



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 28

Commissioner: Honourable Justice Leo Barry

Wednesday

22 February 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Good morning.

Sergeant, you are going to be affirmed.

MS. SHEEHAN: Do you solemnly affirm that the evidence you shall give shall be the truth, the whole truth and nothing but the truth?

SGT JAMES: I do.

MS. SHEEHAN: Please state your full name. Turn on your mic, please.

MS. CHAYTOR: I will help him (inaudible).

THE COMMISSIONER: And you have to stay within six inches or so, usually, to make it most effective.

SGT JAMES: My name is William Francis James.

THE COMMISSIONER: Thank you.

MS. SHEEHAN: Thank you.

MS. CHAYTOR: Good morning, Commissioner, and good morning, Sergeant James.

SGT JAMES: Good morning.

MS. CHAYTOR: Commissioner, before we start, I have a few new exhibits, please, to ask to have entered. Those are P-0023, P-0033, P-0034. And the reason we have low numbers on those, those are policies that we had ready to have exhibited earlier but they are going in through various witnesses. We also have P-0622 through to P-0624, so that also includes of course P-0623, then we have P-0652 through to P-0655.

THE COMMISSIONER: Sorry, P-0652.

MS. CHAYTOR: Correct.

THE COMMISSIONER: What else?

MS. CHAYTOR: And it's through to P-0655.

THE COMMISSIONER: Okay.

MS. CHAYTOR: So it's inclusive. P-0657, P-0702 and P-0522, and those are all public exhibits.

THE COMMISSIONER: Okay, so ordered.

MS. CHAYTOR: Thank you.

Sergeant, I understand you've been a member of the RNC since 1986?

SGT JAMES: That's correct.

MS. CHAYTOR: And you joined the RNC after completing your training at Holland College?

SGT JAMES: That's correct.

MS. CHAYTOR: Your current rank and position, you're a sergeant assigned to the training section and use of force.

SGT JAMES: Correct.

MS. CHAYTOR: And that was also your position in April of 2015?

SGT JAMES: Yes.

MS. CHAYTOR: In fact, I believe you've held that position since 2009?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. Your immediate supervisor is Lynn Best. She is the director of the training section?

SGT JAMES: Yes.

MS. CHAYTOR: And I understand she is a civilian member of the RNC?

SGT JAMES: That's correct.

MS. CHAYTOR: I also understand that that means she oversees the running of the training program?

SGT JAMES: Correct.

MS. CHAYTOR: And she's new to the position in the past year?

SGT JAMES: Yes.

MS. CHAYTOR: Okay. And prior to that, the position was held by Inspector Paula Walsh?

SGT JAMES: Correct.

MS. CHAYTOR: So at the time of the incident, we are speaking of it was Inspector Paula Walsh in that position?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

I understand that your routine duties in the position as sergeant in charge of the use of force are to co-ordinate the training for the members?

SGT JAMES: Yes.

MS. CHAYTOR: And also you are responsible for cadet training, and that includes regarding firearms and control tactics?

SGT JAMES: Correct.

MS. CHAYTOR: Is there anything I'm missing?

SGT JAMES: I don't think so.

MS. CHAYTOR: That's it? Okay. All right.

Perhaps you could tell then the Commissioner the process for you to be involved with use of force training for the RNC and eventually go on to become certified as a use of force instructor?

SGT JAMES: Well, in my particular case, I just demonstrated a desire or an interest in control tactics and firearms.

THE COMMISSIONER: Sorry, Ms. Chaytor, I think Sergeant James was not quite clear on the question.

MS. CHAYTOR: Oh, I'm sorry. I was wondering how it was that you came to be in your position and ultimately become certified as a use of force instructor. I understood on the interview for example that we had that, you said you had been mentored into your position.

SGT JAMES: Yes.

MS. CHAYTOR: And I think maybe by Deputy Chief Carroll, if my memory is serving me correctly, as well as maybe Inspector Ryan at the time?

SGT JAMES: Inspector Ryan, Staff Sergeant Mel Cake and Sergeant Campbell Feehan; three of those four are retired members now.

MS. CHAYTOR: Okay. And tell Mr. Commissioner then about that. In terms of mentorship, how long were you in a mentorship program with them, was it a formal mentorship program and what was your role in that mentorship?

SGT JAMES: During my mentorship, I've been called upon to assist the use of force instructors of the day and I would be in the role of – if we were doing scenario training, I would be the bad guy.

MS. CHAYTOR: Okay.

SGT JAMES: I would be given a script and I would follow the script and let it play out as it would, and react or respond to how the officer worked within the script. I was used as a bad guy again to demonstrate control tactics. And as I got more comfortable in the role, I would take on a leadership role in how to demonstrate hand cuffing or arm bars, or personal weapons, weapons retention. As I got more comfortable with it, I got certified in hand cuffing, that kind of a role, and eventually I ended up getting the use of force instructor course.

MS. CHAYTOR: Okay.

SGT JAMES: And I've done a use of force instructor course (inaudible).

MS. CHAYTOR: Okay. In terms of the use of the term “bad guy,” you’re referring to the subject, are you?

SGT JAMES: Yes, correct.

MS. CHAYTOR: Okay. And I understand you then completed your use of force instructor course around 2009-2010; is that correct?

SGT JAMES: I’ve done two or three. I did one around 2009-2010. I did another one in 2013 I think it was, and another one in 2015. I was re-certified basically.

MS. CHAYTOR: Okay. You were re-certified each of these times?

SGT JAMES: Right.

MS. CHAYTOR: So your first time that you became a use of force instructor and received your certification, I believe you told me was in 2009-2010, it may have been shortly after you took your position?

SGT JAMES: Thereabouts, yes.

MS. CHAYTOR: Okay.

SGT JAMES: But prior to that, I had been certified back in, I’ll say, 1999 in control tactics when it came to like hand cuffing and that kind of thing.

MS. CHAYTOR: Okay. And 2013, so then you had to re-certify?

SGT JAMES: Usually it’s every two to three years, yes.

MS. CHAYTOR: Okay. When in 2015 did you re-certify?

SGT JAMES: It was around – I think it was January or February.

MS. CHAYTOR: Okay. What institute provided you with that training or your use of force instructor certification?

SGT JAMES: I believe two of them were provided by Kelly Keith of Setcan; they are out of Winnipeg.

MS. CHAYTOR: That’s Kelly Keith out of Setcan in Winnipeg?

SGT JAMES: That’s correct.

MS. CHAYTOR: Okay. And would that have been your 2009, your first, as well as –

SGT JAMES: It was probably was 2009 and 2013.

MS. CHAYTOR: Okay. And where did you do your 2015 re-certification?

SGT JAMES: Actually, I did it here in this gymnasium next door.

MS. CHAYTOR: Okay. And so that was done in-house by –

SGT JAMES: Sergeant Jackson.

MS. CHAYTOR: Sergeant Jackson of the RNC, who I understand is a master use of force instructor; is that correct?

SGT JAMES: That's correct.

MS. CHAYTOR: So he is qualified to train the trainer.

SGT JAMES: Train the trainer, yes.

MS. CHAYTOR: Okay.

So do you have to re-certify every so many years or how does that work?

SGT JAMES: That's correct.

MS. CHAYTOR: But is there a number of years or how long can you go without being re-certified?

SGT JAMES: I think it's three years.

MS. CHAYTOR: Okay.

Are you, are you also a certified instructor in firearms?

SGT JAMES: I am.

MS. CHAYTOR: Okay. And when did you complete your firearms instructor certification and where did you do that?

SGT JAMES: My last or my initial one was in 2004 when we transitioned from the – we had six shooters or revolvers and we transitioned to the weapon that we currently have, SIG Sauer. So I was certified as an instructor in that and then I did firearms course in 2005 and 2008. I'm after doing it three, three or four times.

MS. CHAYTOR: Okay. And when have you last re-certified as a firearms instructor?

SGT JAMES: I think it was 2015.

MS. CHAYTOR: And before that had been 2008?

SGT JAMES: No, there was another one in between there.

MS. CHAYTOR: Okay. And when in 2015?

SGT JAMES: The exact date I wouldn't be able – I think it was in the spring.

MS. CHAYTOR: Okay. Was it before or after the incident that we're talking about in April?

SGT JAMES: May have been after.

MS. CHAYTOR: And where did you do that certification?

SGT JAMES: Here.

MS. CHAYTOR: And that again was done internal?

SGT JAMES: No.

MS. CHAYTOR: Okay. So who had trained you?

SGT JAMES: We had two instructors come over, one from Atlantic Police Academy and the other one was from Canadian Boarder Services.

MS. CHAYTOR: Okay. All right.

And how long a course do you have to do or what's involved in that? Is it a one day thing? A one week?

SGT JAMES: It was a one week.

MS. CHAYTOR: One week course?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

In doing your use-of-force training and, I guess, and or your firearms instructor course, does it include theory on the National Use of Force Framework/Model?

SGT JAMES: The continuum?

MS. CHAYTOR: Okay. You refer to it as a continuum; do you understand the National Use of Force model to be a continuum?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

Perhaps then we could skip to that then and you could explain to me what you understand a continuum to be?

SGT JAMES: It's how an officer responds to a particular situation or incident.

MS. CHAYTOR: Okay.

And I understand that the National Use of Force model is circular, it's a circular graphic –

SGT JAMES: That's correct.

MS. CHAYTOR: – and we'll bring that up during your evidence here.

SGT JAMES: Yes.

MS. CHAYTOR: And are you also though familiar with that there is a continuum model, a continuum that's used in some American jurisdictions?

SGT JAMES: No.

MS. CHAYTOR: Okay. And I understand in all jurisdictions in Canada, it's the circular model.

SGT JAMES: It is nationally recognized, yes, it is.

MS. CHAYTOR: Yes.

SGT JAMES: I think it was endorsed by the Canadian Association of Chiefs of Police.

MS. CHAYTOR: Okay.

And I also understand that there is a difference in the circular model versus a continuum, which is used in some of the jurisdiction, American jurisdictions. And the circular graphic depicts that the situation is always changing and that the officer needs to continually assess, plan, act and react to the situation. Is that correct?

SGT JAMES: Correct.

MS. CHAYTOR: All right. And the response options change according to whether your subject's behaviour may be escalating or deescalating. Is that correct?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

On the other hand, a continuum, over the continuum training, I understand that's an approach and it's basically designed on the concept of responding to resistance with the proportional use of force. But it advocates that officers can actually use a level of force higher than the level of resistance that's being presented to them.

SGT JAMES: Right, to gain control.

MS. CHAYTOR: To gain control.

SGT JAMES: Right.

MS. CHAYTOR: Okay. And are you aware of that, in terms of what a continuum suggest and advocates?

SGT JAMES: I'm aware of it somewhat, yes.

MS. CHAYTOR: Okay. All right.

And I think – and I was, and I was a bit confused, too, because in some of materials you certainly do use the word continuum.

SGT JAMES: That's correct.

MS. CHAYTOR: Right. And it's included in your instructing manual.

SGT JAMES: Yes.

MS. CHAYTOR: And in your PowerPoint, it's actually, I think, called the Use of Force Continuum.

SGT JAMES: Yes.

MS. CHAYTOR: But – so I wanted to be clear that it is, in fact, the National Use of Force model that you are teaching.

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

THE COMMISSIONER: What we have here is a possible ambiguity because the US jurisdictions use continuum when it's a more linear ratcheting up approach.

MS. CHAYTOR: Correct.

THE COMMISSIONER: Do I understand you correctly that Sergeant James is using continuum in the circular model sense, treating that as a continuum? Is that – have I understood you correctly?

SGT JAMES: It's subject dependant, Your Honour. In the sense that, you know, my response is going to be dictated by your actions.

THE COMMISSIONER: Right.

SGT JAMES: So if you're, you know, exhibiting, you know, threatening behaviour. Well, I'll respond accordingly. If you're, you know, you're exhibiting that behaviour, and then you, you know, relax or, you know, calm down a little bit. Well, my response is going to be –

THE COMMISSIONER: It's unfortunate we didn't get the report to you before. But we didn't have it. We still – we're still waiting.

MS. CHAYTOR: We still don't have it.

THE COMMISSIONER: Huh?

MS. CHAYTOR: We still don't have it.

THE COMMISSIONER: We're still waiting, but we have a report coming in from a use of force expert who suggests that there may be a confusion between the national – Canadian national model, which emphasizes not just the wheel, we'll say, but emphasizes de-escalation, I guess, –

SGT JAMES: Yes.

THE COMMISSIONER: – more than the American model. Would that be fair?

MS. CHAYTOR: Yeah, the American model –

THE COMMISSIONER: The American model is commonly labelled a continuum. So there's a difference between, as I understand it, how the national Canadian model operates and how the US continuum model operates. Is that what the expert's wondering?

MS. CHAYTOR: Yes. And I don't know if it's all the US. It's certainly some jurisdictions in the US, but I understand –

THE COMMISSIONER: So we're not, we're not trying to –

MS. CHAYTOR: No, no.

THE COMMISSIONER: – catch you up or anything.

SGT JAMES: Yeah.

THE COMMISSIONER: We'll be, if necessary, when your counsel and yourself get to see the report when it finally comes in, if you need to come back or clarify anything or –

MS. CHAYTOR: Yeah.

THE COMMISSIONER: – make us aware of where we might be going wrong in our assumptions, that'll be possible.

SGT JAMES: Yeah.

THE COMMISSIONER: So right now we're trying to make sure we know what it is when you say you're using a continuum model, what it is you mean by that.

MS. CHAYTOR: Yes, yes. Okay.

THE COMMISSIONER: Is that fair, Mr. Avis? You're – I just mentioned that we don't have the use of force report yet, I think that's the last one we're still waiting on and pressing them to get it in as soon as possible, but that will, it might be necessary to bring Sergeant James back to clarify anything that's left.

Oh, I'm sorry –

MR. AVIS: I'm just as interested, but he's kind of our witness but –

THE COMMISSIONER: Well, you're acting for the RNC and I guess it's more the RNC, but I respect your division of work here.

Sorry. Mr. Drover.

MR. DROVER: I understand what you've said this morning.

THE COMMISSIONER: Yeah.

MR. DROVER: It's going to be difficult to put some questions to him if he hasn't seen the report and it's certainly difficult to get into a US use of force model that he has no training in and no awareness of.

THE COMMISSIONER: Right.

MR. DROVER: So

THE COMMISSIONER: The – I guess all I'm saying is cautioning everybody against, you know, assuming that we're into an adversarial type of situation here. We're not. We're trying to get as much understanding –

MR. DROVER: Absolutely.

THE COMMISSIONER: – of what is being used in Newfoundland, what's being used nationally, if there's any difference and how there might be even more modern approaches in other jurisdictions, but we'll wait and get the expert's report on that.

While I think of it, I meant to raise this at the beginning, it's been noted for me that there's a little bit of interference with cellphone beeping. Frankly, I haven't heard it. I've heard a bit of vibration, I think, where those of you might have your cellphone on vibrate, but if you can avoid having your cellphone engage in anything other than the brief – the low vibration, it would help – as we mention it, witnesses are thrown off a bit when the cellphone ring is heard. So I haven't noticed it, as I say. It's a big problem, but if you'd keep that in mind I'd appreciate it.

Okay. Go ahead, Ms. Chaytor.

MS. CHAYTOR: Thank you, Commissioner. Thank you.

Yes, and the only thing, as the Commissioner says, Sergeant James, we're trying to just get some clarity around some of the training you had, because one of the things that in my discussions with – and it's Sergeant Mike Massine from the BC Institute of Justice, and he'll be coming along to give us some thoughts on this. But one of the things that he raised in our discussions with him is this idea of the continuum and the fact that it's been used in that terminology so that we want to get clarity as to whether or not any portion of your training may have in fact involved continuum training.

He was also aware that Setcan and Keith Kelly has taught the PPCT continuum. And so I guess my question would be, was that any component of your training to be taught the PPCT continuum?

SGT JAMES: We were taught the continuum, yes.

MS. CHAYTOR: You were taught the continuum.

Okay. Thank you.

So yeah, and also – yeah, that's the American PPCT, right?

SGT JAMES: PowerPoint, or Pressure Point Control Tactics?

MS. CHAYTOR: Yes.

SGT JAMES: Yes.

MS. CHAYTOR: And that's like a linear graphic?

SGT JAMES: Yes.

MS. CHAYTOR: Yes, that's right. Okay.

Were you also taught then the circular model?

SGT JAMES: Yes.

MS. CHAYTOR: You were taught both?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

SGT JAMES: That's the one we use.

MS. CHAYTOR: And that's the one you use. Okay.

Yeah. And so then I think some more of the confusion probably is that some of the terminology then from the PPCT continuum shows up in your training manual and your teaching materials?

SGT JAMES: Correct.

MS. CHAYTOR: Correct. Right.

And so I think that might be where Sergeant Massine has raised that issue in terms of clarity. And, in fact, I noticed that in – and I think we spoke on this in your interview, some of the quotes that you have in your PowerPoint presentation. For example, there was a Mr. Zittle or Siddle –

THE COMMISSIONER: Siddle.

MS. CHAYTOR: – S-I-D-D-L-E, Siddle. And we spoke about that in your interview, and he's an instructor who I understand teaches this type of US Use of Force the continuum model?

SGT JAMES: I believe he is an American, yes.

MS. CHAYTOR: Yes, okay.

But you're not familiar with him?

SGT JAMES: No, I've never met him or –

MS. CHAYTOR: Okay. But there is a quote, or at least some information attributed to him in your materials.

SGT JAMES: Correct.

MR. COMMISSIONER: What's his name?

MS. CHAYTOR: Siddle, S-I-D-D-L-E, I believe –

THE COMMISSIONER: S-I-D-D-L-E, okay.

MS. CHAYTOR: His initials BK, I believe. BK Siddle. I can't give you his first name but I can check that.

THE COMMISSIONER: Right.

MS. CHAYTOR: Okay. So you were taught, what you're saying is that you were taught both.

SGT JAMES: Yes.

MS. CHAYTOR: Okay. And how about your most recent then in 2015? What were you taught?

SGT JAMES: The wheel.

MS. CHAYTOR: The wheel.

SGT JAMES: The circle, yes.

MS. CHAYTOR: The wheel, okay – and not the continuum?

SGT JAMES: No.

MS. CHAYTOR: Okay.

SGT JAMES: We just used the word continuum, that's all.

MS. CHAYTOR: So yes, you're still using the word but it's, in fact, the circular graphic.

SGT JAMES: Correct.

MS. CHAYTOR: The model. We'll go with model, how about that?

SGT JAMES: Yes, fine.

MS. CHAYTOR: Okay.

So I'm going to move on then and ask you about your knowledge of Joe Smyth. And I understand that you know Constable Smyth fairly well and, in fact, you've known him his entire policing career.

SGT JAMES: Correct.

MS. CHAYTOR: And you've never acted in a supervisory position over him, though.

SGT JAMES: No.

MS. CHAYTOR: You have, however, policed with him.

SGT JAMES: Correct.

MS. CHAYTOR: And that when he first joined the RNC you actually worked on the same platoon in the patrol division.

SGT JAMES: Yes.

MS. CHAYTOR: That was for a couple of years, I understand.

SGT JAMES: Yes.

MS. CHAYTOR: And during that period of time, you actually would have worked side by side in the same police vehicle from time to time.

SGT JAMES: Yes.

MS. CHAYTOR: Okay. And, of course, I think this predated your time as being an instructor in Use of Force.

SGT JAMES: Yes.

MS. CHAYTOR: Did you ever have any concern in working with Constable Smyth with respect to his use of force?

SGT JAMES: No.

MS. CHAYTOR: Prior to April 5, 2015, had you ever known of him to have drawn his weapon or use his weapon?

SGT JAMES: Not that I can recall.

MS. CHAYTOR: And I ask you that in terms of, I understand you are also on the Use of Force Review Board?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

While working with him, did you ever have occasion to arrest a subject or see Constable Smyth arrest a subject?

SGT JAMES: I'm sure I have, yes.

MS. CHAYTOR: Did you ever observe him become angry with a subject or do anything in terms of his approach with a subject that you were concerned about?

SGT JAMES: No.

MS. CHAYTOR: I understand that you have taught and trained Constable Smyth in use of force?

SGT JAMES: I have.

MS. CHAYTOR: And you've re-qualified him for his annual Module 1 firearm recertification?

SGT JAMES: I have.

MS. CHAYTOR: Yeah. Did you ever have any issue with respect to Constable Smyth meeting expectations with respect to Module 1?

SGT JAMES: No problems.

MS. CHAYTOR: In terms of your work with the Use of Force Review Board, you're a member of that board. I'm going to turn now to a number of questions regarding the recent revisions to the Use of Force policy. Okay.

And I understand that as a member of the board, the Use of Force policy underwent substantial revisions in 2016. I think it came into effect August of 2016.

SGT JAMES: Yes.

MS. CHAYTOR: And prior to that, the Use of Force policy was 2012.

So, Commissioner, the policy that would've been in effect, the Use of Force policy in effect in 2015 was the 2012 policy, but there's been a substantial revision in 2016. And I understand that as a member of that board you were offered an opportunity to review the proposed changes and to offer input.

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

Perhaps – I understand also, I guess I should say the overall mandate of that board. And in the materials that we have it says that: “The RNC and its individual police officers have a vested interest in maintaining the highest standards in relation to use of force training and authorities granted under the *Criminal Code of Canada*. To accomplish this objective requires ongoing evaluation of RNC procedures, practices and training in relation to the use of force. The responsibility for such evaluation shall be vested with the RNC Use of Force Review Board.”

And so that's basically the mandate of the Use of Force Review Board. Is that correct?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

MR. DROVER: Counsel, can I ask a question? Were you're reading from an exhibit?

MS. CHAYTOR: Yes, it's both. That wording didn't change, but that's section 17 in the new Use of Force policy. The 2012 policy is P-0033, and that was section 14.

THE COMMISSIONER: P-0033?

MS. CHAYTOR: P-0033 is the 2012 policy, and the new policy is P-0034.

THE COMMISSIONER: P-0034. It's a new one, that's 2016.

MS. CHAYTOR: Correct.

THE COMMISSIONER: Okay.

MS. CHAYTOR: So the Use of Force Review Board, section 14 in 2012 and section 17 in 2016.

THE COMMISSIONER: Sorry, section 14 in 2012, and section –

MS. CHAYTOR: 17 in 2016.

THE COMMISSIONER: 17 in 2016. So that's the sections – got me really concerned – the Use of Force one.

MS. CHAYTOR: Right.

THE COMMISSIONER: Right.

MS. CHAYTOR: Okay.

So I'm going to just take you through some of the revisions.

SGT JAMES: Yes.

MS. CHAYTOR: And, again, it's not meant to be a test in terms of well, this section changed. I've done a bit of a review myself on it, and compared and contrasted it. So I'm just going to ask you then more broad questions about what you understand the reasons were for the changes in 2016.

So I understand the first policy was December 20, 2012, which is P-0033. And it was updated and revised on August 30, 2016 – or that's when it came into effect. And I'm probably not speaking correctly when I say policy. It's actually Policy and Procedure Manual.

I understand, however, Sergeant, that nothing changed in terms of the actual training given to members of use of force as a result of the changes to the Policy and Procedure Manual. It had no effect on the training?

SGT JAMES: That's correct.

MS. CHAYTOR: That's correct.

And no changes that impact how you, in fact, go about doing your job?

SGT JAMES: No.

MS. CHAYTOR: Okay.

And I think it'd be helpful at this point please, Madam Clerk, if we could bring up, please, the new policy: P-0034. Okay.

And, Sergeant James, what I'd like to do here is just basically take you through what I have noted as being some of the changes. First of all this beginning piece, the general piece, which outlines the purpose, scope and principle of the policy and procedure, this is new – this is added?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And are you able to speak as to – was this a general change to how the formatting of your policies and procedures would happen from on a go-forward basis, or was this specific to the Use of Force Policy?

SGT JAMES: Yes, on a go-forward basis, I believe it may pertain to all the sections (inaudible)

–

MS. CHAYTOR: All policies, okay. All right.

The purpose of the policy and procedure is: "To provide direction to police officers regarding use of force. Officers should pay particular attention to specific information enclosed that is intended to guide them in making decisions regarding their use of force application and the subsequent reporting."

The scope: All officers should pay particular attention to this policy, and it's governed by – and then it gives references to the *Criminal Code* provisions sections 25-27 that govern police officers use of force.

The principle is: “Police officers have a responsibility to be fully versed in the use of force guidelines as contained in the *Criminal Code* and associated police policies. Decisions are subject to review in criminal, civil and/or disciplinary proceedings.” Okay.

Clause 2, I don't think, changed; it just became – it used to be clause 1. So then if we come down, the next one is use of force and, again, I don't think there were any substantive changes to Use of Force Training, and you've spoken to that. Except under 3.3, the last wording, there's some wording added here: “The Use of Force Unit shall have discretion in deciding which officers complete specific Use of Force Modules.”

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And I understand that the situation in April of 2015, all officers who were operational were required to do their module once every year, their firearms re-qualification, and then there was a rotation for modules 2, 3 and 4?

SGT JAMES: Correct.

MS. CHAYTOR: And those – everybody would – it'd be mandatory in the sense that if you decided you are doing one, module one has to happen every year and then module two – all officers were basically required to do module two?

SGT JAMES: Unless they're exempt.

MS. CHAYTOR: Unless they're exempted, correct. So now there's discretion being given, is that the case in the Use of Force unit as to whether or not certain officers would have to complete all modules?

SGT JAMES: That's correct.

MS. CHAYTOR: And what was the thinking behind this? Why was that discretion deemed to be an important thing to put into your policy and procedure?

SGT JAMES: If you have an officer that, we'll say – we'll use module 1 for instance, firearms requalification. If you got someone that is off on maternity leave, they are not expected to complete the module, obviously.

MS. CHAYTOR: Okay. So it is the same types of exemptions you would have had before, it's just now been put into policy and procedure that you have that discretion to make that decision?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. So it is not based on particular units that people may be assigned, other than if they are operational or non-operational, I guess.

SGT JAMES: It could be in a – depending on what the module is that we are doing in that particular year, you may be exempt from doing that module depending on where you are within the organization. If you are chief of police, the chief of police doesn't requalify in module 2,

which is control tactics. He doesn't requalify in module 3. So there are people with the Use of Force unit that pick out and say they are exempt.

MS. CHAYTOR: Okay. And you always had that discretion in terms of having certain people in certain positions exempt?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. All right.

Then I believe – and you can correct me if I'm wrong on any of the this, please, Sergeant, because I –

SGT JAMES: I'll try.

MS. CHAYTOR: Okay. I tried to do a compare and contrast, but I believe section 4 is new –

SGT JAMES: Yes.

MS. CHAYTOR: – Carrying of Use of Force Equipment by Specific Officers. Okay, so this is new and talks about plainclothes and forensic identification and then the next section talks about uniformed officers and what they are expected to carry. Then we have the commissioned officers. Tell me, if you can, the discussion around and decision to clarify this or put it in the use of force new policy.

SGT JAMES: I think it was always there, but it was, we'll say, an unwritten rule and just to again clarify it so it's not being questioned inside, it's there – so you know you are in the Forensic Unit, these are my use of force options that I have to carry. If I'm in patrol, these are the pieces of equipment that I am required to carry. There's no question.

MS. CHAYTOR: Okay. I think it is important to say too that the Policy and Procedure Manual, this is the document that is accessible to all officers; is that correct?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. As opposed to the Training Manual that we are going to see in a little while, that's you and the training instructors that have the Training Manual, not every officer has the Training Manual?

SGT JAMES: Presently yes, but we've made a recommendation that it be put on, we'll say, the front line so that all officers can have access to our Training Manual. If they have a question, they can contact one of the use of force officers or they can go right to the manual themselves and –

MS. CHAYTOR: Okay.

SGT JAMES: – answer the question themselves.

MS. CHAYTOR: All right. So that's one of the – that's one of the changes you're considering? Okay.

SGT JAMES: Yes, I think that's already been approved; it's just a matter of uploading it to front line.

MS. CHAYTOR: And front line meaning I guess like your –

SGT JAMES: It's internal directory.

MS. CHAYTOR: – internal website –

SGT JAMES: That's correct.

MS. CHAYTOR: – your internal, yes, like your Internet or –

SGT JAMES: Correct.

MS. CHAYTOR: Yes.

THE COMMISSIONER: I guess they can get it off our website now, can't they?

MS. CHAYTOR: No, we only have up to page 17 I think on our website, or the first 20 pages anyhow or thereabouts. We were careful that there were only certain sections that we could make public exhibits.

Okay, so up until – at the time of April 2015 the Use of Force manual wasn't readily available to all officers?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. And what we're going to see here in the changes now in the policy, though, there are some substantial portions, I would suggest to you, from your Use of Force manual which are now into your policy?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. I didn't realize of course that well, you're going to make the manual readily accessible, but I think it would be fair that if any officers had any questions they'd be looking to their policy – their Use of Force Policy?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. And so now if have it here in the policy, as well you are going to make the manual available?

SGT JAMES: All of our manuals will be made available to our members.

MS. CHAYTOR: Fair enough, okay.

All right. And this refers then 4.2, 4.3 and 4.4. "All members responding to scenes of Critical Incidents will be armed and wearing their issued body armour." And 4.3 speaks about marked patrol vehicles being equipped with use of force items. Then 5, I believe to be new as well: the Authority for Use of Force Under the *Criminal Code*. And when we look at this, this is quite a substantial section here on use of force and when it can be used and what the sections 25, 26 and 27 of the *Criminal Code* says. So this is been spelled out in pretty plain language for your officers

–

SGT JAMES: That's correct.

MS. CHAYTOR: – in terms of their authority and where they derive that authority and what they can expect to be considered reasonable use of force?

SGT JAMES: Correct. I believe in 2012, it wasn't as broadly explained.

MS. CHAYTOR: Yes, I didn't see – I didn't really see much –

SGT JAMES: No, there wasn't a lot on it.

MS. CHAYTOR: – at all of your 2012 policy on this.

SGT JAMES: Correct, so they've, you know, expanded.

MS. CHAYTOR: Okay. And was there discussion that went into the decision as to why to have this spelled out in your new policy?

SGT JAMES: Again, it just makes it that much easier for the officers to know what their roles and responsibilities and what their actions will –

MS. CHAYTOR: Okay.

SGT JAMES: – result in.

MS. CHAYTOR: And then the next section Use of Force Guidelines – there was a Use of Force Guidelines section in your old policy?

SGT JAMES: Correct.

MS. CHAYTOR: And there's just a few I think –

SGT JAMES: Additions.

MS. CHAYTOR: – minor wording changes in here.

Section 7, Subject Behaviours and this is a section where, I think, that there – this is speaking to your Use of Force Manual isn't it, and what you teach?

SGT JAMES: Yes, the model.

MS. CHAYTOR: Okay.

I'm sorry?

SGT JAMES: The model.

MS. CHAYTOR: The model, that's right, the model. I like that. Okay.

Subject Behaviours and then, this is basically what you teach, and it talks also about dialogue communication. All of this is new. So now the officers can go to the policy and see here, there are essentially five categories. Subject Behaviours: Compliance, Passive Resistance, Active Resistance, Assaultive Behaviour, Grievous Bodily Harm or Death. And these are what we see on the wheel when we look at it. These are–

SGT JAMES: That's correct.

MS. CHAYTOR: These are described. That's right.

And then Dialogue and Communication is given its own section in the policy. That's section 8. "Dialogue and communication are those verbal skills which an officer may use to gain voluntary compliance from a non-compliant subject. 8.2 If dialogue and communication skills fail and/or prove to be inappropriate and unreasonable due to the circumstances faced by an officer, then escalation to an appropriate and reasonable force option may be employed to gain compliance and control of a subject. 8.3 Dialogue and communication should be viewed as an option at every use of force incident when appropriate and reasonable to do so."

SGT JAMES: Correct.

MS. CHAYTOR: And, Sergeant, can you tell me about the discussion that went into the decision making to have this spelled out into your Policy and Procedure, in your new Policy and Procedure?

SGT JAMES: Again, it's just a follow or continuation of the model, where communication is one of the elements within the model or the wheel.

MS. CHAYTOR: Okay.

And then your Authorized Force Options, and I believe this section is also new, section 9. And it talks about the approved force options that are utilized and it goes down from presence down to firearms. And, again, that's part of the model training?

SGT JAMES: Correct.

MS. CHAYTOR: And then 9.3 says that "All force options are subject to change depending upon judicial precedents or new control tactics and techniques that become available and which are adopted for use by the RNC." So it's giving notice that, you know, this is not written in stone forever.

SGT JAMES: It's not etched in stone, no.

MS. CHAYTOR: That's right.

SGT JAMES: As new techniques are developed or implemented, they will be reflected in the policy and training.

MS. CHAYTOR: Okay.

And then section 10, and I believe this to be new in your policy, your Use of Force Weapons from Handcuffing; Soft Physical Control Techniques, and that's outlined; Hard Physical Control Techniques; the pepper spray or the OC Spray; your Baton. And then I guess it's the taser, the Conducted Energy Weapon; Less Legal Shotguns; Service Firearms; and the Police Dog Services. And Police Dog Services have been in your old policy but think it's now –

SGT JAMES: It has its own section.

MS. CHAYTOR: – now moved to its own – yes.

Okay.

They only change I saw in Rendering Aid after Use of Force, this was section 9 in the old policy, and it said here that: Any time a police officer uses force; appropriate medical aid will be provided to any person involved, and we have the new wording, as soon as practical.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

Any discussion around that wording and why ...?

SGT JAMES: Not that I can recall, no.

MS. CHAYTOR: Okay.

Justification for the Use of Force, 13, I believe that to be a new section. And again, "When an officer uses any force option in the execution of their duties, they do so to: a. gain control of a subject who is being non-compliant with an officer's lawful order; b. protect themselves or others from physical harm; or c. bring an unlawful situation safely and effectively under control."

And then there's the concept of reasonableness is spelled out here in terms of subject factors and also in terms of officer factors; tactical factors. And this again is all pretty much taken right out of your manual, isn't it?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And this would be part of – and when we get into the discussion on the model, it's a, these are, this is part of the officer assessing his environment and deciding if he needs to re-assess and make his plan. These are some of the factors that you would expect him or her to take into effect

SGT JAMES: That's correct.

MS. CHAYTOR: –or into consideration, I should say.

Okay. So this is now all spelled out in your policy.

Okay. Reporting Use of Force. This section was in your old policy but I believe it had said: Reporting the use of force is mandatory in all cases. And now it says: where police officers have to use force to control a subject.

SGT JAMES: Yes.

MS. CHAYTOR: So it's qualified. And so they no longer have to report use of force in all cases, only if it's used to control the subject.

SGT JAMES: Correct.

MS. CHAYTOR: Is that correct?

SGT JAMES: Yes.

MS. CHAYTOR: Okay. And would there be any other time in which they would use force, other than to control a subject?

SGT JAMES: Some cases where you may put handcuffs on a person that you're not required to report the use of force (inaudible).

MS. CHAYTOR: Okay. So the person might go voluntarily –

SGT JAMES: Yes, exactly.

MS. CHAYTOR: – and would allow themselves to be handcuff?

SGT JAMES: Right. If I'm doing an escort from, you know, –

MS. CHAYTOR: Yup.

SGT JAMES: – the Waterford Hospital to court or wherever and I'm, you know, putting waist chains or leg shackles on them, it's compliant cuffing. So it's not required.

MS. CHAYTOR: Okay. Fair enough.

And there's some, some small changes in the next section we have here – I don't know if they're small changes but they didn't seem that significant to me, but the following uses of force must be reported, so regardless for non, so handcuffs for non-compliant only, you say?

SGT JAMES: Correct.

MS. CHAYTOR: And I think i. was different: Less-Lethal Shotgun. And this might just be changes in terminology in terms of weapons, I'm not sure.

SGT JAMES: Yeah. Well, we've just introduced the less-lethal shotgun.

MS. CHAYTOR: Okay.

SGT JAMES: So prior to 2012 that wasn't in our

MS. CHAYTOR: What is a less-lethal shotgun?

SGT JAMES: Less-lethal shotgun?

MS. CHAYTOR: Yes.

SGT JAMES: It's a .12 gage shotgun.

MS. CHAYTOR: Okay.

SGT JAMES: And we fire beanbags.

MS. CHAYTOR: And I'm sorry. So that's something new?

SGT JAMES: Yes.

MS. CHAYTOR: That's something new.

Okay. And when is that intended to be used?

SGT JAMES: If I have a subject that's, you know, I'll give you an example, the subject is there with a knife and I've got an opportunity to diffuse the situation without having to use my firearm, and I can fire the beanbag round at this person, striking him in a non-vital area. We aim for large muscle groups, which would be like the thighs and the buttocks, and the person drops the knife. That affords me an opportunity then to go in and handcuff the subject without having to go to lethal force.

THE COMMISSIONER: I think that technique has been around for a while now.

SGT JAMES: Yes, it has been, Your Honor, and we've just put it into our arsenal.

MS. CHAYTOR: Okay. So it's new for the RNC.

SGT JAMES: Within the last year or so, yes.

MS. CHAYTOR: Okay.

I think 14, the Procedure, I didn't note any changes there.

Physiological services for the officer, the police officer, which has come up in our discussion here at the inquiry. That appears to be unchanged. It used to be in the old policy, for anyone who's interested, it's section 13.

And Use of Force Investigations. This was section 12 in the old, in the 2012 policy, and the only change that I really notice here is that it now says: "In accordance with the provisions afforded under a Memorandum of Understanding and/ or Letter of Agreement the Chief of Police may request the services of an outside policing agency to act as investigators in circumstances where serious occurrences have taken place involving the actions of one or more police officers of the RNC, including instances of serious injury or death."

It had said in your 2012 policy, it was that the OPP would be brought in.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. And perhaps this is a question better asked, for me to ask next week, I'll have Chief Janes here, so that might be a better question to ask him I guess.

SGT JAMES: I would think so.

MS. CHAYTOR: Okay. So you weren't part of any discussions or decision making around this.

SGT JAMES: Decision on why that was changed, no.

MS. CHAYTOR: And what an outside policing agency may require, whether or not that means outside the Province?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. I'll save that then for Chief Janes.

And then this is the section I already referred to, Sergeant James, Use of Force Review Board, section 17, which was section 14. And it spells out the responsibilities for the board. I think the

only change there is they also have added now to their responsibilities: “review and approve the use of new equipment.”

SGT JAMES: Correct.

MS. CHAYTOR: But I understand that was – was that part of the unit’s responsibility before, or the board’s?

SGT JAMES: Well, we would seek out or, you know, we would see something that we thought may have been, you know, beneficial to the members. And we would bring it to the board. It’s just now it’s stipulated there. We’ve always –

MS. CHAYTOR: It’s in writing now –

SGT JAMES: Yes, yes.

MS. CHAYTOR: – basically, that was all–

SGT JAMES: We always did it; it just wasn’t in writing.

MS. CHAYTOR: Okay. All right.

If we could just briefly bring up, please, P-0033? And this is the old policy, and I don’t intend to go through this in quite as much detail. But I just want to note some sections that we’ve looked at – now, the new sections that have been put in. But I think it’s also important if we could just note on page 2, please – page 3, actually. It starts on the bottom of page 2, so I’ll just scroll back.

The firearms training – so this piece here, under section 3 – shall be compulsory. I understand this is been moved to the – you have a firearms policy and procedure. So this is now taken out of your Use of Force.

SGT JAMES: It’s moved, yes.

MS. CHAYTOR: And it’s moved. So it’s out of Use of Force: firearms training. And as well as this qualification piece – and this is moved to firearms policy and procedures as opposed to Use of Force.

SGT JAMES: Yes.

MS. CHAYTOR: So do I take from that that any emphasis on firearms has been put over in the policy and procedure for firearms. And use of force is clearly stipulated to mean many things, according to the circular –

SGT JAMES: Correct.

MS. CHAYTOR: – model that we have.

SGT JAMES: Firearms has its own section as does, you know, the Taser has its own section, the Police Dog Services have their own section.

MS. CHAYTOR: Correct. Okay.

And there was a whole section in here, as well, on the OC spray and all of that is also – that’s been moved?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

SGT JAMES: To make it easier, I guess, for the members if they wanted to query pepper spray, they wouldn't have to go to fifteen different sections. They can go now to pepper spray section, or the OC spray.

MS. CHAYTOR: Okay. All right.

And I think that's it then. And we've already mentioned the Police Dog Services has been moved.

Okay. All right. Thank you, Madam Clerk and thank you, Sergeant James.

If we could bring up then the model – they use the force training model, which I think you can find at P-0624. And we're going to go directly to page – we can look at the cover page here first, I guess. And I'll have some questions for you on the manual, but right now I just want to look at the model on page five, please. And if we could just make that so that it fits the page and we can see the whole circle and then perhaps the wording underneath as well. If you can make it a bit smaller; I know you're used to me saying the opposite, but here we go.

All right. So this is the graphic that we've been speaking about, Sergeant James?

SGT JAMES: Yes, this is the model.

MS. CHAYTOR: Okay. And this also says that "The officer continuously assesses the situation and selects the most reasonable option –

SGT JAMES: Correct.

MS. CHAYTOR: – relative to those circumstances as perceived at that point in time." And continually re-assessing the situation, the officer is assessing the risk and re-evaluating the risk to himself or others who may be involved in the situation.

SGT JAMES: As he is going along, yes.

MS. CHAYTOR: Okay. All right.

Perhaps you might take a moment to explain – this model now has been enforced – I understand this is the model that the RNC has been following for quite a number of years?

SGT JAMES: That's correct.

MS. CHAYTOR: Do you know exactly when this model was adopted by the RNC in its training?

SGT JAMES: I'm going to – I can't say, you know, with certainty that it was like two years and six months, but it's been, I would say, 10 years, for sure.

MS. CHAYTOR: Ten years, so it pre-dated your time in your position?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

In continually assessing the situation, you told me in your interview that the importance of that is you don't want them to become complacent?

SGT JAMES: Correct.

MS. CHAYTOR: Because when you're complacent, you said that's when you can get hurt?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. And that's part of the assessment that they're doing?

SGT JAMES: Correct.

MS. CHAYTOR: I wonder if you could just take a brief moment and explain the graphic to the Commissioner, you know just the basic stuff, what it means and what it is that you teach in terms of the model.

SGT JAMES: It's going to be dictated by situation that you're, I guess, responding to or, you know, come upon. Say it's two guys on George Street and their getting ready to square off and fight. So as you roll up, you're assessing what's going on in front of you. You can see the two guys are taking their coats off; they're putting their fists up; they're getting ready to fight one another.

So you've got to realize okay, these two guys are going to fight, so how am I going to respond to it? So you're formulating a plan, so you're assessing the situation. You're coming up with a plan and then you're going to put that plan basically into effect to resolve the situation, and that's basically the middle of the model.

MS. CHAYTOR: Yes.

SGT JAMES: The situation is two guys fighting. It's your assessment, you proceeded two guys are going to fight. You formulate that you are going to call for backup or you're going to get out and, you know, speak to these two guys. It's going to be officer dependent. Just the mere fact that you roll up on the scene and you are in a patrol car and you're a marked unit and you're in uniform, that may resolve the situation. Just the mere presence of a patrol car, we'll use the word – I know it's going to come up – it's a form of de-escalation. They see the patrol car, they see the officer or officers and they realize okay, well, let's not continue with this fist fight, so they walk away.

MS. CHAYTOR: Okay, and that's what we have here in the blue: officer presence?

SGT JAMES: Right. And his perception, right. It's in the blue there and you have your tactical considerations. You know, am I going to get out by myself? Am I going to, you know, deploy pepper spray or am I going to need to deploy pepper spray or will I call for backup? Those are your tactical considerations.

Communication, which is, as you can see there on the model, it's all the way around and communication is paramount. So you get out and you say to these guys: Okay, guys, that's enough. I don't know what your beef is whatever, but you know if you continue, you're probably going to end up getting arrested, someone's going to get hurt. So if you speak to these guys and the situation resolves itself, job well done.

MS. CHAYTOR: Okay. And as you pointed out communication is paramount and it goes through all levels of force?

SGT JAMES: Right. So you get out and it's not working and you have to use tactics. So you have your soft control tactics. You have your – again, it's all physical control, and you have your hard options. And then if you move along a little further, you have your intermediate weapons. Intermediate weapons could be your bat and could be your pepper spray, could be your Taser. And then up towards the end there is the lethal force option.

MS. CHAYTOR: Okay. And when we look at the intermediate weapons that goes from – 'cause the other piece that we have to the circle of course is the subject's behavior –

SGT JAMES: Correct.

MS. CHAYTOR: – here in the gray and black, right?

SGT JAMES: And that will dictate what option you are going to use.

MS. CHAYTOR: That dictates what option?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. And so once you're looking at active resistance or beyond –

SGT JAMES: Right.

MS. CHAYTOR: – that's when you would consider your intermediate weapons?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. And in terms of once you get into this black area here of grievous bodily harm –

SGT JAMES: Harm or death.

MS. CHAYTOR: – or death, that's when you –

SGT JAMES: Lethal force.

MS. CHAYTOR: – consider your lethal force at that point.

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

SGT JAMES: And like I said, so I get out and I present my pepper spray and tell the guys to, you know, stop what they're doing and they stop what they're doing, obviously I'm going to put my pepper spray away. So as I'm going up in my options, I also have to be cognitive of that. You know if I'm resolving a situation by presenting my pepper spray, I have to put my pepper spray away.

MS. CHAYTOR: Right. Okay. And that's why it's a circle. You can go back –

SGT JAMES: Right, you –

MS. CHAYTOR: – at any point in time.

SGT JAMES: – go up and back.

MS. CHAYTOR: You can go up or down?

SGT JAMES: Correct.

MS. CHAYTOR: You can go back or forth?

SGT JAMES: Yes.

MS. CHAYTOR: Or you can go around here. Okay. So then once the subjects move from active resistance back to passive resistance or being co-operative –

SGT JAMES: Correct.

MS. CHAYTOR: – then you're obviously –

SGT JAMES: Your response is –

MS. CHAYTOR: Right.

SGT JAMES: – (inaudible).

MS. CHAYTOR: Your intermediate weapons are put away?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. And just before I leave this, I understood that down on the bottom here we have three points about: The primary responsibility of the peace officers is to preserve and protect life. The primary objective of any use of force is to ensure public safety and, thirdly, law enforcement officer safety is essential to public safety.

SGT JAMES: Correct.

MS. CHAYTOR: So those are points that you teach in terms of when you're teaching the model.

SGT JAMES: Use of force, yes.

MS. CHAYTOR: Okay.

And in teaching them to be constantly aware of their surroundings, you're teaching them to look for threat clues in their subjects.

SGT JAMES: (Inaudible), yes.

MS. CHAYTOR: To be assessing, as you just described in your example you gave of the two people on George Street. So you're asking them to continue to reassess the risk, reassess the risk to themselves or others around them, and to adapt their own response accordingly.

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

So risk assessment is part of this use-of-force training?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

When do you teach – and we've heard and we'll hear more about the Module 1, firearms requalification every year. When does this type of training happen?

I understand Module 1 is going to the firing range and you have to requalify in use of your firearm, but when do the officers get this piece that we've just gone through here?

SGT JAMES: That's in Module 4.

MS. CHAYTOR: That's Module 4?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. And we're going to speak a bit about that in a while, but I understand Module 4, the materials get emailed out to the officers.

SGT JAMES: Correct.

MS. CHAYTOR: They're expected to review it. They have to email back. Is that how that happens?

SGT JAMES: That's correct.

MS. CHAYTOR: They email back to say that they have reviewed it?

SGT JAMES: Yes.

MS. CHAYTOR: Okay. And if they have any questions, I guess they could ask the questions?

SGT JAMES: Yes.

MS. CHAYTOR: Okay. Is there any active classroom instruction around Module 4?

SGT JAMES: Not to current members, no. It's done in the cadet program.

MS. CHAYTOR: Okay. So once they're through their cadet program, then they just get the material sent out to them each year?

SGT JAMES: Every third year.

MS. CHAYTOR: Oh, every third year.

SGT JAMES: Yes.

MS. CHAYTOR: Okay. So they get it every third year?

SGT JAMES: Yes.

MS. CHAYTOR: And then they email back and someone keeps track, I guess, who says that they've reviewed it?

SGT JAMES: Yes.

MS. CHAYTOR: Do they have to say they've reviewed it or they've received it or what do they have to tell you?

SGT JAMES: They normally send an acknowledgement, I've received the material, I've reviewed it and I have no issues, problems, concerns, questions, whatever.

MS. CHAYTOR: Okay. And someone keeps track of that?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

So once they've – so there is no further sitting down and doing a refresher course or anything on this?

SGT JAMES: No.

MS. CHAYTOR: Okay.

And perhaps then, in terms of Module 1 which is the Firearms training, and we've spoken already that this is the only mandatory module, I understand. Is that correct, every year? Every year, it's only –

SGT JAMES: Yes, Module 1 is mandatory every year.

MS. CHAYTOR: Every year. Okay.

And then – but every year two modules are completed.

SGT JAMES: There's two modules every year. One – like this year, 2017, it's Modules 1 and 3 and next year it'll be Modules 1 and 4, the year after that it'll be 1 and 2.

MS. CHAYTOR: Okay.

And everyone has to do, unless there are exemptions and some of the exemptions include if somebodies in a non-operational position.

SGT JAMES: Correct.

MS. CHAYTOR: Okay. And what is the policy in terms of officers in non-operational positions or officers who are on leaves of absences, either for medical reason or parental leave, that type of thing? Do they do – in that time period, do they have access to their firearm?

SGT JAMES: If they're on parental leave?

MS. CHAYTOR: If they're on leave or if they're on, in a non-operational position?

SGT JAMES: It depends on where they're too. Like, I have members that are in, we'll say, Communications Centre, that are in a non-operational role that have access to their firearms.

MS. CHAYTOR: Okay.

And if you're not, if you're in a non-operational or on leave, I understand that your firearm is kept in your lockers. Is that correct?

SGT JAMES: That's correct.

MS. CHAYTOR: All right. And that you're given the key to their locker?

SGT JAMES: In some cases, yes.

MS. CHAYTOR: Not all cases?

SGT JAMES: Not all cases, no.

MS. CHAYTOR: All right. And why is that?

SGT JAMES: Just because they're on long term, like maternity leave, doesn't mean that they can't access their equipment.

MS. CHAYTOR: Okay.

Is there any policy or procedure which stipulates whether or not a non-operational officer, what happens to that officer's firearm?

SGT JAMES: An officer's firearm would be removed if I'm given, I guess, direction from, I'll say, the chief or the deputy chief that there's an officer that's suspended, we'll say. And I will go and seize their firearm or retrieve their gun locker key.

If someone's off on maternity leave, it's not mandatory that I remove their firearm or take their key. I just take their key so that – they're going to be off, I could be upwards of two years, and rather than losing their key, I'll just take their key. Their equipment is still in their gun locker, it's just that they don't have access to it.

MS. CHAYTOR: Okay.

What about someone off on mental health leave or stress leave?

SGT JAMES: Depending on whether or not I'm given direction from the chief.

MS. CHAYTOR: And who gives you direction?

SGT JAMES: It would be the chief or deputy chief, someone – a commission officer.

MS. CHAYTOR: Okay. And so I'll ask some more questions of that perhaps from the chief.

But I understand from our interview, at no point in time after April 5, 2015, were you given the key to Constable Smyth's locker or his firearm.

SGT JAMES: That is correct.

MS. CHAYTOR: You were not?

SGT JAMES: I was never given any direction to remove Constable Smyth's use-of-force equipment or retrieve his key.

MS. CHAYTOR: Okay.

Okay. I'm going to move now into what happens in terms of the course of Fire. So how officers are retrained or re-qualified every year or recertified every year. And maybe that's a question too.

Is there a difference between qualification and training?

SGT JAMES: Depending, if you're in the cadet program, you start your training in September and that will continue right through until August when they graduate.

So it's baby steps. Like, we give you your firearms to start off with then we'll teach you how to – there are the parts. This is how you take it a part. This is how you put it together. Then we'll work on how you stand, how you grip the weapon, how you aim the weapon.

So there's – it's a whole process of – like, they'll have the firearm for probably four months before they actually fire a live round. So we're working on the basic fundamentals of how to shoot.

MS. CHAYTOR: Okay. All right.

And I understand that in the actual training there are three courses of fire is that correct?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. All right.

And the first you described as being instinctive course of fire?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. And perhaps you could just describe how that unfolds. What is it that the officers have to do in that course?

SGT JAMES: The course of fire, the first component or first stage is the Instinctive Course of Fire and its subject or your target is five meters away. And you'd be required to draw your firearm from your holster, present, fire two rounds, reassess and then third shot to the head. Then there's – we do that from various positions. It's a total of 18 rounds and you have to score a set number within the body and set number within the head portion.

MS. CHAYTOR: Okay. And so it's two rounds to centre mass?

SGT JAMES: Correct.

MS. CHAYTOR: After that, is there a period of reassessment?

SGT JAMES: We call it reassess, yes.

MS. CHAYTOR: Okay. And so after you fire your round two or after you fire round one?

SGT JAMES: Two.

MS. CHAYTOR: After you fire – so two shots to centre mass, reassess – assess and reassess, I guess, is the better way to say it.

SGT JAMES: Reassess and then one to the head.

MS. CHAYTOR: And then one to the head.

SGT JAMES: Correct.

MS. CHAYTOR: And is – how long do you have to reassess after your two shots to the head?

SGT JAMES: It's not a timed event. So it could take you a half a second. It may take another person two seconds, maybe three seconds. As I stated, it's not a timed event. So it's your perception and you fire that shot when you're ready to take that shot.

MS. CHAYTOR: Okay.

And what do you mean by reassess? What do you teach your officers to actually do in that reassessment?

SGT JAMES: Depending on what the situation is, if I fire two rounds and my subject goes down, would I need to fire that third shot or fourth shot or fifth shot? Well, that's going to be subject dependant, I guess.

MS. CHAYTOR: Okay. And I think my question is more –

SGT JAMES: And for the drill.

MS. CHAYTOR: And for the drill –

SGT JAMES: Yes.

MS. CHAYTOR: – in reassess, two shots.

SGT JAMES: Right.

MS. CHAYTOR: Reassess. Does your finger come off the trigger?

SGT JAMES: Yes.

MS. CHAYTOR: Does your arm get lowered down?

SGT JAMES: Not necessarily, no.

MS. CHAYTOR: Okay.

So I understand that you do, say, depending on how long it takes somebody but you scan and breathe; is that the wording you use?

SGT JAMES: If time affords, yes.

MS. CHAYTOR: Okay. And I understood you to tell me in the interview and that you drop your weapon down; what does that mean?

SGT JAMES: After – after you’ve fired your two rounds and you’ve taken that third shot to the head, you can drop down, again, if your subject is neutralized or stopped. We say we drop down and go to low-ready. And your weapon comes down off your centre mass of your subject, we’ll say, and then you’re going to scan and breathe, look, thinking tactically, I’ve just engage one person or one bad guy, are there any other threats. So that’s when I’m going to scan, looking for additional threats and while I’m scanning, I’m breathing.

MS. CHAYTOR: Okay. So maybe I misunderstood this; isn’t there a period of reassessment after the second shot?

SGT JAMES: It’s officer dependent.

MS. CHAYTOR: So they are not trained or taught to reassess after that second shot?

SGT JAMES: They are told to reassess if time affords it. If time doesn’t afford it, you are going to take the third shot. You may not have the opportunity to reassess.

MS. CHAYTOR: I understand that, but in their drills that they do, their course of fire, what are they taught to do?

SGT JAMES: Two rounds, centre mass; if time affords it, reassess; if not, continue firing.

MS. CHAYTOR: Okay. And so when you are observing what’s going on that day, do the threats or the targets pop up at different speeds and is that why –

SGT JAMES: No.

MS. CHAYTOR: Okay. So there is time for them to reassess before the next target.

SGT JAMES: The target is directly in front of them.

MS. CHAYTOR: Okay.

SGT JAMES: They’ll fire two rounds and, again, if time affords it, they’ll reassess. And if, again, my subject is gone down after two, I would not be required to fire the third shot, or fourth or fifth shot, whatever it is, and stop the threat.

MS. CHAYTOR: Okay. So there is no requirement after the second shot for –

MR. KENNEDY: Sir, the question has been asked. Ms. Chaytor has now gone through the same question about four times. She wants the officer to give the answer that she wants as opposed to the one that he is giving. He said you reassess, if time allows it, before you fire your shot. She wants him, apparently, to say that you reassess, put your gun in low-ready then fire. That’s the interpretation I’m getting.

MR. COMMISSIONER: Mr. Kennedy, again, as I started off at the beginning here, we are not in an adversarial situation here; we are trying to fully understand what is being asked and answered. I haven’t seen anything really untoward so far, but I don’t know – are you just about finished that?

MS. CHAYTOR: I want to be fair to the witness in terms of – because it is a bit different than what I understood and I certainly don’t want any particular answer. I just want what the course is. And I’m not trying to be critical of anyone. There’s no answer that I want, other than the correct one. And I want that to be clear. I want the correct answer. I want to understand –

THE COMMISSIONER: So do I take it –

MS. CHAYTOR: – what the officers are taught.

THE COMMISSIONER: – you believe that there's some difference in Sergeant James's answers this morning, or what he –

MS. CHAYTOR: Yes, and we can go –

THE COMMISSIONER: – previously gave in –

MS. CHAYTOR: Right.

THE COMMISSIONER: – his interview. What –

MS. CHAYTOR: And we can go to those pieces in the transcript if you wish, because I understood that after they were trained to do – and this is what they're –

THE COMMISSIONER: Just one second now before you get into what Mr. Kennedy will say is another leading question, and he'd be right.

MS. CHAYTOR: Uh-huh. And it's not about (inaudible) –

THE COMMISSIONER: I'm not sure it's going to be much – ultimately, in terms of the statement of Constable Smyth, from what I recall, Mr. Kennedy, I don't think there was, you know, that fine a point in terms of time to reassess in terms of the way he described the situation. But you – just what are you trying to –

MS. CHAYTOR: This is about the training. This is a more forward-thinking piece that we're trying to get at here. I –

THE COMMISSIONER: Okay.

MS. CHAYTOR: I'm not – this is not about what Constable Smyth may or may not have done in that room that day. And whether, you know, he had opportunity to even follow whatever he's trained. That's not what this is about. I'm trying to understand what the officers are trained to do.

THE COMMISSIONER: What they were taught, and what they are –

MS. CHAYTOR: Right.

THE COMMISSIONER: – being taught now –

MS. CHAYTOR: Yes.

THE COMMISSIONER: –if there's any –

MS. CHAYTOR: And whether or not it's – you know, whether or not that – I don't want – I want Sergeant James to have answered, you know, understand what my question was, and answer it. And if that's the answer, that's fine. But I want to be fair to him. I don't want someone else to come in and suggest that something else should be trained, some other type of training.

THE COMMISSIONER: Right. Why don't you state what you understand his – in summary, you are saying –

MS. CHAYTOR: Yes.

THE COMMISSIONER: X, whatever it is –

MS. CHAYTOR: Okay, we'll do that way, yeah.

THE COMMISSIONER: Now, Mr. Kennedy, again, this is referring – this is to zero in on the training and how training may be improved, if in fact there is some reason for improving it. So I'm going to allow Ms. Chaytor to proceed with the question, but you have been back to it several times, so if you could just summarize what you understand –

MS. CHAYTOR: Yeah, and perhaps it would've been better to just bring up the –

THE COMMISSIONER: – Sergeant James to be saying and see, Sergeant James, if there is anything in Ms. Chaytor's summary that you disagree with or you want to expand upon, go ahead.

SGT JAMES: I will.

THE COMMISSIONER: So okay, if you would summarize –

MS. CHAYTOR: All right, let's try again. Okay.

So I just want to summarize. From what I understand your evidence today, Sergeant James, is that they're trained to shoot twice to the centre mass –

SGT JAMES: The centre mass.

MS. CHAYTOR: – and that if they have time, they reassess –

SGT JAMES: Yes.

MS. CHAYTOR: – and shoot to the head?

SGT JAMES: Right.

MS. CHAYTOR: But there's no requirement in their training to reassess after the second shot to the centre mass?

SGT JAMES: It's officer – it's the officer's perception. Like when we're on the line and I have seven officers there and we say okay, you know, the drill is to the body, reassess; the reassess is the officer's perception.

MS. CHAYTOR: Okay.

SGT JAMES: For one officer, it may be half a second and, you know, it's not like it's going bang, bang, bang and everybody is done in that same time frame. There could be one officer that goes bang, bang, bang; that's his perception of the threat. Officer next to him may take two seconds to take that shot. It's the officer's perception.

MS. CHAYTOR: Okay. Now, I understood that the officer perception is the amount of time to reassess, but I want to be clear. You're saying that they don't have to reassess?

SGT JAMES: If the threat is still coming, no.

MS. CHAYTOR: Okay. So in saying that when they do the reassessment, then they're trained to do the reassessment after the third shot to the head; is that what you're saying?

SGT JAMES: You fire two rounds and then if time affords, you can reassess. If time doesn't afford, you don't have that reassess, you're going to continue firing until you stop that threat.

MS. CHAYTOR: Okay.

And the reassessment in terms of dropping your weapon down so that you don't block your line of sight, that happens when?

SGT JAMES: After the third shot.

MS. CHAYTOR: After the shot to the head?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

The reassessment in terms of finger off the trigger, is that also after the shot to the head?

SGT JAMES: If time affords.

MS. CHAYTOR: In their training?

SGT JAMES: Correct.

MS. CHAYTOR: But they only shoot three times in their training?

SGT JAMES: On that course of fire, yes, it's three –

MS. CHAYTOR: Okay.

SGT JAMES: – but it's basically to get them accustomed to that, you know, you have to stop the threat. You may fire three shots; someone else may fire four; someone else may fire five.

MS. CHAYTOR: So they're trained after the second shot, there's no lowering the weapon and there's no take your finger off the trigger?

SGT JAMES: No. You go from the body to the head.

MS. CHAYTOR: Directly to the head. Okay.

SGT JAMES: Correct. If your threat is stilling coming after two rounds.

MS. CHAYTOR: Okay.

SGT JAMES: Or perceived the threat is still there.

MS. CHAYTOR: Okay. And that was good to get clarity on that –

SGT JAMES: Right.

MS. CHAYTOR: – because I did understand something different from the interview. All right.

What's the purpose of the shot to the head?

SGT JAMES: It's to eliminate the threat.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Sorry, what was that?

SGT JAMES: It's to eliminate the threat. You fired your two rounds to the centre mass, obviously it hasn't stopped your threat, so you go to the headshot.

MS. CHAYTOR: And I understood you to tell me in the interview that's your fail-safe shot?

SGT JAMES: It's a fail-safe, yes.

MS. CHAYTOR: And is that the terminology that you use in the training?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

The terminology of instinctive course of fire, is that the – is that term the subject of any controversy in the policing world?

SGT JAMES: Well, we call it instinctive, yeah, in the sense that it's not an aimed shot to the body.

THE COMMISSIONER: It's not a what?

SGT JAMES: It's not an aimed shot where you're actually like, you know, close one eye and – it's not target shooting, right. Even though we're calling it instinctive, you still have to pick up your front sight and put your front sight, which is your reference point, on your target. So you're using your front sight as your reference to find the center mass of the target and you fire two rounds.

MS. CHAYTOR: Okay.

And so I take it, it's not that officers are trained to react instinctively as opposed to bringing their professional judgement to the situation.

SGT JAMES: They're responding to a threat of, you know, grievous bodily harm or death.

MS. CHAYTOR: Okay.

And are they trained to respond according to their best professional judgment?

SGT JAMES: They're trained to respond to that threat that's being presented to them.

MS. CHAYTOR: Okay.

And what are they trained to do when they are presented with that threat, other than draw their firearm?

SGT JAMES: Which threat?

MS. CHAYTOR: If it's a grievous bodily harm or a threat of death, what are they trained to do?

SGT JAMES: If they're there to draw their firearm, and they will respond accordingly.

MS. CHAYTOR: Are they trained to do anything else before they fire their firearm or during the encounter?

SGT JAMES: You may not have the opportunity to, you know: put down the knife, put down the gun, don't point the gun at me. Like, if you're presented with a firearm being, you know, staring you in the face, you're probably not going to have the time to respond in that fashion.

MS. CHAYTOR: Okay.

So you're talking about verbal commands?

SGT JAMES: Correct.

MS. CHAYTOR: To re-qualify, you indicated that you have to make so many hits to the body and so many hits to the head.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And is there any other type of reassessment in terms of the evaluation? For example, is there, is there any – do you watch to see whether or not they responded too quickly? Is there any penalty for not reassessing or taking that next shot too quickly? Are they penalized in any other way?

SGT JAMES: No. No, it's officer perception. Again, like I said, if it takes you half a second, someone else takes three seconds, I'm not penalizing because you took three seconds.

MS. CHAYTOR: Is there any evaluation of how often – how many shots an officer fires or if they fire more than three?

SGT JAMES: In the drill?

MS. CHAYTOR: Yes.

SGT JAMES: They don't normally fire any more than three. That's not part of the drill.

MS. CHAYTOR: Okay.

And if they do, if they miss, I take it they have to fire again?

SGT JAMES: They're given – they fire two to the body and one to the head, and then we'll move to the next drill.

MS. CHAYTOR: Okay.

SGT JAMES: And they have to score within, you know, prescribed –

THE COMMISSIONER: If somebody keeps missing, if somebody's not able to –

SGT JAMES: If they don't make the standard or the requirement –

THE COMMISSIONER: Right.

SGT JAMES: – they would fire – they get an opportunity to fire a second time. If they fail on the second course of fire, they would be then deemed to be remedial – remedial training.

THE COMMISSIONER: After trying twice? After the second –

SGT JAMES: That’s correct.

MS. CHAYTOR: Okay.

And so I understand then the second course of fire involves – is the standard course of fire?

SGT JAMES: We call it the standard course of fire, yes.

MS. CHAYTOR: You call it the standard course of fire. And that’s comprised of various exercise, timed events, shooting I think with their dominate hand first and then their other hand.

SGT JAMES: Yes.

MS. CHAYTOR: And also I think the target is moved and there’s different distances.

SGT JAMES: There’s different distances.

MS. CHAYTOR: Okay.

SGT JAMES: Different times allotted for different stages. You know, different shooting platforms from, it could be standing, kneeling, seated, shooting from behind barricades.

MS. CHAYTOR: Okay.

And then the third course of fire is with respect to shotgun course of fire.

SGT JAMES: That’s correct.

MS. CHAYTOR: Okay.

So in terms of module –

THE COMMISSIONER: What was the final one you said?

MS. CHAYTOR: The third one is shotgun.

THE COMMISSIONER: Shotgun.

MS. CHAYTOR: Shotgun, yeah.

And, again, there’s no classroom component to this piece?

SGT JAMES: No.

MS. CHAYTOR: Okay.

And is this more firearm qualification or are they learning a new skill or behaviour in doing the drills?

SGT JAMES: It's what they've been taught. And if new techniques or new training methods are, you know, developed or accepted or adopted by the RNC, they would be trained in accordance with those changes.

MS. CHAYTOR: And has that happened during your time since 2009?

SGT JAMES: Not in this course of fire, no.

MS. CHAYTOR: No, okay.

So while they're on the range doing their fire, doing their shooting, is there any opportunity for – you're observing I take it. You're there and observing.

SGT JAMES: There's usually two or three officers there that are like –

MS. CHAYTOR: Okay.

SGT JAMES: – the Use of Force instructors or firearms instructors that are conducting the drills.

MS. CHAYTOR: And is there any opportunity for teaching, coaching, mentoring during the exercises?

SGT JAMES: Most certainly.

MS. CHAYTOR: Okay.

SGT JAMES: We have officers that will say, like, can you just stand over me, kind of thing, and just watch my target and see if there's anything I need to correct or adjust or whatever, you know. If there is something there that we notice that may improve their accuracy or their shooting or their comfort level, we will point that out to them and, you know, assist them in that regard.

MS. CHAYTOR: Okay.

Then Module 2 is Control Tactics. And I understand that to mean handcuffing, your baton, your pepper spray?

SGT JAMES: That's correct.

MS. CHAYTOR: Those things.

Is that taught in a, is that taught in a –

SGT JAMES: It's a hands-on –

MS. CHAYTOR: Hands on.

SGT JAMES: – component.

MS. CHAYTOR: Okay. So that's actually taught in a, I won't say classroom, but it's in a –

SGT JAMES: It's in the gymnasium.

MS. CHAYTOR: In the gymnasium.

SGT JAMES: Yeah.

MS. CHAYTOR: Okay. All right.

And in, and in teaching that component, are there – has any aspect of that, I guess, changed ...?

SGT JAMES: Yes, we've changed that over the years, yes. We've added things and

MS. CHAYTOR: Okay. And depending, I guess, too in what intermediate weapons that are introduced over time.

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

SGT JAMES: And, we've, we've included like the waist chain and legs shackles and flex cuffs and the whole

MS. CHAYTOR: And if those components that aren't mandatory every year, every third year they would do, for example, Module 2. And if an officer misses because he or she may have been non-operational for a period of time or otherwise was exempted from having to do it. Do – are they required then to –

SGT JAMES: We will try to get them in to update them in that module, yes.

MS. CHAYTOR: Okay. And is there any requirement or anybody keeping track of that to make sure that happens?

SGT JAMES: We keep a running log of who's completed which module, yes.

MS. CHAYTOR: Okay.

And then the third component is Module 3, which is the – it's a refresher of REACT, basically.

SGT JAMES: Correct.

MS. CHAYTOR: And I understand REACT to be an acronym for responding to an active shooter, is that correct?

SGT JAMES: Yes.

MS. CHAYTOR: Or an active threat.

SGT JAMES: Yes.

MS. CHAYTOR: Not shooter, active threat. Right.

And it's an active criminal threat, actually.

SGT JAMES: Correct.

MS. CHAYTOR: Criminal threat is the C. So it's not always a shooter.

And in that situation, there are scenarios that play out.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. And, and I understand that – or I should ask, I guess, whether or not any aspect of that has changed in recent years.

SGT JAMES: We're presently revamping that module because we've encompassed or included a carbine on patrol. And if there's an active or a react situation, an active shooter in say, we'll say a school setting, and a carbine is deployed. The officers that are responding would have to know how to deploy using the carbine, where it fits to in the two or three or four officers that going into the actual building.

MS. CHAYTOR: Okay.

And one thing I noticed in the materials – and we haven't made those public exhibits because there were some concerns about doing that, understandably so, but one thing in the scenarios that I was given, that I was able to review for your REACT and Module 3 is some of your terminology. And, again, you used some of that terminology here today as well referring to a subject as bad guy.

SGT JAMES: That's correct.

MS. CHAYTOR: And that's in the scenario, the scenarios that I was presented with as well and also PERP.

SGT JAMES: Perpetrator.

MS. CHAYTOR: That's perpetrator.

SGT JAMES: Correct.

MS. CHAYTOR: Okay. And are you aware of any movement away from using that terminology?

SGT JAMES: No.

MS. CHAYTOR: No. Okay.

So in terms of that terminology having any kind of negative implication or creating a culture of negativity when dealing with subjects, that's not something you've been trained or taught?

SGT JAMES: Not of late, but if, you know, if there's trends that we should move away from, such wording or terminology, we wouldn't be opposed to changing them. As opposed to using PERP, we would use subject or whatever. That wouldn't be a difficult (inaudible).

THE COMMISSIONER: I think there's some idea that the, rightly or wrongly, that use of certain terms tends to dehumanize the target and it's probably the argument goes that it's encouraging of becoming a quicker trigger than otherwise.

SGT JAMES: Yeah, we – that's not a difficult fix. Like, we can change from PERP or bad guy to subject or whatever word is, the buzz word is.

THE COMMISSIONER: It involves a change of attitude, primarily, –

SGT JAMES: Yes.

THE COMMISSIONER: – is what’s being sought, not so much the –

SGT JAMES: The wording.

THE COMMISSIONER: – particular word, yeah. It’s trying to get at the attitude and avoiding, reinforcing a bad attitude is –

SGT JAMES: Yes.

THE COMMISSIONER: – the concern.

It’s 11 o’clock almost.

MS. CHAYTOR: Okay. Well, we can certainly take a break here.

THE COMMISSIONER: An appropriate place to break.

MS. CHAYTOR: Yes, that’s fine.

Thank you.

THE COMMISSIONER: Okay. We’ll take a 15 minute recess.

How are you doing in your questions?

MS. CHAYTOR: I’m making good progress, actually. And I’ll be able to give you a more definite answer but I think I’m – I’m not quite half way but I’m pretty close.

THE COMMISSIONER: I’m just, for the purpose of counsel, trying to schedule

MS. CHAYTOR: Yes.

THE COMMISSIONER: Yeah, okay.

Thank you.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Just before we start, I don't know if we're going to get into this before final argument or not – it's not in my hands – but in terms of the comments of Staff Sergeant Osmond and Ms. Breen yesterday, you might all want to take a look at the decisions of the Supreme Court of Canada in *Grant v. Torstar Corp.*, which in a defamation case speaks about the implications of freedom of expression.

And, in fact, the Supreme Court of Canada modified the law of defamation to recognize the new defence of – which recognizes a defence of responsible communication on matters of public interest. And I mentioned this case just because it has a good general discussion of the tension between responsible comment and freedom of expression and there's a reference to avoiding – they don't use the term "chill," I think, but basically avoiding excessive chill on the ability of individuals to comment on matters of public interest or concern.

There's other material out there of course, and we'll be dealing with some of this, maybe this issue or this case, in the Phase 2 discussions. I have a number of articles to put up. I don't know if they are on the website yet or not; some of which involve freedom of expression in the context of avoiding undue restriction of freedom of expression in the context of social media and trying to have proper surveillance of social media to remain alert to potential threats, while at the same time not excessively cramping the style of those who want to engage in fair comment concerning whether it might be a criticism of government or some other public issue. I happened to be looking at the *Torstar* case in the last day or so and I didn't make much comment yesterday, but – Mr. Simmonds, go ahead.

MR. SIMMONDS: I wasn't here yesterday, Mr. Commissioner, as you know. We were in the process last night of attempting to get the transcript of the exact comments. I understood the comment from the news blurbs and what we were able to get was scandalous, and I believe it's a term of art in law that has a certain meaning –

THE COMMISSIONER: I haven't researched that and I'm not going to get particularly –

MR. SIMMONDS: No, no (inaudible) –

THE COMMISSIONER: – hung up on the use of a particular term. I'm more interested in the principles, the underlying rationales that are at stake. Go ahead.

MR. SIMMONDS: And the thrust of it, I believe was that Ms. Breen – at least that's certainly the way she took it and we felt, was that her conduct was unbecoming and that's a very serious allegation to make against a lawyer in the representation of her client; and that's something that –

THE COMMISSIONER: Well, that could be something for Ms. Breen and Staff Sergeant Osmond to deal with possibly in another forum than this one. At least I wasn't prepared yesterday, nor do I want to today go down that particular line.

MR. SIMMONDS: No, I understand. We have sought an opinion from counsel and we will be dealing with it as per the instructions or advice that we have received from counsel, once we get it.

Thank you.

THE COMMISSIONER: Sure. All right, anyone else have a brief comment before we continue with the witness?

MS. CHAYTOR: Before I continue on, I was asking about Module 3, which is the REACT portion of your training, but before I do I have a couple of other questions in terms of the firearm component and the course of fire. Are you able to say how long it would take for an officer to un-holster his weapon and draw it?

SGT JAMES: Each individual officer? On average, I've drawn my weapon, presented it to a target and fired eight rounds in three seconds.

MS. CHAYTOR: Okay. And in terms of – and of course I understand it's in a trained –

SGT JAMES: Right.

MS. CHAYTOR: – setting when that happens. Does it matter in terms of what type of holster that the officer is carrying?

SGT JAMES: It all dependent on the officer. Some are quicker than others and some holsters are different.

MS. CHAYTOR: Okay. Are you aware of the type of weapon and holster that Constable Smyth would have had on April 5, 2015?

SGT JAMES: I am.

MS. CHAYTOR: Okay. And I understand that the type of holster that he had may differ from what patrol officers would use?

SGT JAMES: That's correct.

MS. CHAYTOR: And if you could just explain that, please, to the Commissioner.

SGT JAMES: The patrol officers have a Safariland holster.

THE COMMISSIONER: Have a what?

SGT JAMES: Safariland; that's a brand name and it has three levels of retention.

THE COMMISSIONER: Right.

SGT JAMES: And so it's – you know, there's three steps here in order to draw your firearm from that particular holster. The holster that Constable Smyth would have been wearing on the day in question was a leather holster. We call it a pancake and it has one level of retention.

THE COMMISSIONER: That's just the –

SGT JAMES: It's just a snap.

THE COMMISSIONER: Snap over the –

SGT JAMES: Over the trigger guard, yes.

THE COMMISSIONER: Trigger guard, yeah.

SGT JAMES: And he would carry the same weapon as a regular patrol officer.

THE COMMISSIONER: The type of pistol, is that the same?

SGT JAMES: Exact same, yes.

THE COMMISSIONER: (Inaudible) it was SIG Sauer patrol –

SGT JAMES: SIG Sauer, patrol 226, yes.

THE COMMISSIONER: Right. Okay, does the type of holster, to any significant extent, affect the time? I realize different officers might have different capabilities –

SGT JAMES: Correct.

THE COMMISSIONER: – in terms of speed, but does the type of holster give any advantage or disadvantage in terms of the time to –

SGT JAMES: Not really, no.

THE COMMISSIONER: – get the pistol out?

SGT JAMES: No.

THE COMMISSIONER: Okay.

MS. CHAYTOR: Okay. And I realize in answering the question you gave yourself as an example.

SGT JAMES: Correct.

MS. CHAYTOR: And of course you would have higher training, though, than the average officer –

SGT JAMES: Yes.

MS. CHAYTOR: – in terms of you're a firearm instructor.

SGT JAMES: Yeah.

MS. CHAYTOR: So are you able to say what the average would be?

SGT JAMES: During training with our cadets, as they get more comfortable, obviously, towards the end of their training, we have a timer and we'll present a target to them. It's five metres away, and we will get them to draw from the holster, put two rounds center mass, and we time it. And on average it's – most of them are shooting like between two and two-and-a-half seconds, no problem: draw, present, fire two rounds center mass.

MS. CHAYTOR: Okay.

So from getting their weapon out from the holstered position to finishing with the third shot –

SGT JAMES: Two shots. We only fire two.

MS. CHAYTOR: Two shots, I'm sorry.

SGT JAMES: In this particular drill that we timed, on average they're getting off in like two, two-and-a-half seconds.

MS. CHAYTOR: Two, two-and-a-half seconds. Okay.

Thank you.

THE COMMISSIONER: So you said that's at how many metres?

SGT JAMES: Five metres.

THE COMMISSIONER: Five metres. What about your basic training, when they're starting off with a two plus one, how far –

SGT JAMES: That would be, obviously, a little longer.

THE COMMISSIONER: Sorry?

SGT JAMES: That would take a little longer 'cause it's three shots.

THE COMMISSIONER: Yeah. No, I'm thinking now in terms of what the distance is.

SGT JAMES: That would be five metres as well.

THE COMMISSIONER: You stay the same distance, five metres.

SGT JAMES: That's correct.

THE COMMISSIONER: So that's something over 15 feet, so. Okay.

MS. CHAYTOR: Yeah. Okay.

All right; and is that – in giving that answer, is that the three-snap holster, the one-snap holster? What type of holster?

SGT JAMES: The Safariland, or the patrol holster? As I said, it's a Safariland holster and there's three, we'll say, safety mechanisms built into the patrol holster.

MS. CHAYTOR: Yes.

SGT JAMES: So in order to release it you have to push down on the hood guard, tab release in the rear (inaudible) the weapon to the rear and draw.

MS. CHAYTOR: Okay.

And so your two to two-and-a-half-second estimate, would that be with respect to that type of a holster or the type that Constable Smyth had, the pancake type?

SGT JAMES: That would be with the three levels.

MS. CHAYTOR: Okay. So –

SGT JAMES: He would probably be quicker with the pancake.

MS. CHAYTOR: It'd be quicker with the pancake, you would expect.

SGT JAMES: Correct. Yes.

MS. CHAYTOR: Okay.

So I'll just go back to my few questions I had on the REACT training? And I noticed – and, again, we don't have this material made as public exhibits, but in reviewing that material I saw reference to the term double tap?

SGT JAMES: Yeah.

MS. CHAYTOR: Okay.

And perhaps you could tell the Commissioner, what does that mean, double tap?

SGT JAMES: Double tap is just a reference to two rounds center mass.

MS. CHAYTOR: Two rounds center mass. Okay.

And are you aware of the term, instead of double mass, I think – sorry, double tap, the term of, I'm trying to think of it.

THE COMMISSIONER: Pairs.

MS. CHAYTOR: Pairs, yeah. Something –

SGT JAMES: Controlled pairs?

MS. CHAYTOR: Controlled pairs?

SGT JAMES: Yes.

MS. CHAYTOR: Controlled pairs, yeah. And how does that differ?

SGT JAMES: Controlled pairs is, again, it's two rounds but it's when your target is at a further distance. If your subject was at, say, 25 metres, it's hard to put two rounds, like, in quick succession into that target at 25 metres 'cause you're moving, right.

MS. CHAYTOR: Okay.

SGT JAMES: We do the controlled pairs in training. And you're actually moving as you're shooting, so you're not in a static situation.

MS. CHAYTOR: Okay.

And is double tap like two rounds rapid succession, center mass is the subject. And it's fast, I understand, in succession. Almost sounding like one discharge of the weapon.

SGT JAMES: You're closer to your subject.

MS. CHAYTOR: Okay.

SGT JAMES: And, again, as you're – with the controlled pairs you're either 25 metres moving towards the target or you could be moving away from your target.

MS. CHAYTOR: So part of the training you do both, you do double tap and controlled pairs?

SGT JAMES: Only in the cadet program.

MS. CHAYTOR: Only in the cadet –

SGT JAMES: For the requalification –

MS. CHAYTOR: Yes.

SGT JAMES: – we don't do the controlled pairs.

MS. CHAYTOR: You don't do control –

SGT JAMES: No.

MS. CHAYTOR: You only do double tap?

SGT JAMES: Well, two rounds center mass is just wording.

MS. CHAYTOR: Okay. All right.

And in terms of the terminology, are you aware whether or not there was any concern around that terminology or that other police forces no longer use that terminology for some time?

SGT JAMES: No.

MS. CHAYTOR: Okay. All right.

THE COMMISSIONER: You say you're not aware of anything at all?

SGT JAMES: No.

MS. CHAYTOR: Okay.

And there's also the term, I think, dedicated pairs. Are you aware of that?

SGT JAMES: No.

MS. CHAYTOR: And dedicated pairs, and that replacing the term of double tap.

SGT JAMES: No, I never heard of dedicated pairs.

MS. CHAYTOR: Okay.

THE COMMISSIONER: What kind of pairs?

MS. CHAYTOR: Dedicated.

THE COMMISSIONER: Oh, dedicated pairs.

MS. CHAYTOR: Dedicated pairs, yeah. That was the term I was struggling for earlier, sorry. Dedicated pairs and that that replaced back as far as 1999 the terminology around double tap.

SGT JAMES: The first I heard of it.

MS. CHAYTOR: And so you're not aware of any philosophy around why there was a change in terminology?

SGT JAMES: No.

MS. CHAYTOR: Okay.

As of April 5, 2015, was Constable Smyth up to date in his Module 1 training?

SGT JAMES: Yes, he was.

MS. CHAYTOR: Okay.

And was he up to date on all of his modules of Use of Force training?

SGT JAMES: He was current, yes.

MS. CHAYTOR: He was current. Okay.

And in terms of this Module 3 that we're talking about, we saw in some of the communications that Constable Smyth had missed Module 3, the REACT training. And that I understand there's some communications between you and Superintendent Sheppard on that?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

And if we could bring up please, P-0155. And I just want you to speak to the issue that arose and why that training didn't happen on that year. And I take it, it would not have only been Constable Smyth that found himself in this situation, there would have been other officers as well?

SGT JAMES: For 2013?

MS. CHAYTOR: Yes.

SGT JAMES: Yes.

MS. CHAYTOR: Okay. All right.

And this was a question that Superintendent Sheppard said that he had reviewed the letter. This is in the process back in April 2015 in trying to provide the RCMP with information that they were requesting. And he noted that you have written “regarding Cst. Smyth’s firearm qualifications and I have crossed referenced it to his training records from Training Section.” So that would be your section, the Training Section?

SGT JAMES: I’m in Training Section, yes.

MS. CHAYTOR: Yes, okay.

“It appears to me as if he has not completed any modules Use of Force since December 2012. Is this accurate and if so what is the status of that situation.”

SGT JAMES: That is not correct.

MS. CHAYTOR: Right. And you wrote back on, very quickly, I think like within the half hour, to say that he “is up to date on all modules ... Module 3 was scheduled for ... 2013. Due to the construction here at HQ we had no facility to conduct the training. An exemption was granted for this Module in 2013 to carry over into 2014.”

And then I understand that 2014 Module 3 went ahead with members who were considered front line and then you say patrol members, and he was not considered to be front line.

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

So what was the problem, why would you need your headquarters to be able to do your REACT training?

SGT JAMES: That’s where we did it.

MS. CHAYTOR: Okay.

And have you used other facilities as well, vacant buildings around the city?

SGT JAMES: We have. Yes.

MS. CHAYTOR: Okay.

And so in terms of Officer Smyth not being a front line officer, at that particular point in time you’re defining here in this, that’s people on patrol as opposed to –

SGT JAMES: Patrol, yes.

MS. CHAYTOR: – he was in the PSU at the time.

SGT JAMES: That’s correct, first responder.

MS. CHAYTOR: Okay.

And because an officer providing protective services and bodyguard-type functions to the Premier is front line, I guess, in a sense but he's not patrol out on the street every day is what you're differentiating here?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

And so then the officers who missed, including Constable Smyth, would they have been then back into the rotation? Would it be six years before they actually did their Module 3?

SGT JAMES: Some may have been, yes.

MS. CHAYTOR: Okay.

And perhaps we could then go to P-0153 because I think this also speaks to the confusion –

THE COMMISSIONER: What was that last one – the –

MS. CHAYTOR: This one was P-0155.

THE COMMISSIONER: Is that the one saying he's up-to-date? I thought that was the earlier one.

MS. CHAYTOR: This is where he says that he is up-to-date.

THE COMMISSIONER: That's P-0155 there?

MS. CHAYTOR: P-0155, and explains why –

THE COMMISSIONER: Okay.

MS. CHAYTOR: – except for Module 3.

And I guess a question for me on that would be, or a question for you on that would be: What system is in place to keep track of the officers who complete the various modules?

SGT JAMES: We have a spreadsheet in our unit. And as you complete your module, we – if we're, say, doing Control Tactics, and we're doing it in the gymnasium, as you attend, you sign in. It's like a log sheet. So you sign in saying you attended. And when the training is completed, we'll add your name then to our spreadsheet saying that you completed on such-and-such a date and what date it was entered.

MS. CHAYTOR: And does somebody from the training section so back and follow-up with an officer, if they haven't completed?

SGT JAMES: That would be my responsibility.

MS. CHAYTOR: That's your responsibility, is it?

Okay. All right.

And so what you keep on your spreadsheet then, does that eventually get it put into a more formal record for each individual officer?

SGT JAMES: Yes, there's a – as those sheets are completed, we hand them to the secretary within the unit and she'll add it to their training profile or it should be added to their training profile.

MS. CHAYTOR: Okay.

And this is P-0153, we have on the screen now, Sergeant, and this is dated April 27th, 2015. And I understand this was provided to the RCMP and their investigation. And this is a document which caused Superintendent Sheppard to question about whether or not Constable Smyth was up to date. Because you see here, it last showed that in December of 2012, he had done his Module 1 training. And that would've been the most recent of any of his modules, according to this list.

So this document that we see here, which says certifications, I understand this is generated within the RNC.

SGT JAMES: That's correct. It's the training profile.

MS. CHAYTOR: It's the training profile. Okay.

And in terms of it being up-to-date, is that the information that – whose responsibility is this, to have this kept up-to-date?

SGT JAMES: The information is input by the secretary.

MS. CHAYTOR: Okay.

SGT JAMES: There are some, there are some issues within that program. We've identified those and there's steps in the processes now to rectify that.

We did an internal audit just this past fall with Sean McGrath, he's our internal auditor. And he noted that there was a discrepancy in, say, my spreadsheets and the input into the officer's training profile, but spreadsheets that we carry, his audit indicated that we have 100 percent accuracy, whereas there was some discrepancies in the information getting put into their personal profiles.

MS. CHAYTOR: Okay. And this would be the actual official document though P-0153?

SGT JAMES: That's correct.

MS. CHAYTOR: For each officer?

SGT JAMES: Yeah.

MS. CHAYTOR: Okay. So I take it there were other officers found to have similar discrepancies in their training records not being up-to-date?

SGT JAMES: Yes. I know personally I have done courses and taken seminars, whatever, that if you went into my training profile, they wouldn't be indicated.

MS. CHAYTOR: Okay.

And so, for example, for here it would have shown that it was, I believe, for Module 2, Module 3 according to this, it would have been 10 years back to 2002 since –

SGT JAMES: Correct.

MS. CHAYTOR: – since Constable Smyth did Module 3?

SGT JAMES: Correct.

MS. CHAYTOR: And then from what you're saying, he missed again in 2013 because of the issues, the logistical issues, with the premises.

SGT JAMES: Correct.

MS. CHAYTOR: And but you had a record otherwise to show this wasn't the case and that he was in fact up-to-date on Module 3, except for having missed 2013.

SGT JAMES: 2013.

MS. CHAYTOR: Is that correct?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

And what record were you able to turn too to be able to assure yourself of that in your response back within a half an hour to Superintendent Sheppard?

SGT JAMES: I went in to my spreadsheets.

MS. CHAYTOR: So you have spreadsheets that confirm that?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. And so you keep those spreadsheets?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

Now, if we could go to, please – oh, actually, I think I need to finish on Module 4.

Module 4, and I only need briefly to speak on it because we spoke about it before, but I understand that's the PowerPoint materials that gets sent out to the officers. And I think we already spoke about on that in terms of they email back and say that they received and reviewed. Is that correct?

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

And included in the material is the Use of Force Continuum PowerPoint and we spoke about that this morning.

SGT JAMES: Model.

MS. CHAYTOR: Model.

Survival Stress.

SGT JAMES: That's correct.

MS. CHAYTOR: There's another presentation on Survival Stress.

SGT JAMES: Yes.

MS. CHAYTOR: And the third one is High Risk Vehicle Stops.

SGT JAMES: That's correct.

MS. CHAYTOR: So those are the materials that every third year they're sent out and expected to review?

SGT JAMES: Correct.

MS. CHAYTOR: Has that changed? Is there – has there been any change in that in terms of what materials they're asked to review through Module 4?

SGT JAMES: I don't think so, no.

MS. CHAYTOR: That's still the same, is it?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

All right, P-0024 please, Madam Clerk. And this is back to the Use of Force Training Manual and I think you told me that this had been in effect – this is the manual that was in place at the time that you took your position in 2009 and had been in effect some time before that?

SGT JAMES: Yes.

MS. CHAYTOR: And has it undergone any updates since, that you're aware of, since you've been in your position?

SGT JAMES: We've added some components to it, yes.

MS. CHAYTOR: Okay. You have. And any of the components that you and I have looked at together in terms of what is most relevant to this inquiry?

SGT JAMES: I don't, I don't recall.

MS. CHAYTOR: Okay. All right.

SGT JAMES: I know we added like a, as I said earlier, we've added waist chains and leg shackles, flex cuffs

MS. CHAYTOR: Right, according to your changing and (inaudible).

SGT JAMES: Right.

MS. CHAYTOR: Right. Okay.

So if there is any portions that I bring you to, if it's been updated since then you can obviously tell me, yes.

SGT JAMES: (Inaudible.)

MS. CHAYTOR: Okay. And are you aware of how the manual was compiled? Where did it come from?

SGT JAMES: The most current one?

MS. CHAYTOR: Is this the most current one? I thought there wasn't a –

SGT JAMES: Yes.

MS. CHAYTOR: Yeah.

SGT JAMES: Well, we use the Setcan one, previous, and then this one here. This training manual is a compilation, I guess, of some material take from the Setcan manual, some information from the Atlantic Police Academy, plus our in-house module or the components that we've added.

MS. CHAYTOR: Okay. Which Setcan one did you use previously? You mean prior to 2009?

SGT JAMES: No, no, no, no, no, the one that, the Setcan manual that I provided to you. That's what I'm talking about.

MS. CHAYTOR: Oh, okay. So, yes, I think that one is dated 2012?

SGT JAMES: 2012, yes.

MS. CHAYTOR: Okay. So sometimes you use that one?

SGT JAMES: We used it prior to our own manual, now that we've developed.

MS. CHAYTOR: Okay. So you use – which one are you currently using, let me ask it that way?

SGT JAMES: The one that's –

MS. CHAYTOR: The one that's here on the screen?

SGT JAMES: Correct.

MS. CHAYTOR: Okay. All right.

And was there any reason for then, then switching so –

SGT JAMES: We just put it in-house and added our own components to it.

MS. CHAYTOR: Okay. And so this manual that we are seeing here, if we could make it just a little bit bigger please, Madam Clerk, this one has only been in use then since sometime after 2012?

SGT JAMES: Yes.

MS. CHAYTOR: Okay. So the – oh, not that big, sorry – the past couple of years.

SGT JAMES: Yes.

MS. CHAYTOR: All right.

But I understood this was the same manual that had been in place when you took your job in 2009. So was it a situation that it got parked, use the Setcan one and now you're back to this one? Is that it?

SGT JAMES: This is the one that we use now. Prior to this, we used, like the Setcan manual.

MS. CHAYTOR: Okay. Okay.

And so when you're teaching, do you teach directly from the manual or do you use anything other than the manual?

SGT JAMES: Pretty much the manual.

MS. CHAYTOR: Okay.

Do you have course training standards that you use?

SGT JAMES: We present, let's say, the handcuffing component and the candidates have to, you know, attain a certain degree of proficiency in, we'll say, handcuffing in order to move on.

MS. CHAYTOR: Okay.

Are there lesson plans for each training session? Do you have, like, learning objectives? Do you have assessment strategies, rubrics, that type of thing?

SGT JAMES: They're being developed as we go along.

MS. CHAYTOR: So currently there aren't any? They're –

SGT JAMES: We just use the manual. Like, if we're doing control tactics and we're doing handcuffing, say it's standing compliant, that's what we'll utilize for that particular –

MS. CHAYTOR: Okay.

SGT JAMES: – segment.

MS. CHAYTOR: So, I guess I'm thinking, like, if you have the lesson plan. And I know when we met, you told me that you're getting close to retirement, so if someone to come in, step into your shoes, teach the program, are there lesson plans? Or –

SGT JAMES: There would be –

MS. CHAYTOR: – I mean, you could –

SGT JAMES: – a mentorship.

MS. CHAYTOR: – be sick any day. Or –

SGT JAMES: They would be mentored in, same as I was.

MS. CHAYTOR: Okay. So if, for example, you can't be there and there's a class that has to be taught next week, or you're here today and there's a class that has to be taught, how does the person step into your shoes and fulfill the lesson plan for –

SGT JAMES: The one –

MS. CHAYTOR: – the day?

SGT JAMES: – that would replace me would be Constable Scott Snelgrove or Constable Jim Lynch, who are full-time Use of Force instructors.

MS. CHAYTOR: And they use the –

SGT JAMES: And they know –

MS. CHAYTOR: – manual?

SGT JAMES: They use the manual as well, yes.

MS. CHAYTOR: Okay. So there's no set lesson plan for each –?

SGT JAMES: No, we know what we're doing on a particular day, and that's what we will present on.

MS. CHAYTOR: All right.

And I think what you said is that this manual is only taught at the cadet level. This is not reinforced each year with any –

SGT JAMES: That's correct.

MS. CHAYTOR: – or every –

SGT JAMES: When we do our –

MS. CHAYTOR: – three years.

SGT JAMES: – Module 2, this is what we will use as our reference.

MS. CHAYTOR: Okay, so Module 2 for officers on an ongoing –

SGT JAMES: Is control tactics.

MS. CHAYTOR: Control tactics.

SGT JAMES: Right.

MS. CHAYTOR: So you would use – refer to the manual then, as well.

SGT JAMES: Correct.

MS. CHAYTOR: For the control tactics piece. Okay.

All right. And if we could go to page 12 of this document, please?

And this is a section here on situation assessment, and ...

Okay, I'm just going to take you down to certain pages here on it, if we scroll down:

“During the course of their duties, an officer must constantly assess the situation, decide on a plan and subsequently act on that plan. Upon deciding on a plan, law enforcement officers have several force options in which to choose. The officer will select the option deemed most reasonable given the situation, or resistance level. The ‘assess’ process will continue throughout the situation.”

And so my question then, I guess, Sergeant, would be: What are some of the things that you would expect or that you train your officers to assess throughout a situation?

SGT JAMES: Well, you're going to be looking at: What is the nature of the call that you're going on? Who are you dealing with? You know, what's the history on that particular subject? Have you had any prior contact with that subject? His demeanour? If you can get a physical description of your subject, you know, it'll dictate how you're probably going to respond, possibly. Gender: male, female. If you're dealing with more than one subject. Alcohol involved, drug, mental health. There are so many factors there that will come into play.

MS. CHAYTOR: Okay, fair enough, and I think some of the subject variables, if I go on to the next page, the influencing factors, these are some of the things we now see in your policy.

SGT JAMES: Right.

MS. CHAYTOR: The officer considerations as well as subject considerations, and then there is also environmental considerations. And some of what you just mentioned certainly are here, the size of the person of course being one of them; and their history, their demeanour you mentioned, I believe, as well.

Some of the things from the officer's point of view, I guess, the availability of backup?

SGT JAMES: Yes.

MS. CHAYTOR: Their position, distance, reaction time.

And what's disengagement? What does that mean?

SGT JAMES: You know, if you had no other option you can disengage. You can retreat, I guess you could use for another word there; you know, back off.

MS. CHAYTOR: Okay.

And then some of the things in terms of a subject would be their size, their strength, and age, gender, weapons. And, I guess, how many subjects: one subject with one officer, or one with two or more. And this is the history your speaking of, for example, history of violence. Okay, and that would be important to know before the officer is attending, I would take it, in this situation.

SGT JAMES: It would be nice to know, yes.

MS. CHAYTOR: And drug-induced, the mental state of the person, any CPIC information, and previous history or reputation. Those are all things that they're taught to look at, and in doing that they are looking at or assessing the situation even before they get there.

SGT JAMES: Yes.

MS. CHAYTOR: Okay, and according to the model, continuing to assess the situation when they get there. Okay.

And then under environment, what are some of the things an officer is taught to look at when they are actually there and assessing their environment and continuing to assess the environment?

SGT JAMES: Type of neighbourhood, type of lighting, type of terrain you're on – there's a multitude of factors there in the environment – you know, hazards.

MS. CHAYTOR: Okay.

And in terms of – earlier you mentioned the subject's demeanour, and if there's a change in their demeanour, then I take it that goes into the reassessment of the situation and how they are going to respond?

SGT JAMES: Right.

MS. CHAYTOR: Okay.

So in terms of, then, other things for them that they are taught to look out for, and are they taught to look out for any dangerous objects that might be presented to them within the environment?

SGT JAMES: You're going to be looking around to see what's, you know, tripping hazards or, you know, other hazards, yes.

MS. CHAYTOR: And other things that could potentially be used as weapons?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

And how about drug paraphernalia?

SGT JAMES: Yeah, if you can see it, fine.

MS. CHAYTOR: So is that something that you teach your officers to be cognizant of or to factor into their risk assessment?

SGT JAMES: Factor in? You're going to, yeah, you're going to take in whatever is there, presented in front of you and, you know, make an assessment and determination from there.

MS. CHAYTOR: Okay. And do you teach your officers if that's there to make appropriate inquiries of the person as to the purpose of the –?

SGT JAMES: You can; not necessarily. I'd keep it in mind, right.

MS. CHAYTOR: Okay.

And what about presence of security or surveillance cameras? Is that a factor? Would you take – would you teach that as being a factor or is that something that you would expect an officer to take into consideration in doing their risk assessment in their assessment of the environment in which they find themselves?

SGT JAMES: The fact that someone has a camera in their house? Is that what you're asking?

MS. CHAYTOR: Yes.

SGT JAMES: If someone has a camera in the house, that doesn't necessarily mean that it's going to be a threat or a hazard to me. Maybe it's a case of they were a victim of a break-in and they've enhanced their home security by installing a camera system.

MS. CHAYTOR: Okay. All right.

And I understood on your interview that you told me that could be a factor for them to take into consideration?

SGT JAMES: I would be cognizant of it, yes, you know, until I get in and make a determination as to, you know, why the camera is there. I may ask him about it; I may not. They provide it to me. They may say: Yeah, I had a break in and, you know, now I got motion sensors on my – you know, floodlights on the corners of my house and I've also put in a camera system.

MS. CHAYTOR: What about the conditions of the room that you find yourself in? For example, if there's a lot of litter or garbage, would that be a factor in terms of being able to do your assessment of your environment?

SGT JAMES: It would probably cause me to, you know, ask – or not necessarily ask, but I would, you know, be thinking, like, what's going on here that this place is in, you know, such a mess?

MS. CHAYTOR: But no heightened concern about what might be there that you're not able to actually see because of the clutter?

SGT JAMES: There's lots of things that, you know, could be in garbage bags that we don't see or, you know, tucked away into places that's, you know –

MS. CHAYTOR: So they're not taught anything in terms of that –

SGT JAMES: Be cognizant of what you're surrounding, yes. If there's garbage there, you know, make note of it.

MS. CHAYTOR: Okay.

And what about signage on the property warning that certain types of people aren't welcome and to enter at your own risk? What about something like that? Would that also factor into their risk assessment?

SGT JAMES: It'd be nice to know.

MS. CHAYTOR: And what about if there were any presence of ammunition in the room?

SGT JAMES: Yeah, I'd be leery of that, yes.

MS. CHAYTOR: Okay.

And I take it – these are just some of the examples – but I take it you teach, you basically teach your officers to have their wits about them, to be looking around scanning the environment and identifying any other risks that might be presenting?

SGT JAMES: Take it all in.

MS. CHAYTOR: Okay. And the more factors or the more issues that they identify, are they taught to be more diligent in terms of their assessment of the situation and how they might need to respond?

SGT JAMES: Sure.

MS. CHAYTOR: If we could look then, I think it is Page 15 of this document. And I'm going to look at – there's a piece here called The Seven Tactical Principles. There is a quote here: "Bad tactics should not be an excuse to escalate the level of force." And that is in quotation marks.

Do you know you said that or who that's being attributed to?

SGT JAMES: I don't recall who said it, no.

MS. CHAYTOR: Okay.

Continual assessment – I'm reading from this paragraph – "Continual assessment of the environment at the scene, prior to and while confronting the individual(s) involved, will provide the officer with readily accessible cover if and/or when the officer needs it. The officer will not have to spend valuable survival time looking for cover. The officer will already have determined cover options if and/or when the situation escalates. The type of cover is dependent on the nature of the threat perceived by the officer." And then, "Ask this question when looking for and using cover. Will it prevent the threat from harming the officer?"

And then if we turn over to the next page, this continues here with: "Whenever possible plan ahead and look for cover as you approach a situation. If the environment provides no immediate cover, creating distance between the officer and the threat is an excellent form of cover, even when dealing with firearms. The further the officer is from the subject the odds of being struck by his rounds decrease. Prior to intervening and or during the officer's situation he should look for possible escape routes with which to tactically disengage if necessary."

Okay. So, basically, what I took from all of that is the situation, if you're in a situation where there is no cover, if you're in a situation where you talking to someone in their living room, which is what we had here, distance would be a factor though, how far you are away from the person. And looking at, if you need to, how you can get yourself out of the room. It talks about an escape route here, but would it also be to look to see how you can position yourself close to an exit if need be?

SGT JAMES: Where you're positioned in the room?

MS. CHAYTOR: Yes.

SGT JAMES: It's, it's a more advantageous, obviously, if you're – and again it's going to dependent on what, what you're doing there. If I'm just there taking a statement from you because you're a victim of, you know, someone slashed your tires or something like that, you know, the fact that I'm back on to the door –

MS. CHAYTOR: Uh-huh.

SGT JAMES: – is that going to cause me concern? It shouldn't cause me concern, but if I'm there to arrest you and, you know, I know you're, you got a history of violence or what have you. Well, I may want to position myself in a little more advantageous place or if the room doesn't afford it, I just have to be cognizant of that.

MS. CHAYTOR: Okay. And if you're, if you're aware that there's a weapon or an object that could be used as a weapon within the reach of the subject and between yourself and your only exit, would that cause you to reposition?

SGT JAMES: Not necessarily.

MS. CHAYTOR: Okay.

And would that cause you any concern in terms of what you would teach your officers in looking out for their own safety?

SGT JAMES: I wouldn't make them, you know, – we teach them to be cognizant of any weapons or potential hazards, yes.

MS. CHAYTOR: So in terms of considering any kind of repositioning and reassessing your environment, would you expect an issue such as that, you know, in this situation we can see the diagram here with the bat, it's right at the entrance. And we understand that Constable Smyth positioned himself over by the mantel and the bat being closer to Mr. Dunphy and in the area of where his only exit in that room.

So in teaching your officers in entering that situation and then knowing that there's something that the person tells you they use for protection, presented with that scenario, what would you teach your officers to do in terms of positioning in themselves in the room?

SGT JAMES: Depends again on, you know, it's a bat. It may be a hockey stick. Maybe the gentleman just came from a game of baseball or he just came from a game of hockey and the stick is there.

MS. CHAYTOR: No, he's told him that it's something that he uses to protect himself. Would you interpret that as being a weapon?

SGT JAMES: It would be a weapon, yes.

MS. CHAYTOR: Yes. Okay.

And so if presented with that scenario, would you have – what would your advice be to your officers in terms of how to best position themselves?

MR. KENNEDY: Commissioner, excuse me.

One of the problems I have with this line of questioning is that it appears to be the officer is asked about use of force, but is counsel asking specifically in relation to what should Constable

Smyth have done because she's using the examples of the stick in the room and it's what would you teach your officers to do.

So is she asking for this officer to give an opinion on what Constable Smyth did or is it more general? I find it a bit confusing in that it appears to tread over from the general training to the specific circumstances of this case.

THE COMMISSIONER: Well, I think it would be both wouldn't it, Mr. Kennedy?

The, you know, whether it's a stick or a bat or something else, it would apply generally. The specific, specifics of it being a stick rather than a baseball bat, I'm not sure –

MR. KENNEDY: So does it open up then question then for me ask this officer: Based on what you know of Constable Smyth's situation, would you have done anything differently or would you have done the same?

THE COMMISSIONER: I don't see why you shouldn't.

MR. KENNEDY: Okay.

THE COMMISSIONER: As long as it's within the experience and expertise of the, of the witness. If it requires qualification as an expert in a specific area, we may have to do that, but

Ms. Chaytor, do you have any comments in that regard?

MS. CHAYTOR: No, that's fine, that's fine.

Thank you.

THE COMMISSIONER: So, sorry, is that satisfactory, Mr. Kennedy?

MR. KENNEDY: I assume that this witness, based on everything he's given to date, was giving evidence as an expert or giving opinion evidence.

THE COMMISSIONER: Well, we didn't, we didn't go through the actual qualification processes, as I understand it, but – and, I guess, to a large extent, what the questions have dealt with is the actual experience of the officer, which is not to say that he couldn't be qualified for, as an expert in the particular area, if we want to get into specifics, but you know how the process goes.

Normally, if you're going to ask opinion evidence on a matter requiring expertise, you go through the – and Ms. Chaytor did go through Sergeant James' background training and his experience.

So I'm not sure it's going to become a problem but if – and I'm not saying there'd be any problem in qualifying, either now or at the time you ask the question. It'd probably be better until we get a question, you know, that requires the expertise.

But I guess it's complicated a bit by the fact that a person may be established as an expert because of experience and at the same time, a person may testify as to, you know, what he or she would do or what he or she has trained other people to do in a particular situation, is that part of the problem that – I mean, so far?

MR. KENNEDY: This witness is not my witness, Commissioner, so I probably should – other than it goes into Constable Smyth, I probably should –

THE COMMISSIONER: Sorry?

MR. KENNEDY: This witness is not my witness, so perhaps – this seems to be more of an issue for the RNC, so I'm just basically, other than it goes into Constable Smyth, I guess I'm just going to sit here and listen.

THE COMMISSIONER: Yeah, and I think it's fair enough, when you get your chance to question a witness, if you want to ask specifics that are within the experience of this officer, I don't see there being a problem. If it's something, as I say, that requires a particular expertise, you may have to, you know, have him qualified in that area.

Anyhow, go ahead, Ms. Chaytor. I think we're all right.

MS. CHAYTOR: Yes, okay. And I understand –

MR. AVIS: Commissioner, if I may?

THE COMMISSIONER: Mr. Avis.

MR. AVIS: My only issue here is I expected this witness to be called to give evidence about training and experience in what he trains. I'm not certain this witness is qualified to analyze a situation and give an opinion on it, but – or be qualified.

THE COMMISSIONER: Well, I'm afraid that I'm not with you there, unless it's something that, as they say, is – you don't need to have particular experience to testify regarding, as I said in the decision I filed on the chair, if it's a matter in the common experience of mankind or person-kind, or however they describe it.

So what particular question are you concerned about?

MR. AVIS: Well, it does seem to me that we are going from the general to the particular and the specific in being asked about the conduct of Constable Smyth on that date. I'd just like to know a little bit – I understand any number of officers have been asked that.

THE COMMISSIONER: Well, I'm understanding – forget about the other officers, now; let's keep this manageable – I'm understanding that Ms. Chaytor has been asking Sergeant James: What would he have taught with respect to this particular situation, specific situation?

MR. AVIS: Okay, I'll let it go for now.

THE COMMISSIONER: Am I missing something there?

MR. AVIS: That's okay.

THE COMMISSIONER: Ms. Chaytor?

MS. CHAYTOR: Okay.

THE COMMISSIONER: So when you're asking would a stick be considered a weapon, it's both general and specific in that case.

MS. CHAYTOR: In that particular question, yes, and perhaps I can certainly make it more clear that I'm asking if these are some of the things that he has trained his officers to look out for. The whole line of questioning is about this assessment and reassessment of their environment and the types of things, and the next piece is on threat cues, so what type of threat cues they are trained to look out for.

THE COMMISSIONER: Now, we can settle this fairly quickly, it would seem to me. If we put forward Sergeant James for the rest of the questioning in terms of having him qualified, if counsel has no objection – if they do, then I'll listen to them – but having them qualified as an expert in the use of force. Is that a –?

MS. CHAYTOR: Okay, or in the training?

THE COMMISSIONER: It seems to be the least that has been established in terms of training and so forth. Now we can take him through in detail, but any counsel have a problem with him being qualified at least as an expert in the use of force? If there's something else you feel he should be qualified for, we'll do it or consider it.

Is that – anybody have any problem with him being qualified as an expert in the use of force?

MS. CHAYTOR: His CV is included; it's P-0622 and I didn't –

THE COMMISSIONER: The what?

MS. CHAYTOR: His CV.

THE COMMISSIONER: Yeah, we don't need to go through that again, I don't think, Ms. Chaytor. I believe we've –

MS. CHAYTOR: Okay, (inaudible).

THE COMMISSIONER: As I've said, you've gone through that this morning.

MS. CHAYTOR: Yeah, I didn't, yeah – 'cause I wasn't –

THE COMMISSIONER: But we didn't actually go through the process of qualification –

MS. CHAYTOR: Right.

THE COMMISSIONER: – in itself. You had considered that that would not be necessary, as I understand it, but if there's – in light of the concerns raised by counsel, is that – Mr. Kennedy, you started this. Is that fine with you? All right –

MS. CHAYTOR: Commissioner, my only point would be –

THE COMMISSIONER: – he seems to be nodding agreement. Go ahead.

MS. CHAYTOR: I would have thought it would be an instructor in the use of force, but –

THE COMMISSIONER: Well, we can say both. That's taking it one notch higher, it would seem to me. Although they do say that – what was it? Some people do and some people teach.

MS. CHAYTOR: I would not have suggested that with Sergeant James.

THE COMMISSIONER: Hmm?

MS. CHAYTOR: I would not have suggested that with Sergeant James.

THE COMMISSIONER: No, nor would I. So if you want him qualified as well as an instructor in the use of force, is that – any counsel have a problem with that?

No, well, then, okay, I'm prepared to qualify Sergeant James as an expert in the use of force and as an instructor in the use of force, qualified to give opinion evidence in these areas.

So carry on.

MS. CHAYTOR: Okay.

Okay, Sergeant, the seven tactical principles, and I would also ask you: Where does this come from, the seven tactical principles? I understand they've – this has been in your manual for quite some time.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And are you aware of where this information was derived or is this something the RNC came up with?

SGT JAMES: I think that that came out of the Setcan manual.

MS. CHAYTOR: Out of the Setcan manual.

SGT JAMES: Yes.

MS. CHAYTOR: Okay. All right.

And I was asking you some questions, which came out of the first tactical principle, being cover.

SGT JAMES: Uh-huh.

MS. CHAYTOR: And I'm going to move into the threat cues as being the second one.

My questions to you would – were –

THE COMMISSIONER: What was the description of the first one

MS. CHAYTOR: The first one –

THE COMMISSIONER: Would be –?

MS. CHAYTOR: – is cover.

THE COMMISSIONER: Cover. All right. Okay.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Thank you.

MS. CHAYTOR: And the next one, then, is threat cues.

Before I move off cover, my line of questionings was geared towards what you'd teach in terms of the risk assessment, or assessing their environment for anything, anything that may cause concern, and what, if anything, they're taught if they do become aware of certain risk factors, in terms of repositioning or reconsidering and reassessing their next course of action.

SGT JAMES: Well, that's going to be, I guess, depending on the individual officer, you know, their training, their, I guess, confidence in their ability, how often they've been in similar situations and how they've, you know, conducted themselves. And, you know, do they feel it's the bat or the stick or whatever? Is –it's a weapon, yes, but, you know, given your subject, and you factor it all in, some people may feel more threatened than others by the fact that there is a stick or, you know, a hockey stick or whatever there.

MS. CHAYTOR: Okay.

And I understood in – when I asked you those questions on your interview that you agreed that there should be consideration of repositioning himself, an officer, or herself, in the situation, so that they can get –

SGT JAMES: If it 'opports,' yes.

MS. CHAYTOR: – safely out of the room without an incident.

SGT JAMES: Correct.

MS. CHAYTOR: And that it would heighten their – your risk assessment, that situation.

SGT JAMES: You're aware of it, yes.

MS. CHAYTOR: And make an officer more aware of positioning him or herself so that they can make that safe egress out of the room.

SGT JAMES: If possible; or, you know, they may feel comfortable in the room.

MS. CHAYTOR: Okay. And I understood that is what you would teach your officers.

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

In terms of threat cues, then, on page – I think we're on page 16, now. We'll move onto number 2. And this raises certain threat cues and they "are best defined as perceptions, either audible or visual, of a particular situation that SHOULD raise the officer's level of awareness and prepare him/her for any escalating confrontation that may occur. Looking for and reacting to the perceivable threat cues is a critical function of continual risk assessment."

And then there's some examples given, such as "ignoring the officer ... exaggerated movements, ceasing all movement ... the thousand-yard stare."

And you also indicate here: "Threat cues may also be present throughout the environment the officer is working in." And here is where you mentioned some things, as well as weapons, being within the environment.

And is change in the demeanour of your subject, to go to more of an agitated state, would that be one of the things that you would teach could be a threat cue in this situation?

SGT JAMES: Potential threat cue, yes.

MS. CHAYTOR: Okay.

What about frothing at the mouth?

SGT JAMES: That could be – you know, yeah, he may be agitated to the point where he’s excited to that point, or it could be – maybe it’s a medical issue.

MS. CHAYTOR: Okay.

SGT JAMES: Maybe he’s got dry mouth.

MS. CHAYTOR: Okay.

And so depending on the circumstances, I guess –

SGT JAMES: Correct.

MS. CHAYTOR: – of what you find yourself in. Okay.

And we’ve already spoken in terms of weapons, the bat; and what about a box cutting or utility knife?

SGT JAMES: Is it –?

MS. CHAYTOR: As a weapon.

SGT JAMES: Well, yeah, if I could see it, if it’s in his hand, obviously it’s a different thing. If it’s in a toolbox over in the corner and I can see it, then it’s there.

MS. CHAYTOR: Okay.

SGT JAMES: There are hazards everywhere.

MS. CHAYTOR: All right.

And I think you also explained in your interview that there may be less obvious threat cues, as well, depending on the perceptions or the ability of the officer to really see what’s happening in the environment. And, of course, it is officer dependent as well.

SGT JAMES: Correct

MS. CHAYTOR: It depends on the officer’s perception. Okay.

Some of the ones you’ve listed here, I take it those are pretty basic –

SGT JAMES: Pretty general.

MS. CHAYTOR: – and you would expect most officers to recognize.

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

And what about your subject – and this may just go again to demeanour, but what about the subject cursing at you? Is that – would that be considered a threat cue?

SGT JAMES: Not necessarily. A person – we're cursed on all the time. You know, we're driving down the street in patrol cars and someone would curse you out; but, like, the fact that someone curses on me doesn't necessarily mean that I'm going to be, you know, not necessarily agitated, but like you know cued up to watch that guy, kind of thing. It happens all the time where we're cursed on.

I would be aware of it, yes. Okay, so what's going on here that he's upset with me, that he's cursing on me?

MS. CHAYTOR: And what about there's a sudden change in demeanour, then, where he goes from all of a sudden swearing at you, cursing at you? A sudden change in demeanour, would that – would you consider that a threat cue?

SGT JAMES: I'd question as to, you know, what just transpired? Did I say something or did I do something that, you know, resulted in his change in demeanour where he starts cursing on me? Yes.

MS. CHAYTOR: Okay.

And what about erratic behaviour, if the person's behaviour is up and down, calm, not so calm, back and forth? Would that be perceived as a threat cue or something to be concerned about in terms of assessing your situation and your subject?

SGT JAMES: Yes, it's something that I would be cognizant of. Like, so, again, it's officer and subject dependent. Is he on medication and his medication is fooled up, or is he on some other drug or whatever that's caused him to respond in such a way?

MS. CHAYTOR: Okay. All right.

And so I take it when those types of factors start appearing for you and the person's demeanour starts to change, what in that situation are your officers taught to do? Is that part of their reassessment, their planning?

SGT JAMES: These are all factors that, you know, you went in with a plan and now all of a sudden these indicators have cropped up, so you're obviously going to have to change your plan of attack and go from there.

MS. CHAYTOR: Okay.

Okay, and would that plan include what the officer should be considering for his – how to best protect his or her own safety?

SGT JAMES: Sure.

MS. CHAYTOR: Okay.

And that could include tactically repositioning himself in the environment.

SGT JAMES: Possibly, yes.

MS. CHAYTOR: Okay.

On this same page, then, we have “HANDS, HANDS, HANDS,” and that’s in bold and capital letters. And it says: “Look for, demand to see, and watch the hands. They will deliver the threat or at the very least, telegraph the threat is about to be delivered.”

And is that particularly, then, true if there are weapons that you are aware of in the room or other objects that could be used as weapons? Would you expect or do you teach your officers to be even more vigilant in terms of keeping their eyes on the hands of the subject?

SGT JAMES: The hands – and, again, it’s going to be dependent on the situation that you’re involved with. Like, if you just responded to, we’ll say, a break and entry and you enter the property and all of a sudden you see someone there who’s, you know, decked out in the clothing that was described to you as the potential person that broke into the property and their hands are in their pocket, so you want to see their hands.

But if I’m going to a residence to speak to someone in relation to, again, you had your tires slashed and I’m taking a report from you, I’m not going to be demanding that you take your hands out of your pocket.

MS. CHAYTOR: That’s a complainant.

SGT JAMES: Right.

MS. CHAYTOR: That’s a complainant you’re speaking to, not a subject.

SGT JAMES: Correct.

Right.

MS. CHAYTOR: Okay, so you’re in this –

SGT JAMES: Again, depending on what your subject is – you’re interviewing your subject for will dictate whether or not you want to see his hands.

MS. CHAYTOR: Okay.

So you’re interviewing the person. You’re trying to determine whether or not the person might be a threat. You’re doing a threat assessment on the person. The person becomes in an agitated state with you. You are aware that there’s at least one weapon because the subject has told you that.

So in that particular situation, would you teach your officers that they have to be even more vigilant in terms of the situation they find themselves in?

SGT JAMES: I would like to see the hands, yes, but I can’t demand him to, you know, show me your hands, show me your hands. I’m not there to arrest him.

MS. CHAYTOR: I guess you don’t know at that point if you’re there to arrest him or not.

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

If we could go to the next page, please, and for some reason I can't scroll down, "TIME DISTANCE RATIO," and what does that mean, Sergeant?

SGT JAMES: That's basically your reactionary gap. So the closer you are to your subject, your reaction time is going to be dictated how fast you can react. If your subject is 30 feet away, you are going to have more time to, I guess, assess, plan and respond to the actions of your subject; if your subject is 5 feet away, obviously you're not going to have much time to assess, plan and respond to the actions of your subject.

MS. CHAYTOR: Okay, and this refers to here "a minimum of 30 feet"

SGT JAMES: Well, that's, again, depending on what you're looking for.

MS. CHAYTOR: Okay.

And the greater the distance, then, I understand the less vulnerable the officer is going to feel –

SGT JAMES: Correct.

MS. CHAYTOR: – in this situation and his or her response time is going to be greater.

SGT JAMES: It affords you more time to, again, formulate – assess what's being presented, formulate a plan and put that plan into effect.

MS. CHAYTOR: And I think it also says here: "The less vulnerable the officer feels, the more appropriate force option is likely to be chosen."

SGT JAMES: Correct.

MS. CHAYTOR: Okay, and that's part of what you also teach.

If the subject is only 10 feet away from the person, would that increase the officer's level of risk?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

And so distance from the subject, again, is one of the factors that will come into play in terms of the officer's continual assessment of the risk, given the circumstances?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

And then we have the one-plus-one rule, and we've had some evidence already on this. And I understand this to be if there's one object that could be used as a weapon and the subject acknowledges that it is for his protection, then if there is one weapon, be on the lookout; there could be a second.

SGT JAMES: Don't assume there's just the one weapon in the vicinity here, one subject.

MS. CHAYTOR: Okay, and the same with one subject: don't assume there's just one subject.

SGT JAMES: Correct.

MS. CHAYTOR: Okay.

And would you take steps, then, in terms of trying to determine – or do you teach your officers, I guess is the better way for me to phrase it. Are they taught what to do to determine whether or not there's another subject that might be present?

SGT JAMES: You can ask questions: Are you at home alone? You know.

MS. CHAYTOR: Okay.

And if an officer enters a house and there's an entrance to a room immediately in front of him that is barricaded with a sheet of plywood or a sheet of plywood propped up against it, would that cause an increased or heightened sense of concern as to whether or not there might be other people in the house?

SGT JAMES: Not necessarily, no.

MS. CHAYTOR: Okay.

What about a vehicle parked in the driveway that you have the description of what the homeowner owns? You have their vehicle; the vehicle in the driveway is not matching that description. Would that increase your concern as to whether or not there might be someone else in the premises?

SGT JAMES: Might not necessarily increase my concern. You know, we have lots of people that own more than one car. We have people that do repairs to other people's cars or you may have a visitor, yes, but I'm not going to run a check on – you know, if there's four vehicles in the driveway, I'm not going to run a check on the four vehicles in the driveway.

MS. CHAYTOR: Right.

SGT JAMES: You know, I would be aware that there's four vehicles in the driveway, but I'm not going to abandon my purpose for being there.

MS. CHAYTOR: Okay.

And you're aware there's one vehicle registered to the person and there's one person present as far as you can tell. And in that situation, I guess, whether or not it would heighten your concern in terms of asking whether or not there's anyone else present.

SGT JAMES: I may ask.

MS. CHAYTOR: Okay.

And it's not necessarily, though, something they're trained to do, to ask whether or not there's anyone else present?

SGT JAMES: No.

MS. CHAYTOR: Is that what you're saying?

SGT JAMES: No.

MS. CHAYTOR: No, okay.

Does it matter if the officer is entering alone or not, whether or not they would be trained to ask whether or not there's anyone else present?

SGT JAMES: Again, it's going to depend on, you know, the reason why you're at the residence or at the business or wherever it is you're attending.

MS. CHAYTOR: Okay.

And I think this says here to "REMAIN ALERT especially after he/she feels they have control. The general philosophy is, 'Do not drop your guard or relax too soon.' Continue to assess the potential risk throughout the encounter. Remember, the officer's level of force when dealing with a subject must be based on perceived threat cues or actions, not assumed threats."

SGT JAMES: Right.

MS. CHAYTOR: And that's what you teach.

SGT JAMES: Right.

MS. CHAYTOR: Okay.

THE COMMISSIONER: It's lunchtime now, I think.

MS. CHAYTOR: Okay, that's a good place to stop, because we're going to go into de-escalation next.

THE COMMISSIONER: Okay, thank you. We'll break until 1:30

MS. SHEEHAN: All rise.

The Commission of Inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Yes, Mr. Avis, I see you standing – up standing.

MR. AVIS: Thank you, Commissioner.

I just wanted to – I wanted to make a comment before we left for lunch, but I'll make it now. I have some concerns about the way this is going, primarily because we don't have the expert report.

THE COMMISSIONER: All right.

MR. AVIS: I'm concerned about witness fairness, where –

THE COMMISSIONER: About what?

MR. AVIS: Well, witness fairness, as well as to the –

THE COMMISSIONER: Witness – I’m sorry, I couldn’t hear your last word. Witness what?

MR. AVIS: Fairness to the witness. It seems to me – I had anticipated that this man was going to be giving evidence about the training. The questions that are being put to him are very much like he’s being asked about analyzing the –

THE COMMISSIONER: He’s already been interviewed and –

MR. AVIS: Yes, I understand.

THE COMMISSIONER: – you know, those are the questions that were put on at the interview as well.

MR. AVIS: Yes, I appreciate that, Commissioner, and – but some of those things change.

The concern is this: in order to prepare a witness, there is an expert report coming that may or may not be critical of this person, either the training or what Constable Smyth did, and without the benefit of that report I find myself in a difficult position to be questioning the witness.

THE COMMISSIONER: If you –

MR. AVIS: You’ve indicated – I’m merely raising it now –

THE COMMISSIONER: Right.

MR. AVIS: – before you go just in case –

THE COMMISSIONER: All right.

MR. AVIS: – it’s a concern, and you’ve already indicated that we may be permitted to postpone until that time. So I’m merely advising, is it, that right now that I think that’s – it is my position. I’m just advising you of that because I feel it would be important, and for the fairness of both the witness and my client and the process, to have that.

I realize that you’re not responsible for the delay in the report –

THE COMMISSIONER: Well –

MR. AVIS: – the Commission, I mean. Not you in any personal manner.

THE COMMISSIONER: Yeah.

MR. AVIS: So there’s no issue, but it’s just like I find myself in a very difficult position and that’s what I’m going to be requesting, and I say it now before other counsel step up, just so, you know –

THE COMMISSIONER: So let me be straight. You’re going to be requesting any examination until you get the report or –

MR. AVIS: Well, for me, yes, of my own.

THE COMMISSIONER: Right.

MR. AVIS: And I mention that now rather than, you know, maybe the third counsel to stand up when others have done it.

THE COMMISSIONER: Yeah.

MR. AVIS: If you're entertaining my application or position, it may be that you want to finish and then the whole thing is –

MR. COMMISSIONER: Well, that's what we're going to do, I believe.

Ms. Chaytor, do you have any comment on that?

MS. CHAYTOR: Yes, Commissioner.

The line of questioning in terms of they have all been put on the – during the interview, the line of questioning about the training, risk assessment, all of that was certainly put to the witness.

The issues on – the questions I asked this morning on policy, those would have been new to the witness, and I found his evidence to be quite helpful in just explaining some of that.

The only other things that I've spoken to Mike Massine about that hadn't been put to the witness on his interview were the terminology questions, and I spoke to his counsel and gave him heads-up that I would be asking –

THE COMMISSIONER: Right.

MS. CHAYTOR: – the questions on the terminology. So I'm not aware of anything else that would take the witness off guard.

THE COMMISSIONER: So, yeah, but you have no problem if we give leave to Mr. Avis, or any other counsel for that matter, to bring Sergeant James back for examination after the expert report is in and they've had time to study it?

MS. CHAYTOR: I think if we thought that he should be recalled at that point in time, we'd recall him. If there was anything –

THE COMMISSIONER: Well, Mr. Avis is requesting that and I don't see –

MS. CHAYTOR: But I would think we go ahead and finish with the witness today, everybody ask their questions, and then if there's anything else that comes up in –

THE COMMISSIONER: Well, I really think I'm going to be inclined – I don't see any great prejudice in letting them postpone their questions until after they get the –

MS. CHAYTOR: Okay.

THE COMMISSIONER: – the Coleman report – Coleman and Massine report. That would be my inclination, but we finish our questions today, but when we get the report you may have certain questions you may want to put to the witness before this further examination after he's recalled.

Is that –? Yeah.

MS. CHAYTOR: Okay, that's fair. That's – no issue.

THE COMMISSIONER: Okay.

So, before you start, I want to just – so, Mr. Avis, that should settle that, I'd think –

MR. AVIS: Absolutely, absolutely.

THE COMMISSIONER: – in terms of, unless –

MR. AVIS: For me, I would think.

THE COMMISSIONER: – unless any other counsel have any objection to that.

MR. SIMMONDS: Absolutely not.

THE COMMISSIONER: The more information in you have – like, all I'm interested in is getting the best response I can and the best information I can to the types of questions that Ms. Chaytor's been putting there.

Anybody have any problems with it? If not, we can assume that we'll be letting Sergeant James go fairly quickly after we finish, after Ms. Chaytor finishes her questions, and –

MR. DROVER: The only question –

THE COMMISSIONER: – he'll be recalled.

Sorry?

MR. DROVER: Sorry, the only question I'd have on that is, because he's under oath, I wouldn't be able to speak to him about the report or prepare him for the second half for my questions as I've already (inaudible).

THE COMMISSIONER: Well, again, that is something that I think – his evidence is there, his testimony is there, and the purpose, the rationale. I think as long as the issues are dealt with – I'm not as concerned, Mr. Drover, as you would be at a trial. The issues are generally identified and testimony taken before you'll be speaking with the witness. So we can relieve you from that burden of not speaking with your witness. It makes sense, as you'll be able to speak with him about the report.

And it's primarily areas where the person writing the report, the expert we're bringing in, may be critical. It's only fair to give Sergeant James an opportunity to respond. And, you know, I'm not saying that they are necessarily very critical, but they have their own views and Sergeant James would deserve an opportunity to respond to them.

Well, Sergeant, looking back over my notes this morning, you appear to be a little tentative in some of your responses in that they are generally qualified with terms such as it depends, you know. And your use of force manual, to a large extent, sets out pretty clearly what is often a matter of common sense, really. Stay alert; just because you got one suspect, doesn't mean there's another one in the house, or just because you found one weapon doesn't mean there's not another; keep your eye on their hands.

As a matter of fact, a number of these questions, I think, have been answered unqualifiedly by Sergeant Smyth, where – well, I won't get into the one I was thinking of 'cause we're going to

question on it now, but a lot of this is not contentious, I don't think, to a great degree. So if we can leave it at that, Mr. Drover, for now. You can question your witness on the reports when you get them.

I just wanted to briefly deal with, Mr. Kennedy, your proposed application for your own expert witness. And the reason I want to do it now is 'cause I want to get some copies made and get started towards an early response to you on it. But I have no problem with the notion of your calling a witness as you propose, except that I'm asking you if you would identify, if you can, or sometime today after we finish if you want to, the reports that are relied on, or the articles or whatever, the literature that's relied on by your proposed expert with regard to the 24-hour delay for testifying.

You've quoted in your letter – there are a couple of references, one dealing with the Alberta ASIRT, Mr. Len Minello, but I have the impression that that one, and particularly the police psychological section of the International Association of Chiefs of Police, that they take the approach of doing a preliminary interview without any significant delay, but delaying for a full night's sleep before taking a full formal interview, which to me seems to be a bit different than what I've been hearing.

There's also – well, Ms. Chaytor will have some questions regarding what the RNC has been relying on in terms of support for that proposition but I'm wondering, can you identify where the articles are, first of all, that would support what your expert is setting out there?

MR. KENNEDY: Yes, Commissioner –

THE COMMISSIONER: I think you mentioned Ms. Chaytor, they're in a bibliography but we have a CD. Is the bibliography –

MR. KENNEDY: The bibliography is attached to the actual report, Commissioner.

THE COMMISSIONER: No, this is the one you're referring to the –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – so that we have book reviews. These are – is this a bibliography –

MR. KENNEDY: No. Dr. Collins' report, which is only five or six pages, of February 21 –

THE COMMISSIONER: That's right here (inaudible).

MR. KENNEDY: Yes, attached to that, the last page is a bibliography.

THE COMMISSIONER: Okay. The last page here; so we've got the art wall article, which is referred to in his letter I think. That relates to perceptual memory distortion. I'm looking now specifically at when would be the best time to do an interview.

MR. KENNEDY: Yeah, Commissioner, the problem I have, I can outline for you. As outlined in my covering letter, on February 6, Dr. Collins was retained to look at this matter.

THE COMMISSIONER: Right.

MR. KENNEDY: On all of the materials, Commissioner – actually, it was quite an interesting exercise. All of the materials required by Dr. Collins were actually on the Commission website. So what I did for him, I identified potential exhibits for him to review, and you see –

THE COMMISSIONER: Right, where she's listed, yeah.

MR. KENNEDY: But between February 6 and February 21, I've had no discussions with her.

THE COMMISSIONER: Right.

MR. KENNEDY: So I, really in terms of which of these articles support that 24 to 48 hours or when the interview should be given, I can't tell you at this point, Commissioner. I would have to have a discussion with Dr. Collins.

I did read the officer involved shooting guidelines last night by the IACP, police physiological services. And you summarized I think the, at least the night's sleep –

THE COMMISSIONER: Right.

MR. KENNEDY: – in terms of the perspective put forward by, ratified by that group. I would be in a position, if we had some time tomorrow, I'd certainly be in a position – I could read all of these articles and I could be in a position to put forward for you the position, what articles support that.

THE COMMISSIONER: Right.

MR. KENNEDY: But also, Commissioner, one of the major issues here of the asking to be allowed to call Dr. Collins as an expert is the effect of stress and trauma on an individual in an officer-related shooting, especially as it relates to time distortion, memory perception, things like that. So the 24 to 48 hour, that's a secondary point that –

THE COMMISSIONER: Exactly, but – yeah.

MR. KENNEDY: – that has permeated this hearing.

THE COMMISSIONER: Just getting – okay, so that's fine. You have to take whatever time you need, but we won't delay, we won't break to let you do it.

MR. KENNEDY: No, I'm fine.

THE COMMISSIONER: You'll have the Friday afternoon, hopefully; unless counsel is bringing more witnesses. But I'm assuming we are going to have the Friday afternoon, are we?

MS. CHAYTOR: No, not this Friday afternoon. We have a full schedule this Friday.

THE COMMISSIONER: Oh, okay. Sorry.

MS. CHAYTOR: We have a witness in morning and afternoon.

THE COMMISSIONER: All right, I just thought I'd –

MS. CHAYTOR: That's why I was somewhat concerned about where we're going to find in the schedule for Sergeant James to come back as well. Because if we could get as much questions asked of him, and then have to just ask a few –

THE COMMISSIONER: Right.

MS. CHAYTOR: If we're going to finish up early today, that could be an issue.

THE COMMISSIONER: Okay. Well, let's consider how we might deal with that, too.

But, okay, let's go back. So you're going to check and see what sort of authority risk – because as I understand it, Ms. Chaytor would be putting some questions to Sergeant James. We don't know if he'll be able to answer them or not, but the questions will relate to what's suggested as some controversy around this particular approach of giving a delay for better recall. That's not – well, I should put it another way. It's far from unanimous, if that's way to go. So it's not –

MR. KENNEDY: I think that's a fair statement.

THE COMMISSIONER: It's not a settled concept. That's first, okay. So you'll give us some articles to read –

MR. KENNEDY: Well, what I would hope to do is also now to be in a position where I could talk to Dr. Collins. I didn't want to have any conversations with him while he was preparing his report.

THE COMMISSIONER: Yeah, that's fine.

MR. KENNEDY: Okay.

THE COMMISSIONER: So if you do that, find the articles and, if possible, let us have, you know –

MR. KENNEDY: Yes.

THE COMMISSIONER: – copies of them, or at least tell us where to find them easily. But I'm concerned about your time period. You're talking about from March 1 to March 3. Is that –

MR. KENNEDY: Yeah, what I had proposed to Ms. Chaytor, Commissioner, and this was simply as a matter of – if the Commissioner agreed that Dr. Collins could present evidence, than what I had proposed to Ms. Chaytor, knowing how busy –

THE COMMISSIONER: Right.

MR. KENNEDY: – everyone is, is that one of the rules does allow for a witness to be called by a party. Where I could do a direct examination –

THE COMMISSIONER: Right.

MR. KENNEDY: – the rules of direct would apply, and then Commission counsel and everyone else could – if that would – and that would mean preparation on my part, but it would simply – it might facilitate the matter moving along.

THE COMMISSIONER: Right, okay. I think we could do that. We're still going to need, you know, to have the back-up –

MR. KENNEDY: Oh, I will get all that. I'll have that for you by tomorrow.

THE COMMISSIONER: But talking about the – are we talking – we're talking about a teleconference aren't we –

MR. KENNEDY: No, I would have him testify. I would have him come here.

THE COMMISSIONER: – between the 1st and the 3rd of March.

MR. KENNEDY: Yeah.

THE COMMISSIONER: Well –

MR. KENNEDY: Commissioner, you should realize too, other counsel here, the documents I provided have only been provided to counsel.

THE COMMISSIONER: I understand that. So, yeah.

MR. KENNEDY: The other counsel haven't seen these documents until Your Lord –

THE COMMISSIONER: Yeah. And I apologize if I haven't made it clear enough –

MR. KENNEDY: I keep calling you Your Lordship.

THE COMMISSIONER: – but I think from our discussion –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – it should be apparent what the issues are that we're dealing with here. But if counsel have any questions when we finish, fine.

So that's first thing.

MR. KENNEDY: Yeah.

THE COMMISSIONER: You're going to speak to your witness, clarify where the authority may be found that they rely upon –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – the extent of the consensus that they might be able to assert in that regard.

Ms. Chaytor?

MS. CHAYTOR: So I just want to be clear that in terms, then, of the application, you're just asking for more information to support the application and then you'll hear from the other parties on the application? They haven't even seen it; it was just brought to us by Mr. Kennedy over lunch.

THE COMMISSIONER: Yes, the – I'm speaking on a preliminary basis now. Sorry.

MS. CHAYTOR: Yes.

THE COMMISSIONER: Yeah. Thank you for that.

MR. KENNEDY: But even if it's a hypothetical, if he's going to be allowed to be called, if we could set a date that would be helpful.

THE COMMISSIONER: Yeah.

MR. KENNEDY: Yeah.

THE COMMISSIONER: That's what – so it's either Wednesday, Thursday or Friday now. I would take it from what – your witness is travelling again on Saturday or something.

MR. KENNEDY: Yes, he's going to Iceland. Yeah.

THE COMMISSIONER: So it's probably Wednesday or Thursday would be better. Who do we have slotted in there now, do we know?

MS. O'BRIEN: I believe – I stand to be corrected – Wednesday is Judge, former Judge, retired Judge David Riche and Thursday is use-of-force expert Corporal Knapman. I believe that there is nobody else in the schedule on the same day as Knapman; I'm just looking back at RCMP counsel there. If that's the case, Knapman is –

THE COMMISSIONER: Thursday would be the better –

MS. O'BRIEN: Thursday; Knapman won't necessarily be a full day and I stand to be corrected.

THE COMMISSIONER: Thursday the 2nd.

MS. CHAYTOR: I think there is – there is someone.

UNIDENTIFIED MALE SPEAKER: Mark Oram is on there.

MS. CHAYTOR: Yeah. Yeah, that's Mark Oram's afternoon or that day. Yeah.

He's on in the morning and Knapman's the afternoon.

THE COMMISSIONER: Well, it looks like it's going to be Friday morning is probably the best we can do, Mr. Kennedy.

MS. O'BRIEN: Darryl Barr.

MS. CHAYTOR: He's travelling –

THE COMMISSIONER: Probably let your witness get out midday or shortly afterwards I suspect.

MS. CHAYTOR: – on Friday?

THE COMMISSIONER: Or, you know, we can, if we have to, do it by teleconference.

MS. CHAYTOR: (Inaudible) that's Thursday, isn't it?

UNIDENTIFIED MALE SPEAKER: Friday the 3rd.

THE COMMISSIONER: I'm not sure that –

MS. O'BRIEN: (Inaudible) Thursday.

THE COMMISSIONER: – a lot would be gained by having – my being able to look into a psychiatrist's eyes is not going to enhance my understanding I suspect.

MS. CHAYTOR: Sorry, on the schedule, Commissioner, Corporal Knapman and Darryl Barr are travelling from out of province. Corporal Knapman is the afternoon of Thursday, next Thursday the 2nd.

THE COMMISSIONER: Right.

MS. CHAYTOR: And the 3rd is Darryl Barr. And, again, he's travelling – that's the Friday so he's travelling from out of province.

THE COMMISSIONER: Right.

MS. CHAYTOR: It might be Friday afternoon.

MS. O'BRIEN: He's the ballistics expert, Commissioner.

MS. CHAYTOR: He's the ballistics expert, Darryl Barr.

THE COMMISSIONER: Yeah, I understand. I understand.

Well, we have Judge Riche scheduled for all day on Thursday?

MS. O'BRIEN: Wednesday, all day Wednesday.

THE COMMISSIONER: On Wednesday?

Well, you know, it seems to me that can probably be dealt with in half a day. Mr. Kennedy, I'm not minimizing the witness but the – the significance of the witness for you but – although in a way I am in that.

I'm not sure a lot of what Judge Riche is going to bring is going to be evidence relating to, you know, what I'm mandated to look at but there are obvious issues, clear issues that will have to be dealt with. But it seems to me they are so clear that generally you should be able to deal with them. We should be able to deal with them, all of us, in a couple of hours unless I'm missing something. What are, if we –

MR. KENNEDY: Well, you know, that presumes that Judge Riche is going to say what he said in the past.

THE COMMISSIONER: Whatever he says, possibly.

I'm just wondering if we put it –

MS. O'BRIEN: You're asking me for an estimate on direct?

THE COMMISSIONER: Sorry?

MS. O'BRIEN: Sorry, I wondered if you were asking me for an estimate on direct (inaudible).

THE COMMISSIONER: No, no. I'm sort of giving you an estimate on direct.

MS. O'BRIEN: No, no, I understood that but – I understood that I was also – that would be reasonable, I think. In terms of the direct of Judge Riche, you know, we don't need anywhere near a full day.

THE COMMISSIONER: If we had your witness for Wednesday afternoon that probably would meet everybody's needs Mr. Kennedy?

MR. KENNEDY: Perhaps, Commissioner, because we don't have – we've got a tentative list of witnesses, but if we could just get the witnesses who are scheduled for next week that we know of right now. Could we –

THE COMMISSIONER: We have a full new schedule which I haven't received yet because we've been doing –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – pretty good moving them around without losing any time. So that's the only reason we're on schedule.

MS. CHAYTOR: I think this is already –

THE COMMISSIONER: Go ahead.

MS. CHAYTOR: Yeah. I understood it's already distributed. It's – yeah, Diane is giving me the nod. It's already been –

THE COMMISSIONER: If it's not it will be but –

MS. CHAYTOR: It's already been gone but I can run down –

MR. KENNEDY: Ms. Blackmore is always one step ahead of us.

MS. CHAYTOR: She is. She is. Don't question her.

THE COMMISSIONER: You'll get it within a few minutes after we finish this discussion.

So, okay, so we're going to look at Wednesday the 1st at 1:30 for Mr. Kennedy's witness.

MS. CHAYTOR: You have to find time for the application first.

THE COMMISSIONER: It's going to be a brief application, I'm sure, once – we'll deal with that in a moment.

Okay, so we're going to schedule the hearing of the application on the witness for the 1st of March at 1:30?

MR. KENNEDY: That will be – we'd be scheduling the witness if he's allowed to call to testify.

THE COMMISSIONER: Hmm?

MR. KENNEDY: No, I thought we would be, the application –

THE COMMISSIONER: Okay, we'll do the application before.

MR. KENNEDY: Yeah.

THE COMMISSIONER: All right.

We'll do the application – other counsel, they have to see it first before I can get into that. So let's put it down, we're going to put down your witness tentatively for 1:30 on the 1st. Is that all right?

MS. CHAYTOR: We also have a full day scheduled next week for the chief, so perhaps –

THE COMMISSIONER: For what?

MS. CHAYTOR: For the chief, Bill Janes.

THE COMMISSIONER: Right.

MS. CHAYTOR: So perhaps there – that's next Tuesday so perhaps we can condense that. Maybe we could fit the application in there.

THE COMMISSIONER: On the 28th?

MS. CHAYTOR: That's the 28th.

THE COMMISSIONER: But I don't think the witness is available. I think you said –

MS. CHAYTOR: No, I'm talking about the application.

THE COMMISSIONER: Oh the – yeah, we might even be able to deal with that before that.

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: I think we can deal with the application just before we start a witness tomorrow or Monday, whenever. But I'll leave that subject to input by counsel after they've seen the application.

So, Mr. Kennedy, assuming that we're going ahead as of the, as of the 1st at 1:30 – now the other thing that I wanted to raise was these conceptual, and how do you describe them, attention, perception and memory distortions. Do we have many of them that are significant to raise that issue?

MR. KENNEDY: (Inaudible) they've been raised, Commissioner, in cross-examination especially.

THE COMMISSIONER: Can you identify them –

MR. KENNEDY: Sure.

THE COMMISSIONER: – off the top of your head roughly?

MR. KENNEDY: Yeah, I can –

THE COMMISSIONER: I mean one that comes in was the –

MR. KENNEDY: Position of the gun.

THE COMMISSIONER: – the number of seconds to –

MR. KENNEDY: Number of seconds it took to fire.

THE COMMISSIONER: – get out of the room.

MR. KENNEDY: Position of the gun.

THE COMMISSIONER: Position of the gun –

MR. KENNEDY: Do you remember that Constable Smyth initially described the gun as the barrel being up, but when he did his re-enactment the position of the gun he thought was different than –

THE COMMISSIONER: Yeah, okay, I –

MR. KENNEDY: There's been talk –

THE COMMISSIONER: Yeah, I haven't seen much made of that.

MR. KENNEDY: Okay.

THE COMMISSIONER: But anyhow, I've –

MR. KENNEDY: Time frames, Commissioner.

THE COMMISSIONER: Sorry?

MR. KENNEDY: Time frames, for example, the amount –

THE COMMISSIONER: Time frames, yes.

MR. KENNEDY: You know, the amount of time he's in the house, the estimates of six to seven minutes, looking at the file from two to six seconds.

THE COMMISSIONER: Right.

MR. KENNEDY: Looking around. The time – time frame has become important because even though we know we've got a better timeline at this point, there's still – I mean the allegation being made at one point that there was 12 or 14 minutes after the, he called the –

THE COMMISSIONER: Right.

MR. KENNEDY: – before he called the RCMP.

THE COMMISSIONER: Right.

MR. KENNEDY: We've got other inconsistencies or alleged inconsistencies being raised, especially during cross-examination of Mr. Simmonds, as to how he identified himself. We got the issue of forgetting of the calls – the 1:39 calls to Mr. Dunphy. We've got issues, Sir, of the – when he's asked by the RCMP during the interview whether or not there's a possibility of a tipoff.

THE COMMISSIONER: Right, right.

MR. KENNEDY: He didn't tell them about the phone calls.

THE COMMISSIONER: Right.

MR. KENNEDY: There are issues like that.

We've then got, Commissioner, the fact of the use-of-force report refers to the time he entered the residence, I think it was 2 o'clock. The narrative says 2:15.

There's different time frames out there that are very important to straighten away.

THE COMMISSIONER: Right.

Okay.

MR. KENNEDY: You know, the issue of whether or not – and much has been of this –

THE COMMISSIONER: Yeah, I'm not forgetting you, Mr. Simmonds.

I'm sorry, go ahead.

MR. KENNEDY: I'm surprised by the emphasis that's been placed upon this, both by Commission counsel and Mr. Jones's report, that Debbie and Dick Dunphy saying whether or not he didn't have a firearm or he did have a firearm and what Constable Smyth told the police.

There's issues like that, that I would suggest to you, Commissioner, that Dr. Collins can provide evidence which can be – may or may not be of assistance to you, to you in making your decision.

THE COMMISSIONER: Right.

MR. KENNEDY: The issues of what takes place in the house itself in terms of, you know, the event. There's a lot of issues relating to the event where he's been –

THE COMMISSIONER: All right. Okay.

That's enough. I don't need you to – Thank you.

I just wanted to get the sense of what you'd be – your witness would be getting into.

All right.

The final – I think that might have been it, actually, in terms of – there was one other thing but I've forgotten what it is now, so it couldn't have been too important.

Okay, so I'm going to get counsel copies of –

MR. KENNEDY: But, Commissioner, I will indicate that I'm not sure – and, again, I haven't discussed this with Dr. Collins – but I'm not sure that he's going to come forward and say with definitive that there's a 24 – should be a 24-hour time frame.

You'll see from his letter in terms of his discussions with the SIU, his discussions with ASIRT, the IACP guidelines. We know there's an FBI article out there, I think, which suggests that statements be taken immediately. So there – Mr. Jones suggests statements be taken immediately.

THE COMMISSIONER: Well, that's what I wanted to get clear, you know.

MR. KENNEDY: Yeah.

THE COMMISSIONER: And I don't know if I can get a feeling for it, but I know there is some differing of opinion.

MR. KENNEDY: There's certainly differing of opinion.

THE COMMISSIONER: And I'm not sure what the mainstream is, but it seems though the mainstream might not be that far from the traditional way of doing things, at least as far as our preliminary statements are concerned, but I'm holding an open mind on that until I see more literature.

MR. KENNEDY: Okay.

THE COMMISSIONER: But I have done a bit of reading that would lead me to think that it's far from settled.

Now, if Ms. Blackmore is still here we can get – do you have copies of your application for all counsel or do you want me to –

MR. KENNEDY: No, I just provided that – I just provided it over lunchtime, Commissioner, as quick as I could. I received the letter last night and I –

THE COMMISSIONER: Okay. I'm just going to copy the letter –

MR. KENNEDY: Yes.

THE COMMISSIONER: – and your letter and I'm not going to copy the large CV and bibliography and so forth until you're able to –

MR. KENNEDY: I can get copies.

THE COMMISSIONER: – identify what's significant there.

So unless other counsel have any submissions to the contrary, Mr. Kennedy's application is to bring in a psychiatrist to deal with two main aspects, would be fair I think, would be the impact of trauma on memory and recall and possible distortion that may occur as a result of traumatic event. And the other major aspect is this bit we've been hearing about delaying for 24 hours and whether that's sufficiently established to make it reasonable to do that without it being considered preferential treatment. So those are the two main areas.

You'll have a copy of the report now and if you want to make a preliminary comment fine, but, otherwise, we'll try and deal with it briefly before we the – let you make comments before the next witness is called.

Mr. Simmonds, you were up there, looked like you are ready to say something.

MR. SIMMONDS: I mean, the same concerns that Mr. Kennedy expressed when we wanted to call the expert. I haven't seen the application, obviously, in the report.

THE COMMISSIONER: Right.

MR. SIMMONDS: But if this is a psychiatrist being called basically, and I don't mean the term loosely, but to justify or to give a foundation as to why Officer Smyth's answers might be what they were or why his recollections might be what they were. That would certainly be something that we would want to get and have reviewed by another psychiatrist, without a doubt. And if the

application is going to be heard one day early next week, that does not appear to give us any workable time to get that kind of opinion or get a second opinion with respect to –

THE COMMISSIONER: Well, maybe if you take a look at what the witness is going to bring to the hearing. And as I, I think I indicated, I have a big question as to how much it will be worth in terms of what's an issue when you weigh, again, you're suggesting I'll have to make the same consideration, weighing the preponderant of evidence or, sorry, the probative value against the prejudice from delay and so forth, but, sorry, go ahead.

MR. SIMMONDS: Two issues really, one back, the one you just highlighted and the other one is the fairness of – and I'm sure you're not trying to be unfair, it's just that we are in a very, very tight time schedule, as counsel has let us know.

I would certainly want to, you know, we probably could get someone local to review it, but even with the time frame we've got, to have a proper review and the background articulated, I'm not so much concerned with the 24 hour or 72 hour concern. I am significantly concerned with, if this expert comes forward and attempts to explain why officer Smyth's answers might really all line up if you looked at them a certain way or why there's a justification for him having things different or not being able – that would be a real grave concern.

THE COMMISSIONER: Well, my recollection again, I've only had since lunchtime to, to look at it, but it seemed, it seemed to be fairly general evidence, which is, which is one of the reasons why I've, I've, questioned –

MR. KENNEDY: Yeah, but, Commissioner, I would intend to make it more specific during his testimony.

THE COMMISSIONER: Once you speak to your – sure, sure.

MR. KENNEDY: Yes, that's, that's, yeah.

THE COMMISSIONER: Yeah.

All right. We'll just have to – sorry, Mr. Flaherty, you go ahead.

MR. FLAHERTY: I just have one quick question, Mr. Commissioner.

We understand that there are still some BlackBerry messages that have to be dealt with, with respect to whether or not they'll be called into evidence and entered as an exhibit. And there's still the possibility that there may be other communications which have not been uncovered yet.

THE COMMISSIONER: We're going to know that fairly, fairly soon, I believe.

Do we know when our – the potential witness with the missing phone calls, whether there are any missing phone calls, deletions, whatever?

MS. CHAYTOR: The information was delivered to us from the RCMP this morning. It's being couriered to our expert today. It'll be early next week before he will have analysed it.

He also – if there's going to be a potential witness there, we've got three people sidelined already. There would be him, as well as Debbie Dunphy, as well as Kent Luther. And there's also the potential of the recall for Constable Smyth. So those are the witnesses in the queue.

THE COMMISSIONER: Things are looking interesting. We're making good progress.

MS. CHAYTOR: Yeah, really.

THE COMMISSIONER: We're still on schedule.

So it's going to be, by the sound of it, and I understand it's not going to take him a long time to establish – you're talking hours rather than days.

MS. CHAYTOR: He's talking hours, so I'm hoping we'll have an answer early next week, Monday, Tuesday, next week, hopefully.

MR. FLAHERTY: And, so that's good, but with respect to whether or not that information ultimately gets put into evidence, I would want to have all those evidentiary issues put to rest before the psychiatrist comes in to provide evidence because BlackBerry messages, emails, language used and the content of it, should be put towards a psychiatric expert when they're talking about state of mind of a person of interest or a subject.

THE COMMISSIONER: Mr. Flaherty, first of all, we don't know whether there's anything to be concerned about so – sorry. Go ahead.

MR. SIMMONDS: There is absolutely one other set of comments, Mr. Commissioner, that I think Mr. Kennedy has generally referred to as the salacious value outweighs – or the prejudicial value outweighs the evidentiary value. And those are a set of quotes from messages that would be (inaudible).

THE COMMISSIONER: From the one, from the message – I was referring to the messages that we're waiting to see; if they have been deleted or not, you know. Go ahead.

MR. FLAHERTY: And just be clear, I was speaking with respect to all those messages.

THE COMMISSIONER: Right.

MR. FLAHERTY: The ones that we know of that haven't been entered and the ones that we don't know of.

So I would ask that those evidentiary issues – whether or not some of the messages are going to be not put into evidence because the potential of prejudicial value outweighs the probative value, I'd want that considered before we have the psychiatrist. Because, once again, if they are to be put into evidence I'd want to put all of those comments, all those utterances before the psychiatrist.

THE COMMISSIONER: Say again? You want – you'd want to do what?

MR. FLAHERTY: So we have, as far as I know, and correct me if I'm wrong, Commission Counsel or Mr. Commissioner, we already do have in our possession –

THE COMMISSIONER: Certain comments.

MR. FLAHERTY: – certain comments.

THE COMMISSIONER: And I mean there's an issue as to what will go in.

MR. FLAHERTY: Yes.

THE COMMISSIONER: And there were suggested redactions –

MR. FLAHERTY: Yes.

THE COMMISSIONER: – and possibly a further redaction. And that's to be – I haven't heard what conversation has been with, between counsel. I'm assuming that we'll have a schedule for finalizing that, will we?

MS. CHAYTOR: I'm not sure because there may have to be some scheduling for that as well.

THE COMMISSIONER: Yeah, so we don't have that scheduled yet. Okay.

Now, I don't understand why you would want to delay or not hear from this psychiatrist that Mr. Kennedy is proposing until you get a position on that.

MR. FLAHERTY: Because I would imagine, based upon what I've heard from yourself and what I've heard from Mr. Kennedy, the psychiatrist is going to go into issues relating to Joe Smyth's statement of mine – or state of mind. And, particularly, we're going to be looking into a post-shooting window of at least 24, 48 to 72 hours.

My concern is, is that if we have evidence with respect to utterances or statements that Constable Smyth may have made in that time period –

THE COMMISSIONER: Right.

MR. FLAHERTY: – I would want to be able to put those statements to a psychiatrist and say, okay, based upon what you know and based upon the evidence, what do these statements suggest is the state of mind of Constable Smyth? What do they suggest with respect to whether or not these statements themselves have been made by a traumatized mind?

So I think there's two issues of fairness here: one to the psychiatrist to make sure all the evidence is before him; and two, if we have additional evidence in the way of statements that – the deleted statements, then I believe that the psychiatrist's opinion with respect to those statements could be useful, could be probative, could be of value to your determination, Mr. Commissioner. So –

THE COMMISSIONER: Right.

Okay, I understand what you're saying now. Let's wait until we get the copies of the applications and take a look at them and we'll have to probably revisit this tomorrow morning briefly but ...

Are you all right, Mr. Kennedy, in terms of proceeding with contacting your witness and getting the information on the second –

MR. KENNEDY: (Inaudible) do, Commissioner, actually, when we start, I'm just going to go out for a few minutes; there's other counsel here. I'll just go for a few minutes and start that process, get the ball rolling.

THE COMMISSIONER: Sure. All right.

All right, we'll come back to it before we close this afternoon too, just to make sure I'm updated.

Any other counsel have any comment? Mr. Freeman? Ms. Rasmussen?

No? Okay. No – RNC. All right.

Let's finally get to our witness. Sorry about that, Sergeant.

SGT JAMES: It's no problem.

THE COMMISSIONER: But we're trying to keep a tight schedule here and I have a number of balls in the air at the same time.

MS. CHAYTOR: Yeah, I'm not sure how that's working out.

THE COMMISSIONER: Now, just – remember my comment. It's not adversarial; we're trying to get as clear a picture. And excessive qualification and answers may not be helpful, let's put it that way.

SGT JAMES: Okay.

THE COMMISSIONER: And you may find that we'll be going with someone who's more definite in their answers, rather than qualifying it.

So with that in mind, Ms. Chaytor.

MS. CHAYTOR: Thank you, Commissioner.

I think when we broke I was about to turn to the de-escalation piece. If I could have back up, please, P-0024 – 0624, I apologize, 0624. And I need page 18.

And of course, Sergeant, we only have portions, a very small portion of your manual in evidence. It's actually, you know, quite thick, a couple of inches thick I think would be fair to say, wouldn't it?

SGT JAMES: Yes.

MS. CHAYTOR: Yes.

And we've only put in what we discussed of course with the RNC and the RNCA solicitors in terms of some concerns about not putting everything in. But throughout the manual this seems to be the portion of the manual that we see here, number 6, which is, we're still under the tactical considerations. And number 6, De-escalation; this is the paragraph dedicated to de-escalation, is that correct?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

When we – and what's written here, of course, is what can the officer do to lessen the danger. And the part here about, "The officers primary concern in any confrontation is the safety of the public and him or her-self."

And there are ways mentioned here in terms of what an officer might be able to do: "The officer can use various strategies to achieve this, whether it is through verbalization, tactical repositioning, and a call for back up or the use of specialty units. The continuous assessment of the threat level throughout the situation will determine which strategy will effectively de-escalate the danger to the officer and those around him or her."

And I believe when we met back in December you indicated that the RNC were looking to engage somebody from the Atlantic Police Academy to perhaps come to St. John's and assist in developing a further de-escalation piece for your training. Is that correct?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

And are you able to say whether or not there's been any further progress on that?

SGT JAMES: Since we had our discovery hearing, Inspector Wayne Rudderham from the Atlantic Police Academy was here.

MS. CHAYTOR: I'm sorry, what was the name?

SGT JAMES: Inspector Wayne Rudderham.

MS. CHAYTOR: Okay.

SGT JAMES: He was here and he did a course with us in relation to REACT and taser recertification.

While he was here I had some discussions with him in relation to the program that they do at the Atlantic Police Academy and essentially its role playing. And when we discussed our scenarios that we do here and the role plays and the use-of-force program and the REACT program, essentially it's pretty much the same thing as what we're doing, it's just that it's an elaboration on those components, that's all.

MS. CHAYTOR: Okay – sorry.

SGT JAMES: And I've spoken with the director of the Atlantic Police Academy since then and they haven't come up with a time frame yet as to when they will be, or if they will be doing a course. I'm still waiting on a response from them in relation to –

THE COMMISSIONER: So I guess if I can summarize, you're hoping to get some attention on the concept of de-escalation through the use of individuals at the Atlantic Police Academy, is it?

MS. CHAYTOR: We're exploring it. And we'd like to see what their program is, I guess, or what their course is so we can evaluate it.

THE COMMISSIONER: Right.

So you haven't committed to needing that yet or having it available.

SGT JAMES: No.

It's just being explored, yes.

THE COMMISSIONER: Okay.

MS. CHAYTOR: Okay.

And in terms of other ways in which to de-escalate the situation, have you talked to officers that looking down and writing or pretending to write notes is a way to de-escalate a situation?

SGT JAMES: In one sense, yes.

MS. CHAYTOR: I'm sorry.

SGT JAMES: In the sense that if I'm looking at you and then I look away to make a few notes, I'm not, you know, continuing my eye contact with you because some people find that a little threatening. So if I can, you know, de-escalate or bring the temperature down a little bit just by breaking eye contact with you, that's, that would (inaudible).

MS. CHAYTOR: Okay. So that's something you taught your officers to do?

SGT JAMES: Yes.

Now, you have to be cognizant of the fact of, you know, cultures.

MS. CHAYTOR: I'm sorry?

SGT JAMES: You have to be cognizant of, you know, certain cultures take offence to, you know, holding a gaze or they won't look at you eye to eye.

MS. CHAYTOR: Okay. All right.

And I made note that, that wasn't the answer that you gave in your interview, but we can come back to that if – and find the page reference for you.

Would you – do you teach your officers to tell, if somebody's upset that calm down, to tell them to calm down? Is that something you teach?

SGT JAMES: No.

MS. CHAYTOR: And I take it the concern there is that that can come across patronizing and have the opposite effect?

SGT JAMES: Yeah, exactly.

MS. CHAYTOR: Okay.

And in terms of looking down to de-escalate this situation, would you have concerns that in doing that you're taking your eyes off your subject and that's not in keeping with what they're trained to do?

SGT JAMES: Obviously, you have to, you know, you can't be looking at your subject and the same time making a few notes or jotting whatever it is you're trying to document there so

THE COMMISSIONER: Doesn't it, doesn't it conflict with your hands, hands, hands in capital letters in your training manual, keep your –

SGT JAMES: Hands, hands, hands would be, I guess dictated by the situation that you're in, if it's, you know –

THE COMMISSIONER: Well, it all is. We realize that, but if – isn't that a pretty basic thing? It's a –

SGT JAMES: We like to see the hands at all times.

THE COMMISSIONER: It's sort of a – I think *New York Times* calls: It's the End of the World headline. It's almost what you had that in your training manual, big capitals.

SGT JAMES: Yes, hands, hands, hands.

THE COMMISSIONER: Hands, hands, hands.

SGT JAMES: Hands are what's going to kill you.

THE COMMISSIONER: Sorry?

SGT JAMES: Hands, hands, hands is what's going to kill you.

THE COMMISSIONER: Yeah.

SGT JAMES: Right, so as long as there's nothing in the hands, you should be fine.

THE COMMISSIONER: Right. So when you take your eyes away from an individual, you don't have your eyes on their hands anymore. That's a problem, isn't it?

SGT JAMES: It is but, you know, it's a reality. You have to break your contact – your eye, eye contact at some point in time to make a note.

THE COMMISSIONER: Why do you have to make a note in that situation?

SGT JAMES: Well, if I'm asking you a question and I want to make a note of it, I have to look down to make my note, obviously.

THE COMMISSIONER: Well, we've had a long series of officers testifying about how notes, even though the ideal is to have notes immediately, we've got them up to 24 hours or longer before they sit down and make their notes.

SGT JAMES: I realize that but if I want to make a note at that particular point in time, obviously, I have to look down and make notes and look to see where I am writing.

THE COMMISSIONER: Yeah.

MS. CHAYTOR: And so I don't know that the intent was to actually make a note of what is being said, but I understood that the evidence from Constable Smyth was looking down in an effort to try and de-escalate the situation.

SGT JAMES: Yes.

MS. CHAYTOR: As opposed to the necessity of recording a note at that particular point in time.

SGT JAMES: Correct.

MS. CHAYTOR: And in fact, he wasn't clear if he was actually making a note or just, I think, on his direct evidence was that he was sort of tracing over an arrow on his folder at that point in time. So it wasn't so much the necessity of recording the information being given to him but it was what he did to try and de-escalate the situation.

SGT JAMES: Yes, that's fine.

MS. CHAYTOR: So in that situation, that's fine, look down, de-escalate the situation and that's something you would have taught him.

SGT JAMES: Yes.

MR. SIMMONDS: I wonder if we could refer to page 258 and 259 of the transcript. That's –

MS. CHAYTOR: Thank you.

We do have 258 and 259 (inaudible). Oh, 258, sorry.

MR. SIMMONDS: 258 and 259.

MS. CHAYTOR: Okay.

MR. SIMMONDS: And what are they taught in terms of maintaining eye contact is it at the bottom –

THE COMMISSIONER: No, Ms. Chaytor has – give her a chance to go back. She had noted –

MR. SIMMONDS: Thank you.

THE COMMISSIONER: Is that the section you were thinking of in terms of your notes?

MS. CHAYTOR: Yes, okay.

Thank you.

MR. SIMMONDS: You're welcome.

MS. CHAYTOR: Yes, it starts actually on 256: Have your officers ever been taught that looking down and pretending that you're writing or making notes that that might be a way to de-escalate a situation? Has that been a part of their training? Answer: No.

And then over onto the pages that Mr. Simmonds is referencing: So there would have to be verbalization that goes along with it to explain what I'm doing – I'm not sure if that's the part Mr. Simmonds is referring to – oh, maintaining eye contact.

MR. SIMMONDS: Right.

MS. CHAYTOR: And is maintaining eye contact, is that also something for the officers own protection and safety? Sure. I'm looking at you, you know, and then all of a sudden you start looking over there. I'm looking here and I'm talking to you like you looking over there towards the knife, I'm missing that.

And so I think those were the sections where you –

SGT JAMES: If I'm looking at you and then you're looking over towards, you know, something else, I'm going to be obviously curious as to what it is that you're looking at over there, but I may have misunderstood the question when you asked me it at the discovery hearing, but, like, we don't want you to maintain, you know, that stare so that's, you know, imposing, is what I got.

MS. CHAYTOR: I think my question was whether or not you teach looking down –

SGT JAMES: We do.

MS. CHAYTOR: – and pretending that you're writing or making notes, that that's part of de-escalation.

SGT JAMES: It is part of de-escalation, yes.

MS. CHAYTOR: And I think you pretty clearly said, no.

SGT JAMES: Yes.

MS. CHAYTOR: But you're saying now, yes, it is part of –

SGT JAMES: It is.

MS. CHAYTOR: – what you teach.

SGT JAMES: Yes.

MR. AVIS: Commissioner?

THE COMMISSIONER: Yes.

MR. AVIS: Sorry. If you go down to, you know, line 13.

MR. SIMMONDS: Which page, Mr. Avis?

MR. AVIS: 257, after the no, he says: I don't know the purpose of it. And he's asking what the purpose of the question was. And there's a further explanation.

So not sure there such a, you know, direct contradiction but

UNIDENTIFIED FEMALE SPEAKER: He don't know what the purpose is.

MR. SIMMONDS: With the greatest respect, Mr. Avis, if you continue on down at the bottom of the page: And what are they taught in terms of maintaining eye contact? Eye contact? So you keep eye contact. You're showing – I'm looking at you.

Okay?

THE COMMISSIONER: All right. I shall carefully consider transcripts and responses.

Anyhow, it's suggested that, Sergeant, that your answer today is contrary to the answer that you gave at the interview.

You've – Ms. Chaytor, did you want to add something else?

MS. CHAYTOR: No, I think we should just, probably move on, and the transcripts can speak for themselves.

THE COMMISSIONER: All right. I want to give –

MS. CHAYTOR: Those are page references.

THE COMMISSIONER: – Sergeant James a chance to deal with it.

It's suggested that your two answers are not consistent. Do you have any comment on that?

SGT JAMES: And, again, it goes back to, maybe I misunderstood the question when she asked me, like, you know.

THE COMMISSIONER: Okay.

SGT JAMES: Yes, we maintain eye contact, but I don't want it to be, you know, looking at you and being imposing. If I break eye contact with you and look away for a second and that works to, you know, bring the temperature down. That's the way I would interpret it now.

MS. CHAYTOR: Okay.

And I think, also, in terms of the questioning on eye contact, you said that it is, that you trying – you teach them not to look around when you're speaking to someone because it shows that you're interested in them.

SGT JAMES: Yes.

MS. CHAYTOR: So you maintain eye contact to show that you're engaged with them.

SGT JAMES: To show that I'm engaged, but at the same time, you have to cognizant of your surrounds, so I'm going to continue to look around at the same time as I'm speaking to you.

MS. CHAYTOR: And in terms of what you teach officers to do with respect to their own hands. I understand their taught to keep their hands free.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. And is that of particular importance when the subject's demeanour changes and starts to become hostile towards the officer?

SGT JAMES: I would think so, yes. You wouldn't want to have your hands in your pockets.

MS. CHAYTOR: And in terms of having your hands engaged and holding a folder and writing with a pen. Same thing, your hands are engaged?

SGT JAMES: Your hands are engaged, yes.

MS. CHAYTOR: Okay.

And perhaps then we can move on then to page 18, and there's Tactical Errors to Avoid that are taught in conjunction then with the Seven Tactical Principles. I think there's a total of 12 that you've outlined here. And again, I think this is page 18 of the exhibit, for those who are following along.

We have: failure to skillfully find or use available cover; failure to watch the hands of the subject(s); closing the reactionary gap too soon, prior to a proper risk assessment – and that's the one I think you indicated earlier as the complacency issue; is that correct?

SGT JAMES: Yes.

MS. CHAYTOR: Indecision. Acting without a plan; slow movement in open areas – I'm not sure if there's much applicability here with that.

Failure to know where your position is, when you move; losing sight of your objective. What is the officer trying to accomplish? Do not take foolish risks. It may not be necessary to engage in a weapon confrontation. Keep the ultimate goals in mind – safety and apprehension; 8. being embarrassed to react safely and properly; 9. failure to identify and locate targets. Search from near to far. Clear the area you are in before moving to the next location; failure to hit with every shot; target fixation/tunnel vision. Look around! What is that referring to?

SGT JAMES: Target fixation and tunnel vision?

MS. CHAYTOR: Yes.

SGT JAMES: Basically you want to take in the entire place you're to, the situation you're in. Whether, you know, you're looking in a car or you're looking in a room.

MS. CHAYTOR: Okay.

SGT JAMES: Be aware of your surroundings, essentially.

MS. CHAYTOR: Okay.

And perhaps if you're aware that there's one object that could potentially be used as a weapon in the room, focusing too much on that as opposed to looking around for other objects or weapons, would that also be an issue?

SGT JAMES: That would be target fixation, yes, tunnel vision.

MS. CHAYTOR: Okay. That would be target fixation.

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

Relaxing too soon. It may not be over – and again, I guess that's something in terms of complacency?

SGT JAMES: Complacency.

MS. CHAYTOR: Okay. So those are the 12 warnings or tactical errors –

SGT JAMES: Potential errors, yes.

MS. CHAYTOR: – you call them. Yes. Okay.

I'd like to move on then to page 31.

THE COMMISSIONER: Before you move off, what was the seventh tactical principle again? I forgot to note –

MS. CHAYTOR: Seventh tactical principle was WIN mentality –

SGT JAMES: WIN mentality.

MS. CHAYTOR: – I didn't cover that one.

THE COMMISSIONER: WIN mentality, okay.

MS. CHAYTOR: I'm not sure if there's – I'm trying to cut back on some of my questioning now, but it says here: "The rule speaks for itself. The WIN mentality must be created and engraved in the officer's mind."

I would ask: Where's this from? Do you know where this derived?

SGT JAMES: It's one of the seven tactical principles, like I said that's been taken from the Setcan manual, I believe.

MS. CHAYTOR: From Setcan?

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. CHAYTOR: I'm sorry?

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. CHAYTOR: Yes, I think we need – your volume is going down there –

SGT JAMES: Oh, I'm sorry.

MS. CHAYTOR: – Sergeant. I know it's getting late. It's been a long day already.

All right, page 31, please. This is a piece on the Critical Stress Amnesia. And I'm going to bring you to this because it's included in the Training Manual and we've seen this here at the Commission before and basically there's four points. It can be defined as a physiological basis and the implications of memory loss during extreme survival stress situations.

Officers who encounter an extremely stressful situation will consistently exhibit difficulty in transferring information into their long-term memory, and then this is also what – you were here during the discussion that there may be some expert who can speak to some of this. But I'm just wondering in terms of this being in the manual, the Use of Force manual for the RNC, are you able to tell us what the source of this information is?

SGT JAMES: No.

MS. CHAYTOR: Okay. And are you aware of whether or not – I noticed in other places in your material you referred to David Grossman.

SGT JAMES: Yes.

MS. CHAYTOR: Are you aware whether or not that he is the source of this information?

SGT JAMES: I don't know.

MS. CHAYTOR: Okay. Have you ever attended a conference that he's taught?

SGT JAMES: I have.

MS. CHAYTOR: Okay. And was that taught as part of your use of force training?

SGT JAMES: His conference?

MS. CHAYTOR: Yes.

SGT JAMES: No.

MS. CHAYTOR: Okay. And what was the conference that you attended?

SGT JAMES: It was a course out in Vancouver – or Victoria actually back in, I think it around 2000, 2005. It was an officer safety course or conference.

MS. CHAYTOR: Okay. In terms of this piece here in the manual you told me, I think on your discovery, that you think this has been in the manual for over 10 years, certainly longer than you have been in your position.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay. Are you yourself aware of any controversy around this issue –

SGT JAMES: I've heard –

MS. CHAYTOR: – other than what you've heard here today?

SGT JAMES: Yes.

MS. CHAYTOR: Yes. Okay. All right.

In terms of any more recent research on this or whether or not this is the subject of any research, which has been subject to peer review, are you able to say, Sergeant?

SGT JAMES: No.

MS. CHAYTOR: Okay, so we will leave that for others to speak to us on.

Sergeant, in terms of the actual incident, I understand that you didn't have any immediate knowledge of it, it was something that you had heard about in the media actually, and that you weren't tasked with anything by management to do in the aftermath of the incident.

SGT JAMES: No.

MS. CHAYTOR: Okay.

I do understand that you were approached, however, by Constable Smyth to attend the first re-enactment with him?

SGT JAMES: That's correct.

MS. CHAYTOR: And that was on April 8. What did you understand to be the purpose of why Constable Smyth reached out to you and asked you to attend with him?

SGT JAMES: Like I said, we've worked together since he's joined the job. He's, I guess, comfortable with me, and asked me to go out and just support.

MS. CHAYTOR: Okay.

And that's the one, of course, that the recording was lost from that re-enactment.

SGT JAMES: That's correct.

MS. CHAYTOR: And as a result, I understand, you were then interviewed by the RCMP and you gave a statement of your recollection of events.

SGT JAMES: Yes.

MS. CHAYTOR: Okay. Now, I understand that statement was taken 20 days later, April 28.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

So was – and in the meantime from having attended the re-enactment until you were asked to give your statement by the RCMP, had you had other discussions with anyone about knowledge of the event and what had transpired?

SGT JAMES: No.

MS. CHAYTOR: And I understand you did have further communications, though, with Constable Smyth.

SGT JAMES: I did.

MS. CHAYTOR: Okay. And you called him for – there was some conversations with him?

SGT JAMES: Yes.

MS. CHAYTOR: Okay. All right.

Prior to attending then on the re-enactment with Constable Smyth, did you have any meetings or discussions with him? So he called you and asked you to attend, and did he discuss anything with you? Did you have any background as to what had transpired?

SGT JAMES: No.

MS. CHAYTOR: Okay.

Did you discuss with him his use of force training?

SGT JAMES: No.

MS. CHAYTOR: Okay.

And you travelled out, I understand, to the re-enactment with him in the car.

SGT JAMES: In his truck, yes.

MS. CHAYTOR: In his truck, okay.

And so was there anything talked about in terms of his training as you were travelling out together that day or otherwise about the incident?

SGT JAMES: Not that I recall, no.

MS. CHAYTOR: Did you otherwise assist him in any respect as to how to prepare for his re-enactment?

SGT JAMES: No.

MS. CHAYTOR: I also understood from what you told me on your interview that while you were there to observe and note anything of concern in terms of his training, you weren't able to observe everything that day.

SGT JAMES: No, there were points where – I was essentially in the background – Judge Riche was along side of me or the forensic officer, Kelly Lee I believe it was –

MS. CHAYTOR: Corporal Lee, yes.

SGT JAMES: Corporal Lee was conducting her role that I couldn't see. But when they moved, I could see.

MS. CHAYTOR: Okay. And I think you were making a point and you made a point to tell RCMP when you got there, you're not there to interfere so you were trying to stay in the background.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And so there were times, because of your position, that you hadn't observed everything, but I also think you told me that you also, at one point during the re-enactment, walked down the hall of the house and looked a bit around the house.

SGT JAMES: I stepped around Judge Riche and moved just to the end of the hall there and looked to the left.

MS. CHAYTOR: Okay. Because you were able to say, you know, where the different rooms were positioned –

SGT JAMES: Correct.

MS. CHAYTOR: – the bathroom and all of that. Okay.

And also I understand at one point you stepped out onto the porch with one of the RCMP officers.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And I believe that RCMP officer to be Dion Foote. Is that correct?

SGT JAMES: I believe it was, yes.

MS. CHAYTOR: Okay.

And did you – and what did you Corporal Foote discuss?

SGT JAMES: He just asked me how Joe was doing, and I –

MS. CHAYTOR: I'm sorry?

SGT JAMES: He asked me how Joe was doing.

MS. CHAYTOR: Okay.

And I noted in your RCMP statement, and it's P-0623. I don't know if we need to bring it up, but I'll just read out the portion here. It does say at page 4, you make the point about, you said you stayed in the hall and couldn't see what Joe was saying or doing. But then you went on and gave a fairly detailed account of what was being said. And so I'm just wondering, by the time then you're able to give that, is there any other source of knowledge that you were relying on, on April 28 to give the detail in your statement?

SGT JAMES: No. As I stated, there was points where Judge Riche or Corporal Lee was blocking my field of view.

MS. CHAYTOR: Yes.

SGT JAMES: So, obviously, I couldn't see what was taking place in the room at that particular time. But when they did move, I could see, and there were points where, you know, I could hear what was being said.

MS. CHAYTOR: Okay.

Did you hear what Joe Smyth said he did when he first observed the rifle come out of his peripheral vision? Did you hear what he said or did?

SGT JAMES: I don't recall what's in my statement, but I'm sure –

MS. CHAYTOR: Okay.

So putting up his left hand and saying no, no, no.

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

And was that in keeping with his training?

SGT JAMES: Putting up his left hand?

MS. CHAYTOR: And saying no, no, no.

SGT JAMES: No.

MS. CHAYTOR: Okay.

And in terms of the repositioning in the room, I understood you to say that, at least in your interview – so the point that Mr. Dunphy began to show agitation and other threat use became apparent, you would've expected or hoped that Constable Smyth would have repositioned himself in the room. Is that correct?

SGT JAMES: That's right. That's what I would have thought he would have done, yes.

MS. CHAYTOR: That's what you would have thought, and that would have been in keeping with your training?

SGT JAMES: If at all possible, yes; but, as I say, it's officer dependent. And if he felt comfortable in the room, that's going to be his call. Where he's positioned to in the room, that's going to be – again, it's going to be his call.

MS. CHAYTOR: Okay.

Did you speak to any other RCMP officers at the scene that day?

SGT JAMES: I spoke to a couple of officers that were there. I spoke to Corporal Lee, the forensic officer, and I believe in my statement I say that I sat in the car with another officer. Who that was, I don't recall, but I did speak with another officer there at the scene.

MS. CHAYTOR: Okay.

And you sat in his car. I understand it was a male.

SGT JAMES: Yes.

MS. CHAYTOR: And do you think it was Sergeant Kent Osmond?

SGT JAMES: Possibly.

MS. CHAYTOR: Okay.

And I only suggest that because when you were giving your statement to Constable Nippard he was asking for a description of the person and he was suggesting it may have been. But you're not sure, are you, who it was?

SGT JAMES: It could have been Corporal Osmond, or Sergeant Osmond.

MS. CHAYTOR: Okay.

And what was the purpose of sitting in the car with him and what was discussed?

SGT JAMES: He just asked me to sit in the car and I sat in the car and he asked, basically, how Joe was.

MS. CHAYTOR: Asking about how Joe Smyth was?

SGT JAMES: Right.

MS. CHAYTOR: Okay.

And Joe Smyth was there that day. He obviously – he's there going to do the re-enactment. He came along with you.

SGT JAMES: I went along with him, yes.

MS. CHAYTOR: Okay.

The next day following the re-enactment on April 9 – or the first re-enactment, the one you attended with him, because I understand you did not go back to attend with him on the 10th.

SGT JAMES: That's correct.

MS. CHAYTOR: The next day Constable Smyth underwent his annual firearm requalification.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And I understand that you were in attendance that day as well and you signed off on his training for that day.

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And was that something that was arranged at your suggestion or through consultation with you and Constable Smyth as a result of anything that you observed at the re-enactment the day before?

SGT JAMES: No.

MS. CHAYTOR: Okay.

So it's just a coincidence that it was the next day, nothing else?

SGT JAMES: That's correct.

MS. CHAYTOR: Okay.

And why – it was only, I think, Constable Smyth and Sergeant Buckle who attended that day?

SGT JAMES: That's correct.

MS. CHAYTOR: So it wasn't, I take it, a regular plan where you would have a number of people.

SGT JAMES: It wasn't scheduled, no.

MS. CHAYTOR: Okay.

SGT JAMES: Sergeant Buckle happened to be in from Corner Brook –

MS. CHAYTOR: Okay.

SGT JAMES: – at the time, and we throw it out to the members from the outlining detachments, St. John’s – well, Corner Brook and Labrador, if they are in town to touch base with us if they want to do their firearms requal because we have an indoor range; whereas Corner Brook and Labrador, they don’t have an indoor range. They shoot outdoors.

So we try and make it as comfortable for the officers as we can. So if they want to do their requal while they’re in town, we will certainly make the range available to those officers. It just so happened that Buckle was in town and asked to do his requal and Smyth was with him.

MS. CHAYTOR: Okay.

And I take it you satisfied yourself – it’s only four days after the fatal shooting – that Constable Smyth was in an adequate frame of mind to be able to go through his requalification on that day.

SGT JAMES: Yes, I asked him if he was up to it and he said he was fine. I observed him, being cognizant of the situation, that he had just been involved in a shooting, and if there had been any indication there exhibited by Joe that he wasn’t in the right frame of mind, I would have shut it down and told him to step off the line.

MS. CHAYTOR: Okay.

SGT JAMES: But he was fine.

MS. CHAYTOR: And he was fine, and he performed okay and he was able to pass without any difficulty.

SGT JAMES: No difficulties at all.

MS. CHAYTOR: In terms of – there was an internal review carried out by Saskatoon Police force and I understand that you were interviewed by Sergeant Grant Little.

SGT JAMES: Yes.

MS. CHAYTOR: Okay.

And that’s who carried out the review of course. And in that, you also provided him with some information as well.

SGT JAMES: Yes.

MS. CHAYTOR: And if we would bring up, please, P-0657. And this is an email to Sergeant Little dated June 18, 2015. And we’ve spoken about this email before, Sergeant, in terms of the dates that you gave here as to when Constable Smyth qualified. You gave those dates to Sergeant Little –

SGT JAMES: Yes.

MS. CHAYTOR: – as required on the following dates. I understand there are some errors in these dates.

SGT JAMES: Possibly, yes.

MS. CHAYTOR: Well, the 2010 date I don’t believe is consistent with the records. And also April 3, 2015, which would suggest that he had prequalified a couple of days before the event.

SGT JAMES: That's correct. That's an error.

MS. CHAYTOR: That's an error.

SGT JAMES: Yes.

MS. CHAYTOR: So the actual requalification for 2015 happened after the event, not before.

SGT JAMES: That's correct.

MS. CHAYTOR: And, again, in coming up with those dates you would have checked the training schedules. Is that right? The –

SGT JAMES: I would have checked the spreadsheet, yes.

MS. CHAYTOR: The spreadsheet. Okay.

Was Sergeant Little provided with the Training Manual or was he just provided with the use-of-force policy in effect at the time in 2012?

SGT JAMES: I wouldn't be able to answer that.

MS. CHAYTOR: Okay, so you weren't responsible for what he received.

SGT JAMES: No.

MS. CHAYTOR: Okay.

All right.

And when you met with him – because I understand that he interviewed you and asked you questions about the use-of force-training –

SGT JAMES: That's correct.

MS. CHAYTOR: – did he ask you any questions similar to what I have canvassed with you in your interview and again here today in terms of some of the risk assessment points, de-escalation points that are contained in your Training Manual?

SGT JAMES: Not that I can recall. I think he was basically looking at the policy.

MS. CHAYTOR: It was just the use-of-force policy.

SGT JAMES: Policy review, yes.

MS. CHAYTOR: Okay.

Okay.

Sergeant, I think those might be all my questions. I'm just going to have a quick look because I was a bit disjointed and I apologize for that.

Commissioner, I think I'll stop there.

THE COMMISSIONER: Okay.

MS. CHAYTOR: And thank you.

Thank you, Sergeant.

THE COMMISSIONER: All right.

Now, any counsel want to start your questions?

Mr. Williams, you don't – right, you have no questions so – okay, that's one out of the picture.

Anybody else want to start today or do you all want to wait to receive the report? You're going to wait to receive – we're going to have to get you back, Sergeant, when we get that report and we'll have counsel notify you.

SGT JAMES: No problem.

THE COMMISSIONER: Is there anything before Sergeant James leaves this afternoon?

MS. CHAYTOR: (Inaudible.)

THE COMMISSIONER: Okay.

All right, so it's close to the time for our break so let's take 15 minutes and then we'll come back.

Who do we have when we come back?

Oh Ms. –

MS. CHAYTOR: Heather MacLean, yes.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now in recess.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Sorry for the brief delay. We were trying to work out some scheduling here.

We're looking at Monday morning for the redaction argument. I take it, Mr. Simmonds, you and Mr. Kennedy have discussed this and cannot agree. Is that a fair ...?

MR. KENNEDY: I assumed we wouldn't agree.

MR. SIMMONDS: I can't imagine myself and Mr. Kennedy agreeing.

We can talk tomorrow and see if there's any possibilities.

THE COMMISSIONER: Is that a yes?

MR. KENNEDY: We can certainly have a conversation, yes.

THE COMMISSIONER: I think, anyhow, counsel will mediate as they have.

Does Mr. Simmonds and Mr. Kennedy both know – and Mr. Flaherty – both know what the suggestions are for redaction?

MS. CHAYTOR: I'm not certain at this point if they do, unless they've spoke to each other directly.

THE COMMISSIONER: Or whether further redaction. I suggest after we –

MS. CHAYTOR: We'll do it right after we finish today.

THE COMMISSIONER: Before we leave today.

MS. CHAYTOR: I understand from Mr. Kennedy what his concern is and I can certainly –

THE COMMISSIONER: And other counsel as well, of course. You're welcome to pitch in but they may not be as impacted.

Okay, so that's that.

We're suggesting that we also hear the application on the psychiatric expert suggested by Mr. Kennedy, that they both be done within – between 9:15 and 10:15 on Monday. Monday morning is not a good time, I understand, but we just got to face up to our schedule and bite the bullet.

Go ahead.

MS. CHAYTOR: And the first application will have to be in-camera, the first application.

THE COMMISSIONER: The first application will be an in-camera Garofoli-type. I couldn't remember that before.

MR. SIMMONDS: 9:15.

THE COMMISSIONER: Pardon?

MR. SIMMONDS: 9:15.

THE COMMISSIONER: 9:15. I know it's on Monday.

MR. SIMMONDS: I can't imagine anywhere else I'd want to be.

THE COMMISSIONER: So I think that's all we can decide at this point and –

MR. KENNEDY: Commissioner, do you need me to – there's a letter there in terms of Dr. Collins. Do you need me to file any kind of application or letter in relation to the request for the redaction or exclusion or is it fairly clear?

THE COMMISSIONER: On the – wait now, the redaction doesn't relate to Dr. Collins, does it?

MR. KENNEDY: No, no, the (inaudible).

THE COMMISSIONER: You have an application there, right? So you're – I think where there is disagreement you should clearly indicate it somehow just so –

MR. KENNEDY: Is the letter fine, Commissioner?

THE COMMISSIONER: The letter would be okay, I think, yeah.

Just make the formal request with your reasons. And, Mr. Simmonds, –

MR. SIMMONDS: No, that's fine.

THE COMMISSIONER: – you can either respond or wait for the hearing to respond.

MR. SIMMONDS: Well, I'll have a talk with Mr. Kennedy today. I really believe that it's a very small portion. There's a lot of redaction that there's no issue with whatsoever. There's a small portion, which I'm sure, Mr. Commissioner, you're aware of.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: And I'll discuss that with him and we'll see where we're to at the end of that discussion.

THE COMMISSIONER: Yeah.

And that small portion – both of you keep in mind, there may not be much disagreement over the law. It's going to come down to, I think, my discretion, exercising my discretion, in terms of what I see as probative value versus prejudice, you know, but I'll hear you, whatever arguments you have.

MR. KENNEDY: Quite frankly, Commissioner, I don't think there, there will need to be much arguing once the issue is identified because, as you've rightly indicated, it will come – it will be within your discretion in terms of fairness of the hearing.

THE COMMISSIONER: That's what I'm saying. But if they find wrong and if, you know, there's a smoking gun precedent out there, give it to me.

Okay. So we'll get on with our witness and we'll try and deal with any other issues that are left after your discussion today, following this witness.

MS. CHAYTOR: Our next witness is Heather MacLean.

THE COMMISSIONER: Sorry. I made a terrible mistake and came off without my notebook.

MS. CHAYTOR: Okay. I'm sure Diane is listening and Diane will bring your notebook right down.

THE COMMISSIONER: Yeah, I hope she's listening, if not –

MS. CHAYTOR: And along with the binder.

THE COMMISSIONER: Go ahead in the meantime. I'll do it on a RCMP type notebook.

MS. CHAYTOR: I can give you my – do you want my notebook?

THE COMMISSIONER: No, that's okay.

Thank you.

MS. CHAYTOR: Okay.

If I could ask to have the witness affirmed, please.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

THE COMMISSIONER: It's on my desk I believe.

MS. CHAYTOR: It's on his desk.

THE COMMISSIONER: I brought the wrong pile of material.

MS. SHEEHAN: Do you solemnly affirm that the evidence you shall give shall be the truth, the whole truth and nothing but the truth?

MS. MACLEAN: I will.

MS. SHEEHAN: Can you please state your full name?

MS. MACLEAN: Heather MacLean.

MS. SHEEHAN: Thank you.

THE COMMISSIONER: Hello, Ms. MacLean.

MS. MACLEAN: Good afternoon.

MS. CHAYTOR: Commissioner, I ask please to have the following exhibits entered through Ms. MacLean. It is P-0549 through to P-0554.

THE COMMISSIONER: Okay.

So ordered.

MS. CHAYTOR: Thank you.

Ms. MacLean, I understand that in April, or as of April 5, 2015, you were Director of Communications in the Office of the Premier.

MS. MACLEAN: Correct.

MS. CHAYTOR: And you held that position since November 2014?

MS. MACLEAN: Correct.

MS. CHAYTOR: And that's after having been a communications director in the provincial public service since 2003.

MS. MACLEAN: Yes.

MS. CHAYTOR: And you remained in your position in the premier's office until the change of government in December 2015.

MS. MACLEAN: Yes.

MS. CHAYTOR: Your job duties in your positions included being the lead communications person for the Premier's office.

MS. MACLEAN: Yes.

MS. CHAYTOR: And you provided strategic advice to him on some policy issues as well.

MS. MACLEAN: Correct.

MS. CHAYTOR: And as well, you helped him prepare for media and speaking engagements.

MS. MACLEAN: Yes.

MS. CHAYTOR: And you liaised, as well, with Executive Council and the Communications Branch at the time as well.

MS. MACLEAN: Yes.

MS. CHAYTOR: Okay.

And I also understand that you were – considered yourself to be a key advisor to Premier Davis.

MS. MACLEAN: Yes.

MS. CHAYTOR: I understand that you reported to the chief of staff, Joe Browne.

MS. MACLEAN: Correct.

MS. CHAYTOR: And that that was a direct report.

MS. MACLEAN: Yes.

MS. CHAYTOR: And also I understand that Donna Ivey, communications specialist, reported to you.

MS. MACLEAN: Yes, she did.

MS. CHAYTOR: Okay.

One of the issues within the mandate of the Commissioner is to inquire into the relevant policies, protocols or manuals in force in April of 2015 in the Office of the Premier relating to the

monitoring of and response to social media. And I understand that in our interview there's only one policy that you were able to identify that would have fit within that categorization.

And if we could bring up, please, P-0069, Madam Clerk. And this is the social media policy and guidelines. So it's P-0069, Madam Clerk, when you have an opportunity there.

And we've already, Ms. MacLean, for your benefit this policy has already been brought up. I believe it was referred to in Donna Ivey's evidence. And I understand that this came into effect in January of 2014. And if we could turn, please, perhaps to page 5 of this document.

So, Ms. MacLean, can you confirm that to the best of your knowledge this was the only policy in effect that would have pertained to the social media monitoring and response to social media in government at the time.

MS. MACLEAN: That's correct.

MS. CHAYTOR: Okay.

And on page 5 of the document, we can see the reference here to – and I know we've gone through other parts in the – I'm sorry; it might be page 6 then. Yes, sorry, it's page 6.

So here we have monitoring. It is: "A process to deal with feedback, both positive and negative, is required, as well as an approval process established prior to posting responses." And, "It is important to measure and track audience use to determine whether particular social media channels are a productive use of time and resources."

And I understand from having reviewed the document, and from having reviewed it with you in the interview, this is the only reference to monitoring of social media. Is that correct?

MS. MACLEAN: Yes.

MS. CHAYTOR: And I understand that this – within the Premier's office, this process of monitoring, this was Donna Ivey's responsibility.

MS. MACLEAN: It was.

MS. CHAYTOR: And she had authority to monitor and respond to questions, concerns or issues that came up through the various social media channels used by the Premier's office.

MS. MACLEAN: Yes, and it was also an opportunity to respond to any questions with respect to any policy announcements, or announcements or decisions of government.

MS. CHAYTOR: Okay.

And I also understand that for the most part, the use of social media was for promotional purposes by the government to basically get out a message to the public about particular initiatives, campaigns, that type of thing?

MS. MACLEAN: That's correct.

MS. CHAYTOR: And I also understood from what you told me that there was – in your other positions that you were in in the public service prior to joining the Premier's office, that you were aware of similar monitoring taking place?

MS. MACLEAN: Yes, I mean every government department, board, agency or commission would have a social media person who'd be monitoring, putting up social media commentary on a daily basis with respect to any kind of policy decisions or announcements of their particular department.

MS. CHAYTOR: Okay. And I'm just going to ask if you could please – we have to speak a little bit closer into the mic so we make sure that we can hear you.

Thank you.

So, Ms. MacLean, was the monitoring of social media that was happening in the premier's office when you were there any different in terms of its nature or frequency from what you had experienced in the other departments with which you worked?

MS. MACLEAN: No, to be consistent.

MS. CHAYTOR: Okay.

And the Commissioner has heard in terms of the monitoring of social media that Donna Ivey came across a tweet and she was monitoring the premier's Twitter accounts, and we understand he had two Twitter accounts, and this one was @PremierNL?

MS. MACLEAN: Correct.

MS. CHAYTOR: Okay.

And that's when she came across certain tweets belonging to Mr. Dunphy. Was there anyone else who had access to that Twitter account?

MS. MACLEAN: She was the sole person responsible for putting up information as well as monitoring the account.

MS. CHAYTOR: Okay. And did anyone else – did you have access to that Twitter account?

MS. MACLEAN: I believe I might have had access, but I did very little with it. That was really her job and her responsibility as part of her job.

MS. CHAYTOR: And when we say access, would that – any messages posted to that account come up on your cellphone?

MS. MACLEAN: No.

MS. CHAYTOR: Okay.

And do you know whether or not Mr. Davis had access to that Twitter account in terms of it having being able to access it or getting messages on it on his cellphone?

MS. MACLEAN: I don't believe he did, no.

MS. CHAYTOR: Okay.

And what was the purpose of monitoring social media?

MS. MACLEAN: It was more or less to gauge public reaction response to government policy announcements, decisions, speeches, commentary going on with the premier and other ministers and members of government.

MS. CHAYTOR: Were there tools used to monitor social media, such as Hootsuite?

MS. MACLEAN: Not that I'm aware of.

MS. CHAYTOR: Okay.

Are you aware of the use of any software which would help identify issues or trends or patterns around issues?

MS. MACLEAN: No.

MS. CHAYTOR: And was there any monitoring happening in terms of trends or patterns around issues?

MS. MACLEAN: There might have been a little bit of monitoring with respect to Facebook pages in terms of likes and usage; and if there was a video posted, what type of viewership it would receive, but very limited. Social media was a very small part of what we were doing in the Premier's office.

MS. CHAYTOR: Okay.

Were there any notifications set for social media alerts so that you would be aware of certain things?

MS. MACLEAN: Not that came directly to me, no.

MS. CHAYTOR: Okay. And are you aware of whether or not Donna Ivey had any alerts set?

MS. MACLEAN: Not that I'm aware of.

MS. CHAYTOR: Okay.

When you joined your position in the Premier's office, and you went there in November, I understand –

MS. MACLEAN: Correct.

MS. CHAYTOR: – and Donna Ivey was already in her position. Were you given any kind of briefing or instruction by the members of the Protective Service Unit as to what their role would be?

MS. MACLEAN: I don't believe it was a briefing. We probably had a brief conversation with – or I probably had a brief conversation with Constable Smyth in terms of what their role is and what our responsibilities would be.

MS. CHAYTOR: At any point in time did you have occasion to pass along a message of concern to any member of the Protective Service Unit?

MS. MACLEAN: No.

MS. CHAYTOR: Did you receive any instruction as to information that might warrant being passed along? When you say you had a brief discussion with Constable Smyth, did he give you any instructions or help you identify what he might deem to warrant coming to his attention?

MS. MACLEAN: The direction was very simple. If we were out at a public venue and noticed something that we had questions about or made us feel uncomfortable, or we saw or read something, then just to let them know and that they would take it from there.

MS. CHAYTOR: Okay.

And I understand you didn't know Joe Smyth prior to that. You met him in November 2014?

MS. MACLEAN: That's correct.

MS. CHAYTOR: Okay.

Did you notice any change in terms of security surrounding the premier in the aftermath of Mr. Dunphy's shooting?

MS. MACLEAN: No, it was with the discretion of the Protective Services Unit and we had no involvement whatsoever. I didn't notice any changes.

MS. CHAYTOR: You didn't notice any change –

MS. MACLEAN: No.

MS. CHAYTOR: – in terms of any increased security or anything like that?

MS. MACLEAN: No.

MS. CHAYTOR: Okay.

We have seen a couple of emails that went out to members of the premier's office at the time, including yourself, that Constable Smyth sent. And one was dated January 25, 2015, alerting to certain issues and the other one is February 4, 2015, and I reviewed those with you in your interview.

And perhaps I'll just bring up one of them; if we look at P-0072, please.

And I believe on your interview you recalled getting both of the email.

MS. MACLEAN: I do.

MS. CHAYTOR: Okay.

And this one is actually dated this – the February 4th one. And there's some points of consideration related to the Protective Service Unit of ongoing assessments and risk towards the Office of the Premier and there's a number of bullets listed here.

Did any of the content of this email cause you any concern in terms of from your – from a messaging point of view, as director of communications for the premier?

MS. MACLEAN: No, I felt it was advice and that they were doing their job. And certainly there was – the premier at that particular time was the chair of the Council of the Federation, so we

were doing a little bit of national and international travel. And so I thought it was appropriate for them to send that type of a message to us just to make us aware.

MS. CHAYTOR: Okay. All right.

And the second bullet here: “NL is undergoing a period of fiscal adversity and restraint. A struggling economy, whether real or perceived, creates some heightened concern for security of elected officials. Persons whom already hold a grievance towards government can feel further justified in their actions or rhetoric based on a perceived sentiment of an apparent majority.” And the same perception can cause an escalation in the number of persons of interest where herd mentality becomes a factor.

And, I believe you told me that from your perspective you thought that was good advice.

MS. MACLEAN: I thought that was good advice and they were just providing some perspective. And I didn’t give it much more thought that that.

MS. CHAYTOR: Okay. All right.

Now, I understand that the tweet that caught Donna Ivey’s attention – did you have any discussion with her about that at the time on April 3 when she noticed it?

MS. MACLEAN: No, I wasn’t aware of any tweet until, I guess, Sunday, following the shooting.

MS. CHAYTOR: Okay.

And did you know whether or not she had reached out to any executive assistant for Minister Collins about the tweet on April 4?

MS. MACLEAN: No, no information.

MS. CHAYTOR: That wasn’t brought to your attention.

MS. MACLEAN: I didn’t know. I didn’t know anything until the 5th.

MS. CHAYTOR: Okay.

And, Ms. Ivey – if we could bring up P-0077, Ms. Ivey reported directly to you.

MS. MACLEAN: Yes.

MS. CHAYTOR: And – but on her email, when she sends it along to both members of the PSU, Joe Smyth and Doug Noel, on April 3 – let me look at this document here and we scroll down – she copies Joe Browne but she didn’t copy you with her tweet of concern.

Was Ms. Ivey instructed to copy the chief of staff on issues of security or potential issues of security?

MS. MACLEAN: I mean, she had – she was given the authority and the ability to make those types of decisions and advise the chief of staff, Joe Browne, so I felt it to be appropriate.

MS. CHAYTOR: Okay.

Prior to April 3, 2015, had you ever heard of Mr. Dunphy, Donald Dunphy?

MS. MACLEAN: No, I hadn't.

MS. CHAYTOR: Okay.

And he had sent other messages to the premier's Twitter account but you had not heard his name spoken in the premier's office prior to that?

MS. MACLEAN: No, I had not.

MS. CHAYTOR: Okay.

And in terms of your employment in any other department had you ever heard of Donald Dunphy?

MS. MACLEAN: No, I had not.

MS. CHAYTOR: Did you have any knowledge of Constable Smyth going to Mr. Dunphy prior to the shooting?

MS. MACLEAN: No.

MS. CHAYTOR: Did you have any communications with Constable Smyth regarding the tweet or his intentions to investigate Mr. Dunphy prior to the shooting?

MS. MACLEAN: No.

MS. CHAYTOR: We do have an email, and I don't think we need to bring it up, but it is P-0079, it's dated April 4. You are not on the email; however, it is addressed to a Heather.

Can you confirm – and perhaps we can bring it up, it's P-0079. Can you confirm that you were not blind copied or otherwise received this email?

MS. MACLEAN: I had not received the email.

MS. CHAYTOR: Okay.

So even though he says Heather here, you were not – you did not receive this email?

MS. MACLEAN: I did not receive the email, no.

MS. CHAYTOR: Okay.

Prior to the shooting did you have any discussions with Joe Browne regarding this matter?

MS. MACLEAN: No, I didn't.

MS. CHAYTOR: Prior to the shooting did you have any discussions with Premier Davis about the tweet or anything to do with this matter?

I'm sorry?

MS. MACLEAN: No.

MS. CHAYTOR: No. Okay.

So when and how did you learn about Mr. Dunphy's shooting?

MS. MACLEAN: I received a call from Premier Davis on Sunday afternoon following a shooting and his message was very simple; there had been an incident and he wanted to get together in the office quickly to have a discussion about it.

MS. CHAYTOR: Okay.

And so I understand that a meeting did happen very quickly at Confederation Building?

MS. MACLEAN: It did.

MS. CHAYTOR: Okay.

And up to the time of receiving that call from Mr. Davis, you had no knowledge of the circumstances of which Constable Smyth had been visiting Mr. Dunphy.

MS. MACLEAN: That's correct.

MS. CHAYTOR: And what did Mr. Davis tell you when he called?

MS. MACLEAN: I believe he said there had been a shooting and someone had been killed. And he seemed very shaken by that and that he wanted to get our group together quite quickly. It wasn't unusual for him to call on a number of issues with respect to anything going on in government and get together, so this was – obviously this was a different type of circumstance but I took the call and we went in immediately and had a quick meeting.

MS. CHAYTOR: Okay.

And I take it, it would have been more information than just there's a shooting, someone killed, because it had to have had some connection to the premier or the premier's office for –

MS. MACLEAN: Not on the call; the call was very quick, direct to the point and let's get in quickly.

MS. CHAYTOR: Okay.

And so you didn't ask, well, what does this have to do with us or why do we have to meet on this?

MS. MACLEAN: I did not, no.

MS. CHAYTOR: Okay. All right.

And so you didn't know that it involved the PSU?

MS. MACLEAN: When we got together at the office, then we had a conversation about it. That's when I learned, I guess, a few additional details.

MS. CHAYTOR: Okay.

And I believe Paul Davis's cellphone records – which we don't have to bring up, but they're P-0252 – indicate that there were several calls to you within a few minutes. And I believe those calls started at 3:45 p.m. that day.

Does that sound about right, in terms of the time?

MS. MACLEAN: That sounds correct.

MS. CHAYTOR: Okay.

And so before you attended the meeting you didn't know this was the PSU or Constable Smyth was involved. Is that correct?

MS. MACLEAN: I don't believe so.

MS. CHAYTOR: All right.

And I believe in your interview you told me that you did know that, that you knew it was PSU and that he did mention Constable Smyth.

MS. MACLEAN: Could be. Yeah, I don't recall exactly what I said to you.

MS. CHAYTOR: Okay.

And so is it that – which do you now recall as being the right answer?

MS. MACLEAN: He could very well have told me there was – Constable Smyth was a part of the incident.

MS. CHAYTOR: After receiving, then, the calls from Mr. Davis, did you contact anyone else before attending the meeting?

MS. MACLEAN: No, I didn't.

MS. CHAYTOR: Okay.

And why would it be important for you as director of communications to meet with him immediately after?

MS. MACLEAN: Well, we would get together on, like I said, a variety of issues with respect to government. And this obviously would be an unusual, critical incident with respect there was someone who was deceased and there was a member of the Protective Services detail that had been involved in the shooting.

So it would have been important to have key members of his staff participate in a discussion in terms of what our next steps would be because we knew it would be a very sensitive media and public issue.

MS. CHAYTOR: Okay.

And so you were going to prepare to respond to the media and might have to do that quite quickly, I believe, is what you told me in the interview.

MS. MACLEAN: Yes.

MS. CHAYTOR: Okay.

And you also told me that as soon as you went through the office doors that day you'd already had a contact from the media. Is that correct?

MS. MACLEAN: I did.

MS. CHAYTOR: All right.

And who was it that contacted you from the media?

MS. MACLEAN: David Cochrane with CBC.

MS. CHAYTOR: Okay.

And you told me in the interview that David Cochrane had relayed Mr. Dunphy's tweet to you and he seemed to know more than you knew about the incident.

MS. MACLEAN: That's correct.

MS. CHAYTOR: Okay.

And did you speak to him on the telephone?

MS. MACLEAN: I believe I got an email and I also, I think I spoke with him for a couple of minutes as well.

MS. CHAYTOR: Okay.

And if we could bring up P-0550, please. This is an email that you received from him April 5, 2015, 4:43 p.m.

P-0550, please.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. CHAYTOR: 0550.

MS. O'BRIEN: 0550.

MS. CHAYTOR: Sorry, I misspoke or didn't speak loud enough.

And this email, the subject line is: "We need to talk ASAP." And it's clear from the email that David Cochrane knows that it's Joe Smyth, about Joe Smyth and the shooting in Mount Carmel, Mitchells Brook, and he's saying: "We need to talk ASAP."

You tell him: "Best to contact RCMP," and you reply with that around, well, at 5:29 p.m. I understand, however, that you would have also spoken to him that day?

MS. MACLEAN: I believe – yeah, I believe I received a call from him as well.

MS. CHAYTOR: And you know David Cochrane well from your years in communication?

MS. MACLEAN: Yes, I've dealt with him in different departments that I've worked with throughout the years.

MS. CHAYTOR: Do you have any knowledge, having spoken with Mr. Cochrane, how he would have known so soon that Joe Smyth was involved?

MS. MACLEAN: No, I don't.

MS. CHAYTOR: Okay.

And in your discussion with David Cochrane, was he able to give you any further information?

MS. MACLEAN: I can't recall any particular details that he provided to me, but I certainly felt after talking to him that he knew a lot more than our office did in terms of he identified Constable Smyth. I think he identified Constable Smyth's vehicle was out there. He knew there was a tweet, and I believe he knew Donald Dunphy and that he was an injured worker.

MS. CHAYTOR: Okay.

And I think you said that he knew there had been a concern that had been forwarded to Constable Smyth?

MS. MACLEAN: I believe so, yes.

MS. CHAYTOR: And he was aware of Donna Ivey's tweet, was he?

MS. MACLEAN: I don't think he knew where the tweet came from, but I believe he saw Donald Dunphy's tweet.

MS. CHAYTOR: Okay.

Who else attended the meeting that evening?

MS. MACLEAN: Pardon me? Sorry?

MS. CHAYTOR: Who else attended the meeting at the premier's office that evening?

MS. MACLEAN: The Chief of Staff Joe Browne, Deputy Chief of Staff Darrell Hynes, Premier Davis and myself.

MS. CHAYTOR: Okay.

And what was discussed at that meeting? And what, if any, takeaways or outcomes were achieved?

MS. MACLEAN: Well, the purpose of the meeting was to get together and discuss what we knew, which at that point was very little. We knew that Constable Smyth had gone to Mitchells Brook and that there had been a shooting and a man was deceased. We also knew that we were going to be under a tremendous amount of pressure to provide a comment or a statement quickly. And that's kind of what we were talking about, what our next steps may be, what our responsibilities would be, that type of discussion.

MS. CHAYTOR: Okay.

And I understand the meeting was less than a half hour – a quick meeting is what you told me?

MS. MACLEAN: That's probably fair. It was pretty quick.

MS. CHAYTOR: Okay. And so, by the end of the meeting, was there any discussion as to whether the premier would, in fact, speak, when he would speak and what his messaging would be?

MS. MACLEAN: We decided that the premier would speak on Monday morning. And we had a conversation about offering condolences to the family. And we recognized that there was an active police investigation, so we weren't going to be able to speak to any level of detail, but we felt it was important to make the premier available quite quickly to make his statement of condolence and to respond to any questions that the media might have.

MS. CHAYTOR: Okay.

And Mr. Browne was also in attendance at that meeting –

MS. MACLEAN: He was.

MS. CHAYTOR: – and he would have been included in the email trails, so I take it he was able to offer some context around Mr. – or Constable Smyth visiting Mr. Dunphy?

MS. MACLEAN: I don't recall the exact discussion, but I would have imagined it would have probably come from Joe Browne when he was –

MS. CHAYTOR: Was there any discussion about any increased security for the premier that evening?

MS. MACLEAN: Not that I recall, no.

MS. CHAYTOR: Okay.

So then, when did you next have any communications regarding this matter?

MS. MACLEAN: With who? Sorry.

MS. CHAYTOR: With anyone – when did you next discuss this matter?

MS. MACLEAN: I believe I spoke with Premier Davis that same evening on Sunday night and I think I spoke to Joe Browne as well on Sunday evening.

MS. CHAYTOR: Okay. And I believe we have that as well in Joe Browne's telephone records and that he would have called you at 1903 p.m. What were the purpose of those telephone calls that evening?

MS. MACLEAN: Well, they were keeping an ear to what was going on with the media. We were also preparing for the premier to make a statement the next day, so we were talking about timing and logistics, and if there's any – what we should be saying to the public at that particular time.

MS. CHAYTOR: And then did you assist the premier – I understand the premier did speak to the public the next day. And did you assist the premier in preparing for the media scrum?

MS. MACLEAN: I did.

MS. CHAYTOR: Okay. And did you assist him in preparing the speaking notes?

MS. MACLEAN: I don't think we had formalized speaking notes, but we did prepare in terms of what he was going to say.

MS. CHAYTOR: And did you undertake any efforts to get any additional information before he would be able to speak?

MS. MACLEAN: I believe – I believe I was in contact with the RCMP in terms of logistics for when they may say something, what time, what they may say. I was gathering information, but that would probably be it.

MS. CHAYTOR: Okay. Were you also in contact with the RNC?

MS. MACLEAN: I might have been.

MS. CHAYTOR: Okay.

And if we could bring up, please, P-0502; this is an email between yourself and Chief Bill Janes, April 6, 2015, 9:36 a.m. Chief Bill Janes is forwarding you a copy of his speaking notes. And we just see here – we don't have the actual attachment of his notes, but he says: Speaking notes – Heather, Attached is a current draft of my speaking notes. You can call him – he gives a phone number – if you want to chat. And you say: “Much appreciated. Premier will be making statement today as well. Will be in touch....”

Ms. MacLean, was it usual that the chief of police would send you his speaking notes or that the chief of police would consult the premier's office regarding an intended statement that he is going to give to the public on a police matter?

MS. MACLEAN: It wouldn't be usual, but I would say the circumstance that we were in was also not usual, that there was a shooting death where there was a protective unit services member who was involved in a shooting, so it wasn't something that we've dealt with on a regular basis. This was more – this was happening prior to the premier making himself available to the media and to speak to the public that same day.

So I was imagine this would be gathering information in terms of when the RNC or RCMP might be making a statement, what they might say, and what time they might be saying it. So when the premier spoke to the media at 12:30 – which I would imagine would probably follow the RNC and RCMP – that he'd be prepared for any questions that might come at him.

MS. CHAYTOR: So had you requested these notes from Chief Janes?

MS. MACLEAN: I'm not sure if I requested them, or if he just sent them to me.

MS. CHAYTOR: Okay.

And how well would you have known Chief Janes at this point in time?

MS. MACLEAN: I didn't know Chief Janes.

MS. CHAYTOR: And he refers to you as Heather, and if you want to chat, he gives you his phone number. How would he know who you are and how to contact you?

MS. MACLEAN: Well, I would imagine that my name would've been pretty public, where I'm attached to all the premier's – I'm his media contact and my number is available quite publically. So I would imagine he could've got it through there.

I'm not sure if he got it through somebody else, but I don't find it unusual. It's kind of – I felt I was doing my job to gather information.

MS. CHAYTOR: Okay. And so is that what happened then that you requested this from him and he replied? Is that that you're doing, gathering information, as opposed to Chief Janes –

MS. MACLEAN: I'm not sure who reached out first.

MS. CHAYTOR: Okay.

And did you then speak or have the chat with Chief Janes that he invited?

MS. MACLEAN: I can't recall if I spoke to him directly. But I know that I took the speaking points, reviewed them. I didn't provide any commentary back to him in terms of making changes. I used it as a reference point of information in terms of preparing the premier for his media availability at 12:30.

MS. CHAYTOR: Okay. And I take it you passed the information along to Premier Davis?

MS. MACLEAN: I'm not sure if I gave him a copy of the notes or if we spoke of them. But we would've had some kind of discussion about them, I would've imagined.

MS. CHAYTOR: Were there any concerns expressed in the premier's office about any of the content of Chief Janes's notes and what he intended to say?

MS. MACLEAN: Not that I can recall, no.

MS. CHAYTOR: Okay.

And you do reply: Will be in touch – dot, dot, dot – but you don't recall whether or not you went back and spoke to the chief about it.

MS. MACLEAN: No, I think that'd be a pretty common response for me in terms of anybody I was dealing with on an issue.

MS. CHAYTOR: Did you share any information back to Chief Janes in terms of what the premier intended to say?

MS. MACLEAN: I don't believe I did, no.

MS. CHAYTOR: Okay.

And I believe, when I asked on your interview, did you share the premier's speaking notes to Chief Janes or anyone in the RNC, you said you may have.

MS. MACLEAN: I don't think there was any written or typed-up notes prepared for Premier Davis. I think it was – it was a verbal scrum to the media. So we spoke about them. We organized his thoughts verbally. But I don't think there was anything documented that I can recall.

MS. CHAYTOR: Okay.

From a communication's perspective, how did the media scrum go that day?

MS. MACLEAN: I mean, likely as we would have expected to. There was tremendous amount of interest, lots of questions and, you know, people were interested in finding out detail about exactly what happened.

MS. CHAYTOR: Okay.

And I believe in that media scum Mr. Davis stated that it appeared the comment in the tweet was directed towards him and another Cabinet minister and also the people that were most important to you, and he mentioned their families. He referenced his mother, wife and child and made a comment along the lines of they never put their hands up.

In terms of – was this something that you had discussed with Mr. Davis in your preparation for the media scrum? And did you think, or members of the premier's office at that point, think that Mr. Dunphy's threat had been directed at Mr. Davis and his family members?

MS. MACLEAN: I don't think we – I didn't bring up a conversation about his family. It was something, I think, that he was sensitive to so he might have spoke about that prior to the scrum. But it wasn't one of our key message points in terms of when he addressed the public and media in terms of what he was going to say.

MS. CHAYTOR: And is that any information that you would have received from the RNC as to the interpretation of who the perceived threat was against?

MS. MACLEAN: No, I never received any detailed information from the RCMP or RNC.

MS. CHAYTOR: And is that how the premier's office then interpreted the message at the time that Mr. Davis spoke?

MS. MACLEAN: We didn't have a great conversation about interpreting the tweet. Our focus was on the issue itself in terms of what had happened, how we were going to deal with it. And we also recognized the heightened sensitivity with public and media interest. So we were – my focus was really from a communications perspective. I didn't spend much time analyzing or trying to interpret the tweet.

MS. CHAYTOR: Okay.

Also in answering a question from the media that day as to the size or scope of the premier's detail and whether that would change in the aftermath of the incident, Mr. Davis replied that it was something that we've got to give very serious consideration to and the quote from him was it's: "... fair to say we are in a very different time today than we were, you know, a number of years ago."

Was that a message or part of what you assisted him in preparing in your key messages that you refer to?

MS. MACLEAN: No.

MS. CHAYTOR: Okay.

And if we could have P-0554, please. And this is also April 6, 2015. There's a question from CBC and Chief Janes is forwarding this to you as an FYI.

And you can see that Mr. Cochrane is sending to it RNC Media Relations and then that gets sent on to Joe Smyth, Joe Gullage, Jason Sheppard, Bill Janes and then Bill Janes forwards it on to yourself and Luke Joyce. We are gathering and you say: "Ok thanks."

And is this – do you know why you are – the premier's office would be included in getting this information?

MS. MACLEAN: It would be something that we would have to be prepared to respond to should we get a similar question from media. Certainly, if the RCMP release that type of data or information, the media would also look to the premier for comment on that type of data.

MS. CHAYTOR: Okay.

And I believe you told me in the interview then, in that respect it would be a courtesy so the premier wouldn't look unprepared if he got that question.

MS. MACLEAN: That's correct.

MS. CHAYTOR: Okay.

And on P-0551, please – Madam Clerk, this is also April 6, 2015 – you received an email from Sandy Collins. And he's received a media inquiry and he forwards that on to you for advice as to how to respond.

And I'm wondering; first of all, Sandy Collins – I understand Mr. Collins would have been a minister at the time.

MS. MACLEAN: Yes.

MS. CHAYTOR: And so would it be the normal channel that he would seek instructions or direction from you as to how to respond as opposed to his own director of communications?

MS. MACLEAN: Yes, it would.

The director of communications that he worked with in his department would be non-political staff and would be assigned to deal with departmental issues. This was a political issue and it was outside the scope of the department so it wouldn't be unusual whatsoever.

MS. CHAYTOR: Okay.

And you reply to him that it's: "Best to respond that you will not be providing comment as the incident is under police investigation."

MS. MACLEAN: That's correct.

MS. CHAYTOR: Okay.

And was that concern – in terms of limiting public communications, was the concern just limited to public communications that you wouldn't communicate on the matter? And I take it's because you don't want to interfere with the police investigation. Is that it?

MS. MACLEAN: I don't think we ever had a conversation about limiting public communications; in fact, we were keen to make the premier accessible quite early the very next day. We were aware that it was under police investigation and we were sensitive to that fact that we didn't have the information or detail to provide any commentary. And there was also an investigation underway so it would be inappropriate to provide any kind of commentary or observation about that.

MS. CHAYTOR: Okay.

So let me just better frame my question here. So when you tell Mr. Collins that it's best – or you will not be providing comment as the incident is under police investigation, what was the concern in not providing comment as it's under police investigation?

MS. MACLEAN: That would be a typical response. If there's – if the police are investigating and looking at a matter, typically, right across government we wouldn't be providing any kind of commentary on it.

MS. CHAYTOR: Right. Okay.

MS. MACLEAN: Even outside of this issue.

MS. CHAYTOR: Okay.

And so – and then my question is: Would that also not only in public – I take it's because you don't want to interfere in any way with the investigation?

MS. MACLEAN: That's correct.

MS. CHAYTOR: Okay.

And would that also pertain to conversations with individuals who might be – private conversations with individuals who might be witnesses to the investigation?

MS. MACLEAN: I didn't have any private conversations with any other individuals.

MS. CHAYTOR: Okay, but you would expect that it would pertain to that as well, not –

MS. MACLEAN: If somebody was asking for advice in terms of what they should – is that what you're asking?

MS. CHAYTOR: Or to communicate with people who might be witnesses. You wouldn't communicate during the active investigation about the investigation.

MS. MACLEAN: No, certainly not.

MS. CHAYTOR: Or about matters related to the investigation.

MS. MACLEAN: Right.

MS. CHAYTOR: Right. Okay.

Was Mr. Collins the minister responsible for Workers' Compensation at the time?

MS. MACLEAN: I'm not sure.

MS. CHAYTOR: Okay. If we could have P-05 –

MS. MACLEAN: I think he was Child, Youth and Family Services.

MS. CHAYTOR: Okay.

So in terms of your advice to Mr. Collins, was that a change in position of the communications plan for the government at that time? Because we know that, of course, Premier Davis had spoke earlier in the day.

MS. MACLEAN: The premier's comments early in the day also said there was an active police investigation underway and that he wouldn't be providing any commentary on the matter because it would be inappropriate to do so. So there was no change.

MS. CHAYTOR: Okay.

And if we could have P-0552, please. And this is you contacting Greg Hicks who was the media spokesperson, I understand, for the investigation for the RCMP.

And if we scroll to the bottom you're asking him: "Hi Greg – understand there is an update this afternoon. Can you share any information?" And this is on April 7 now.

And then – I'm sorry, it doesn't look like we have the full document here. We'll try P-0553.

And why are you making this request from the RCMP to get information before they have spoken publicly?

MS. MACLEAN: Well, I believe in the second email you'll see that it was more with respect to timelines about making a briefing.

MS. CHAYTOR: I'm sorry, about ...?

MS. MACLEAN: It was more about timelines and logistics in terms of when they were going to be making a statement and what they were going to be saying. We were coordinating timing.

MS. CHAYTOR: Okay. And timing for what? Is it anticipated that –

MS. MACLEAN: What they were going to be saying and when, just so the premier is aware. Even though the premier may not have had a separate additional scrum with respect to the Donald Dunphy shooting, he may have been out publicly speaking at an event and would have been – he would have been speaking to the media at a scrum, maybe for a different issue or announcement.

So it's just preparing, making sure we have all the information, recognizing – understanding when and what the RCMP are going to say. If the RCMP were to make a statement it wouldn't be unlikely for us to get a request from the media within a few minutes looking for the premier's response to the RCMP comments. So it was just really doing my job to be organized and make sure the premier was briefed and up to speed with what was going on.

MS. CHAYTOR: And Greg Hicks then provides to you as well as the RNC Media Relations what will be going out in 10 minutes. So you're given an advance on – he says: Please keep it in your respective departments. And so then he does give you an advanced copy of the media briefing that's going out.

MS. MACLEAN: Correct.

MS. CHAYTOR: Yes, okay.

And did you have any concerns of the appropriateness of the premier's office requesting and receiving information on this matter from the police force that's investigating the incident, before the public is actually informed about the incident?

MS. MACLEAN: No, I didn't. We we're looking for particular details on the incident. We were looking for logistical information in terms of what they were going to say and when and who'd be speaking to so we'd have the Premier prepared should he get a follow-up call from the media.

MS. CHAYTOR: Did anyone in the premier's office express any concern to you about not communicating with the RCMP during the investigation for any purpose?

MS. MACLEAN: No, they didn't.

MS. CHAYTOR: And I understand we don't have – you did forward this on to the Premier and to Mr. Browne?

MS. MACLEAN: I believe I did, yes.

MS. CHAYTOR: Yes, okay.

If we could have, please, P-0549. I'm going to ask you whether or not you have – before we bring that up – whether or not you've discussed this matter with Joe Browne and what was discussed – Joe Smyth, I'm sorry? Joe Smyth and what was discussed?

MS. MACLEAN: Sorry, when –

MS. CHAYTOR: Have you ever discussed the matter with Joe Smyth and, if so, what did you discuss with him; meaning the matter of the shooting?

MS. MACLEAN: Discuss the shooting?

MS. CHAYTOR: Yes.

MS. MACLEAN: Yes, I did speak to Joe Smyth.

MS. CHAYTOR: Okay. And when was that and what was discussed?

MS. MACLEAN: I believe I spoke to him within a couple of days of the shooting. I believe he had called me and I returned his call. And it was a discussion about, wasn't into a high level of detail, but we spoke, I asked him if he was okay. And this was obviously a situation that I'd never been involved or engaged with before, so I was concerned how he was doing. And I expressed my sympathy that I felt it would have been a very difficult situation for him and his family. And he relayed to me that it was certainly a situation he wasn't expecting to have walked into.

It was very, it was a human conversation. That's the best way I can categorize it.

MS. CHAYTOR: Okay. All right.

And we did have, at the time that we interviewed you, it appeared that he had tried to call you. It was April 6 and it was at 3:04 p.m. UTC time and that you then called him back. So it appeared he had initiated the call and then you called him back. And ultimately he then called you again and you connected at 7:40 – that’s all right, we’re okay, it’s just the numbers of the calls here – 7:40 p.m. And I think that happened 7:40 p.m. UTC or 5:10 p.m. that night, is when you talk and you spoke for about, over seven minutes that night.

MS. MACLEAN: Okay.

MS. CHAYTOR: Okay.

And in terms of that, I believe you told me on your interview that he mentioned in terms of what happened in Mr. Dunphy’s house. He walked into a situation that went wrong quickly. And Mr. Dunphy pulled a gun and was shot and killed.

You recall telling me that in your interview?

MS. MACLEAN: Yes, they were – that were my words, not his, yes.

MS. CHAYTOR: Right. Okay. So that’s, basically, the message you took from your conversation with him that evening?

MS. MACLEAN: Yes.

MS. CHAYTOR: Okay.

MS. MACLEAN: We didn’t have a conversation about details or what transpired, it was, it was very much a how are you doing conversation.

MS. CHAYTOR: Ms. MacLean, did you recall having had any other communications in this time frame or in the immediate aftermath with Constable Smyth?

MS. MACLEAN: I did contact him one additional time when there was – the email that he had written to RNC was released publicly. And I noticed that it had been posted on a media site. So I did contact him to make sure that he was aware that it was made public.

MS. CHAYTOR: Okay. And that’s in April – that’s April 10?

MS. MACLEAN: That sounds right, yes.

MS. CHAYTOR: That you contacted him. Okay.

And since we did the interview, the Commission has found BBM messages between you – or we’ve had disclosed to us BBM messages between you and Constable Smyth. And so I didn’t have those at the time of your interview. So I didn’t have an opportunity to ask you any questions.

If we could bring up, please, P-0581?

And I take it you don’t recall these BBM messages, Ms. MacLean?

MS. MACLEAN: No, the first time I, I saw them was a couple of days ago when I got your package.

MS. CHAYTOR: Okay.

So we're now aware of – there were several other communications that you had with him by this way of this messaging. And those occurred on April 6, 7 and 8.

And I'm just going to ask you, Madam Clerk, if you could go to page 4, please?

Okay. And this begins on the bottom of page 4. I'm just going to scroll down here. And right here we have Joe Smyth with Heather MacLean. And this is, appears to be, he tried to reach you by BlackBerry before the scrum.

“Hey, anything I can help you with ffor scrum?” So this is on April 6, before Ms. – before the Premier speaks. And then he comes down – you come down and you reply: “Sorry could not pick up - in scrum. Went well. You doing ok? Tough stuff...” And that's twenty minutes after.

So this then is one minute, when I checked the time record. So this here is one minute after he tried to reach you by phone. So this is you telling him that you couldn't pick up because you were in the scrum. So that was the first phone call, it appears, when he first tried to reach you. It was a minute before he –

MS. MACLEAN: The times, the times look a little strange here to me.

MS. CHAYTOR: Those times are UTC.

MS. MACLEAN: Okay.

MS. CHAYTOR: So you have to – yes, there's 2½ hours difference.

MS. MACLEAN: Okay, that makes sense.

MS. CHAYTOR: Okay, yeah. So that'll make more sense to you than when you look at it that way. So it's 2½ hours earlier.

So this is – he's sending you a BBM message. And this BBM message is one minute in the difference between his phone call to you that you missed and you're indicating sorry, you couldn't pick up, you were in the scrum. And that's 20 minutes later.

Actually, I think it's that one that's 20 minutes later. Okay.

So it looks like that the initial purpose of his contact was to see whether or not he could assist with the scrum, according to this. And he replies then immediately to you: “Indeed, how is everybody? I'm free to talk to anybody that wants to.” And then later that day, you then had your seven minute conversation with him.

So does that help refresh your memory in terms of the chain of communications between you and Constable Smyth and what you may have spoken to him about?

MS. MACLEAN: No, I don't, I don't change my position that we spoke about how he was doing. We didn't speak about any details with respect to the incident.

MS. CHAYTOR: Okay.

And did you tell Mr. Davis or Joe Browne, Mr. Browne about Constable Smyth's offer to talk to anybody who wants to talk to him?

MS. MACLEAN: No.

MS. CHAYTOR: Okay.

Did you tell Mr. Davis or Mr. Browne about any communications that you had with Constable Smyth?

MS. MACLEAN: I'm not sure if I let anybody know that I had been speaking with him. Can't say with certainty that I did.

MS. CHAYTOR: And in terms of Constable Smyth's offer to talk to anybody who wants to, did he actually come to the premier's office in the days following and speak to anybody?

MS. MACLEAN: No.

MS. CHAYTOR: Okay.

Okay. And then you contact him the next day, April 7, and you say: "did you come across any other correspondence from DD when you were looking into him?"

And, Ms. MacLean, are you asking about Donald Dunphy?

MS. MACLEAN: I am, yes.

MS. CHAYTOR: Okay. And this is at – you can see here he says: "Not outside of social media."

So you appear to be trying to get some information about Mr. Dunphy. And why would you be doing this and did anyone instruct you to do this on April 7?

MS. MACLEAN: No, I would imagine it would've been my own, my own question. I don't recall the text back and forth, but at that particular time I was inundated with a number of meeting inquiries looking for some additional information. So I would guess that I would have contacted him to find, to get an answer to that particular question, but it would have been on my own.

MS. CHAYTOR: But why specifically would you be looking for any correspondence from Mr. Dunphy?

MS. MACLEAN: I'm just looking for some information to be prepared and organized with respect to the issue.

MS. CHAYTOR: Okay.

And, Ms. MacLean, you're cognizant, of course, at this point in time about the active police investigation happening and you would realize, I take it, that Constable Smyth would be the subject of that investigation or at least a key witness. So did you think that it was appropriate for you to be seeking any information from him regarding what he may have done in terms of any threat assessment leading up to visiting Mr. Dunphy?

MS. MACLEAN: No, I think it is fair to say that I didn't give it much thought; it was a unique – I have never been in a situation like this before, so I felt I was just trying to find some information, but I didn't give it – I didn't question myself in terms of reaching out to him to ask him that question.

MS. CHAYTOR: Why would the premier's office be entitled to that information?

MS. MACLEAN: Well, I don't know if it was the premier's office looking for the information; it was Heather MacLean looking for the information as a communication director.

MS. CHAYTOR: In your role as communications director –

MS. MACLEAN: Right.

MS. CHAYTOR: – you weren't doing this personally; you're not personally looking for this information.

MS. MACLEAN: No, but I was doing it in the capacity in my position. But I knew little about Don Dunphy and I was, I guess, reaching out to see if there was anything else he could provide me.

MS. CHAYTOR: Okay.

And again, he tells you: "Not outside of social media. I would have gone looking for it to form part of a full threat assessment." And then you reply: "K thanks." All okay, he asks you – "All ok?" And you say: "Yes- talking to cochrane this am. He may file atippa request on correspondence/contemplating story on common nature of threats." And then you ask him: "Police record?" So you're wondering if Mr. Dunphy had a police record, I take it?

MS. MACLEAN: Yes.

MS. CHAYTOR: And he replies: "No record."

So why would it be relevant to you as director of communications of the premier's office as to whether or not Mr. Dunphy had a police record?

MS. MACLEAN: I would imagine it was a question I was being asked by the numerous media outlets and I was trying to garner information for myself.

MS. CHAYTOR: So media outlets are asking the director of communications of the premier's office whether or not Mr. Dunphy has a criminal record?

MS. MACLEAN: I can't say that it is fact, but I would surmise that might have been part of my – of some of the calls I was receiving, yes.

MS. CHAYTOR: And do you think that was an appropriate inquiry for you to make of Constable Smyth?

MS. MACLEAN: I didn't at that time, no.

MS. CHAYTOR: You didn't think it was inappropriate?

MS. MACLEAN: I didn't think it was inappropriate at that time, no.

MS. CHAYTOR: Okay. And what do you think now?

MS. MACLEAN: I felt I was doing my job at that particular time; I was gathering information.

MS. CHAYTOR: Did you pass any of this information that you received on to either Mr. Davis or Mr. Browne?

MS. MACLEAN: Well, I didn't receive any information back – well, no, I guess I did. No, I didn't have any further conversations with respect to this conversation with Constable Smyth.

MS. CHAYTOR: And again, what was your purpose then in asking this information?

MS. MACLEAN: To prepare myself in terms of responding to media inquiries and Premier Davis – to make sure he was prepared.

MS. CHAYTOR: And did the RNC give you any information on people's criminal records upon request, previously or since?

MS. MACLEAN: I've never made a request to the RNC for anyone's criminal records.

MS. CHAYTOR: Okay, but you understand that Constable Smyth is a member of the RNC?

MS. MACLEAN: Yes, this was related to this particular incident; that would be the only time I've had any conversations about criminal records.

MS. CHAYTOR: So you have never previously or since asked any member of the RNC to provide you information on somebody's criminal record?

MS. MACLEAN: Absolutely not.

MS. CHAYTOR: And that would be because ...?

MS. MACLEAN: I had no reason to do so.

MS. CHAYTOR: We continue on down then on page 6:

Joe Smyth says to you, and I take it he is referring to David Cochrane: "I wish I could talk to him."

Is that correct? Is that how you understood what's being –

MS. MACLEAN: That's how I take the text.

MS. CHAYTOR: All right.

And he says: Would love them to have higher insight into intelligence-based investigations and threat assessment.

And then you tell him that he, being, I understand, David Cochrane, is putting a call into Jason Sheppard. And Constable Smyth says: "I know I can't" – and I take that to mean he can't speak with David Cochrane – "while an investigation is ongoing, but I could so easily answer their questions."

First of all, with respect to the information here that he is putting a call into Jason Sheppard, is that something that David Cochrane told you?

MS. MACLEAN: I would imagine he would have told me that. I can't – I can't recall the conversation with David Cochrane, but it wouldn't be unusual for him to relay that type of information.

MS. CHAYTOR: Okay. And did you have any understanding as to what would be the purpose of his call to Superintendent Sheppard?

MS. MACLEAN: I can't recall the details of the conversation with David Cochrane, so I can't answer that.

MS. CHAYTOR: So you don't have any recollection of any details or any of the discussion you had with David Cochrane?

MS. MACLEAN: No.

MS. CHAYTOR: Okay.

And Constable Smyth says that he knows he can't speak while the investigation is ongoing, but he could easily answer so many questions and then you reply: "Hear you..." And what did you mean by that and is there anything significance to the dots?

MS. MACLEAN: It would be I understand what you're saying, that I'm sure he would like to talk to David Cochrane and respond to the questions.

MS. CHAYTOR: Okay.

And, Ms. MacLean, as you mentioned earlier, ultimately, Constable Smyth did write a lengthy email that he distributed broadly amongst members of the RNC and a few other people, and the reporter that that email is ultimately leaked to is David Cochrane.

It addresses two main points and two points that are included in his communications to you, including his issues that he would have liked to have been able to directly address threat assessments and also intelligence-based investigations. And he also had said, of course, that he couldn't speak directly while it was under investigation.

Ms. MacLean, did you see Constable Smyth's email before it became public?

MS. MACLEAN: No, I didn't.

MS. CHAYTOR: Did you assist Constable Smyth in any way with his drafting of that email?

MS. MACLEAN: No, I didn't.

MS. CHAYTOR: Did you know of its existence at all before it went public?

MS. MACLEAN: No, I didn't.

MS. CHAYTOR: Okay.

The next communication then you have is, as you've said earlier, is the next day. And you do have a telephone conversation with him as well. And on April 10, Constable Smyth asked you – so the next communication we've got a gap between the 7th to the 10th. He asks: "Has cochrane said what he's doing with it?" And you reply: "Have not heard.. have not spoken with him. Believe he was dealing direct with rnc." And Constable Smyth says: "Ok, thanks."

So the email, apparently, hasn't been public at this point in time because Constable Smyth is wondering what's going to happen with it or what David Cochrane might do with it. Did you know how the email ended up in David Cochrane's possession?

MS. MACLEAN: I never knew there was an email until I read it posted on the media. I think it was on CBC.

MS. CHAYTOR: How did you know that the RNC is dealing with it?

MS. MACLEAN: I would imagine this is probably referring to Jason Sheppard.

MS. CHAYTOR: And why do you imagine that?

MS. MACLEAN: Because that's the only thing that makes much sense to me.

MS. CHAYTOR: Okay. So can you connect those dots for me –

MS. MACLEAN: In our previous texts –

MS. CHAYTOR: – because it's still not making sense to me? Can you just connect the dots, please?

MS. MACLEAN: Well, our previous texts was in with respect to David Cochrane speaking to Jason Sheppard of the RNC. So I would imagine I'm still talking about that same conversation.

MS. CHAYTOR: Okay.

If we could go to P-0549, please?

And Ms. MacLean, before – and I'm still on this April 10 email piece, but I just want you to answer my question: Do you know how David Cochrane received the email?

MS. MACLEAN: I do not.

MS. CHAYTOR: And if we could have page 2 of this document, please. And this is April 10, 2015, 2:39 p.m. UTC which is nine minutes after noon Newfoundland time. So this is before your BBM exchange with Constable Smyth.

MS. MACLEAN: I'm sorry; I'm not seeing it come up.

MS. CHAYTOR: Okay, I'm going to find it for you then. I understand it's supposed to be on page 2 in the middle of the page, item number 95.

Okay? Heather Maclean, right here.

So you have a 9½-minute discussion with Constable Smyth. And this is before – when I do the time calculations on it this is happening just nine minutes after noon. So this is before your BBM exchange with Constable Smyth. You had spoken with him for nine minutes.

So what was your purpose of your call to him at this time?

MS. MACLEAN: This is the call that I reached out to him and expressed that there was – his letter that he had written to the RNC was made public and it was – it was on a news site. I

wanted to make sure he was aware of it. And we spoke about the text or the email that he had written.

MS. CHAYTOR: Okay.

And that's what I understood you to tell me on your interview too; that you were reaching out here to tell him that it was already public, that you had seen it online.

MS. MACLEAN: That's the truth.

MS. CHAYTOR: Okay.

And back in – when we look at the BBMs, though, this happens before your BBMs. And he seems to be querying: Well, what's David Cochrane going to do with it? So are you saying that it was already public at the time you're having this 9½-minute conversation with –

MS. MACLEAN: Yes.

MS. CHAYTOR: Okay.

And I note from other references that I leave – and I stand to be corrected, Ms. Maclean, because perhaps that's correct, but I understood that the article was actually published later that afternoon. But are you saying that it was posted elsewhere before CBC posted it?

MS. MACLEAN: It was public when I reached out and I spoke to Joe Smyth.

MS. CHAYTOR: Okay.

And if we could just go back, then, please, to P-0581; page 7, please.

And I understand this is the next communication; Constable Smyth contacts you then later that day. And we're talking at 8:53 p.m. UTC which would be 6:33 p.m. Newfoundland time.

And he asks you: "Do you have a cell for Cochrane? I want to at least thank him for not releasing my name." That may have saved my family a lot of grief. And then you provide him with a phone number.

So it appears at this point in time Constable Smyth didn't have a contact for David Cochrane and you provided it to him.

MS. MACLEAN: Correct.

MS. CHAYTOR: Okay.

Ms. MacLean, is there anything else that you can recall independent of what I've just shown you in terms of this exchange? If not I'm going to move on.

MS. MACLEAN: No.

MS. CHAYTOR: Okay.

What was the focus of the government's – from a communications point of view in the days and weeks following Mr. Dunphy's shooting?

MS. MACLEAN: What was the focus of government?

MS. CHAYTOR: The government from a communication – you're in communications so from a communications point of view.

MS. MACLEAN: We were dealing with multiple issues outside of the Donald Dunphy's shooting. We were getting ready for a budget, we were making announcements in long-term care, we were negotiating teachers and pension deals, there was flooding in Central; there was hundreds of issues that we were managing.

MS. CHAYTOR: Okay.

And I take it whatever the issues were – including the issues regarding Mr. Dunphy – you continue to prepare Mr. Davis for his public communications or any communications in the House of Assembly?

MS. MACLEAN: It was an issue that was on our radar certainly because we knew that anywhere the premier went he could be asked questions about it. There was a tremendous amount of public and media interest in the issue but it certainly wasn't the main focus and priority of our office.

MS. CHAYTOR: Okay.

And were you – you were – as part of his management team and saw yourself as one of his key advisors. Following the shooting, were the circumstances of Mr. Dunphy discussed in any meeting in which you were present in any other context other than the communications issue?

MS. MACLEAN: We never had – we never had a meeting that I can recall specific just talking about the Donald Dunphy incident. We would have been discussing on a regular basis but it wouldn't have been our focus or priority issue that we would have been dealing with.

MS. CHAYTOR: Was his case ever discussed in the premier's office in your presence, in terms of the situation that could have potentially led to his long-standing grievance, with any kind of view to determining if there were any issues that might be – have need to be addressed from a government point of view?

MS. MACLEAN: No.

MS. CHAYTOR: Okay.

Those are all my questions.

Thank you Ms. MacLean.

THE COMMISSIONER: Counsel?

MR. KENNEDY: I just have one or a couple of questions, Commissioner.

I was just going to introduce myself, Ms. MacLean, but I guess we know each other.

How long had you worked with or not worked necessarily with, but in conjunction with Constable Smyth in the Protective Services Unit?

MS. MACLEAN: I think I was introduced to him probably in my first week of work with the premier in November of 2014.

MR. KENNEDY: And so how much or how often would you have had dealings with Constable Smyth yourself?

MS. MACLEAN: Maybe not daily but maybe a few times a week for sure.

MR. KENNEDY: And how did you find him in your dealings?

MS. MACLEAN: Professional, courteous, logical. I respected him.

MR. KENNEDY: How did he appear to you to handle stress or pressure or things like that?

MS. MACLEAN: He was professional, like I said, logical. I never saw him in a stressed-out situation but I felt very comfortable that anybody under his protection or guidance would be very well taken care of.

MR. KENNEDY: Had you travelled either outside the province or outside Canada with Constable Smyth at any time as part of Protective Services Unit?

MS. MACLEAN: Yes.

MR. KENNEDY: And would you – how often would that have occurred?

MS. MACLEAN: Multiple – dozens of times perhaps.

MR. KENNEDY: Did he appear to you to take his work seriously?

MS. MACLEAN: Very seriously.

MR. KENNEDY: Do you know – and, again, I don't know if you know the details of his work, but were you aware of the preparations that he would take, for example, in terms of doing intelligence works and things like that, preparing for these trips that the premier would go on.

MS. MACLEAN: Yes. And my observations of him were that he was – took a lot of time, very well prepared, very organized. He was the – he was always two and three steps ahead of our contingent in terms of being ready.

MR. KENNEDY: And were you – and I'm assuming you did – attend functions with the premier where there would have been a lot of people in our province.

MS. MACLEAN: Correct.

MR. KENNEDY: And we understand, or I understand that at this point in time in April of 2015 there are only two members of the Protective Services Unit being Acting Sergeant Smyth and Corporal Doug Noel of the RCMP.

MS. MACLEAN: Yes.

MR. KENNEDY: So would there oftentimes be events where there would only be one of them present?

MS. MACLEAN: Yes.

MR. KENNEDY: Yeah.

Now, had the – we also know, Ms. Maclean, that at one point the Protective Services Unit can – there were four dedicated members. Did that occur? Do you know if they had four members while any time you were present there working with Premier Davis?

MS. MACLEAN: At one particular event? No.

MR. KENNEDY: No, but in terms of – there was a point in time we know there's four of them, that there was a Tammy Madden, Eddie Benoit, Shannon McEntegart, Lindsay Anstey. There was a bunch of these people worked there at different times.

MS. MACLEAN: Yeah, I think they rotated in and out so. But, yeah, it was always two.

MR. KENNEDY: Yeah.

So I also understand that the – there was a point, though, that the Protective Services Unit was reduced from four members to two full-time members. Do you –?

MS. MACLEAN: I believe so but I don't know the details of that.

MR. KENNEDY: Yeah.

MS. MACLEAN: I think that might have happened before I joined –

MR. KENNEDY: Okay.

MS. MACLEAN: – the premier's office

MR. KENNEDY: So in any event – yeah, and you could be correct on that. So in any event you'd be at events where Constable Smyth would be there by himself?

MS. MACLEAN: Correct.

MR. KENNEDY: Were there lots of people at some of these events?

MS. MACLEAN: Yes.

MR. KENNEDY: How many, approximately? What was the big – you know, an average event?

MS. MACLEAN: Could be dozens, could be hundreds.

MR. KENNEDY: And were there any times where there would be people who, as there is wont with politicians, would be vocal and perhaps even critical?

MS. MACLEAN: Yes.

MR. KENNEDY: Did you ever witness any events where Constable Smyth had to intervene or just deal with people; get them to calm down, things like that?

MS. MACLEAN: No.

MR. KENNEDY: Okay.

So, again, are you aware of what preparation he would put into getting ready for these meetings or discussions – or the events that were taking place?

MS. MACLEAN: I knew – we provided or we had prepared event scenarios with respect to any events that the premier would be attending or speaking and the Protective Services Unit would take those event scenarios and then do some additional work on that. But that would provide some information on location and number of people and layout of the floor.

I know they took that then and they took a couple of additional steps to check out the location, to check out exits and entrances, to get a sense for who was going to be there, where the premier was going to be located. They did a fair bit –

MR. KENNEDY: Okay.

MS. MACLEAN: – of work pre-event.

MR. KENNEDY: So you've indicated that Constable Smyth, or I think he was acting sergeant at the time, was always professional. Was he courteous?

MS. MACLEAN: Absolutely.

MR. KENNEDY: Polite?

MS. MACLEAN: Yes.

MR. KENNEDY: Did you ever see him lose his temper or get angry at any time or in any way?

MS. MACLEAN: Never.

MR. KENNEDY: No.

Those would be my questions.

Thank you very much, Ms. MacLean.

THE COMMISSIONER: Any other counsel?

MR. FREEMAN: No questions from the RCMP, Mr. Commissioner.

Thank you.

THE COMMISSIONER: Okay.

MR. AVIS: No questions, Mr. Commissioner.

THE COMMISSIONER: Mr. Avis.

MR. DROVER: Likewise, no questions.

THE COMMISSIONER: Mr. Flaherty?

MR. FLAHERTY: Good afternoon, Ms. MacLean.

MS. MACLEAN: Good afternoon.

MR. FLAHERTY: My name is Cletus Flaherty; I'm counsel for the Don Dunphy Community Coalition. I just have a couple of questions.

So just be clear, did Donna Ivey ever say to you or describe the tweets of concern that is subject to this inquiry – did she ever call them or describe them to be a threat?

MS. MACLEAN: No.

MR. FLAHERTY: Okay.

Now, we understand that your department or communications officers do monitor social media. Was it your practice, your policy and procedure, either yourself or others in the communications in government, to gather and hold files relating to vocal – people who were vocal on social media who may have an unkind view of the government or its policies?

MS. MACLEAN: Not that I'm aware of. No.

MR. FLAHERTY: Leading up into the Donald Dunphy shooting were you ever aware or did you ever any discussions with people regarding, what I guess I could call, problem commenters, people who are constantly on *Open Line* or constantly on social media who have an unkind view of the government and its policies?

MS. MACLEAN: No.

MR. FLAHERTY: So earlier in your evidence, Ms. MacLean, you referenced a call that you had with Joe Smyth – Constable Smyth, sorry – and you stated that the discussion was largely about, you know, feelings; how are you feeling, how Smyth was feeling.

Did Joe Smyth call you? Is that how that phone conversation occurred?

MS. MACLEAN: According to the phone records he had called me, yes.

MR. FLAHERTY: He called you and in that – you answered the phone and then you had a conversation.

MS. MACLEAN: No, he called me. I never picked up the phone.

MR. FLAHERTY: Okay.

MS. MACLEAN: I believe I returned his call.

MR. FLAHERTY: Okay.

And so what was the purpose in Constable Smyth phoning you? Did he say why he was phoning you?

MS. MACLEAN: No, you'd probably have to ask him that question.

MR. FLAHERTY: Okay.

Well, what did you glean from your communication with him? What did he want? Was he calling you looking for information?

MS. MACLEAN: No.

MR. FLAHERTY: Or was he calling you just because he wanted to discuss his feelings?

MS. MACLEAN: I don't think he called me to discuss his feelings; I was concerned about his feelings.

MR. FLAHERTY: Oh, okay. So then why did he phone you?

MS. MACLEAN: I think that I returned – I returned his call. I believe I carried the conversation –

MR. FLAHERTY: Okay.

MS. MACLEAN: – in terms of asking him how he was doing. And, certainly, I felt for him and his family.

MR. FLAHERTY: Uh-huh.

MS. MACLEAN: I recognized it was a difficult situation. And it was that type of conversation but I believe I was the one who led the conversation.

MR. FLAHERTY: Okay.

But he had initially called you and you were returning a phone call.

MS. MACLEAN: That's my understanding according to the phone records.

MR. FLAHERTY: Okay.

And so when you made that phone call did you say: Constable Smyth, I missed your phone call?

MS. MACLEAN: I don't recall.

MR. FLAHERTY: So you didn't ask him why he phoned you initially, prior to your phone conversation?

MS. MACLEAN: No.

MR. FLAHERTY: And your evidence is that the phone conversation that you ultimately had was just with respect to how Constable Smyth was doing?

MS. MACLEAN: Correct.

MR. FLAHERTY: During your direct examination, the issue of Constable Smyth saying – and I think, actually, your evidence was that you paraphrased it – he said that things went wrong quickly

MS. MACLEAN: He didn't say things went wrong quickly. I said things went wrong quickly. That was my interpretation of the conversation.

MR. FLAHERTY: Okay, that was your interpretation.

So do you recall what he said to you, that you would come up with the opinion that things went wrong quickly?

MS. MACLEAN: I don't recall the particular language that he used –

MR. FLAHERTY: Uh-huh.

MS. MACLEAN: – or the exact words that he used, but that was my interpretation of he went for a visit to Mr. Dunphy, they had a conversation and things turned bad quickly. And he was put in a situation that, obviously, he didn't expect and he had no other choice but to do what he did.

MR. FLAHERTY: Okay.

And when you – your interpretation is that he communicated to you that things went wrong quickly. When you say went wrong quickly, are we talking immediately things went wrong, within seconds, within minutes, within – what do you mean by that? I'm just –

MS. MACLEAN: I'd be speculating. I really can't say.

MR. FLAHERTY: Okay.

MS. MACLEAN: That was really my language in terms of how I felt the conversation went.

MR. FLAHERTY: And so we see in the BlackBerry messages that you had asked Joe – Constable Smyth – whether or not he had any other correspondence from Donald Dunphy. So I mean, I guess what you were asking for was were there any other tweets or social media comments that were of concern?

MS. MACLEAN: I believe I was asking, in his search of information, did anything else come up –

MR. FLAHERTY: Okay.

MS. MACLEAN: – with respect to Mr. Dunphy.

MR. FLAHERTY: And so your evidence is that you asked these questions because you wanted to be prepared. Prepared for what, though? What line of questioning were you contemplating to be prepared – that you wanted to be prepared for by asking for the information?

MS. MACLEAN: I think when you're in government or a public elected official or the Premier, you would have to be prepared for any kind of questioning.

MR. FLAHERTY: Okay.

And so what steps did you take to ascertain whether or not Constable Smyth had a criminal record?

MS. MACLEAN: I believe there was a text message that Ms. Chaytor showed me and that was – I didn't even recollect doing that. So that would be the only thing that –

MR. FLAHERTY: No, I mean I'm referring to a possible criminal record of Constable Smyth. Did you take any –?

MR. WILLIAMS: Mr. Commissioner, I thought that the reference was with respect to Mr. Dunphy, not Mr. Smyth.

MR. FLAHERTY: Yeah. No, you know, that's pretty clear. You wanted to be prepared so you asked if Donald Dunphy had a criminal record. Correct?

MS. MACLEAN: Yes.

MR. FLAHERTY: Okay.

So I would imagine that in wanting to be prepared you would also want to know whether or not Constable Smyth had a criminal record. Did you – did you ask that?

MS. MACLEAN: I have –

MR. KENNEDY: Commissioner, again, that's –

MS. MACLEAN: – no idea what you're talking about.

THE COMMISSIONER: It's a broad leap, Mr. Flaherty.

MR. FLAHERTY: No –

THE COMMISSIONER: That's a broad leap.

MR. FLAHERTY: Well, it's a broad – well, first off, okay, to see how broad it is, what were the questions you –

THE COMMISSIONER: No, I –

MR. KENNEDY: There's an objection, Mr. Commissioner, on the basis that there's – again, as happens, apparently, every time there is – Mr. Flaherty is putting forward a proposition for which we know no evidence exists.

So how can you say to this witness: Did you do any check to find if Constable Smyth had a criminal record?

THE COMMISSIONER: Mr. Mr. –

MR. FLAHERTY: I don't know what that's – what evidence that that –

MR. KENNEDY: Excuse me, the British Virgin Islands incident is there, I'm not –

THE COMMISSIONER: Sorry?

MR. KENNEDY: Yes, the British Virgin Islands incident is there.

MR. FLAHERTY: Yeah, so, I mean, once again it's not a hard question. I'll rephrase it: Did you ever make inquiries into whether or not Constable Smyth had a criminal record?

MS. MACLEAN: No.

MR. FLAHERTY: Okay. Did you ever make any inquiries into whether or not Constable Smyth had a history of inappropriate use of force?

MS. MACLEAN: No.

MR. FLAHERTY: Okay.

So were you prepared then to make any comments based upon Constable Smyth's prior record of use of force or potential criminality that he had engaged in, previous to the shooting?

MS. MACLEAN: We weren't providing any commentary on the incident, event or speculating on anything to do with the shooting, full stop.

MR. FLAHERTY: Okay. So why then did you want to know whether or not Donald Dunphy had a criminal record or whether or not there were other tweets or social media comments that might be relevant? Why did you want to know?

MS. MACLEAN: Because I felt it could have been information that could have been made public through other ways, other means. So I was just looking to have information, be prepared, be organized. I wasn't, I wasn't looking to go out and make that public or do anything with it. I was just looking to have the information for my own preparation

MR. FLAHERTY: Be prepared if anyone from the media or public asks questions that might touch upon that, correct or ...?

MS. MACLEAN: I don't think we were ever going to get into speaking about Mr. Dunphy's past. I just think it was information to have to be organized and prepared. I mean, it's as simple as that.

MR. FLAHERTY: Okay. If you're not going to go into his past, then what are you trying to prepare yourself for?

MS. MACLEAN: It was just information that I just, I wanted to have knowledge of, in the event that it was made public or it came out in the media story.

MR. FLAHERTY: And if it became, if that information got its way out into the public or was content in a story, what were you going to do? What was that information? How was that information going to allow you to act? Do you see what I'm saying?

MS. MACLEAN: No, I don't have any idea what you are saying.

MR. FLAHERTY: No, okay. So you're –

THE COMMISSIONER: Well, I guess, first of all, Mr. Flaherty, you should find out if Ms. MacLean was going to act on the information, herself.

MR. FLAHERTY: It, well, sorry, it appeared to me that she –

THE COMMISSIONER: Otherwise, you may be asking what was the Premier going to do with it.

MR. FLAHERTY: Uh-huh.

MS. MACLEAN: I think I've made that clear that we weren't going to be making any statements with respect to Mr. Dunphy's past, his history. It was more of an information gathering purpose, period.

MR. FLAHERTY: Okay. Information gathering purpose, you said to be prepared, and I'm asking you whether or not you had that information, how is that going to prepare you for the work that you are going to do or contemplated in doing?

If you weren't going to make a statement on his past or on what happened, why did you require the information?

MS. MACLEAN: I would imagine it was questions I was probably receiving from other individuals and I was just, I was just looking to see if I could garner that information. I never went any further than asking him one question.

MR. FLAHERTY: So now instead of just being prepared, it's because you think you may have been asked questions of whether or not Donald Dunphy had a criminal record or whether or not Donald Dunphy had any other concerning tweets. So that's what the evidence is now?

MS. MACLEAN: I'm not really sure where you are going with this, but I think you're going in a direction –

MR. FLAHERTY: You don't need to be sure where I'm going with it, Ms. MacLean. I'm asking you a question.

MS. MACLEAN: I'm not clear on your question.

MR. FLAHERTY: Okay.

First, you said that you just wanted to be prepared. Okay?

MS. MACLEAN: Correct.

MR. FLAHERTY: And prepared for what? Were you prepared – were you gathering the information to prepare for a future statement?

MS. MACLEAN: No.

MR. FLAHERTY: Okay. So what was the purpose in getting that information?

MS. MACLEAN: To have knowledge.

MR. FLAHERTY: With respect – why? I mean why? What knowledge? What use are you going to put that knowledge to?

MS. MACLEAN: I was looking to see if there was any additional information that we could – if there was anything else available on Mr. Dunphy.

MR. FLAHERTY: Okay.

MS. MACLEAN: That was, that was it.

MR. FLAHERTY: Okay.

MS. MACLEAN: There was –

MR. FLAHERTY: And so did you make any inquiries into Constable Smyth's past?

MS. MACLEAN: No.

MR. FLAHERTY: Why not?

MS. MACLEAN: There was no need to do that. No need to –

MR. FLAHERTY: Why not? Why was there a need not to look into Constable Smyth's past but there was a need for you to look into Donald Dunphy's past?

MS. MACLEAN: I'm not sure how that's a relevant question. I –

MR. FLAHERTY: Well, your counsel can make an objection.

MS. MACLEAN: I have no idea where you are going with this.

MR. FLAHERTY: But I'm asking you the question.

MR. WILLIAMS: Mr. Commissioner, we're getting into a number of hypothetical scenarios here that Mr. O'Flaherty is putting into.

I know when he, he was granted standing in respect to this matter that the direction that came from the Commissioner was that the caution to avoid any unnecessary examination of witnesses. And we're into a number of hypotheticals here from which I think the evidence that has been given by this witness in direct testimony is with respect to her role in communications in the office and on that day.

We seem to be, you know, we are on tight time frames here and we're going out on exercises now of hypothetical situations that I wonder the relevancy for.

MR. FLAHERTY: I'm not sure either. I don't know what the word hypothetical means or my friend doesn't. I'm not asking about hypotheticals. I'm asking why you did one thing and why you chose not to do the other.

MS. MACLEAN: I think I've been clear in my response to you a number of times, quite honestly.

MR. FLAHERTY: Okay. Well, I'll give you one last opportunity.

MS. MACLEAN: I was – I felt like I was doing my job.

MR. FLAHERTY: Okay.

MS. MACLEAN: I was gathering information and I was getting prepared for questions that may come up.

We weren't – I was not on a, on a, any kind of seeking out scandalous things about Mr. Dunphy by any means, nor would I ever suggest doing anything with that.

MR. FLAHERTY: No.

MS. MACLEAN: I felt like I was doing my job to get information and be prepared and organized, full stop.

MR. FLAHERTY: Fair enough. Okay. And I'm not suggesting that you were trying to build a file to conduct a character assassination, but I –

MS. MACLEAN: Well, you seem to be suggesting something. I'm not sure what that is.

MR. FLAHERTY: Well, here's the question: Why did you look into Donald Dunphy's past and not look into Constable Smyth's past?

MS. MACLEAN: I didn't look into Donald Dunphy's past.

MR. FLAHERTY: Why did you look into his criminal record?

MS. MACLEAN: I didn't look into his criminal record.

MR. FLAHERTY: Did you ask that he, if he had a criminal record?

MS. MACLEAN: I asked: police record, question mark. One question.

MR. FLAHERTY: Okay. So you asked if he had a criminal record. Why?

MS. MACLEAN: I gave you that response already.

MR. FLAHERTY: Why didn't you ask if Joe Smyth had a criminal record?

MS. MACLEAN: I mean –

MR. FLAHERTY: No, that's a straight forward question.

MS. MACLEAN: I think –

MR. FLAHERTY: Why did you not do it?

MS. MACLEAN: This is –

MR. FLAHERTY: I just want the answer.

MS. MACLEAN: – an inquiry not an interrogation. This is a little ridiculous.

THE COMMISSIONER: Well, I'm letting it go, Ms. MacLean, because to some extent there's a question there.

MS. MACLEAN: I'm not sure what the question is.

MR. FLAHERTY: The question is why didn't you look and see –

THE COMMISSIONER: The question is why did you see – why did you conclude there was no need to look into Constable Smyth's past but there was a need to check on Mr. Dunphy, whether it's looking in his past or not, to ask a question about Mr. Dunphy? Why did you feel there was a need to do so in the case of Mr. Dunphy but not in the case of Mr. Smyth?

MS. MACLEAN: I felt that I knew little to nothing on Mr. Dunphy. And I wasn't aware of who he was until after the shooting. And it was a simple couple of questions, probably without a lot of thought given to them.

MR. FLAHERTY: Okay. That's fine so –

THE COMMISSIONER: That's as far as Mr. Dunphy is concerned. Why didn't you seek information about Constable Smyth? That's the other part of the question, I believe.

MS. MACLEAN: I never considered seeking information on Constable Smyth.

THE COMMISSIONER: All right.

MS. MACLEAN: He was a representative of the RNC. I'm assuming he was in good standing. He was assigned to the Protective Services Unit for the Premier. So I would have no reason to believe that he would have any kind of a criminal police record.

THE COMMISSIONER: Okay. That's an answer.

MR. FLAHERTY: Okay. And with respect to the criminal record, that's fine.

Same question but with respect to – did you not think that someone may ask you with respect to, or ask you questions concerning Constable Smyth's prior record of use of force? Did you consider that?

MS. MACLEAN: Did I consider if they would ask the Premier questions about –?

MR. FLAHERTY: Or yourself, because you stated that you wanted to be prepared and that you imagined that people were going to ask you questions or had asked you questions. Did you contemplate whether or not some of these same people would go to you and ask: Do you know if Constable Smyth has anything concerning in his prior use of force history?

MS. MACLEAN: No, I did not.

MR. FLAHERTY: And this is a tough – this is actually a tough question to ask, but can you tell me why you wouldn't have thought about that? Did it just – did it not just come to you, or is there a reason why you didn't contemplate it?

MS. MACLEAN: No, I don't have an explanation for that.

MR. FLAHERTY: Okay.

MS. MACLEAN: I didn't feel it was necessary.

MR. FLAHERTY: So just before I move on, you wanted to be prepared to answer questions on this incident and you didn't think that having knowledge of Constable Smyth's prior use of force history may come up or would be necessary to be prepared for whatever questions you may say – or you may be asked?

MS. MACLEAN: I did not consider that it would come up to the premier, no.

MR. FLAHERTY: Okay.

Is it your policy or your practice, you personally, not to make notes of meetings with media or any information requests? Do you make notes or did you make notes when you were in your position at the time, before and after the death of Donald Dunphy?

MS. MACLEAN: Yes, fair to say I make notes, regularly, yes.

MR. FLAHERTY: Okay, so you would've made notes documenting media requests, information requests, discussions you've had with members of the media?

MS. MACLEAN: In some circumstances, yes. Some media requests would have gone through Donna Ivey; some would come directly to me.

MR. FLAHERTY: And what about interdepartmental requests? So, for instance, I can't put a concrete example to you, but if someone from another department contacts you and says, Heather, do you have information with regard to this, would you make a document, a note, regarding that request and the conversation you had?

MS. MACLEAN: It's not really the way that government functions. It depends on what the request would be. You would have to give me a particular example, but there's a communication director for every department within government. They would work through the Executive Council and Communications Branch of government on all kinds of requests. It would be unusual for communication directors to contact me directly on everyday issues, unless it was of a very significant nature.

MR. FLAHERTY: Now –

MS. MACLEAN: But I may not take notes on those conversations –

MR. FLAHERTY: Okay.

MS. MACLEAN: – no.

MR. FLAHERTY: Now, I imagine you must've been somewhat surprised when the undisclosed BlackBerry messages came to light, and you're aware of them. Upon finding out that these BlackBerry messages did exist, did you undertake to – or at least consider, think or review whatever files you may have to see if there were any relevant notes with respect to any conversations that you may not have already disclosed or talked about with Commission –

MS. MACLEAN: No –

MR. FLAHERTY: – counsel?

MS. MACLEAN: – I do not have any additional notes.

MR. FLAHERTY: Okay.

Now, you had an opportunity –

THE COMMISSIONER: Sorry, you – you did check and found you had no notes, is that –?

MS. MACLEAN: Yes, I did. I didn't have any additional notes, no.

MR. FLAHERTY: Okay.

Now, you did state that you had the opportunity to review Constable Smyth in his performance with the PSU, correct?

MS. MACLEAN: Yes.

MR. FLAHERTY: You found him professional, courteous, logical.

MS. MACLEAN: Correct.

MR. FLAHERTY: Found him to be prepared. So when you would travel with him, how much contact would you have with Constable Smyth when you would be traveling with Constable Smyth, or other members of the PSU, and the Premier? How much contact would you –?

MS. MACLEAN: When we were travelling? Regular contact. We would – he would normally greet the premier early in the morning. He'd be aware of the premier's schedule. We would see him throughout the day. He would accompany the premier to wherever he was moving.

MR. FLAHERTY: Uh-huh.

MS. MACLEAN: And we would also see him in the evening before everyone went to bed for the night.

MR. FLAHERTY: Yeah.

MS. MACLEAN: So we would see him throughout the day on trips on a regular basis.

MR. FLAHERTY: And would you see or did you have the opportunity to observe Constable Smyth in the context of him performing a risk assessment or a threat assessment?

MS. MACLEAN: No, I mean, observing what he did or who he spoke to?

MR. FLAHERTY: Or how he prepares for risk assessment. How he prepares for threat assessments.

MS. MACLEAN: No, I mean, we – I mean, my observation of that was that the Protective Services Unit operated independently of the Premier's Office.

MR. FLAHERTY: Uh-huh.

MS. MACLEAN: That's what they were trained and skilled to do. And –

MR. FLAHERTY: Yeah.

MS. MACLEAN: – I had trust and faith in that.

MR. FLAHERTY: Oh, fair enough.

MS. MACLEAN: It's also a very busy office. We were dealing with hundreds of issues. And, quite honestly, me spending time observing or evaluating how Protective Services Unit is doing their job I think would be a waste of time.

MR. FLAHERTY: No, fair enough, but I just wanted to provide some context to your comments that he was logical and prepared, and I just wanted to see with respect to performance of what duties.

MS. MACLEAN: I had multiple conversations with him, because I was interested in learning about what the Protective Services Unit did, how they operated and how they functioned, what our role was or my role was at the premier's office versus what their role was. So I had some – a number of conversations with both Mr. Smyth and Mr. Noel on exactly what they did and what their expectations were of us.

MR. FLAHERTY: Did you ever travel in a vehicle with the premier and Constable Smyth on the way to an event that Constable Smyth was providing close protection services at?

MS. MACLEAN: Yes.

MR. FLAHERTY: Okay.

Did you ever see him prepare, try to do record requests or try to gather information on the way to such an event?

MS. MACLEAN: No, I think he had that done before he got into the vehicle. So when we got in the vehicle, he would advise the premier that he may have visited the site before he had picked the premier up and what he had observed, what the set-up was of the doors, the emergency exits. So all that stuff would have been done prior to him picking up Premier Davis.

MR. FLAHERTY: Okay.

Thank you very much. Those are all my questions.

THE COMMISSIONER: Any other counsel?

MR. SIMMONDS: I just have a couple of very brief questions, Mr. Commissioner.

My name is Bob Simmonds. Ms. MacLean, how are you?

MS. MACLEAN: Good, thank you.

MR. SIMMONDS: Ms. MacLean, on exhibit five –

THE COMMISSIONER: I'm sorry, you asked her how she was; I think she was getting frustrated, but she looks better now.

MS. MACLEAN: I'm okay now.

MR. SIMMONDS: I hope she's not frustrated with me.

MS. MACLEAN: I revamp quickly. I'm fine.

MR. SIMMONDS: Myself and Ms. MacLean know each other.

Exhibit 0547 was, I think, the transcript of the media scrum on the 6th. Am I correct that that's –

MS. MACLEAN: Yes.

MR. SIMMONDS: – the scrum where you had him prepared – you had the premier prepared and he answered questions from the press?

MS. MACLEAN: That's correct.

MR. SIMMONDS: Officer Smyth has told us, and indeed all the other witnesses that had related to the issue, that there was no threat to anybody. These were tweets of concern, I think is the way Ms. Ivey categorized them?

MS. MACLEAN: That's my understanding, yes.

MR. SIMMONDS: And Constable Smyth confirmed that that was his opinion. When he was going out there, he wasn't going out there to arrest. These were not threats. He had no grounds to arrest him, but it appears – and I'm going to page 2 where the premier answers a question from one of the reporters: "Did you view what Mr. Dunphy put on Twitter as any kind of a threat?"

It appears he's working on the assumption that, not only was it a threat to him –

MS. MACLEAN: Can you scroll up? Sorry, I can't see.

MR. SIMMONDS: Oh, I'm sorry.

MS. MACLEAN: I can't see where you're referring to.

MR. SIMMONDS: Page 2: "You know"

MS. MACLEAN: Okay, I got that. Got it.

MR. SIMMONDS: Yeah, that portion right there, if you just want to have a glance through it.

MS. MACLEAN: Okay. Correct.

MR. SIMMONDS: He appears to be operating under the belief that it was a threat not only to him but also some type of a threat to his family members. And he speaks about his mother and I'm not quite –

MR. WILLIAMS: I –

MR. SIMMONDS: Go ahead.

MR. WILLIAMS: I just don't see where the word "threat" is used there. You're saying he's working on the assumption of threat and I'm looking for the language in that paragraph.

MR. SIMMONDS: Well, you know, decisions we make with government upsetting, you see a comment made like directed. You know, it's directed – it appears to be directed towards me and another cabinet minister and also the people most important to me – our families. You know, I got an 83-year-old mother.

It certainly appears –

MR. WILLIAMS: No, well, I ask that – your words to the witness are it's a threat and I don't see the language threat there so –

MR. SIMMONDS: Point taken.

MR. WILLIAMS: – if we could –

MR. SIMMONDS: It appears that he's considering it. He doesn't say there were – I'm just wondering where did he get, when you read the group of tweets indeed, I think overwhelmingly, the reasonable interpretation of them is that they are not any kind of, even of concern when he says about your families, he's meaning not hurting the family's feelings by mentioning the names at the end.

I'm just wondering was there anything that we're missing here that the premier had knowledge of that gave him some idea that this was pointed at him, pointed at his family, at his children, his mom.

MS. MACLEAN: No. And I think Premier Davis, will, you know I'm sure, be prepared to answer that question. But I read it as it was obviously a difficult couple of days.

MR. SIMMONDS: Understandably.

MS. MACLEAN: He was very – he was upset and rattled by what had happened and he had his family on his mind at that particular time. That's how I'm speculating. It's not something we discussed as part of his messaging before he went out and spoke to the media –

MR. SIMMONDS: Okay.

MS. MACLEAN: – but it was weighing heavy on him.

MR. SIMMONDS: Understandably.

MS. MACLEAN: And I think he was sensitive to have how his family was probably feeling. That's my interpretation of it.

MR. SIMMONDS: Oh, fair enough. And –

MS. MACLEAN: He would be prepared to speak to that I'm sure.

MR. SIMMONDS: He will. And we will certainly ask him that. I think he comes on Friday afternoon.

Have you read all of the tweets in sequence that were part of these tweets of concern? There was only one part of it sent by Ms. Ivey.

MS. MACLEAN: Yes.

MR. SIMMONDS: But have you had a chance to read them all?

MS. MACLEAN: Yes.

MR. SIMMONDS: Would I be pushing the edge of the envelope if I said indeed they are not a threat and in reality they are not even of concern? They're a statement.

MS. MACLEAN: My – I never saw or read the tweets until after the shooting.

MR. SIMMONDS: Uh-huh.

MS. MACLEAN: My observation of them was that they made me feel uncomfortable because I didn't know what they meant and I'm still not sure I do know what they meant.

MR. SIMMONDS: But when he's referenced the –

MS. MACLEAN: So I found it – I found them unsettling. That's as far as I can say.

But our instruction from the Protective Services Unit was if you see something or hear something that makes you feel uncomfortable or unsettled, then to flag it for them. And that's exactly what happened from our office and I feel that was the appropriate thing to do.

MR. SIMMONDS: And that was what Donna – you believe Donna Ivey was doing when she sent this on.

MS. MACLEAN: I believe she did her job, yes.

MR. SIMMONDS: Okay.

Thank you very much Ms. MacLean.

MR. WILLIAMS: Ms. MacLean, I just have a couple of questions prior to finishing up for the day.

You had indicated that you had worked with Donna Ivey. Did you work with Ms. Ivey prior to your going into the Office of the Premier?

MS. MACLEAN: No.

MR. WILLIAMS: How would you describe Ms. Ivey's level of competency in terms of her role in the communications department within the premier's office?

MS. MACLEAN: She did her job well. She was on top of issues. She was a good writer. She was very keen to do her job well. She dealt with people in a professional manner.

MR. WILLIAMS: Okay.

MS. MACLEAN: She was somebody who I felt did her job well and I trusted her in that capacity.

MR. WILLIAMS: Do you feel she had a good handle on the monitoring of social media and Facebook accounts, things that she was tasked with?

MS. MACLEAN: Absolutely.

But I guess, to put in perspective or context, social media was a very small part of Donna Ivey's job. She was tasked with writing speeches and news releases and dealing with departments on issues on a whole bunch of different levels. So her monitoring social media was on a very, very small scale but I feel how she handled it was very appropriate.

MR. WILLIAMS: Okay.

So this issue being that monitoring social media was only a small segment, the security side of that social media would be even a smaller section of the (inaudible).

MS. MACLEAN: She didn't have any role in security with respect to social media. She had a responsibility to flag it for the Protective Services Unit.

MR. WILLIAMS: Okay.

Did you ever find that in her actions of reviewing social media that she was ever an alarmist, brought matters to your attention of grave concern on a frequent basis and things of that nature?

MS. MACLEAN: Never.

MR. WILLIAMS: And did you have any concern – when you learned subsequently that she had referred this matter on to the Protective Services Unit, did you have any concerns because she had done so?

MS. MACLEAN: No. I felt she did the right thing.

MR. WILLIAMS: Okay.

With respect to the day in which the tragic events occurred, you indicated that very shortly after the premier, Mr. Davis at the time, had learned of it that he called a meeting with three of his staff. Is that correct?

MS. MACLEAN: Yes.

MR. WILLIAMS: And where was that meeting held?

MS. MACLEAN: It was held in the premier's office.

MR. WILLIAMS: Okay.

And do you remember what time of day it would have been held?

MS. MACLEAN: It was late afternoon.

MR. WILLIAMS: Okay.

So we know the shooting was in – well, I'll call mid-day, you know, between 2:30 – around the, between 2:30-3 type thing. So you would have met within how many hours of the actual event having occurred?

MS. MACLEAN: We met within a half an hour of him reaching out to ask for a meeting, but I know it was probably close to supper time.

MR. WILLIAMS: Okay. And at that time you said it was a relatively brief meeting?

MS. MACLEAN: It was.

MR. WILLIAMS: And the purpose of the meeting was for purposes of formulating a plan, an action plan for the following day?

MS. MACLEAN: Yes.

MR. WILLIAMS: And did I understand your direct evidence to Ms. Chaytor to be, that during that discussion, there was specific conversation with respect to reaching out to the Dunphy family during that media briefing the next day?

MS. MACLEAN: Yes, it was very top of Premier Davis's mind to immediately offer condolences to the family, right off the bat at the media availability.

MR. WILLIAMS: There's been much attention made that Premier Davis had spoken to Constable Smyth later that evening. I believe it was in the late hours of that evening. But your evidence today was that within three hours of this event having occurred, he had brought the

attention of you, as his communications director, of formulating into his briefing, reaching out to the Dunphy family?

MS. MACLEAN: Correct.

MR. WILLIAMS: Okay. And why was it felt that it was appropriate to reach out to the Dunphy family in that manner as opposed to picking up the phone, for example, at that meeting?

MS. MACLEAN: Well, I believe the, I mean, the shooting had happened that same day. He didn't have any knowledge or relationship with anyone on the Dunphy side, so he was sensitive to the fact in terms of what they may be going through at that particular time and didn't want any, to put any undue stress on the family. So the conversation we had was that we felt it was most appropriate to (inaudible) in a public manner on the next afternoon.

MR. WILLIAMS: But he specifically turned his mind to addressing that issue the following day.

MS. MACLEAN: Absolutely.

MR. WILLIAMS: Okay.

With respect to your subsequent dealings in the days immediately following with the RNC and RCMP, would this be typical, and when I speak of the police agencies, would this be typical actions of the communications director in terms of gathering information for purposes of compiling speaking notes or briefings for the public official that you were working with?

MS. MACLEAN: Well, in any department in government you would typically have relationships and reach out to boards, agencies, commissions with respect to any major issues that were going on in that department.

So when I worked in the Department of Health, for example, I reached out to Central, Western, Lab-Grenfell on a regular basis on sensitive issues. I was in the Department of Justice, I reached out; we had conversations all the time. In Natural Resources, I spoke with Nalco.

So it's a very common occurrence within government to work with your stakeholders and shareholders to make sure that you're all in lined in terms of timing and information et cetera. It's not unusual at all.

MR. WILLIAMS: So much of your discussion that has come up today is with respect to information gathering, not that you might necessarily be doing a release, but that you would have gathered information for the purposes of not only making public releases but if questions were posed to either yourself, as communications director, or to the Premier at the time.

MS. MACLEAN: That's correct. It would help me be more prepared and organized to deal with whatever would be coming our way.

MR. WILLIAMS: And at any time, with any of the discussions, communications, BBMs that you may have had with Constable Smyth, was there any specific detail or any discussion whatsoever of the actions that happened within the home of Mr. Dunphy on April 5?

MS. MACLEAN: No.

MR. WILLIAMS: Okay.

That's all the questions I have.

Thank you.

THE COMMISSIONER: All right we are going to recess now. And I'm just going to remind counsel, I believe you're going to have a chat before you depart about the upcoming applications.

Okay. Thank you.

We'll adjourn until 9:30, is it, tomorrow morning?

MS. SHEEHAN: All rise.

The Commission of Inquiry is now closed.