gunshots there were, as he did not recall hearing any of them. Constable Michalyshen confirmed that he did indeed feel that Mr. Miles posed a significant threat to both he and Constable Kapka and the other police officers. He also felt that Mr. Miles posed a threat to the people around the store, and other people in the vicinity who were not fully aware of what was going on.

[85] Constable Michalyshen says that he momentarily lost sight of Constable Kapka when Mr. Miles made his last lunge towards Constable Kapka.

### **Evidence of Constable Michael John Lockington**

[86] Constable Michael John Lockington has been a member of the Winnipeg Police Service for a period of five and a half years. On the evening of November 5<sup>th</sup>, 2001, he was partnered with Constable Darren Carlson. He says that they were northbound on Salter Street at Selkirk Avenue in the City of Winnipeg on the evening of November 5<sup>th</sup>, 2001 when they heard the call from Constables Kapka and Michalyshen on their radio. They immediately attended to the Shell service station at the northeast corner of Salter Street and Mountain Avenue. Constable Carlson was driving the vehicle and Constable Lockington was the “jumper”. He says that when they arrived on the scene Mr. Miles had his back against the windows of the Shell convenience store, and was facing towards the parking lot holding a knife in his right hand, and a piece of wood in the left hand. Constable Lockington does not recall Mr. Miles saying anything at all. He says that four officers were on the scene and that Mr. Miles was not complying with demands to drop the weapons. All four officers were demanding that he drop the weapons. The following exchange occurred between Mr. Abra and Constable Lockington:

Q Okay. Now, we've heard evidence that Kapka and Michalyshen were there already. Carlson has told us that he went up and sort of stood beside them. Where did you go, sir?

A I exited the cruiser car and out the right -- the passenger side door and was between our car and the store. The door to the store was still open. As I recall, when we approached, there was somebody leaving the store so the, the store was still open. It was very bright inside, and I could see lots of people inside buying groceries and whatnot. So that was my -- one of my main concerns was making sure that this male that we saw armed with the weapon did not enter the store as it was open and just prevent that threat. So that's basically where I stood, initially, was by the door and then I moved around and basically just formed a line facing the male --

Constable Lockington apparently arrived on the scene after the door to the store was locked in response to Constable Michalyshen's shouts to the people inside the store. Obviously Constable Lockington was not aware this had been done.

[87] Because he was concerned about people in the store, Constable Lockington initially positioned himself by the entrance to the door, and then:

...then I moved around and basically just formed a line facing the male...armed with the weapons.

Constable Lockington says that he had taken his service handgun out immediately upon exiting the police vehicle.

[88] Constable Lockington says that he (along with the other officers) yelled at Mr. Miles:

a few times

to:

drop the weapons, drop the knife.

[89] Constable Lockington says that he was trying to use his radio to advise dispatch what was occurring, the threat Mr. Miles was posing, and to indicate that some help was needed.

[90] Constable Lockington says that he remembers seeing streams of pepper spray aimed at Mr. Miles, and that it:

basically had no effect on him whatsoever.

[91] Constable Lockington says that at one point Mr. Miles began drawing his knife across his own neck in what he described as a “sawing motion”. To his recollection, Mr. Miles was not using the sharp edge of the knife because there was no blood being drawn by this sawing action.

[92] Constable Lockington says that he was still concerned about the question of the door to the store being locked and the fact that there were:

people, children, innocent bystanders in the store.

and that he was trying to keep in touch with the dispatch centre to let them know what was going on. He says that he also heard people approaching from behind them and at one point he turned around to tell these people to stay back due to the threat the armed male posed.

[93] Constable Lockington says that Constable Kapka constantly demanded that the male drop his weapons but the male refused, and continued to walk towards Constable Kapka. He says then Mr. Miles:

...all of a sudden, lunged directly at him with the knife.

He says that it was at that point that he heard one shot followed by what he thought was three more shots. He says that Constable Kapka had turned around

and was running or retreating away from the threat that Mr. Miles posed. His recollection is that Constable Kapka was running away from the store towards Salter. He says that:

The male stumbled for a couple of seconds, and then he fell to the ground and he was laying partially on his right side or his right leg. And then shortly thereafter, what I estimate is five seconds, there's a large pool of blood creeping from his body around his abdominal area. The male twitched a couple of times and he stopped moving.

[94] Constable Lockington says that other police cars arrived shortly after shots were fired. To his recollection, Constable Carlson discharged his firearm, and that although he heard a series of shots he does not know who else fired their handgun. Constable Lockington says that he estimates that there were perhaps a total of four shots fired.

[95] Constable Lockington says that he and Constables Carlson, Michalyshen and Kapka were taken back to the District 3 station, were separated, had their clothing seized, and were interviewed by Homicide detectives. This evidence is consistent with other police evidence to the effect that this incident and the location where it occurred were treated by the police as a "Major Crime" scene. Constable Lockington confirms that there was no discussion among the four officers prior to their interviews by the Homicide detectives.

[96] Constable Lockington says that he doesn't recall Mr. Miles having said anything during the course of the incident. He said that the request to Mr. Miles to drop his knife was repeated constantly to him by the various officers:

the whole time we were there.

He says he remembers Mr. Miles waving the knife,

just all over.

and he considered Mr. Miles to be a definite threat to the officers there and to:

all the people inside the store.

### **Forensic Evidence**

[97] The evidence of firearms expert Darryl Glenn Barr together with the autopsy reports of Drs. Balachandra and Littman establishes that a total of five shots were fired by Officers Kapka and Carlson. Constable Kapka fired his handgun three times and evidently did not hit Mr. Miles at all. However, one of



his shots must have ricocheted off the pavement and struck Constable Michalysen in the leg. On the other hand, apparently both of the shots fired by Constable Carlson from his handgun hit Mr. Miles. These two shots resulted in the ultimately fatal injuries to Mr. Miles.

### **I. Evidence of Darryl Glen Barr**

[98] Mr. Darryl Glen Barr has been a civilian member of the R.C.M.P. in the Forensic Laboratory in the Firearms Section for a period of 12 years. His posting initially was in Winnipeg but when the R.C.M.P. decided to consolidate the Firearms Section in Halifax, Nova Scotia, he moved there about one year ago.

[99] He has previously been qualified in both the Provincial and Queen's Bench Courts in Manitoba and elsewhere as an expert qualified to give opinion evidence on firearms. He was, in fact, so qualified at this Inquest.

[100] Mr. Barr says he was called late on November 5<sup>th</sup>, 2001 to attend at the Public Safety Building. He was briefed there about the police shooting of Mr. Miles. He was then teamed with Constable Richard Hebert of the Winnipeg Police Service Identification Unit, and they went to the Health Sciences Centre to view the body of the victim of the shooting, Mr. Miles. Mr. Barr also attended the autopsy performed by Drs. Balachandra and Littman the next morning. He says that Constable Hebert made seizures of pertinent items at the autopsy. He says that sometime later he was provided with items seized by Constable Comeau, all of which:

related to the firearms in this particular case

and included the firearms of Constables Carlson and Kapka.

[101] Among other exhibits examined by Mr. Barr were chambered rounds of ammunition from the handguns of both Constables Carlson and Kapka, as well as a bullet fragment taken from the body of the deceased. He also examined five cartridge casings found at the scene of the shooting. He confirmed that three of those cartridges were fired from Constable Kapka's firearm, and two were fired from Constable Carlson's gun. The bullet fragment recovered from Mr. Miles' body was fired from Constable Carlson's handgun. As well, another copper-jacketed bullet found in the parking lot:

next to blood

was fired from Constable Carlson's handgun.

[102] Four other bullet fragments which were located could not be identified or eliminated from having been fired from either Constable Kapka's or Constable Carlson's handgun. One of these was a bullet fragment removed from the left leg of Constable Michalyshen.

[103] Mr. Barr testified that a hole in Constable Michalyshen's trouser was consistent with having been caused by the passage of a deformed bullet. This in turn would be consistent with the bullet having struck something prior to hitting Constable Michalyshen's pants.

[104] Mr. Barr also examined clothing taken from the deceased. He says that the deceased's blue denim jacket had a hole in the right side under the sleeve consistent with being:

an entrance hole from a bullet.

He says that the same jacket had two holes in the right sleeve area between the elbow and the wrist. He says the one on the outside was consistent with being a bullet entrance hole and the one on the inside consistent with an exit hole from a bullet. He also says that the accused's T-shirt had two holes in the right side of the back which were consistent with the passage of a bullet. It also had another hole in the lower right side of the shirt and:

it was more to the side down low as opposed to the other two which were up higher and towards the back end.

He concluded then that it was also consistent with the passage of a bullet.

[105] Mr. Barr also examined the briefs the deceased had been wearing and testified that there was a hole on the right side consistent with an entrance hole from a bullet and a hole in the left groin area in the front consistent with an exit hole from a bullet.

[106] At the autopsy, Mr. Barr saw the entrance and exit wounds on Mr. Miles' body and concluded that they were consistent with the possible entrance and exit wounds he identified from the clothing.

## **II. Autopsy Report**

[107] The autopsy report in question can be found in Schedule 5 to this Report.

[108] A report on the autopsy conducted on the body of Donald Lorne Miles was filed as Exhibit No. 44. It consisted of a Report of Medical Examiner by the Chief Medical Examiner for the Province of Manitoba, Dr. Balachandra, and an autopsy report form signed by Dr. C. Littman. These reports indicate that the immediate cause of death of Donald Lorne Miles on November 5<sup>th</sup>, 2001 was hemorrhage due to or as a consequence of a transection of the right femoral artery and vein resulting from a gunshot wound.

[109] A photograph taken at the autopsy, which was performed on November 6<sup>th</sup>, 2001 at 10:05 a.m., showed the body of what was described as a well-nourished and otherwise healthy 34 year old male with multiple tattoos on the upper part of the body and gunshot wounds to the right side of the body. These gunshot wounds are described as follows in the autopsy report:

1. Entrance bullet wound in the right lumbar area measuring 0.5 cm in diameter with an eccentric abrasion collar measuring 0.5 cm between 1 o'clock and 5 o'clock and 0.2 cm from 5 o'clock to 1 o'clock. The wound was centred 112 cm above the heel and 16.5 cm to the right of midline. The path of the bullet passed through the soft tissues of the back fracturing the spinous process of lumbar vertebra #5 and the deformed bullet was lodged at the side of lumbar vertebra #5. The deformed bullet was found 107 cm above the heel. The depth of the wound from the skin surface was 15 cm and the direction was from right to left, slightly forwards and slightly downwards.
2. Entrance bullet wound in the right lateral thigh measuring 0.6 cm in diameter with an eccentric abrasion collar measuring 0.5 cm posteriorly and 0.1 cm anteriorly, the wound was centered 94.5 cm above the heel and 17 cm to the right of midline. An irregular exit wound measuring approximately 1.8 x 0.6 cm was present in the left groin area just lateral to the base of the penis. The exit wound was centred 88 cm above the heel and 4 cm to the left of midline. The path of the bullet passed through the soft tissues in front of the pubic bone severing the right femoral artery and vein with associated extensive bleeding which extended into the scrotum. The length of the wound path from entrance to exit was 23 cm and the direction was from right to left, slightly forwards and slightly downwards. There was no bony injury associated with this wound.

[110] One of the photographs taken at the autopsy included in Exhibit No. 2 shows the body of Mr. Miles on its left side with plastic rods extending upward from the bullet holes in the right side of Mr. Miles' body indicating the trajectory of the two bullets which struck him. These plastic rods clearly indicate that the two bullets were fired at Mr. Miles by someone to his right and

in a somewhat downward trajectory. These photographs together with the description of the two bullet wounds set out above seem to be entirely consistent with Mr. Barr's conclusions on the forensic examination of the firearms and bullet fragments that the shots in question were fired from Constable Carlson's service pistol. As well, the bullet trajectories indicated by the rods are consistent (assuming that Mr. Miles was standing facing more or less towards the east at the location at the northeast corner of the Shell lot where he was shot) with Constable Carlson's evidence as to his location near the pay phones on the west wall of the Shell convenience store when he says he fired two shots at Mr. Miles.

[111] The autopsy reports further indicate that during the course of the autopsy various specimens were collected, notably including "deformed bullets from tissue beside lumbar vertebra #5 and a fragment of copper jacket" and blood and urine samples.

[112] A summary at the end of Dr. Littman's portion of the autopsy report reads as follows:

This was the case of a 34-year-old male who suffered two gunshot wounds during an altercation with WPS. Autopsy showed two gunshot wounds, one in the right thigh exiting in the left groin and one in the right lumbar area. The gunshot wound in the right thigh transected the femoral artery and vein. Minor abrasions were also found in both knees and the back of the left arm and right hand. Several linear abrasions consistent with slash wounds were noted on the left side of the neck. Death was due to blood loss secondary to the gunshot wound in the right thigh.

### **III. Evidence of Gertrud Patricia Lehmann**

[113] Further forensic evidence relating to very heavy concentrations of alcohol in Mr. Miles' body was provided by Gertrud Patricia Lehmann. This evidence can be summarized as follows.

[114] Ms Lehmann is a graduate of the Faculty of Pharmacy at the University of Manitoba and has been employed in the Alcohol Section of the R.C.M.P. Forensic Laboratory for a period of 17 years. She is an expert in the analysis of blood alcohol as well as breath and urine alcohol analysis, and has testified in the courts in Manitoba, Saskatchewan and Alberta. She was qualified as an expert to testify in these areas at this Inquest.

[115] Ms Lehmann reviewed the report of Mr. R.T. Prokopanko from the R.C.M.P. Forensic Laboratory in Winnipeg, which report is included at Tab

No. 10 in Exhibit No. 1. Mr. Prokopanko had, on December 20<sup>th</sup>, 2001, examined certain exhibits from Mr. Miles' autopsy as follows:

- Exhibit 10B: one container of blood (post mortem)
- Exhibit 10F: one container of urine (post mortem)
- Exhibit 10H: one container of vitreous humor (post mortem)
- Exhibit 10T: one container of blood (ante mortem).

[116] As well, Mr. Prokopanko had examined a further exhibit from the autopsy on February 21<sup>st</sup>, 2002, that being:

- Exhibit 10C: one container of blood (post mortem).

[117] Apparently, however, only Exhibits 10C, 10F, 10H and 10T were analyzed "for alcohol and similar volatiles", and the results are indicated in Mr. Prokopanko's report as follows:

Exhibit 10C was found to contain 257 milligrams of ethyl alcohol in 100 millilitres of blood.

Exhibit 10F was found to contain 334 milligrams of ethyl alcohol in 100 millilitres of urine.

Exhibit 10H was found to contain 258 milligrams of ethyl alcohol in 100 millilitres of vitreous humor.

Exhibit 10T was found to contain 247 milligrams of ethyl alcohol in 100 millilitres of blood.

[118] Ms Lehmann was asked about the considerable variation in the alcohol levels indicated by Mr. Prokopanko's testing. She advised the Inquest that these variations are normal insofar as:

Alcohol partitions itself according to the water content of the body fluid or tissue, the higher the water content in the tissue or blood fluid we expect the alcohol levels to be higher there. And because urine and vitreous humor do have a higher water content than blood, we do expect them to have higher ethyl alcohol concentrations in them. So looking at that, to me this is, is quite normal.

[119] Ms Lehmann also advised that the .01 variation between the .257 post mortem and the .247 ante mortem reading was also not surprising. Ms Lehmann was asked what effect these alcohol readings would have had upon Mr. Miles. She responded:

In this particular case we're looking at 247 or 257 as far as the alcohol level goes. In the average drinker I would expect that to be consistent with extreme intoxication, not just impairment intoxication, but extreme intoxication. However, just by looking at the result too we do know that Mr. Miles is a drinker.

Ms Lehmann explained the significance of Mr. Miles being "a drinker" as follows:

Because people who are not drinkers or who drink slightly, you know, are just social drinkers and, and so forth really cannot attain alcohol levels of this magnitude. They become quite drunk and need to sleep before they can get to that level or they physically can't do it just because they become so sick. So we know that Mr. Miles is a heavy user of alcohol because he can attain those. So when you look at a blood alcohol level and try to determine what signs and symptoms you would see from an individual, you need to couple that with his tolerance to alcohol. Personally I have seen both ends of the spectrum. I've seen someone at 50 milligrams percent who is so drunk that they can't move from one breathalyzer to another to provide breath samples. They have to be taken by a chair and wheeled because they are feeling the effects, and those are your novice or non-drinkers. I've also had a breath test subject who had a blood alcohol level of 290 and conducted himself in a very good fashion, answered questions appropriately, was very cooperative and provided breath samples all afternoon. He did admit he was a heavy user of, of alcohol. So we can see those two things.

Now, with respect to Mr. Miles, I can't really predict what his behaviour would be, but I do know he is tolerant to alcohol. I would expect that he would show outward signs of being under the influence of alcohol, like (inaudible) behaviour, drunkenly, silly, staggering gait, difficulty with speech and motor control, unless he's extremely tolerant to alcohol and then he too might conduct himself in, in a fairly good fashion. Not saying that he isn't impaired, because certainly he would be because that's more of a cognitive thing.

Whether or not he is aggressive or violent really doesn't have to do with the alcohol itself, but with his personality. And alcohol does cause a loss of inhibitions, so if he is an aggressive and violent person these -- that would be disinhibited and those would manifest themselves. Those types of behaviours were not symptoms or signs of alcohol. If it were we would all become that way, and we all don't. So it's really -- it can facilitate violence in those people who are violent.

[120] Ms Lehmann was also asked about a report which was filed at Tab 11 in Exhibit No. 1, being a report by Shirley A. Treacy, M.Sc., also from the R.C.M.P. Forensic Laboratory in Winnipeg. This report indicates that there

were findings of the drugs THC; COOH-THC; Diazepam; and Nordiazepam in blood samples taken from Mr. Miles as well as findings of Diazepam; Nordiazepam; and codeine in samples of urine taken from Mr. Miles.

Ms Lehmann advised that these drugs:

suppressed the central nervous system as does alcohol  
and that they will intensify the impairment caused by alcohol.

[121] Ms Lehmann did not venture any opinion on exactly what effect the combination of very high levels of alcohol combined with some level of the drugs referred to above in Mr. Miles' blood would have had on his conduct on the evening of November 5<sup>th</sup>, 2001. This is, of course, understandable in light of the very significant variations she has witnessed from the effect of the high levels of alcohol taken by experienced drinkers as opposed to the effect of relatively low levels of alcohol on inexperienced drinkers. It can, however, be concluded from the evidence heard at this Inquest from the police and others as to Mr. Miles' conduct on the evening of November 5<sup>th</sup>, 2001, that his consumption of alcohol had a very significant negative impact on his conduct that evening.

### **Evidence of Other Witnesses to the Confrontation Between the Deceased Donald Lorne Miles and Members of the Winnipeg Police Service**

#### **Other Police Officers**

[122] Certain other Winnipeg Police officers who were in one way or another involved in either the events leading up to the death of the late Donald Lorne Miles or were otherwise involved in the subsequent investigation of those events is summarized hereunder. This evidence is entirely consistent with the evidence of Constables Kapka, Carlson, Michalyshen and Lockington already summarized.

#### **I. Evidence of Constables Kelly McClure and Barry Guy Steinthorson**

[123] Constables McClure and Steinthorson were in a police cruiser in the area of Dufferin Avenue and Robinson Street in the City of Winnipeg when they heard Constable Kapka's two messages on the radio requesting assistance. They immediately proceeded to the corner of Salter and Mountain with their emergency lights activated.

[124] They pulled onto the Shell station lot just at the point that Constable McClure heard four or five shots fired. They saw Mr. Miles drop to the ground.

[125] Constable Steinhorson went toward the pay phones where the police officers and Mr. Miles were located. Constable McClure stayed by the car because Constable Michalysen came limping towards him and ultimately collapsed in front of their cruiser car.

[126] Both Constables McClure and Steinhorson commented on the fact that there was a sense of urgency in the second of the two radio messages they overheard from Constable Kapka.

[127] Because Constables McClure and Steinhorson had overheard the shots fired they were treated as “involved officers” and they did not discuss the incident with the other “involved officers”.

[128] Constable Steinhorson thought that he heard three or four shots fired. Neither of the officers, however, was able to say who had fired those shots.

[129] Constable Steinhorson only spoke to Constables Kapka, Carlson and Lockington to make sure that they were not injured.

[130] Constable Steinhorson says that he made a radio request for two ambulances to attend the scene. After that he continued to help secure the scene of the incident.

## **II. Evidence of Constables Esther Elizabeth Schmieder and Susan Roy-Haegeman**

[131] Constables Schmieder and Roy-Haegeman were in a police cruiser at Jarvis Avenue and Sinclair Street in the City of Winnipeg when they heard Constable Kapka’s request for assistance. They immediately headed to Salter and Mountain and apparently arrived there just after Constables McClure and Steinhorson. They were in time to see Constable Michalysen staggering across the lot, and when Constable Schmieder went around the pumps on the lot she saw Mr. Miles lying on his right side. She could see that there were weapons on the ground in front of him. She requested an officer (she thought it was either Constable Lockington or Constable Kapka) to clear the weapons away from Mr. Miles. Although she initially said that she thought it was Constable Kapka who stepped around and moved the weapons away from Mr. Miles, she agreed that it might have been Constable Carlson who did this.



[132] Constable Schmieder says that she then knelt down to check on Mr. Miles and the ambulance arrived shortly after this. She says that at that time Mr. Miles was conscious and breathing, and he had a pulse. When she spoke to him he mumbled something which she could not understand. She also observed that at this point there was:

a vast amount of blood coming from his side onto the ground.

[133] Constable Schmieder says that she thought that the shooting occurred just at the point that they were arriving on the scene, and that she may not have heard the shooting because their siren was still on.

[134] Constable Roy-Haegeman says that when they pulled onto the lot she could hear what sounded like three gunshots while she still was in the cruiser car. She says that she had heard over the radio that an officer was down, and that she saw Constable Michalyshen was moving in the parking lot in:

kind of an unnatural fashion.

She concluded that he had been injured somehow.

[135] Constable Roy-Haegeman stayed with Constable Michalyshen until the ambulance arrived. She took possession of his firearm and turned it over to Patrol Sergeant Swan when she arrived at the scene.

### **III. Evidence of Constable Peter Derksen**

[136] Constable Peter Derksen arrived with his partner, Constable Lambert, just after an ambulance arrived there. He says at that point Mr. Miles was on the northeast corner of the parking lot:

being treated by ambulance.

Constable Derksen says that he spoke to Constable Michalyshen, and when he returned to his partner at the northwest corner of the lot, Patrol Sergeant Savoie asked them to go to the hospital with Mr. Miles. (It may be that in referring to Patrol Sergeant Savoie, Constable Derksen might actually have meant to refer to Patrol Sergeant Swan.) Constable Lambert actually rode in the ambulance with Mr. Miles while Constable Derksen followed in the police cruiser. Constable Derksen says that Mr. Miles was pronounced dead very shortly after his arrival at the hospital at 11:00 p.m.

[137] Constable Derksen seized Mr. Miles' clothing and a vial of blood. The clothes were turned over to the Identification Unit and the vial of blood was given to the Medical Examiner.

#### **IV. Evidence of Patrol Sergeant Susan Swan**

[138] On the evening of November 5<sup>th</sup>, 2001, Patrol Sergeant Susan Swan was working as a "street supervisor". She was in the lunchroom of the District 3 police station when she heard Constable Kapka's radio message about a male with a knife at Salter and Mountain. She says:

I advised the shift supervisor in the station to check on their call.

At the same time, Patrol Sergeant Swan headed to the front door of the station. By the time she got there she heard another radio message indicating that shots had been fired and an officer was down.

[139] Patrol Sergeant Swan says that as a street supervisor in situations such as this it was her responsibility to take charge of the scene. She says that she got to the scene before the ambulances arrived, to find that Mr. Miles was on the ground with Constables Schmieder and Basic attending him. Constable Michalyshen was also on the ground by a cruiser car, being attended to by Constable McClure.

[140] Patrol Sergeant Swan checked with the dispatcher to confirm that two ambulances were on their way.

[141] Patrol Sergeant Swan says that she took possession of the firearms of Constables Carlson, Kapka and Michalyshen, as:

one of my other main jobs as a street supervisor is to preserve the scene and evidence subject to that.

The seized firearms were ultimately turned over to Sergeant Frank Weiss of the Identification Section. Clothing and other equipment from all of the "involved officers" were also seized.

[142] Patrol Sergeant Swan says she was advised by Constable Steinhorsen that both Constables Kapka and Carlson had discharged their firearms. She says that she seized Constable Michalyshen's handgun because when she arrived at the scene, Constable Susan Roy-Haegeman came to her with Constable Michalyshen's gun.

[143] She says that the involved officers were removed from the scene and taken to the District 3 police station. She says that police shootings are handled:

in exactly the same manner as any other homicide by the Police Service...

[144] Patrol Sergeant Swan says that upon hearing the first call placed at 2207 hours, she was on the scene in two minutes. She says that she immediately left to go to the scene because of the urgency in Constable Kapka's voice.

[145] Patrol Sergeant Swan says that she instructed the members involved not to discuss the incident with each other.

[146] Patrol Sergeant Swan says that she was at the scene until 3:20 the next morning.

## **Civilian Witnesses**

**A. Civilian witnesses whose evidence is supportive of the police version of events set forth above, with little or no variation, can be summarized as follows:**

### **I. Evidence of Paramedic Raymond Rempel**

[147] Raymond Rempel is a member of the Winnipeg Fire and Paramedic Service. He was on duty on the evening of November 5<sup>th</sup>, 2001 with his fellow paramedic, Steven Bradley, in an ambulance. He advises that they were summonsed to attend to the corner of Salter Street and Mountain Avenue in Winnipeg at 10:10 p.m. He says they arrived on the scene at 10:13 p.m.

[148] Mr. Rempel says that when he and Mr. Bradley arrived at the Shell service station lot at Mountain and Salter they split up, and his partner, Mr. Bradley, attended to Constable Michalyshen while Mr. Rempel went directly to Mr. Miles. He says that Mr. Miles was face down and that a female officer assisted him in rolling Mr. Miles over on his back. Mr. Rempel says that he looked for signs of life, specifically for a pulse and respiration. He says that there were no signs of life. He immediately started CPR. He says that very shortly after starting CPR further help arrived in the persons of Paramedics Hourie and Ulrich who arrived in a second ambulance. Paramedics Hourie and Ulrich assisted Mr. Rempel in the treatment of Mr. Miles. Mr. Rempel says that Mr. Miles was strapped onto a long spine board with a cervical collar. He was then transported in Mr. Rempel's ambulance to the Health Sciences Centre.

He says that Mr. Miles was attended in the back of the ambulance by four paramedics in the persons of Messrs. Hourie, Ulrich, Burtney and Bradley.

[149] At the Health Sciences Centre Mr. Miles was turned over to medical staff there, and about 10 or 15 minutes later he was pronounced dead by Dr. Russ McDonald.

[150] Mr. Rempel says that Mr. Miles was actually conscious in the back of the ambulance for a period of time and that he recalled the paramedics who were attending to him fighting with Mr. Miles because he was pulling away from them as they were trying to start an intravenous line.

[151] Mr. Rempel says that they arrived at the Health Sciences Centre at 10:36 p.m. He also estimates that it was about 11:00 p.m. that he was advised that Mr. Miles had been pronounced dead.

## **II. Evidence of Marilyn Sessan and John Sessan**

[152] Mr. and Mrs. John Sessan were driving home from the St. Joseph's Hall on College Avenue in Winnipeg on the evening of November 5<sup>th</sup>, 2001. Apparently just after 10:00 p.m. they were waiting at a red light on Mountain Avenue at Salter Street. They were travelling east on Mountain and were the second car in line at this stop light when a male pedestrian came out in front of their car. Mrs. Sessan said that the fellow:

walked or ambled or stumbled

in front of their car. Mr. Sessan says that the man:

was intoxicated or was on drugs, I don't know.

and that he was:

on something. Because he was not walking straight.

Mr. Sessan, who was driving their vehicle, was about to pull forward when a police officer banged on his car and told him to stop. Mr. Sessan stopped his car until the police officer cleared his vehicle and ran in front of them after the pedestrian.

[153] Mrs. Sessan says:

And the fellow crossed Salter and came to a halt in the intersection of Salter and Mountain, and that's when the police officer approached and just kept telling him to, "Drop it, drop it, stop."

She says that the man had a baton in his left hand and what looked like a knife in his right hand. She says that the police officer kept saying over and over:

"Drop it, drop it, stop, drop it".

She did not hear the man say anything.

[154] Both the Sessans described the man crossing the street into the Shell station area. Mrs. Sessan heard one of the officers yell to the people in the store to turn the lights out and lock the door. She says that the pedestrian proceeded to the door of the store and started to kick it and that he did try to get in the store but that the door must have been locked.

[155] Mr. Sessan made a left turn onto Salter Street and stopped at the entrance to, or actually onto the lot of the Shell service station. The Sessans saw one of the police officers pass the pedestrian, and Mrs. Sessan says that was when the man lunged at the police officer with the knife. The Sessans heard shots fired and saw the man fall. Mrs. Sessan says that she thought the man:

was inebriated and that he tripped.

Both of the Sessans thought that the shots fired might have been warning shots.

[156] Very shortly after this occurred, a police officer approached the Sessans and told them to move along. Mr. Sessan actually drove around the block and came back to the Shell station. He said by the time he got there, there was an ambulance on the scene. Mr. Sessan told the police officers that they had seen what had happened and that they were directed to the police station to give a statement.

[157] Both Mr. and Mrs. Sessan say they heard the police officers yell at the man to drop his weapon "almost continuously" throughout the whole incident. Mr. Sessan says that the police pepper-sprayed the man three or four times but:

he just shook his head and it never bothered him.

### III. Evidence of Brian John Baryski

[158] Brian John Baryski says that he was traveling west on Mountain Avenue at approximately 10:15 p.m. on November 5<sup>th</sup>, 2001. He says the traffic light was green for him to proceed across Salter Street, and there was a police car in the intersection. He says when he got parallel to the Shell station lot on the northeast corner of the intersection, he saw a commotion on the service station lot. He says he saw four police officers and an aboriginal male. He says that the officers were “begging” the man to:

“Put the knife down, get on the ground, get on the ground.”

[159] He heard the commands to:

“Drop it, get on the ground.”...Many, many times. Like on the first round at least eight or nine times.

He said then there were eight or nine times each on the “second and third rounds” before the man charged one of the police officers. He says he actually thought that the officer had been stabbed. He further says that he saw the officers attempt to pepper-spray the man three times before the attempted stabbing.

[160] When Mr. Baryski was asked whether or not he thought that the man was being threatening towards the officers, his response was:

Yes, very indeed. I thought for sure an officer was going to be very, very injured on this.

[161] When he was asked if he thought the police were justified in shooting the man, he responded:

They were well trained, they were well professionalized. They did a very good job. In fact, I think they let him go too far, like after three times coming out slicing that is what you call deadly force.

[162] Mr. Baryski further said:

They begged him many times, “Put down the knife, please. We’ll help you. Get on the ground. Put down” -- they begged him so many times it was just like a tape recorder keep on going on and they did very well.

[163] On examination by Ms Carswell, Mr. Baryski advised the Court that he has been an animal control officer for 24 years, apparently in the City of Winnipeg. He said he also has acted as a constable in Beausejour and that:

I do the Highway Traffic Act.

[164] He said that he has:

been through pepper spraying courses before...

#### **IV. Evidence of John Sydney Jones**

[165] John Sydney Jones and a companion had just come out of the parking lot of the legion near the intersection of Salter and Mountain on the evening of November 5<sup>th</sup>, 2001 when he saw a police car with a flashing light:

directly parked opposite me on Mountain.

[166] He says that he had already backed out of the legion lot and was actually facing in the same direction as the police cruiser. He says that he saw a policeman pursue a man who was trying to get away from him into the street where the man nearly caused an accident. He says that the police car then drove into the intersection to stop traffic. He says that the first officer was confronting the man on the east side of the intersection. He says that when the second officer got out of the police car:

At that time I saw the individual started to do an action with his hand. It was at that time I realized he had something in his hand.

[167] He says that the man was doing “a kind of cutting motion across his throat”. He says that he saw a policeman extending his arm:

it looked like to me he was pepper spraying the individual.

[168] He says that there was no reaction from the individual and that the man “kind of staggered” to the Shell convenience store. He says that the man got close to the store and at that time a second police car coming west on Mountain turned into the Shell parking lot off Mountain. He says that two officers got out of that car and joined the first two officers. He says:

it looked like they were trying to tell the individual to basically drop whatever he had in his hand.

[169] Mr. Jones acknowledged that this could have been a stick or it could have been a knife:

I couldn't honestly tell.

[170] Mr. Jones says that he and his friend were standing on the sidewalk on the west side of Salter and were about 60 to 70 feet away from the confrontation in the Shell parking lot. He described the individual having been surrounded by a semi-circle of police officers. In his opinion the man was a threat to the police officers and had been:

fairly belligerent when he was first stopped on Mountain and also in the intersection.

[171] He says the only time he heard a definite command from the police was in the intersection when he heard the police officer say "Drop it." He says at the point shots were fired the man was "coming fairly fast" towards the backpedaling officer. He says it was fairly clear that the man was threatening the life of the officer "with whatever he had in his hand". Mr. Jones says:

At that time I heard three shots being fired. I saw the individual go to the floor and then it seemed like all hell broke loose. There were squad cars all over the place.

[172] Mr. Jones says that within a minute to a minute and a half of the shooting paramedics had arrived on the scene. He also says that it was between five to ten minutes "from the time I saw him on Mountain to the actual shooting."

[173] Mr. Jones says that he did not see the officers use pepper spray in the parking lot but that before the man began to chase the officer the man looked "very disoriented and fairly agitated". He was waving the object in his right hand around.

## **V. Evidence of Amanda Christine Ducharme**

[174] Ms Ducharme is a security guard with Securitas Canada. She says that on the evening of November 5<sup>th</sup>, 2001 she was working, and was eastbound on Mountain. She apparently was just behind Constables Kapka and Michalyshen's police cruiser which she says was stopped at a bus stop. She pulled in behind it to see if she could be of assistance. She says that one of the officers got out of the police cruiser and:

was dealing with the individual.



She said that this individual was on the sidewalk at first but:

then he walked into the middle of traffic and there were just -- you know, not cooperating.

She says the officer was trying to get the man off the road.

[175] She said that the man kept going eastward and:

Then the cruiser just took off into the intersection, blocked it off, and then the other officer got out. Like they didn't even have time to close the passenger door.

She says that the officers tried to get the man off the road.

[176] She says that the man proceeded onto the eastbound side of the intersection followed by the two police officers. Another police cruiser car arrived and pulled onto the Shell station lot. She says that it was at this point that the man:

took off running towards the store.

[177] She says he was trying to get into the store and that:

Then all of a sudden a knife appeared, but I couldn't see it at my angle, like earlier. They were issuing him to -- ordering him to put the knife down and he just wasn't cooperating. And next thing he started chasing after one of the officers with the knife after they semi-circled him in. And then shots were fired and he took off around the building.

[178] Ms Ducharme was asked if she saw the man fall and she responded that the man did not fall, but an officer fell down. Ms Ducharme apparently never did see the man on the ground. Why she missed seeing this is unclear, but in my view does not seriously impact on the accuracy of the rest of her evidence.

[179] Apparently Ms Ducharme's viewpoint of the incident was from the median lane on Mountain Avenue somewhere behind the police cruiser that Constable Kapka had left stopped in the intersection at Salter Street.

[180] Ms Ducharme says that she did see the officers use pepper spray but that it did not seem to have any effect on him. She says that the first time she saw the man with a knife was when he was in the Shell parking lot. She also says that although the man tried to get into the Shell store, he was not successful.

She says that she heard the police officers tell him to “Drop it” at least six times.

[181] She says that the man was chasing a police officer, and that he lunged at him with the knife.

[182] Ms Ducharme says that the man did not fall after the shots were fired and that he ran off. She says she saw an officer:

being helped back up onto Mountain behind one of the cars.

[183] Ms Ducharme says that she did not see the ambulance arrive because she had alarm calls to attend to. She says she was at the scene:

I think I was there until about the -- probably about the 15th cruiser.

[184] Ms Ducharme says that she contacted the police dispatch and was advised that detectives would probably be in contact with her sometime that night.

[185] Ms Ducharme says that although she didn't hear the man say anything to the police that he:

appeared quite intoxicated.

She formed this opinion from the way he walked and acted.

## **VI. Evidence of Lance Rosolowich**

[186] Mr. Rosolowich lives very close to the intersection of Mountain Avenue and Salter Street. He says that his residence is:

On the south side of Mountain -- southwest side of Mountain. It would pretty much be one building off -- three lots off the corner (off Salter Street).

He says that his house would be:

considered kitty corner

to the Shell station. He advised that the Shell station is located to the northeast of his house.

[187] Mr. Rosolowich says that he was looking out the window of his house because the flashing light of a police vehicle caught his attention. He described what he saw as follows:

there was a police car in the middle of the intersection at an angle, two policemen trying to apprehend or grab another person in the intersection who had something -- some things in each hand, wearing a baseball hat, and he was not cooperating with police. Obviously couldn't hear anything. We were behind double windows.

[188] He says that the man was swinging whatever he had in each of his hands at the police and that:

then he ran towards the Shell station which is at quite a good speed and tried to get into the Shell station.

[189] Mr. Rosolowich says that more police cars arrived and that the police:

had him sort of standing against the Shell station door.

[190] He says that the man had tried to get into the Shell station but that he could not get in. He further says that:

he was always motioning towards the police, swinging his arms, doing all kinds of things.

[191] He says that the man then ran down the side of the building to the north:

where the pay phones are.

[192] He says that:

Something happened a minute after he got into that position sort of pinned against the wall with the police semi-circle around him, because they all drew their weapons at the same time.

Mr. Rosolowich went on to say:

So I don't know what happened, but you could see they all reached down and they grabbed and they were all pointing down at the ground at his legs. And it seemed to me that he was facing the -- he was looking south, so there was -- I couldn't see the mouths moving on the people or anything like that, but something was distracting him that way on the, on the -- the police officer farthest to the north started to sort of creep underneath, like he was going to grab him or something like that. And as he did that the man seemed to notice, like he looked and saw him there and he lunged at him.

[193] Mr. Rosolowich was asked about the man lunging at the police officer and he said:

That person who was shot lunged at the police officer and that's when the shooting started. And that I heard.

Mr. Rosolowich said that he heard five shots fired, and that it might have been more than that. Mr. Rosolowich was asked if the man actually lunged at one of the officers before he heard the shots. His response was:

Absolutely.

[194] Mr. Rosolowich says that the man was within a yard of the policeman when he lunged at him. He says that when the incident started in the intersection the officer seemed to be talking to the man:

because they both were doing a lot of movements with their hands.

while:

he was just making aggressive movements forward with this kind of stepping motion...

[195] Mr. Rosolowich says that he was surprised that the police officers did not shoot the man sooner. He says that a lot of people in the area were scared. He felt that the police officers were justified in shooting the man when they did, as the man was acting aggressively towards them. He also said that:

-- the officers that were initially there in the intersection were obviously very afraid, a lot of -- they were making a lot of movements to get away from him and --

[196] Mr. Rosolowich did not see the officers pepper-spray the man. He did, however, see the officers holding something at shoulder level:

I don't know if they were showing them (sic) their badges or spraying them (sic). I have no idea.

[197] He said this occurred before he heard the shots.

[198] Mr. Rosolowich says that he feels the people in the store were at risk from the actions of this man.

## **VII. Evidence of Margaret Rose Truss and Margaret Stacey**

[199] Both Margaret Rose Truss and Margaret Stacey were working in the convenience store at the Shell service station on the northeast corner of Salter and Mountain on the evening of November 5<sup>th</sup>, 2001. At approximately

10:00 p.m. their attention was attracted by some yelling in the intersection of Mountain and Salter. Ms Truss says:

All we heard was yelling and that to drop his weapons....

[200] She said they were spraying the individual and telling him to drop his weapons.

[201] Margaret Rose Truss says that the individual had “a big, big knife”, while Margaret Stacy says that she saw a big knife, and that she thought it was a machete. She says that while they were in the intersection the man was swinging the knife “like if he was Bruce Lee --...at the police officer”.

[202] They both say that the man came towards their store and someone called them or someone near the door of their store “-- to get in there and lock the door”. In fact, Ms Truss says that the door was locked before the lady who was near the door could get in, that they had to reopen the door and then lock it again.

[203] Both Ms Truss and Ms Stacey described the individual with the knife having come to the door of the store and kicking it when he found that it was locked. They also both describe the individual being confronted by three or four police officers in the parking lot in front of the store and that the officers were in a semi-circle around him. Both also describe the individual having a knife in his right hand and some other object in his left hand. Ms Truss says:

I thought he was on drugs or something because the amount of stuff that they put in his face.

[204] She also says:

I thought if we didn't get that door locked we would have been taken hostage.

[205] She says that the man's hands:

were going all over the place because he was, he was wild.

[206] Both Ms Truss and Ms Stacey described the individual lunging at the police officers with a knife. Ms Truss says:

He thought he was Zorro or something.

[207] Both Ms Truss and Ms Stacey said that the individual refused to put his weapons down although the police were yelling at him to do so.

[208] Ms Stacey says that the second time the police pepper-sprayed him the man lunged right at one of the police officers. She saw the police officer back up and fall down in front of his cruiser. She says:

Then that's when I saw all the guns pulled out and the gentleman started walking towards the pay phones and when he started walking to the pay phones that's when I heard a police officer say, "Cop down," and they started shooting.

[209] She says she heard the call of "Cop down" before she heard the shot. She said she didn't see a police officer shoot the man. She says that when she saw the man lunge at the officer she thought he had stabbed the officer in the leg. It was her impression that the police officer got stabbed, not shot.

[210] Ms Stacey also said that she did not think that the pepper-spraying by the police which occurred "two or three times" had an effect on the man.

[211] Both Ms Truss and Ms Stacey advised that they were scared when the male came toward the store. Ms Stacey said that:

he looked like he was out to hurt someone.

and Ms Truss says:

I thought if we didn't get the door locked we would have been taken hostage.

### **VIII. Evidence of Elizabeth Kolomi**

[212] Ms Kolomi lives at 406 St. John's Avenue which is:

the next street over from Mountain going north.

[213] Her home is north of the Shell convenience store on Salter "right even" with the Shell station. She says:

There is only about a six foot fence that divides my parking lot of that building to the Shell station.

[214] Ms Kolomi's view of the Shell parking lot is apparently significantly obstructed by two good-sized trees "that were fully and still in leaves...". Ms Kolomi says that she was watching the 10:00 p.m. news on the T.V. when she heard some hollering and she went to the window in her bedroom. She saw several cruiser cars in the intersection of Mountain and Salter and in the entrance to the Shell station. She says she saw two officers kneeling with their

handguns pointing towards the building. Significantly, she says she heard “Drop your weapon.” and then “Drop your knife.” She says that:

A few minutes lapsed by when this man came into view, a native, I could see from my distance and that, maybe five foot nine, and he was just holding, like a knife.

[215] Ms Kolomi says that she saw the man gesture across his throat with his right hand and then back out of her view again and:

that’s when I saw a puff of smoke and the guns went off. Like it sounded like maybe two or three shots.

[216] She says that an ambulance arrived in about five minutes. She says that about ten minutes later the ambulance pulled away “with no siren going”.

[217] Ms Kolomi says that she did not know what the puff of smoke was but that she learned later “that they had used pepper spray...”.

## **IX. Evidence of Diane Lavallee**

[218] On the evening of November 5<sup>th</sup>, 2001, Ms Lavallee had gone to the Shell station at Mountain and Salter to put gasoline in her car. She says she was going into the store to pay for her gas and on the way started talking to a young man on a bike. She says that:

...that’s when something got our attention to the middle of the street.

[219] She says that there was a police cruiser in the middle of the intersection of Mountain Avenue and Salter Street:

and the cop was standing there and he was asking the young man to drop his knife.

[220] She says the policeman pepper-sprayed the man and the man’s hat fell down. She says:

...and then all of a sudden the guy started running towards the store.

[221] Ms Lavallee says that the policeman was chasing the man and:

he told me to get in the store and either lock the door or just get in the store.

[222] She says she turned around and they had already locked the door. She called on the people inside to open the door and they did and she got in and the

door was locked again. She said shortly after this the man kicked the door. She says at that point she ran to the back of the store and did not see anything after that. She did however hear shots.

[223] Ms Lavallee did not see a knife or a piece of wood in Mr. Miles' hand. She heard the policeman say "Drop the knife." while they were in the intersection of Mountain and Salter. She said that the police officers repeated the commands to the man to drop his knife in a loud voice a number of times. She says that when he ran toward the store she felt he was threatening and he scared her.

**B. Civilian witnesses whose evidence is in some material respect at variance with the police version of events are as follows:**

**I. Evidence of Wayne Alexander Pirrie**

[224] Wayne Alexander Pirrie had just come out of the Dominion Store at the Shell station at the corner of Salter and Mountain on the evening of November 5<sup>th</sup>, 2001. He was sitting on his bicycle speaking to "Marg", one of the employees there (apparently either Margaret Rose Truss or Margaret Stacey). He says that he saw a man walking down the street being followed by a police car. He says that he remembers:

one cop from the cruiser getting out and saying put something down.

[225] He also says:

All's I seen was a stick from what I could see....a big brown stick.

[226] He says that the police were yelling to the man to put it down and "We can help you."

[227] Mr. Pirrie says that he saw the officer pepper-spray the man but that the man just wiped it away and that it didn't have any effect on him. He says that the man ran towards the store "towards me". He says that he didn't see anything in the man's hands beside the stick. He says that the man kicked the door "after I told them to lock it".

[228] Mr. Pirrie says that after the man came running at him:

I got told to get the fuck off the parking lot.



[229] He says that he rode off the parking lot to the other side of Mountain, but before he turned around to watch what was happening, he heard shots fired. He says:

All's, all's I can remember from leaving it, before I left there was guns drawn.

He says he never did see a knife, however he heard the officers yell to drop the knife "several times". He says he did not see the officers use pepper spray before he left the lot.

[230] Mr. Pirrie says that he heard several shots:

I can't calculate how many.

He says that when he looked back the guy was already lying on the ground.

[231] Mr. Pirrie says that the police yells to drop the knife were loud and "...with some authority anyway". When he was asked if he found the incident frightening, he said:

Not something I'd want to relive again.

[232] Mr. Pirrie says that the man was three or four steps from him when he took off from the parking lot. When he was asked how the man looked, he says he doesn't know, and:

from then 'til now everything's a blur.

[233] He says that a police officer was yelling to lock the doors to the store but:

But the door -- from what I understand the door was locked the minute I asked one of them, the female co-workers.

## **II. Evidence of Daniel Louis Albert Kozminski**

[234] Mr. Kozminski says that that he was driving south on Salter Street with the intention of pulling into the parking lot of the Shell station to make a phone call. He says that just before he pulled into the parking lot he saw "some problem going on". He says that he saw:

...the suspect wrestle with a police officer and then he made a -- he ran down the side of the building toward the pay phones on the north side of the building. And then I saw two officers shoot at him.

[235] Mr. Kozminski acknowledged that he was not sure if there was actual physical contact between the man and the police officers. He says:

I think so before I got there. I believe they were just scuffling...

[236] Mr. Kozminski acknowledged that he actually did not see them scuffling and he said that he thought the man was holding a gun but:

I found out after that it was a knife.

[237] Mr. Kozminski said:

He was just yelling at the officers and...

[238] The following exchange then occurred between Mr. Abra and the witness:

Q Might it have been the officers that were yelling, or did you think it was the man?

A No, it was the man.

Q Okay. Were the officers yelling anything?

A Not that I heard, no.

[239] Mr. Kozminski says that the man:

just kept walking around and just yelling something...

and

he was just waving his hands around and yelling at the officers and then they, they shot him.

[240] Mr. Kozminski says that he did not see the man go after any of the officers with what he had in his hand. He thinks that he heard four shots. He says that he was stopped in the driveway (presumably off Salter) onto the Shell parking lot. He says that the man was in front of the telephones when the police officers shot him. He thinks that one of the officers sprayed the man with mace. He also says that before he heard the shots the man was still waving the object in his right hand. He did not, however, hear the officers yell "Drop the knife." or "Drop your weapon." Mr. Kozminski acknowledged that when he pulled onto the parking lot he wasn't expecting anything like this and:

-- I seen what happened but I didn't really pay attention, you know.

[241] In further questioning by Ms Carswell, Mr. Kozminski repeated that the man was waving the object that he thought was a gun and that:

...he was acting, acting insane.

[242] He said he did not roll down his car window but that he could see the man's mouth moving.

### **III. Evidence of Bradley Raymond Malcolm**

[243] On the evening of November 5<sup>th</sup>, 2001 Mr. Malcolm was walking on St. John's Avenue to Salter Street. He says that when they got to Salter he saw a police car coming down Salter Street. A lady was running towards them and said "Don't go over there because there is a crazy guy." Mr. Malcolm says "Then we went there."

[244] Apparently Mr. Malcolm and his companion stood on the corner in front of the legion across Salter Street from the Shell station. He says that on looking into the Shell parking lot he saw a guy "with a small knife and a big knife". He says that the man was trying to cut himself at his neck. He was over by the pay phones. He said there was shouting but he can't remember what was being said.

[245] Mr. Malcolm says that the man was trying to cut himself and was "trying to go towards the cops". He says he heard the cops yelling "Drop the knives." and that they then sprayed him with mace. The man however simply "put up his jacket". Mr. Malcolm says that after the police sprayed the man, he did not see the man do anything with the knife. He said that the officers were holding guns and that "some had, like shotguns". He says he heard "like four" shots and the man:

fell on his knees, then on this chest, and then the cops came and kicked the knives away.

[246] He also said:

That's when I think they shot him because he was, like walking towards them with the knives.

[247] He said that that officer was moving away from the man, but that he did not see the man do anything with the knife as he moved towards the officer.

[248] Mr. Malcolm says that he did not see the man at the Shell convenience store door:

...just, like in between the door and the pay phones by the windows.

[249] On further questioning, Mr. Malcolm said that he could not recall if the man was waving the knife or holding it out when he was walking toward the officer with the knife.

#### **IV. Evidence of Crystal Erin Payment**

[250] Ms Payment says that on the evening of November 5<sup>th</sup>, 2001 she was driving her car east on Mountain Avenue towards Salter. She said she was going that way because she saw flashing lights. Two friends of hers were in the vehicle with her. She says she saw a police car in the intersection of Mountain and Salter which was parked diagonally in the intersection. She says that there were:

...at least five cop cars standing there.

[251] Ms Payment says that she was sitting at the lights:

...but there was at least a couple of cars ahead of us.

and she said:

And then we saw a guy come out of Shell and, I don't know, he waved his arms and stuff like that. And then we talked amongst ourselves and kind of lost what was going on and then we heard a gunshot. And I rolled down my window to hear, I don't know why, and then I saw him get up and then run towards the pay phones by the Circle-K and then there was more gunshots fired and he went down and we -- eventually at that point we were able to go and we turned and parked and we got out and went to see.

[252] Ms Payment said that she could not tell if the man had anything in his hand and that she did not hear anything being yelled or said. She said that the man was waving his arms but she could not see if he had anything in either hand.

[253] When Ms Payment was asked how many shots she heard fired, she said:

I heard one before. Like you couldn't see what they were doing because they were behind the gas pumps.

and

So we weren't sure. Then I heard a shot and then I saw him get up and then run away and then there was more gunshots fired.

[254] Ms Payment says that she did not get the impression that he was chasing a police officer. She says, rather, that the police officers were running after him.

[255] Ms Payment says:

And then they kind of stopped and then I heard more gunshots. So seeing stuff like on TV you assume that they stopped to shoot at him.

[256] On further being asked what she remembered seeing, Ms Payment said:

Okay. What I remember seeing is him coming out and then him dropping and then going behind the gas pumps and we couldn't see. Hearing a gunshot, him taking off and running away from the cops and then them kind of follow him but then stop and then there was more gunshots.

[257] The following exchange occurred between Ms Carswell and Ms Payment:

Q And I take it you'd agree with me your recollection of the events were -- was probably better back the night --

A Yes.

Q -- of the events? And if I could just read to you what you said. You, you talk about going to the Circle-K store and then you talk about turning around. I'm going to use that as the starting point. You say:

I turned around to look at Marissa and Jenny. I turned down the music, rolled down my window. I could see a group of policemen standing near the gas pumps. I couldn't see the guy anymore. I heard gunshots next. It happened really fast. The officers started running towards the pay phone and then I turned right and parked on Salter.

There's no mention in your statement, ma'am, of, of two sets of gunshots --

A Oh.

Q -- or of the man running in the interim.

A I did hear a gunshot and the police officer kind of looked at me weird and he was trying to lead me towards it. Like I did say I heard a gunshot before they started running after him, and there was a brief pause, I

know, because I rolled down my window, and then they got up and they then ran again and had more gunshots.

Q All right. But you couldn't see the man anymore, you couldn't see what he was doing?

A Not, not until he got up and ran away, no.

Q Ran away towards the north of the --

A Yes.

Q -- property?

A Well, they were behind the gas pumps. I couldn't see them until I heard the first gunshot and then there was a pause and then I saw him run.

Q You saw him run. Did you see what he was running towards?

A Towards the area of the pay phones.

[258] Ms Payment did not tender, nor was she asked for, an explanation of what she meant by saying that "...the police officer kind of looked at me weird and he was trying to lead me towards it".

### **Assessment of Civilian Evidence at Variance with Police Version of Events**

[259] I would make the following observations on the evidence of the four civilian witnesses whose evidence is at odds with the police evidence:

1. As to Mr. Pirrie, although he says the man in question came running toward him, he did not see a knife. Mr. Pirrie was apparently sitting on his bike in the Shell station lot when this happened. He says that when the man came running at him he was unceremoniously told to get off the parking lot, and he did so.

I conclude that for some unknown reason Mr. Pirrie simply failed to see the knife that many other witnesses did see in Mr. Miles' right hand. Mr. Pirrie did, after all, hear the officers yell at Mr. Miles "several times to drop the knife".

2. As to Mr. Kozminski, it would seem that his evidence about the suspect wrestling with the police and then running down the side of the building to the pay phones is a case of constructive

recollection, because he also testified that he thought this wrestling had occurred before he got there.

Because so many other witnesses, both police and civilian, who were in as good or better position to view what happened, testified that Mr. Miles never said anything to the police, while the police were constantly yelling at Mr. Miles to drop his weapon, I conclude that Mr. Kozminski is mistaken in saying that the situation was exactly the reverse. Similarly, I conclude that he is mistaken in saying that Mr. Miles was just waving his hands around and yelling when the police officers shot him. With four police officers on the scene, if all that Mr. Miles was doing was shouting and waving his arms, the police could easily have physically subdued him without resorting to the use of firearms, and I reject the implication from this evidence that that was the case.

3. As to the evidence of Mr. Malcolm, it would seem quite clear that he is mistaken in having testified to Mr. Miles having had a small knife and a big knife. The evidence of the police and others who were closer to Mr. Miles clearly establishes that he had a knife and a stick (or a table leg, to be more accurate).

It would also seem that Mr. Malcolm simply missed seeing Mr. Miles lunge at Constable Kapka with the knife just before the shots were fired.

I also conclude, because all of the police and forensic evidence is to the contrary, that Mr. Malcolm is mistaken in testifying that some of the police officers had shotguns.

4. The evidence of Ms Payment did not seem to fit very well with the evidence of any of the other witnesses. Further, Ms Carswell's questioning of Ms Payment with respect to the police statement she gave that night indicates some significant discrepancies from the testimony she gave at this Inquest. It would seem that she is mistaken in saying that she saw "him coming out and then him dropping and then going behind the gas pumps" in reference to Mr. Miles. The reference to his "dropping" may be her perception of what happened when Mr. Miles dropped his knife and picked it up again. It would seem, however, that she completely missed

seeing Mr. Miles lunge at Constable Kapka with his knife and the pepper spraying by the police officers before that. I conclude that it is not safe to put any degree of reliance upon her evidence.

I am not suggesting that Ms Payment was in any way attempting to give misleading testimony, but simply that she was mistaken in the evidence that she gave. Likely the location she viewed these events from (she said there were two cars in front of her at the intersection to start off with), and the noise and socializing that was going on in her car interfered with her observations of what actually occurred.

5. In the final analysis then, I must reject the evidence of the witnesses Pirrie, Kozminski, Malcolm and Payment where it conflicts with the police evidence and the evidence of the civilian witnesses whose testimony supports the police version of what happened.



### **SCHEDULE 3**

#### **EXPERT EVIDENCE ON THE USE OF FORCE BY POLICE OFFICERS**

##### **Evidence of Patrol Sergeant Jeffrey James Quail**

[260] Patrol Sergeant Jeffrey James Quail has been a member of the Winnipeg Police Service for 15 years. He is presently the Officer Safety Coordinator for the Winnipeg Police Service, and as such is responsible for all training in regards to police officer safety issues with the exception of firearms training which is done by the Range Master.

[261] Patrol Sergeant Quail agreed that he has:

significant input with respect to the, the actual use of force policy as it relates to firearms and other methods of use of force and defensive tactics that Winnipeg police officers are taught as part of their training.

[262] Patrol Sergeant Quail provides:

tactical training with the firearm

and

Just the actual handling or shooting of the firearm is dealt with by the range master.

[263] Patrol Sergeant Quail says that the circumstances under which a firearm is to be used is his training responsibility. Beyond this the training of police officers in the use of force and defensive tactics is based on what is known as the “force continuum”.

[264] Patrol Sergeant Quail explains the force continuum in this way:

The continuum is -- actually, probably the, the easiest way to understand it is if we look at Section 25 of the Criminal Code that authorizes the use of force to overcome resistance to a lawful arrest. It does not provide specific or clear direction on what is appropriate level of force to be used, other than if an officer or anybody else is fear of grievous (sic) bodily harm or death, so continuums have been developed by, in conjunction with police experts, lawyers, judges, doctors right across North America. Almost every major municipal police agency, or federal police agency have developed these continuums to give a more clear direction to an officer in terms of what would be an appropriate level of force to be used in what situation.

[265] Patrol Sergeant Quail says that the structures of the force continuums of the various police forces across North America are completely consistent, that being:

Not only Canada, but in, in the United States, also.

[266] Patrol Sergeant Quail explained that the police force continuum effectively is constituted on the basis of a recommended police reaction to the “resistance continuum” of the accused. It is premised on the idea that police officers respond to the level of resistance being exhibited by an accused with an appropriate level of force. Thus, police reaction to the level of resistance exhibited by the accused works in the following manner:

#### Level of Resistance

1. Psychological intimidation

This is the lowest level of resistance by an accused and includes conduct such as wearing biker colours or other paraphernalia that indicates an anti-social attitude. It could also include attempting to stare down a police officer or

any sort of non-verbal cues that indicate that if, if he has to be arrested, he may become resistant and that’s sort of the lowest point.

2. Verbal Non-compliance

This could be a statement by the accused that he is not going to comply with the direction of a police officer.

3. Passive Resistance

This is the first level of actual physical resistance by an accused and was described by Patrol Sergeant Quail in this manner:

they’re not going to try to defeat physical control, but they are also not going to assist the officer in physical control.

An example of this conduct given by Patrol Sergeant Quail would be someone who lies on the ground and tells the police officer that he is not going with him or that he is going to have to pick him up and take him, and then acting simply as dead weight or going limp,

thus forcing the officer to use a low level of force to extract them or arrest them.

4. Defensive Resistance

This would include overt measures by the accused to defeat the officer's control, such as pulling away or running away from the officer. This kind of conduct, however, would not include the accused directing force at the officer. Patrol Sergeant Quail's comment about this level of resistance was:

this predominantly is what we encounter as police officers out on the street.

5. Active Aggression

This would include the accused directing force at the officer or someone else but not including such force as to cause grievous bodily harm or death.

6. Aggravated Active Aggression

This would include deadly force or deadly force assault. It would include an individual with or without a weapon:

utilizing a tactic that has a high probability of causing grievous bodily harm or death to the officer or anybody else.

[267] Patrol Sergeant Quail advised that after teaching the "resistance continuum" he teaches police officers to do a "threat assessment" which provides:

a framework for the officer to make a decision whether there is a, a, a clear and immediate threat being presented.

He explained that:

...an individual may have a knife in their hand, and they may be agitated, but if there's no clear complete threat assessment, we would tell them that they would not be justified in using force at that point.

[268] Patrol Sergeant Quail says that a threat assessment consists of three components:

First, identifying the weapon.

Second, delivery system:

do they have the means to deliver the weapon to the officer.

Last, intent – the officer has to be able to articulate how the intent was demonstrated by the accused.

[269] Patrol Sergeant Quail says that if the above three components are in place the officer is justified in using force but:

If one of those components is missing, we tell the officers that they should not be using the deadly force control option because they need those three components to be able to justify utilizing that level of control.

[270] Patrol Sergeant Quail advised that the control continuum recommended to officers is similar in structure to the resistance continuum, as the injury potential for both the subject and the officer goes up with each step. This control continuum operates as follows:

### Step One

The first step in the control continuum is the presence of the police officer with identification as such. Patrol Sergeant Quail said:

...we find, especially with most of society that has respect for police officers, that a lot of times presence alone can quell any problems.

### Level Two

The next level of control is verbal direction and:

we encourage officers to provide verbal direction regardless of what level of resistance, physical resistance or control they're using.

### Step Three

This is the first level of physical control, and was referred to by Patrol Sergeant Quail as:

...soft, empty-hand control.

Patrol Sergeant Quail described this as using basic strength techniques such as picking up and lifting the individual, pressure point tactics, etc.,

but not striking any part of the body. It would include grabbing the upper part of the body of the accused. Patrol Sergeant Quail says:

We call that an escort.

Level Four, hard, empty-hand control.

This level of control is comprised of a striking of the accused's body with either empty hands or feet. Patrol Sergeant Quail says that it includes:

punching, pushing, kicking, or kneeling

non-vital areas of the body of the accused. There is, of course, injury potential included at this level of control.

Step Five, intermediate weapon level.

This level of control involves the use of so-called intermediate weapons such as OC or pepper spray and could include a police baton used to strike a major or minor muscle group on the accused. However, if a baton is used to strike:

a lethal force target

that is what Patrol Sergeant Quail refers to as a deadly force level. Patrol Sergeant Quail says that used in this manner:

the officer would had to have identified the level of resistance as a deadly force assault against them and that there was weapon intent delivery system present, and at that time they'd be justified in using the baton to strike a lethal force target such as the head, the spine, the neck. The easiest way to think about it is if they were justified in using a firearm, they'd be justified in using a baton to hit those targets.

Level Six, deadly or lethal force.

This is the final control level and is predominantly represented by a firearm, although it could be represented by the use of a baton as indicated above or by choking. This level of force can only be justified after a:

complete threat assessment.

By this, Patrol Sergeant Quail said that the police officers:

...have to feel that they are in danger, and the way we teach them that is that weapon intent delivery system. If one of those components is missing, they would not be justified in using deadly force at that point. They maybe have firearms readiness, they may be ready to use that, but they would not be justified in actually using it at that point. If all three were present, now they would be justified in using deadly force to protect themselves or anybody else from grievous bodily harm or death.

[271] Patrol Sergeant Quail explained that police officers are taught the “one plus one doctrine” which means that officers are taught that:

they should select one level of control higher than the level of resistance being offered.

[272] He says that:

And what we've also found is by utilizing the one plus one doctrine, it lowers the injury potential because it can hopefully end the confrontation quicker, so that it does not have the ability to escalate, or the longer the duration goes on, obviously, the larger or bigger the chance there is for injury, not only to the officer, but to the subject. But, like I say, the one-plus doctrine is taught as a starting point. There are going to be circumstances where we'll say to an officer it wouldn't be justified, such as a very elderly person that's a shoplifter and is arrested and becomes resistant and, say, a 90-year-old lady puts up her dukes. Well, obviously, our officers are not going to say, Well, we -- we're going to use our one plus one doctrine and hit her with a baton. It would be ridiculous. In those circumstances, we'd, we'd have to say, Okay, what is the totality of circumstances? Reasonably, can you control that individual at lower levels, and we'd have to assume that, yes, they could, so they may actually drop two levels down from that starting point and say, no, we're going to use soft, empty-hand control and grab a hold of her arms and escort her. So it's not a definitive solution. In other words, we don't say if -- the one plus one doctrine is utilized all the time. We say, here's a starting point. Here's a premise that in most situations where somebody is resistant you're going to have to be one level higher, but taking all things into account, you may have to go lower and in some circumstances, even raise higher. For example, if the officer is exhausted or injured and won't have the ability to deliver just one level higher successfully he, he or she may have to escalate even higher to control that individual.

[273] Patrol Sergeant Quail says that officers are also taught to continually assess for escalation or de-escalation. This is always based on the resistance

being offered by the offender so that the officer's actions are always based on what the subject is doing:

If the subject de-escalates, then the officer must de-escalate. If the subject escalates, then the officer has to escalate.

[274] Patrol Sergeant Quail advised that the Winnipeg Police Service has recently purchased 58 tasers which is a number:

equal to the number of general patrol vehicles that we have out on the street.

Twenty instructors have already been trained in the use of the taser, and:

we are just getting the policy in place to be approved.

[275] He advised that a taser is in essence a stun gun, and explained that a taser shoots out two probes which have wires attached. If both probes contact a person an electrical current will be sent from one probe to the other. This overrides the nervous system of the individual and effectively immobilizes him. A taser apparently is effective up to about 21 feet, but typically the optimal range for these weapons is between seven and 15 feet. The problem is that if only one probe makes contact with the target person, no electrical current will go through that person. However, the probes don't have to penetrate the skin of the individual; they can be effective when simply hanging on the individual's clothing. Patrol Sergeant Quail says:

we'll have a current that flows through them of 50,000 volts, so 50,000 volts with an amperage of less than -- be .04 amps or 4 milliamps (phonetic) which is done -- the amperage is lower because the amperage is actually what's dangerous to a human being, not the voltage.

[276] The taser is considered an intermediate weapon, one level below deadly force. Patrol Sergeant Quail says:

it's a low likelihood to cause grievous bodily harm or death.

However, research on the dangerousness of tasers is continuing, and Patrol Sergeant Quail acknowledged that it is possible that:

we may have to change it on the continuum and place it at a higher level.

He emphasized that the probability of a taser causing grievous bodily harm is what will dictate where it will be placed on the continuum. He emphasized that in any event:

...in terms of officer use of deadly force, generally speaking, it's going to be their firearm.

[277] Patrol Sergeant Quail emphasized that police officers are taught that section 25 of the *Criminal Code of Canada* is specific direction on the use of deadly force and that an officer can only use such force when:

in fear of grievous bodily harm or death, or they're in fear that somebody else is -- potentially may be killed or experience grievous bodily harm.

[278] With regard to the actual use of a firearm, Patrol Sergeant Quail says that officers are:

taught to shoot center mass to, to the resistant individual.

When asked what this meant he indicated that this meant that the officer should shoot at the chest of the resistant person.

[279] Patrol Sergeant Quail explained that the rationale behind his training is not that officers are trained to kill people. Rather:

We teach officers to shoot when they're justified, with a goal of stopping the threat. If the person dies as a result of that, it's unfortunate, but that's not our goal. Our goal is to stop the threat. When we -- an officer is in acute stress situation, in other words, a deadly force encounter where they feel they may die or be seriously injured, and especially if it's at closer range, the officer, under those stressful situation -- research from experts have, have shown us that there's a shift from their cerebral cortex or the higher brain functioning down to their mid-brain functioning, and what happens when that shift occurs, is there's all sort of physiological changes in the body that will prevent an officer from actually being able to focus on their sites (sic) of their weapon, which limits their ability to aim or specifically pick where there that, that round is going to go. So by teaching them center mass, we increase the likelihood that they are going to be able to hit the subject and stop that assault.

[280] Patrol Sergeant Quail says that because the chest is where the vital organs are located:

there's a high likelihood to, to cause that individual to cease from attacking. If you hit him in a non-viable area, it may not stop that attack.

[281] Patrol Sergeant Quail made reference to research that has been done with regard to police use of firearms in stress situations, including 300 dynamic scenarios Patrol Sergeant Quail has used himself with recruits where they use a weapon similar to a paintball gun. He advised that:



not one of those recruits

after completing a scenario reported that they had seen the sights on their firearm. Patrol Sergeant Quail explained that scientific research had indicated that this is caused by what is known as “vasoconstriction” which is a moving away of the blood from the extremities:

to protect us in a fight situation so that we don’t bleed out.

[282] Patrol Sergeant Quail says that:

With vasoconstriction comes changes to the eye. There’s obviously small capillaries in the eye. When that vasoconstriction occurs, blood moves away from the eye. The eye now loses its ability to focus close, and if you think from an evolutionary perspective, Your Honour, we, we haven’t -- cavemen weren’t walking around with guns, so they never had -- needed the ability to see sites (sic) on their gun. They needed to see the threat and what we do as humans is we lock in on the threat and predominately, we’ll experience tunnel vision so that we exclude all other information because we know if we don’t deal with this threat, we could lose our life. Unfortunately, it’s not congruent to the use of a firearm or aiming a firearm. When they’re in the acute stress situation, they’ll lock on the threat of, of -- that’s in front of them, and they’ll look past the firearm. So by teaching them to shoot center mass and look over the top of the firearm, it becomes congruent to what’s going to happen in a real stressful situation.

This can be contrasted to an individual using a firearm who is not under a similar stress situation. Patrol Sergeant Quail agreed that this was “absolutely” the distinction between the situations of Constable Kapka and Constable Carlson in the confrontation with Donald Lorne Miles.

[283] With regard to the initiation of the confrontation between the police and Mr. Miles, Patrol Sergeant Quail’s view was that it was entirely appropriate for Constable Kapka to stop the police cruiser and make a U-turn on Mountain Avenue to speak to Mr. Miles when he saw him run out between houses on Mountain Avenue, and stop running when he apparently saw the police vehicle.

[284] Similarly, Patrol Sergeant Quail expressed his opinion that the progression of the police conduct after they made contact with Mr. Miles was appropriate, ranging as it did from the initial calling to Mr. Miles indicating that they wished to speak to him and the progression in the use of weapons including the production of a baton, the use of pepper spray and ultimately the production of firearms in response to Mr. Miles’ conduct.

[285] With regard to the ultimate firing of handguns by Constables Kapka and Carlson, Patrol Sergeant Quail advises that this use of the firearms was justified insofar as the final component in the deadly threat assessment had at the point the officers fired their handguns come to reality. Mr. Miles had a deadly force weapon, namely the knife. By closing the distance between himself and Constable Kapka by charging at him, he had created the “delivery system”. He had already displayed his intent to use a deadly force weapon by refusing to put it down when this was demanded of him. In Patrol Sergeant Quail’s opinion:

they made the right decision by not using their firearms...

until all three elements of the deadly threat analysis had come into existence.

[286] Patrol Sergeant Quail notes that the officers had:

explored other options

by encouraging Mr. Miles to put the knife down, and when he did not do so, by using pepper spray. Patrol Sergeant Quail saw this as a calculated risk by the police officers to de-escalate the situation and to interfere tactically with his ability to deliver the weapon.

[287] Patrol Sergeant Quail advised that he was not surprised that the two or three instances of the use of pepper spray on Mr. Miles seemed to have no effect on him. He says that:

We teach them that, that there are resistant personality profiles, individuals that are goal-orientated can fight through pepper spray. Individuals that are intoxicated or, or drug intoxicated have a higher ability to fight through pepper spray and individuals that are suffering from any sort of mental diseases also have been shown to be resistant to pepper spray. In, in these circumstances, we, we had an individual that was obviously intoxicated, so that obviously is going to play into his ability to, to fight through the pepper spray.

[288] With regard to the final confrontation between Mr. Miles and Officers Kapka, Michalyshen, Carlson and Lockington, Patrol Sergeant Quail says that these officers, who were operating in a very dynamic process, acted appropriately in containing Mr. Miles but not getting so close to him as to create a “delivery system” for the deadly weapon which he possessed. He says that any suggestion that they should have attempted to disarm Mr. Miles is ludicrous, as it would have immediately created the missing element of a delivery system to complete a deadly threat to the officers. He points out that

the officers continued to try to encourage Mr. Miles to put down the knife and to converse with them by telling him:

We can help you. We're here to help you. Tell us what's wrong.

[289] Patrol Sergeant Quail says that he was not surprised that none of the three shots fired by Constable Kapka hit Mr. Miles. He notes that Constable Kapka was experiencing tunnel vision and was running away at the same time that he was firing his handgun. As to Constable Carlson shooting at Mr. Miles, Patrol Sergeant Quail says that Constable Carlson was shooting to prevent injury to Constable Kapka and that this shooting was in accordance with section 25 of the *Criminal Code of Canada*:

he recognized that Constable Kapka's life was in serious danger and there was a complete threat assessment at that point.

It was Patrol Sergeant Quail's opinion that firing his handgun at Mr. Miles was a "prudent decision" on the part of Constable Carlson.

[290] Patrol Sergeant Quail says that it would "absolutely not" have been appropriate for the police officers to disengage from Mr. Miles hoping that he would calm down. He says:

This is a situation where an individual is not contained. He's armed, armed with a deadly force weapon. He's intoxicated. And to be specific about intoxication, I can tell Your Honour that 67 percent of our reported use of force reported encounters involved somebody who's intoxicated. And to put that really into perspective, less than one percent of all contact with police officers in Winnipeg result with any force being used, so less than one percent of the time that we're out there dealing with people do we actually have to use force, but in 67 percent of those cases, the individuals are, are either high on drugs, or, or drunk on alcohol.

In this situation, you have an aggressive individual that's presented a deadly force weapon. He is not contained. They have an obligation to protect people in that area from him. They had no knowledge at that time what his intent was. They see him running out from behind a house. He could have been running to -- it could be a domestic-related situation where he's chasing somebody. It could be that he's got into an argument with someone at the store and is now returning to, to deal with it in a physical manner. They don't know that. All they know is they have a violent individual with a deadly force weapon. It would be completely imprudent to, to disengage at that time. They have an obligation to protect society from somebody that's in that state.

[291] Patrol Sergeant Quail says that it would not have been appropriate for the police officers to use tasers on Mr. Miles at the point they discharged their firearms. He says:

Where you would consider that option is when there's not a complete threat assessment, there's time, there's firearms cover, but at the time when a firearm would be used, it would not be appropriate because the result may be that it does not stop the attacker and, obviously, the results could be catastrophic to the officer.

He goes on to say:

Where we might explore it is very similar to -- like they did with the pepper spray. They realized there was no complete threat at that time. They had firearms readiness to protect themselves, so they explored, let's try something and maybe it will work, because we can do that without putting ourself (sic) in danger and without putting the individual in danger. In that situation, the taser may have been explored. Obviously, if they could use a pepper spray, they could have tried using a taser. The advantage to a taser is it has the ability to cause physical incapacitation, unlike pepper spray.

Patrol Sergeant Quail advised that he could:

only hypothesize

as to whether or not a taser might have worked where the pepper spray did not.

[292] Patrol Sergeant Quail advised that Winnipeg Police officers have to qualify annually on the use of a firearm. He said that they also:

have to re-certify on intermediate weapon use such as their baton and their pepper spray, and they also have to re-certify on their knowledge of the use of force policy and continuum.

He confirmed that all of the officers involved in the confrontation with Mr. Miles had been recertified:

...and if they had not, they would be removed from the street until such time that they achieve the appropriate level.

[293] In response to questioning from Ms Carswell, Patrol Sergeant Quail advised that CALEA (acronym), which is an agency that certifies internationally law enforcement services, has not only certified Winnipeg Police Service but has said:

our training program is an exemplary example for other services. It rated the highest rating that we can get under CALEA for, for its -- for our training program.

[294] Again with regard to the issue of the effect of stress on the performance of police officers, Patrol Sergeant Quail advised that:

a Dr. Alexi Artwald (phonetic), a doctor in the States, a psychologist, did a study on deadly force encounters and found that 88 percent of officers in deadly encounters experienced auditory exclusion. They did not hear the gunshots going off. They did not hear voices around them when they were in that mode, because they needed their eyes to keep them alive, so the brain shifted all its energy to its visual acuity of the threat.

He says that this would explain the differences in evidence among various police officers relating to the number of shots that were fired.

[295] In further evidence, Patrol Sergeant Quail dealt with the possible danger of the proposed introduction of tasers as standard equipment for Winnipeg Police officers. He noted that a taser has an effective use up to 21 feet and:

so they have a lot of distance, and it has the ability to cause physical incapacitation, unlike the pepper spray where a person could be goal-orientated and fight through it.

He also noted that when the use of OC spray was first introduced:

we went through the same thing that we're going through with the taser. There were a lot of in-custody deaths associated to pepper spray.

He says that independent bodies researching such deaths concluded that other factors such as cocaine-induced excited delirium and positional asphyxia may have entered into some of the deaths attributed to OC spray and he says that now we will likely see with regard to the use of tasers:

more in-depth research from outside agencies other than taser's company itself obviously want an independent body to come to the decision that these weapons are safe, that may change.

and

In other words, I believe they, they've had six, six deaths, I believe – I'm not positive – in Canada where somebody has died where there's been taser use, but if, if you put that in perspective where there's, you know, a hundred thousand taser uses that six out of a hundred thousand is there other factors. I think only time is going to tell, Your Honour, once independent research

comes to that determination, and there is -- the Canadian Association of Chief of Police has just, I believe, requested that more research be done into the use of tasers.

### **Evidence of Sergeant Joel Johnston**

[296] Sergeant Joel Johnston of the Vancouver Police Department previously held a position with the Vancouver Police Department equivalent to Patrol Sergeant Quail's current position with the Winnipeg Police Service. He has, however, since advanced from that position to assume leadership of the entire Emergency Response Team for the Vancouver Police Department. He still has responsibility in this position to train members of the Vancouver Police Department in the use of weapons, in defensive tactics, and for tactical training for the entire Department. He has previously been qualified as an expert in these areas with the Provincial and Supreme Courts of British Columbia.

[297] Sergeant Johnston's evidence in good part covered the same area as did Patrol Sergeant Quail, particularly with regard to the police use of force continuum. A "National Use of Force Framework" was filed as Exhibit 52. This document consists of a one-page, colour-coded graph relating a suspect's conduct to appropriate police use of force. It would appear that this framework follows fairly closely the same use of force continuum adopted by the Winnipeg Police Service. Sergeant Johnston said that this National Use of Force Framework has been approved by "various police services across Canada". Sergeant Johnston says that this includes all the major police agencies across Canada.

[298] Sergeant Johnston prepared a report entitled "Police Involved Shooting, Winnipeg Police Service, November 5<sup>th</sup>, 2001". This report was filed as Exhibit 51 at this Inquest.

[299] This report details the circumstances leading up to Constables Kapka and Carlson discharging their firearms. Page 5 of this report reads in part as follows:

As MILES fell, the officers immediately de-escalated their use of force and called for emergency medical support for both MILES and the wounded MICHALYSHEN. Medical aid arrived and rushed MILES to hospital in an effort to save his life.

Clearly the officers were all in the legal execution of their duty in dealing with MILES. The officers were acting on reasonable and probable grounds in

deciding to check MILES, and in pursuing MILES when he represented a clear and present danger to the public and to himself.

It would seem that the officers used only the amount of force necessary to stop the threat that MILES posed. The officers went through a trained, logical progression of Force Response Options from their initial approach to MILES right through to the point when shots were fired. The officers utilized “Officer Presence”, “Tactical Communication”, the lowest level “Intermediate Weapon” that police are equipped with (OC spray). In fact KAPKA placed himself at personal risk twice, and CARLSON once when they approached MILES to deploy the OC spray. This was done at great risk to themselves in an effort to avert the need to use a higher level of force to stop MILES’ dangerous, violent behaviour.

The officers continued with “Tactical Communication”, offering help and telling him to drop the weapons. It was only at the point when MILES presented an imminent deadly threat to KAPKA that the officers fired their service pistols. It could be argued that the officers would have been justified in firing sooner than they did. KAPKA could have easily been stabbed by MILES under the circumstances. This is not uncommon in police-involved shootings, where police officers frequently wait too long to deploy deadly force, hoping that some other option will work.

Because the public was clearly in danger, and MILES appeared to be a danger to himself it would have been entirely inappropriate for the officers to leave the scene (“Disengage”).

Because these officers had no other less lethal distance options, such as an impact (“bean bag” or “sock round”) shotgun, an ARWEN or SAGE impact gun, or a TASER, there was ultimately no option other than the “firearm” to potentially stop MILES’ behaviour.

All lesser options had been precluded (“Officer Presence”, “Tactical Communication”, “Intermediate Weapon” – OC spray) by virtue of the fact that they were attempted and failed, they were inappropriate given the circumstances (eg: “Intermediate Weapon” – baton), or they simply were not available (less lethal distance options).

These officers were ultimately forced to deploy deadly force (“Firearms” – shots fired) in the face of imminent jeopardy of serious bodily harm or death.

[300] Sergeant Johnston says this:

**Conclusion:**

All of these officers were acting in the legal execution of their duty, and further they were acting upon reasonable and probable grounds in dealing

with MILES. KAPKA and MICHALYSHEN demonstrated good judgment and good police work in forming the grounds to check MILES.

It would seem that these officers employed a logical progression of force response options. Upon preclusion of lesser force response options (by virtue of application and failure, or consideration), and because other less lethal distance options were not available, when faced with imminent jeopardy of serious bodily harm or death, they necessarily escalated to deadly force in an effort to stop the imminent threat.

They responded to MILES behaviour in accordance with the federal statutes of the Criminal Code of Canada, specifically sections 25, 34 and 37. They acted in accordance with common police training standards and in accordance with generally accepted use of force principles. They were legally justified in deploying deadly force under these circumstances.

In this case, it appears that this shooting could have been avoided through the voluntary compliance of MILES during the numerous opportunities that were afforded him by the attending police officers. Under the circumstances, this shooting could not have been avoided by the police.

The sections of the *Criminal Code of Canada* referred to by Sergeant Johnston read as follows:

PROTECTION OF PERSONS ACTING UNDER AUTHORITY

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if



- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
  - (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
  - (c) the person to be arrested takes flight to avoid arrest;
  - (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
  - (e) the flight cannot be prevented by reasonable means in a less violent manner.
- (5) A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of subsection 2(1) of the *Corrections and Conditional Release Act*, if
- (a) the peace officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person; and
  - (b) the escape cannot be prevented by reasonable means in a less violent manner.

#### SELF-DEFENCE AGAINST UNPROVOKED ASSAULT

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

#### PREVENTING ASSAULT

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

## **SCHEDULE 4**

### **RECOMMENDATIONS**

[301] On the basis of the evidence heard at this Inquest from experts on police use of force, it is recommended:

1. That the Winnipeg Police Service deploy taser guns in a manner assuring that all general patrol police cruisers are equipped with them.
2. That prior to such deployment, the Winnipeg Police Service train all members in the use of taser guns as an intermediate force weapon to be used appropriately only in accordance with the Winnipeg Police Service Use of Force Continuum.
3. That the Winnipeg Police Service carefully monitor the use by its members of taser guns, after deployment of them as recommended above, to determine that they can be used safely by members of the Winnipeg Police Service; and to determine whether or not the taser's present status on the Winnipeg Police Service Use of Force Continuum as an "intermediate" weapon should be changed.

**SCHEDULE 5****Exhibit List**

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>
1	Book of Documents
2	Booklet of photos containing 32 photographs and two diagrams
3	Enlarged diagram of the area of Salter and Mountain
4	Enlarged diagram of the Shell gas station and immediate surrounding area
5	Service belt belonging to Constable Carlson
6	Service revolver no. W1102 belonging to Constable Carlson
7	Chambered round from service revolver belonging to Constable Carlson
8	Magazine and 12 rounds of ammunition belonging to Constable Carlson
9	Patrol jacket worn by Constable Carlson
10	Service belt belonging to Constable Kapka
11	Service firearm no. W0291 belonging to Constable Kapka
12	Chambered round from service revolver belonging to Constable Kapka
13	Magazine with 11 rounds belonging to Constable Kapka
14	Service shirt belonging to Constable Kapka
15	Pepper spray can – issue no. F3A173110 (Police Ex. 11-A)

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>
16	Pepper spray can – issue no. F31245167 belonging to Officer Kapka (Police Ex 11-B)
17	Pepper spray can – issue no. F3A74678 belonging to Officer Michalyshen (Police Ex 11-C)
18	Expended cartridge case, caliber 40 S&W (Police Ex 12-A)
19	Expended cartridge case, caliber 40 S&W (Police Ex. 12-B)
20	Expended cartridge case, caliber 40 S&W (Police Ex. 12-C)
21	Expended cartridge case, caliber 40 S&W (Police Ex. 12-D)
22	Expended cartridge case, caliber 40 S&W (Police Ex. 12-E)
23	Fired copper-jacketed bullet (Police Ex 13-A)
24	Metal bullet fragment (Police Ex 13-B)
25	Metal bullet fragment (Police Ex 13-C)
26	Fragment of copper bullet jacket (Police Ex 13-D)
27	Fragment of a copper bullet jacket (Police Ex 13-E)
28	Metal bullet fragment (Police Ex 13-F)
29	Metal bullet fragment (Police Ex 13-G)
30	Metal bullet fragment (Police Ex 13-H)
31	Fragment of a copper bullet jacket (Police Ex 13-I)
32	Black-handled butcher knife
33	Piece of wood from furniture resembling the leg of a coffee table
34	Blood-stained blue jeans belonging to D. Miles
35	Blood-stained underwear belonging to D. Miles

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>
36	Black baseball cap
37	Police-issued pants belonging to Constable Michalyshen
38	Bullet fragment recovered from the leg of Constable Michalyshen
39	Jean jacket with “BUM” logo
40	Black t-shirt belonging to D. Miles
41	Dark blue long-sleeved t-shirt belonging to D. Miles
42	Black-handled paring knife
43	Bullet fragments removed from D. Miles
44	Two autopsy reports and report of the Medical Examiner
45	Curriculum Vitae of Patricia Lehmann
46	R.C.M.P. criminal record for D. Miles
47	WPS criminal record for D. Miles
48	C.V. of Jeff Quail
49	Use of Force Policy
50	Firearms Discharge Policy
51	Use of Force Analysis Report by Joel Johnston, January 14, 2004
52	National Use of Force Framework