



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 16

Commissioner: Honourable Justice Leo Barry

Friday

3 February 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry opened.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Good morning, everybody. We're going to start in a moment. A little bit of housekeeping first.

First of all, Ms. Rasmussen, I'd like you to bring back a message to Sergeant Noel. I realized I probably cut it off a bit too early yesterday. He indicated he had some views on the set-up of the PSU and, as I was walking out the corridor, I realized that I would benefit from having those views.

And so I'd like you to mention to him – I understand from counsel that one of the things he might be able to help on is his view concerning how the security unit might be depoliticized, the setting up of that unit to take politics out of it insofar as it might be there. So whether he passes that and any other remarks he has through you or through Mr. Freeman or directly to our counsel, I'll leave it to you, the format that might take.

I don't want to get him into any trouble in terms of speaking out as an RCMP officer beyond what he might, according to the force protocol, be permitted to do, but you can pass on to anybody above him that I think he has had enough experience in the area that he could usefully give us some ideas with respect to the formation of the Protective Service Unit. So that's that one.

Also, you should have received, I think, from counsel, or about to receive, a notice regarding phase two, which we'll be putting up on the website shortly, but I wanted to have counsel given the opportunity to have input into that and if you have any comments upon the items that are set out there.

We're contemplating basically having a one-day session webcast with access by the general public, either in the audience or over the Internet, to have their input on certain items as identified there. So at an appropriate time, probably after discussion on the application, we can discuss phase two, although we don't have – I see probably have to leave that until Monday because there's not sufficient counsel here this morning.

So over the weekend I'd ask that you put your mind to whether we've covered everything that I need to cover in order to carry out my terms of reference and whether there's anything else there that might be of benefit to either of your clients or any of your clients. Feel free to make suggestions.

Okay. So we now have two witnesses this morning and then we're going to get into argument on the admissibility of the experiment proposed by Mr. Simmonds and his client.

Go ahead when you're ready.

MS. O'BRIEN: Thank you, Commissioner.

Before I begin, I just want to advise you of some information. This morning I was visited by Mr. Bart Dunphy, who is one of Don Dunphy's brothers. And yesterday, as you may recall, we had some testimony from Sergeant Doug Noel and in that he made – he gave some evidence that

he'd been advised by one of the RCMP officers down in Holyrood that one of Don's brothers had made a comment to the effect of whatever happened in that house was Don's fault. And Mr. Bart Dunphy has asked that we – that I please clarify for you that he made no such statement. He can't speak for either of his other two living brothers, but just to clarify that on the evidence here that he made no statement.

THE COMMISSIONER: Yes, I understood it was not a reference – or I should put it another way: I understood that the reference was to Richard Dunphy, but I'm not sure if that's –

MS. O'BRIEN: I don't know that Sergeant Noel knew that for sure, but so it was left, you know, with some ambiguity there. So we just wanted to get that clarified for the record.

THE COMMISSIONER: Okay, thank you.

MS. O'BRIEN: Thank you.

So I'll call – the next witness is Nancy Linehan.

Good morning, Ms. Linehan. I'm going to ask Madam Clerk to get you to affirm your evidence.

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

MS. LINEHAN: I do.

MS. SHEEHAN: Please state your full name.

MS. LINEHAN: Nancy Agnes Linehan.

MS. SHEEHAN: Thank you.

MS. LINEHAN: Thank you.

MS. O'BRIEN: Commissioner, before we begin, I ask that new exhibits P-441 and P-442 be entered. Also, I'm not certain, but I'm not – I'm also going to mention just out of an abundance of caution that C-0013 and C-0014 also be ordered entered into evidence.

THE COMMISSIONER: So ordered.

MS. O'BRIEN: Thank you.

Good morning, Ms. Linehan. I know we've met before, but I'm Kate O'Brien, one of the Commission co-counsel.

MS. LINEHAN: Morning

MS. O'BRIEN: Now, I understand that you are a paramedic?

MS. LINEHAN: Yes, I am.

MS. O'BRIEN: All right. And you've been working as a paramedic for approximately 10 years?

MS. LINEHAN: Yes.

MS. O'BRIEN: And all that time you've been with Don Gibbons Ambulance Service –

MS. LINEHAN: Yes.

MS. O'BRIEN: – is that right?

So you were working there as a paramedic on April 5, 2015?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

So I'm going to – we know that you were one of the – you were the paramedic who responded to the Donald Dunphy incident, so that's what we're going to be talking to you about today.

Did you know Mr. Don Dunphy prior to that?

MS. LINEHAN: Not personally, no.

MS. O'BRIEN: Okay. But I understood you had some knowledge of his daughter, Meghan?

MS. LINEHAN: Oh, yes, yeah.

MS. O'BRIEN: Okay, can you just explain that to the Commissioner?

MS. LINEHAN: Well, Meghan worked with us for a period of time.

MS. O'BRIEN: Okay.

MS. LINEHAN: Yeah, so I knew her from that, yeah.

MS. O'BRIEN: Okay, so you knew her professionally because she worked –

MS. LINEHAN: Yes.

MS. O'BRIEN: – I think she worked for Don Gibbons Ambulance as an EMR; is that right?

MS. LINEHAN: Yes, she did. Yeah.

MS. O'BRIEN: Okay. And did you have any personal relationship with her or was it just a professional relationship?

MS. LINEHAN: Well, I knew her personally as well but not a lot outside of work but, you know, we did know each other.

MS. O'BRIEN: Okay.

Now, we've heard the word "EMR" and we've heard the word "paramedic." And I know EMR is an emergency medical –

MS. LINEHAN: Medical responder.

MS. O'BRIEN: – responder. Can you explain for us what is the difference between a paramedic and an EMR?

MS. LINEHAN: Well, an EMR is – basically, they’re the level below a paramedic.

MS. O’BRIEN: Okay.

MS. LINEHAN: And they do a lot of training, too, to become an emergency medical responder. And basically they assist the paramedics in what they do and they drive the ambulance for the paramedics.

MS. O’BRIEN: Okay.

MS. LINEHAN: But they do also assist the paramedics in whatever needs to be done with the patient besides.

MS. O’BRIEN: Okay. So is it the usual case that a paramedic is teamed with an EMR and –

MS. LINEHAN: Yes, in our service. Yes.

MS. O’BRIEN: Okay. So you go out together and the EMR drives the ambulance.

MS. LINEHAN: Yes.

MS. O’BRIEN: All right.

And in this case the EMR you were working with was Kevin Bishop.

MS. LINEHAN: That’s correct.

MS. O’BRIEN: Right. Okay and we’re going to hear from Mr. Bishop this morning.

So were you active – you know, were you working on April 5, 2015?

MS. LINEHAN: Yes, I was.

MS. O’BRIEN: Okay. And where were you stationed on that day?

MS. LINEHAN: In St. Mary’s.

MS. O’BRIEN: Okay. So can you briefly tell us how did you come to be dispatched to Mr. Dunphy’s residence?

MS. LINEHAN: Well, normally we’re not dispatched in the Mount Carmel area but Mount Carmel ambulance was already dispatched to a call at that time. So if they’re out on a call, then the St. Mary’s ambulance is dispatched in the Mount Carmel area. So because they were gone, we got called.

MS. O’BRIEN: Okay. And what information were you given on your, on the call to send you on (inaudible).

MS. LINEHAN: The initial call came in that there was a gunshot in the Mitchells Brook area and that’s what we were dispatched. That was the initial and that we would receive more information en route.

MS. O'BRIEN: Okay. So you were stationed there in St. Mary's, you got that call, you get the ambulance – you and Kevin meet, get the ambulance and off you go towards the scene. Is that fair to say?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. How long would it have taken you to arrive?

MS. LINEHAN: I think it was about 35 minutes –

MS. O'BRIEN: Okay.

MS. LINEHAN: – approximately.

MS. O'BRIEN: Okay.

And did you get any – while you were, while you were driving en route to Mitchells Brook, did you get any further information from your dispatch about what you were going to be facing when you arrived?

MS. LINEHAN: We actually had gotten a call en route that the – was deceased. The man had been deceased, yes.

MS. O'BRIEN: Okay, so you knew that there was a shoot – a gunshot in Mitchells Brook and that a man was deceased.

MS. LINEHAN: Was now deceased.

MS. O'BRIEN: Was now deceased.

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

MS. LINEHAN: Yeah.

MS. O'BRIEN: Did you get a name? Did you –

MS. LINEHAN: Yes, we did. Yeah.

MS. O'BRIEN: So the name you got was Donald Dunphy's name?

MS. LINEHAN: Yes.

MS. O'BRIEN: Would – did you get any information that there was anyone else involved in the incident?

MS. LINEHAN: Not at that time, no.

MS. O'BRIEN: Okay.

Did you know where Mr. Donald Dunphy's house was?

MS. LINEHAN: No we got a, kind of in the vicinity of where it was, but not a direct – you know, I knew the Mitchells Brook area, so I kind of got an idea from that.

MS. O'BRIEN: Okay.

So how did you know where to go?

MS. LINEHAN: I kinda knew Dick Dunphy in the area and I asked where in relation to his house where Mr. Dunphy's was going to be.

MS. O'BRIEN: Is that what you asked your dispatch –

MS. LINEHAN: Yes.

MS. O'BRIEN: – the person on your dispatch?

MS. LINEHAN: Yes

MS. O'BRIEN: So you knew, you knew Dick Dunphy?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. And you knew where he lived?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. So you said I know Dick Dunphy; where is it I'm going?

MS. LINEHAN: I know Dick Dunphy and where in relation to his house would he be.

MS. O'BRIEN: Okay. And was the dispatch able to tell you that you're gonna be right next door to that house?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

MS. LINEHAN: Yep.

MS. O'BRIEN: When you were arriving at that time, you know, you say you knew Dick and you knew Meghan, did you know at that time that the house you were gonna go to would be Meghan's father's house?

MS. LINEHAN: Yes. Oh yes, I knew that that was Meghan's father, yes.

MS. O'BRIEN: You knew Meghan's father's name, did you?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

As you're arriving, did you have any concerns for your safety? So, for example, did you have assurances that there wasn't an active shooter on the scene or was there any concerns at that point?

MS. LINEHAN: No. No, I didn't. I think the dispatcher had said that there may be RCMP on scene or en route, or something to that effect.

MS. O'BRIEN: Okay, so you –

MS. LINEHAN: And then as we were en route to the scene, and if you can understand, as we're going up one side, say, on the Salmonier side –

MS. O'BRIEN: Yes.

MS. LINEHAN: – we could see RCMP vehicles going down Mount Carmel side.

MS. O'BRIEN: Okay. All right. So they would have arrived at –

MS. LINEHAN: Before us.

MS. O'BRIEN: – before you?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. So you, so knowing there was RCMP already on the scene was –

MS. LINEHAN: Yes.

MS. O'BRIEN: – alleviated your concerns –

MS. LINEHAN: Yeah.

MS. O'BRIEN: – for safety? Okay.

Can you describe for us what the scene was like when you arrived? Who was there? What did you see?

MS. LINEHAN: There were RCMP vehicles. I'm not exactly sure how many, but there were a couple, for sure. There was an unmarked police vehicle in the driveway, inside yellow tape.

MS. O'BRIEN: Okay. So there was some yellow police caution tape –

MS. LINEHAN: Yes.

MS. O'BRIEN: – or police, do not enter the scene tape –

MS. LINEHAN: Yeah.

MS. O'BRIEN: – across the bottom of the driveway. And you recognized an unmarked police vehicle in the driveway?

MS. LINEHAN: Yeah like a big, one of those big, black SUV type vehicles.

MS. O'BRIEN: And did you recognize that as an unmarked police vehicle?

MS. LINEHAN: Yes, you could tell it was a police vehicle. It was a big, black type, you know.

MS. O'BRIEN: Okay.

MS. LINEHAN: Yes.

MS. O'BRIEN: Any other vehicles in the driveway?

MS. LINEHAN: I can't recall off hand. I think there might have been another vehicle but, like I say, I didn't take notice if there was or not.

MS. O'BRIEN: Okay.

Did you take note of how many people were on the scene?

MS. LINEHAN: I know there was two RCMP officers met us when we got out of the ambulance and came towards us.

MS. O'BRIEN: Okay.

MS. LINEHAN: With regards to how many more were there, I can't recall. I know there was a couple of vehicles, but how many RCMP officers were there I'm not really sure, but two officers came towards us as we went there.

MS. O'BRIEN: Were they in uniform, those two officers?

MS. LINEHAN: They were in uniform.

MS. O'BRIEN: And were they men or women or do you –

MS. LINEHAN: They were men.

MS. O'BRIEN: Two men, okay.

Did you know any of the officers on the scene, previously?

MS. LINEHAN: No, no.

MS. O'BRIEN: Okay. All right.

The two officers who came and met you, did you get their names?

MS. LINEHAN: No, I didn't.

MS. O'BRIEN: Okay.

So they come and meet you, did you see anyone on the scene there who wasn't in a police uniform?

MS. LINEHAN: Yes, I did. There was, who I now know is Constable Smyth was in the driveway.

MS. O'BRIEN: Okay.

So what was he doing in the driveway?

MS. LINEHAN: He was just pacing around, like back and forth.

MS. O'BRIEN: So was he inside the tape?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

Now, if you don't recall, just say so, but do you recall what Constable Smyth was wearing at that time?

MS. LINEHAN: I don't know exactly what he was wearing. He was wearing some type of a leather jacket, from what I can remember, dress pants and shoes.

MS. O'BRIEN: Okay. Did you make any notes at the time of what he was wearing?

MS. LINEHAN: No, I didn't.

MS. O'BRIEN: Did you know Constable Smyth previously?

MS. LINEHAN: No.

MS. O'BRIEN: When you saw him there in the driveway, did you associate him with the incident or what –

MS. LINEHAN: No.

MS. O'BRIEN: Did you understand him to be a police officer? What did you ...

MS. LINEHAN: Not at that time.

MS. O'BRIEN: Okay.

When did you learn who he was or what his role was in the incident?

MS. LINEHAN: Well, when we came back from the house, when we came out of the house, I noticed he was a police officer because I noticed his gun holster on his side. What's when I knew he was a police officer.

MS. O'BRIEN: Okay. And that was after you had entered the residence?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

So going back then to the two police officers in uniform who met you, what was the next thing you did after being greeted?

MS. LINEHAN: So we had to go into the house and they told us we had to give them a few minutes, that they had to enter the house prior to us going in to make sure that it was all right for us to enter the house. So they went in, took 'em a minute or two maybe and then –

MS. O'BRIEN: Sorry, took how long approximately?

MS. LINEHAN: Took a minute or two maybe, and maybe not even that long. And they went inside and then they came out and told us it was all right for us to enter the house.

MS. O'BRIEN: Okay.

While you were waiting there, did you have any conversation with Constable Smyth?

MS. LINEHAN: No, we weren't near him.

MS. O'BRIEN: Okay.

MS. LINEHAN: We were just waiting by the step basically for us to be able to go inside.

MS. O'BRIEN: Okay.

At that time, was there anything unusual standing out or do you remember making any observations about Constable Smyth's behaviour?

MS. LINEHAN: No.

MS. O'BRIEN: All right. So after the officers came out and said they'd cleared the house, so what happened next?

MS. LINEHAN: We went inside.

MS. O'BRIEN: Okay, and who went inside with you?

MS. LINEHAN: Myself and Kevin and the two officers.

MS. O'BRIEN: Okay.

What were your first impressions upon entering the house?

MS. LINEHAN: We had to be very careful going in over the step. I think – I don't know if the step's rickety or we had to use – I think there was a couple of tires or something we had to use as a step to get in and we had to be very careful going in over the step, you know. And we went in and there was a lot of cat food and stuff we were walking on as we went inside.

MS. O'BRIEN: So cat food spilled on the floor?

MS. LINEHAN: On the floor, yes.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MS. LINEHAN: There was a lot of cat food that we were walking on as we went inside.

MS. O'BRIEN: I'm going to ask to get – help you, where you went in the house. I'm going to bring up a map of the house. Scene – or sorry, P-0035. So you're going into the house, the four of you. Where did you enter?

MS. LINEHAN: We entered through the front door.

MS. O'BRIEN: Okay, and where did you proceed from there?

Okay, so you came in the front door, so you came in this area right – oops, I've lost my mouse. So you came in here, through the front door.

MS. LINEHAN: Yes.

MS. O'BRIEN: And where did you proceed from there?

MS. LINEHAN: We went in that little front porch area, and we just went to the right, in towards the living room.

MS. O'BRIEN: In towards the living room.

MS. LINEHAN: Yeah.

MS. O'BRIEN: Did you ever go in any other areas of the house?

MS. LINEHAN: No, we didn't.

MS. O'BRIEN: Okay. So, when you went into the living room, what did you see when you entered?

MS. LINEHAN: We didn't initially see – as you went in the front porch, you wouldn't have seen Mr. Dunphy 'cause that wall was there, you know. So you had to kind of make a right turn and go in, and then he was in the chair, there on your right-hand side.

MS. O'BRIEN: Okay, and what position was he in, in the chair?

MS. LINEHAN: He was sitting, just kind of slouched. I remember his left arm being hung over the left arm of the chair, and his head was just kind of leaning back against the back of the – the back of the armchair.

MS. O'BRIEN: Okay. So what did you do when you entered the room?

MS. LINEHAN: There was obvious death, you could tell, the gunshot wound, and I just assessed him to determine that it was obvious death.

MS. O'BRIEN: Okay.

Can you just describe – I understand that you have a protocol for assessing death.

MS. LINEHAN: Yes.

MS. O'BRIEN: Can you just briefly go over that for the Commissioner and just explain what you would have done (inaudible)?

MS. LINEHAN: So we have – there is a protocol that we use for obvious deaths. We use four things: you listen for heart sounds, respirations, carotid pulse and non-reactive pupils.

THE COMMISSIONER: Sorry, what's the last one?

MS. LINEHAN: Non-reactive pupils.

MS. O'BRIEN: So while you're checking – and I understand it's the paramedic who does this checking, not the EMR.

MS. LINEHAN: Well, an EMR can do it, but I did it.

MS. O'BRIEN: You did it in this case.

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

Would you – what were you wearing? Were you wearing any protective clothing?

MS. LINEHAN: Gloves.

MS. O'BRIEN: Gloves, okay.

Any other protective suits or booties or anything like that?

MS. LINEHAN: No.

MS. O'BRIEN: But you were wearing sort of latex-type gloves.

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

And now to check the carotid pulse, that's the pulse that you feel on the neck, is that right?

MS. LINEHAN: That's correct.

So I had my – I put my fingers on the side of his neck closest to me, which would have been on the left-hand side.

MS. O'BRIEN: Okay, on the left-hand –

MS. LINEHAN: Yes.

MS. O'BRIEN: His left-hand side.

MS. LINEHAN: Yeah.

MS. O'BRIEN: And so did you feel a pulse?

MS. LINEHAN: No.

MS. O'BRIEN: Okay.

And you said you checked respirations. How would you have done that?

MS. LINEHAN: So as I put my stethoscope on, I just laid it on the chest outside of clothing, listened for heart sounds, and at the same time I was doing that, as my hand was laid with my stethoscope for the chest rising and falling and there was none.

MS. O'BRIEN: Okay.

So, just for the purposes of the record, you're showing that you would have placed your hand –

MS. LINEHAN: Yes.

MS. O'BRIEN: – with the stethoscope on Mr. Dunphy's chest –

MS. LINEHAN: Yes.

MS. O'BRIEN: – to listen for the heart, and at the same time you would have been feeling for movements of respiration.

MS. LINEHAN: Yes. Right.

MS. O'BRIEN: Okay.

And the fourth item that you said you check was pupil movement. Can you just tell us how is it that you would have checked that?

MS. LINEHAN: So you would shine the light in the eye to check to see if the pupils moved in any way.

MS. O'BRIEN: Okay.

So were Mr. Dunphy's eyes opened or closed?

MS. LINEHAN: They were closed. I had to open. I don't know if they were open a little bit or if they weren't open, but I did – I know I did have to lift the eyelid to see.

MS. O'BRIEN: And then you have a light that you shine in there.

MS. LINEHAN: Yes.

MS. O'BRIEN: Is that the idea?

MS. LINEHAN: That's correct.

MS. O'BRIEN: And did you get any pupil movement?

MS. LINEHAN: Absolutely not.

MS. O'BRIEN: Okay.

So all those tests turned out negative.

Did you see any visible signs of injury on Mr. Dunphy's body?

MS. LINEHAN: Oh yes, I did, yes.

MS. O'BRIEN: Okay.

Just briefly, what were those?

MS. LINEHAN: So there was a huge hole right here in the centre of his forehead. There was also a trail of blood coming from his left ear, and other than that I didn't look inside his clothing or anything like that. I didn't move his body whatsoever.

And when I placed my stethoscope, I placed it outside his clothing, just right here. I didn't move any of his clothing whatsoever.

MS. O'BRIEN: Okay.

Did you see any weapons in the room?

MS. LINEHAN: Yes, I did.

MS. O'BRIEN: What did you see?

MS. LINEHAN: I saw a rifle on the floor.

MS. O'BRIEN: Okay.

Can you just describe what position it was in, where it was?

MS. LINEHAN: It was by his – by his chair, the chair that he was sitting in. And to the – I had to, I had to step over it or I remember having to step over it when I went to assess him. And I can't remember exactly if, while I was assessing him, it was between my legs or – but I do remember that I had to step over it.

MS. O'BRIEN: Okay.

MS. LINEHAN: So I don't know if I stepped over it on the way to assess him or while I was assessing him, but I do remember that I did have to step over it.

MS. O'BRIEN: Okay.

Do you remember if it – how it was lying, what orientation it was in? Was it laying against anything? How do you remember it?

MS. LINEHAN: I think it was laid either against the chair or his foot. And I can't recall, like, because I didn't take a lot of notice of it. But it was either laid against – you know how the little skirt comes out on the bottom of the sofa, you know, the chair that – if it was laid up against the edge of that or if it was against his foot or something. It was tipped up a little tiny bit –

MS. O'BRIEN: Okay.

MS. LINEHAN: – so that, you know, but I didn't have to lift, but I remember having to step over it.

MS. O'BRIEN: Okay. And did you take any notes or anything on that day as to –?

MS. LINEHAN: No, I just wrote on my glove no respirations, no heart – I just wrote that on my glove.

MS. O'BRIEN: Okay, so you wrote those jot notes on your glove.

MS. LINEHAN: Yes.

MS. O'BRIEN: And that had to do with your death protocol check only.

MS. LINEHAN: Yes. That's right.

MS. O'BRIEN: Okay.

Do you recall any other weapons in the room?

MS. LINEHAN: Not that I recall, no.

MS. O'BRIEN: Okay. And the gun, what type of gun was it? Do you recall?

MS. LINEHAN: It was – it had like a bolt thing, you know, that you would have to – bolt-action something or other that you would have to haul on, I know that.

MS. O'BRIEN: Okay. All right.

Do you recall any other details of the living room?

MS. LINEHAN: Not a lot. We weren't in there for very long, five minutes maybe, so – and my purpose in being there was to assess Mr. Dunphy.

MS. O'BRIEN: Right.

MS. LINEHAN: And that was my main reason for being in the room. And initially when I went in there, I didn't know what had transpired. And when I saw Mr. Dunphy and I saw the gun, I thought he had done this to himself. That was my initial – and I even said that to the two RCMP officers and when I made the – they didn't make no response to it.

So – and had I maybe known what had transpired, maybe I would have looked around and I would have made mental notes of something, you know, but I didn't know at that time what had transpired.

MS. O'BRIEN: Your first impression was that it was a suicide when you went into the room with really no knowledge of (inaudible) –

MS. LINEHAN: Yes, so I went there to assess Mr. Dunphy. I did that and we exited the room the same way we went in there. And I didn't really – like, I can remember the – when I made my statement to the RCMP a few days later, they had asked me was there a TV in the room; I couldn't even remember if there was a TV.

MS. O'BRIEN: Okay.

MS. LINEHAN: Because obviously my back was to it and I didn't remember seeing it.

MS. O'BRIEN: Okay.

MS. LINEHAN: You know there was a few things – I remember there was some garbage being around and things like that but, you know, right –

MS. O'BRIEN: Do you remember anything about the smell of the house, anything standing out in your mind?

MS. LINEHAN: No. I remember, like the cat food I remember because I remember having to walk on it, you know, and I remember like there's – he must have been feeding a lot of cats because there was a lot of cat food like, you know.

MS. O'BRIEN: Did you see any cats while you inside the house?

MS. LINEHAN: No, no cats inside the house, no.

MS. O'BRIEN: Did you see any cats when you were outside the house?

MS. LINEHAN: Yes, yeah. There were cats outside, but none inside.

MS. O'BRIEN: While you were there with Mr. Bishop and the two RCMP officers, did anyone else enter the house for that five minutes that you were there?

MS. LINEHAN: No.

MS. O'BRIEN: No.

I'm just going to ask Madam Clerk to bring up P-0035 again. I just want to get a sense of where everyone was standing while you were doing your checking of Mr. Dunphy.

So can you just tell me, looking at this diagram, where would you have been standing approximately, Ms. Linehan, when you were doing your work?

MS. LINEHAN: I would have been standing probably by the corner of – yeah, about right there.

MS. O'BRIEN: Okay, by the left-hand, front left-hand corner of Mr. Dunphy's armchair.

MS. LINEHAN: Somewhere around that area, yes.

MS. O'BRIEN: Okay.

Did you go any further into the room than that? At any time?

MS. LINEHAN: No.

MS. O'BRIEN: And where were the other three men who were with you? Where were they standing?

MS. LINEHAN: Kevin was standing back by the very corner of where you entered the room, almost by the archway type.

MS. O'BRIEN: So this side?

MS. LINEHAN: No, by the chair.

MS. O'BRIEN: Around here, okay.

MS. LINEHAN: Yep, right by the wall.

MS. O'BRIEN: Okay, close to the wall there on the right-hand side of the door as you're entering the room, where the opening is, you're entering the room.

MS. LINEHAN: Yes.

MS. O'BRIEN: Do you recall there being anything down around Mr. Bishop's feet?

MS. LINEHAN: I wouldn't be able to tell you.

MS. O'BRIEN: Okay.

And where were the two police officers standing?

MS. LINEHAN: I know, I can't – I don't remember. I know one of them was definitely still in the hallway because I can remember speaking and when I looked, he was there. Where the other fellow was, I really don't know.

MS. O'BRIEN: Did anyone go further into the living room, like right into sort of the heart of the living room or was everyone –

MS. LINEHAN: I don't remember.

MS. O'BRIEN: You don't remember, okay.

Did you see – I know you said you touched Mr. Dunphy's body; did you touch anything else other than what you've already described to us?

MS. LINEHAN: No.

MS. O'BRIEN: Did you see anybody else touch anything while you were in there?

MS. LINEHAN: No.

MS. O'BRIEN: Okay. Do you recall – would – do you recall if Mr. Bishop was also wearing gloves?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. And so he was. What about the two RCMP officers, do you have any recall?

MS. LINEHAN: I don't recall if they were or not.

MS. O'BRIEN: Okay.

I'm going to show you, Ms. Linehan, a couple of photographs. These are confidential exhibits, Commissioner, so I'll ask that the monitors be turned off, but I'm just going to ask, show you photographs that were captured; they were captured after you were there. And I just want you to look at them and see if there's anything there that you recall as being different from what you saw or, or not.

So I'd ask to see C-0001, Photo 040, please. And that's going to come up, Ms. Linehan, on your monitor. Can you see it there?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. So looking at that, do you see anything there that stands out for you as being different from what you saw that day, and, if so, please identify it for the Commissioner?

MS. LINEHAN: I don't recall that, the blue tub that, that the gun is sitting on there now.

MS. O'BRIEN: Okay.

MS. LINEHAN: I don't recall that being in the room.

MS. O'BRIEN: Okay.

THE COMMISSIONER: That's the blue one you're talking about?

MS. LINEHAN: The Rubbermaid looking tub that's there.

THE COMMISSIONER: Right.

MS. O'BRIEN: Okay. That the gun is laying against?

MS. LINEHAN: Yes.

MS. O'BRIEN: All right. What about the position of Mr. Dunphy's arms? Any difference there?

MS. LINEHAN: That's down by his side right now and I'm, I can't say for 100 per cent sure, but when we entered Mr. Dunphy's arm was, was over, hanging over the chair, the side of the chair.

THE COMMISSIONER: Which arm?

MS. LINEHAN: His left arm.

THE COMMISSIONER: Thank you.

MS. O'BRIEN: Okay. So you recall his left arm hanging over the side of the chair?

MS. LINEHAN: Yes.

MS. O'BRIEN: Did you note down any of your observations at that time?

MS. LINEHAN: No.

MS. O'BRIEN: Okay.

MS. LINEHAN: No.

MS. O'BRIEN: All right.

MS. LINEHAN: I remember, yeah, I remember having to step over, I remember having to step over the gun when I went in and I remember not having to lift my leg very high to step over it.

MS. O'BRIEN: Okay.

MS. LINEHAN: I do remember that, and for me to have to lift my leg over that tub, it's, that's going to be –

MS. O'BRIEN: Okay. I'm going to show you the gun from another perspective in a moment.

MS. LINEHAN: Yeah.

MS. O'BRIEN: Before I leave this photograph though, anything else there that you note as being different from your memory?

MS. LINEHAN: The heater, a fan heater or something is there.

MS. O'BRIEN: Yeah.

MS. LINEHAN: I don't recall that either.

MS. O'BRIEN: Okay.

MS. LINEHAN: And that's pretty close to the chair as well. So that kind of would have been pretty close to us as we went in there to do the assessment. Now, I don't – and like I say, maybe it could have been there and I didn't see it when I walked in, but I don't, I don't recall seeing it.

MS. O'BRIEN: Okay. All right.

If you – are you finished with that photograph, then?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

Another confidential exhibit coming up, C-0001, photograph 096.

So, Ms. Linehan, is that up on your screen there now?

MS. LINEHAN: Yes, it is.

MS. O'BRIEN: So this is a view, a photograph that's taken more of the view that you would have seen. You know, from the perspective that you were approaching Mr. Dunphy to do your work. Anything there that is different from how you remember it?

MS. LINEHAN: And again, the blue tub –

MS. O'BRIEN: Okay.

MS. LINEHAN: – and the positioning of the gun. Like I said, I did have to step over the gun when I went in, no doubt, and where it's positioned right now I would be able to assess Mr. Dunphy without even having to be near the gun, and I do remember having to step over it.

MS. O'BRIEN: Okay.

Does the gun look like the same gun, other than its position?

MS. LINEHAN: It does, yes.

MS. O'BRIEN: And again, we see the heater in this photograph. Does that –

MS. LINEHAN: And it looks pretty close to his chair, and I didn't walk around that heater when I went in. And right there, like I'd have to walk between the heater and the chair, and I don't recall doing that.

MS. O'BRIEN: Okay.

And again, we see the position of Mr. Dunphy's arm, left arm, is now inside the chair and again that's inconsistent with –

MS. LINEHAN: Yeah.

MS. O'BRIEN: – what your memory is.

MS. LINEHAN: Yes, I can remember it hanging out over the side of the chair.

MS. O'BRIEN: Okay. All right.

So after you finished assessing Mr. Dunphy, did you leave the house then immediately?

MS. LINEHAN: We did.

MS. O'BRIEN: And did all four of you leave together as a group?

MS. LINEHAN: From what I can remember. Kevin and I left through the door first, I do know that. If the two officers left directly behind us, I'm not exactly sure.

MS. O'BRIEN: Okay. And what did you do next?

MS. LINEHAN: We went outside and I went – I think I went to the ambulance to do some paperwork on what I had done inside.

MS. O'BRIEN: Okay, we're going to look at your paperwork before we finish today, okay.

MS. LINEHAN: Okay.

And I think, and I, I, and I don't – I can't really remember how it transpired, but I, I don't know if somebody said that, that I was too assess, just, I should assess Constable Smyth.

MS. O'BRIEN: Okay.

MS. LINEHAN: And so I did that, but that was a – that was just shortly after that.

MS. O'BRIEN: Shortly after –

MS. LINEHAN: After we came out of the house.

MS. O'BRIEN: Shortly after you came out. Now, at that point did you have any knowledge of who Constable Smyth was or what his role in the (inaudible) was?

MS. LINEHAN: Yes, I found out just shortly after we left the house what had happened.

MS. O'BRIEN: Okay, so who –

MS. LINEHAN: And I can't remember who told me. I have no idea. I'm guessing it was one of the officers probably. And we came out and I really don't know who told me.

MS. O'BRIEN: Okay, but what did that person tell you?

MS. LINEHAN: That he was the one who had shot Mr. Dunphy.

MS. O'BRIEN: Okay. And did you understand him to be a police officer?

MS. LINEHAN: Yes. Well, I knew, I knew because I had seen when we came out when he was in the driveway.

MS. O'BRIEN: Okay, you –

MS. LINEHAN: I knew he was a police officer.

MS. O'BRIEN: Because of his holster you said earlier.

MS. LINEHAN: Yes.

MS. O'BRIEN: Do you remember if there was a weapon in the holster?

MS. LINEHAN: No, I can't remember.

MS. O'BRIEN: Okay.

All right, so did you do an assessment of Mr. – of Constable Smyth?

MS. LINEHAN: Yes, I did.

MS. O'BRIEN: And where did you do that?

MS. LINEHAN: In the back of the ambulance.

MS. O'BRIEN: Can you just explain to the Commissioner what you would have done as part of your –

MS. LINEHAN: I just checked his vitals.

MS. O'BRIEN: Okay. And when you check vitals, what are the vitals you checked?

MS. LINEHAN: I checked his blood pressure, his heart rate and his oxygen level.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Sorry, what was the last one?

MS. LINEHAN: His oxygen level.

MS. O'BRIEN: How did Constable Smyth appear to you? What was his demeanour? What was he like when you're doing this?

MS. LINEHAN: He was okay. He spoke when I asked him his name and date of birth and things like that.

MS. O'BRIEN: Okay.

MS. LINEHAN: Yeah. We didn't have a big lot of conversation or anything, you know.

MS. O'BRIEN: Okay, anything else that you can remember about his appearance or demeanour?

MS. LINEHAN: No, all I knew when he was in the driveway he looked really, really cold –

MS. O'BRIEN: Okay.

MS. LINEHAN: – and that, you know. And he wasn't wearing much – it was really cold that day and he wasn't wearing much warm clothes or anything and –

MS. O'BRIEN: Did he have on a hat?

MS. LINEHAN: No.

MS. O'BRIEN: Did he have on gloves?

MS. LINEHAN: No.

MS. O'BRIEN: Okay.

All right, so you would have checked his vitals in back of the ambulance. Is that where you would have done that?

MS. LINEHAN: Yes, that's correct.

MS. O'BRIEN: Okay. And how long would that type of an assessment take?

MS. LINEHAN: Oh, not very long. Like a couple of minutes.

MS. O'BRIEN: Okay. And was anyone else there while you were doing that?

MS. LINEHAN: Kevin Bishop was. He wasn't in the ambulance but he stood by the back of the ambulance at the time, I think.

MS. O'BRIEN: Okay. And I know you, you would have filled out some paperwork while you were doing that assessment. Is that right?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. I'm going to bring that up. This is – it's a confidential exhibit because it's a medical record.

Could you bring up, please, Madam Clerk, C-0014. Is that before you there now?

MS. LINEHAN: Yes.

MS. O'BRIEN: All right, so you should be looking at the – I understand this is – we're seeing it as a two-page exhibit but these are two sides of the same page –

MS. LINEHAN: That's right.

MS. O'BRIEN: – when you fill out the paperwork. Okay.

So at the top of the page there – and, Madam Clerk, I'll get you to lead through it because I don't have it up on my screen. At the top of the page here we just see some – sorry, I'm on the wrong exhibit. I'm on Mr. Dunphy's, sorry.

We see some data there for Joseph Smyth: date of birth, age. You would have gotten this information from him?

MS. LINEHAN: That's correct.

MS. O'BRIEN: Okay. And I know you have some information there about your vehicle, your odometer in and out, and the time of the call and such, but you would have recorded that yourself, independent of Constable Smyth I take it?

MS. LINEHAN: Oh, yes.

MS. O'BRIEN: Yeah, okay.

So in terms of the information that you got from Constable Smyth, I see here we have a section where you do the exam and I think the first one there is S, you don't have anything written?

MS. LINEHAN: (Inaudible) no.

MS. O'BRIEN: Under A for allergies you have NKA ticked. What does that mean?

MS. LINEHAN: That's no known allergies.

MS. O'BRIEN: Would you have asked him that question?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. And medications, you have – is that a zero there?

MS. LINEHAN: Yes.

MS. O'BRIEN: So would you have asked him if he was on any medications?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

And P is past history, you have zero slashed. Would you have asked –

MS. LINEHAN: Yes.

MS. O'BRIEN: – that question to Constable Smyth?

MS. LINEHAN: Yes.

MS. O'BRIEN: What question would you have asked him?

MS. LINEHAN: Are you on any medications or do you have any past medical history?

MS. O'BRIEN: And you would have just asked it as simply as that?

MS. LINEHAN: Yes.

MS. O'BRIEN: And he would have said no.

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

And then we see L, which stands for last ate. That's blank. Is that right?

MS. LINEHAN: Yes, I probably just didn't ask him when he last ate.

MS. O'BRIEN: Okay.

And events you wrote: RCMP officer shaken up by the events that – I think that says just transpired?

MS. LINEHAN: Transpired, yes.

MS. O'BRIEN: Okay. I'll get you to read that.

MS. LINEHAN: I checked him out to make sure he was okay. Vital signs stable, other than blood pressure is a bit elevated.

MS. O'BRIEN: Okay. You note here that he's shaken up by the events. What did you see or observe, or what information did you get from Constable Smyth to record that he was shaken up by that?

MS. LINEHAN: Well, he just seemed like – he was like pacing around a little bit and, you know, stuff like that. He was – he just seemed like it to me. That he was just – he was in the driveway and he was just pacing back and forth and stuff like that you know. So I said, you know, maybe you – 'cause at first he wasn't gonna get checked out. And I said, well maybe you should get checked out.

MS. O'BRIEN: Okay.

MS. LINEHAN: So I brought him down to the ambulance and we checked him out.

MS. O'BRIEN: Okay. So when you first – did you first approach him to ask him if he wanted to be checked out.

MS. LINEHAN: Yes, 'cause one of the officers said maybe you should check him out because, you know, with all that's after happening here today, you know, I think he needs to be checked out.

MS. O'BRIEN: Okay. So you would approach Constable Smyth then?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. And asked him, at first he said no and then you –

MS. LINEHAN: Yes.

MS. O'BRIEN: – suggested, again, it would be a good idea and he agreed.

MS. LINEHAN: Yes.

MS. O'BRIEN: Is that what you're saying?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

MS. LINEHAN: Because one of the officers I think came to me and suggested that he get checked out, you know.

MS. O'BRIEN: Okay. And so the shaken up there, those are your –

MS. LINEHAN: Yes.

MS. O'BRIEN: –that's your impression –

MS. LINEHAN: Yes.

MS. O'BRIEN: – that you're recording here, that he was shaken up.

MS. LINEHAN: Yeah.

MS. O'BRIEN: Okay. Then we see two notes here at 1520, so 3:20 in the afternoon. You make record of his respirations at 24. Is that a, considered a normal respiratory rate?

MS. LINEHAN: Yeah.

MS. O'BRIEN: Okay –

MS. LINEHAN: Well, it's a – yeah, anything 20 to 24 is fine, you know. Yup.

MS. O'BRIEN: That didn't strike you as unusual.

MS. LINEHAN: No.

MS. O'BRIEN: Okay. You did not take his temperature I take it?

MS. LINEHAN: No.

MS. O'BRIEN: And then, I guess here's where you check his oxygen, is it, 96 per cent?

MS. LINEHAN: That's correct.

MS. O'BRIEN: And how do you check oxygen?

MS. LINEHAN: You have to put a pulse oximeter on your finger, and it reads.

MS. O'BRIEN: Okay. And is 96 per cent oxygen considered a usual range?

MS. LINEHAN: Oh, yes.

MS. O'BRIEN: Okay.

MS. LINEHAN: Yup, that's nothing out of the ordinary.

MS. O'BRIEN: Okay. And pulse 82, what would that be considered in terms of normal?

MS. LINEHAN: Oh yeah, that's fine.

MS. O'BRIEN: And then blood pressure you record 180/90. Is that a normal-range blood pressure?

MS. LINEHAN: No.

MS. O'BRIEN: Okay, so what –

MS. LINEHAN: That, that would be considered elevated blood pressure.

MS. O'BRIEN: Okay. And eye opening four. What does that mean?

MS. LINEHAN: That's, that's normal. Those are all normal Glasgow Coma Scale levels, the four, six and five. That's all normal.

MS. O'BRIEN: But what are you testing there, eye opening.

MS. LINEHAN: Spontaneous eye opening.

MS. O'BRIEN: Okay. Just explain to me what, what does that mean?

MS. LINEHAN: Like if somebody's, if they're not spontaneous then the numbers go down, if it's a three or a two or one –

MS. O'BRIEN: What are you testing? Are you shining a light in their eye, are you testing their reflexes –?

MS. LINEHAN: No, no. No, if somebody is alert –

MS. O'BRIEN: Yes.

MS. LINEHAN: – and their eyes open spontaneously, well they will get a four.

MS. O'BRIEN: Oh, I see what you're saying. Okay.

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay. And the, so you mention there the Glasgow Coma –?

MS. LINEHAN: Glasgow Coma Scale, yes, that's how you test somebody's neurological findings, so –

THE COMMISSIONER: If you fall off your Ski-Doo or your ATV and hit your head –

MS. LINEHAN: And you have a brain injury or something then the Glasgow Coma Scale changes.

MS. O'BRIEN: Okay.

MS. LINEHAN: So if anybody is normal brain functioning then Glasgow Coma Scale will be 15, the numbers add up. But anything less than 15, then something else is going on.

MS. O'BRIEN: Okay.

MS. LINEHAN: So he would be a 15 that day 'cause everything is fine.

THE COMMISSIONER: So that might –

MS. O'BRIEN: So you thought everything was fine.

MS. LINEHAN: Yup.

THE COMMISSIONER: Sorry. That test would indicate whether there was any possible brain damage –

MS. LINEHAN: Brain damage to a person, yup.

THE COMMISSIONER: – swelling between the skull and the brain and so forth.

MS. O'BRIEN: And did you perform that test that day?

MS. LINEHAN: You would perform that test on anybody that you would think had any type of brain injury or anything like that –

MS. O'BRIEN: Okay.

MS. LINEHAN: – and anybody that doesn't have brain injury has the normal Glasgow Coma Scale.

MS. O'BRIEN: Okay. So you didn't do a – did you do a test, did you do a Glasgow Coma test?

MS. LINEHAN: No. No, there's, there's – he had normal Glasgow Coma Scale. Anybody who doesn't have anything would have normal.

MS. O'BRIEN: That's what you'd just say –

MS. LINEHAN: Yes.

MS. O'BRIEN: – if there's no signs for you to do the in-depth test you just say it's normal and you move on.

MS. LINEHAN: That's normal, yes.

MS. O'BRIEN: Okay. So eye opening four which is normal. Motor, what are you recording there?

MS. LINEHAN: His motor skills are normal, which is all within the Glasgow Coma Scale, you see.

MS. O'BRIEN: Okay, so that's – so you recorded that as six, which is normal?

MS. LINEHAN: Yes.

MS. O'BRIEN: And verbal, again what's that?

MS. LINEHAN: That's the same thing, that's all within the Glasgow Coma Scale as well.

MS. O'BRIEN: I see, so you add up all these three numbers and they came to –

MS. LINEHAN: And they come to 15.

MS. O'BRIEN: And they came to 15, which was normal.

MS. LINEHAN: That's correct.

MS. O'BRIEN: Okay. And then we have LOC and you have ticked A, what is that mean?

MS. LINEHAN: He was alert.

MS. O'BRIEN: Okay.

And LOC stands for?

MS. LINEHAN: Level of consciousness.

MS. O'BRIEN: Level of consciousness, okay.

So we see you do the same test again at 1600 hours, so approximately 40 minutes later. So just explain why did you do that second test.

MS. LINEHAN: He was, I just – where his blood pressure was elevated in the prior, I suggested that I check it again and he had gone over and sat in one of the police cars or something for a while, so I suggested that I check it again.

MS. O'BRIEN: You suggested to him that you give him another check?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

MS. LINEHAN: Just to see, you know where he was elevated blood pressure and you know, so I checked him again.

MS. O'BRIEN: Okay. And we see his respiratory rate has fallen down again and so has his pulse. So his respiratory rate now is 20. His oxygen level is around 97 per cent, so close to what it was before. His pulse has come down again to 76. That respiratory and oxygen pulse rate, anything abnormal about those?

MS. LINEHAN: No.

MS. O'BRIEN: Okay.

His blood pressure has now come down to 162/90. Is that considered still a high blood pressure –

MS. LINEHAN: It's still elevated a bit, but it had gone down.

MS. O'BRIEN: Okay.

And his Glasgow Coma Scale numbers hadn't changed.

MS. LINEHAN: That wouldn't have changed anyway, no.

MS. O'BRIEN: And he still stayed alert.

And then down here on the bottom here, you checked his pupils and both, you indicated left and right were R; what does R stand for?

MS. LINEHAN: Pupils are reactive.

MS. O'BRIEN: Reactive, so that's the light, shining the light test.

MS. LINEHAN: Yeah.

MS. O'BRIEN: Okay, and size, you have indicated for both, size is three; would that be considered a normal size?

MS. LINEHAN: Normal, his pupils would be normal.

MS. O'BRIEN: Okay.

Did you ask Constable Smyth what his normal blood pressure was? I mean, did he –

MS. LINEHAN: I asked him if he had high blood pressure or anything, he said no.

MS. O'BRIEN: Okay.

What would be – you're saying a 162/90 is still a bit elevated? What would you consider to be a normal rate for Constable Smyth?

MS. LINEHAN: 120/80.

MS. O'BRIEN: Okay.

So did the second assessment take around the same, just a few minutes, the same as the first?

MS. LINEHAN: Oh yes.

MS. O'BRIEN: Okay. And did you do it in the same location, the back of the ambulance. Okay.

And I think, just to clarify, you said between the two assessments, he was sitting down in a police vehicle, in between your two assessments?

MS. LINEHAN: Yes, he was.

MS. O'BRIEN: Okay.

How long were you at the scene in total?

MS. LINEHAN: Probably about an hour and 10 minutes maybe.

MS. O'BRIEN: Okay.

I see here, I'm just looking at exhibit C-0014 that– is that still up before you? We see a received – there's a time call there. Received at 4:30; en route 4:35; arrived at scene 1505. So is that when you would have arrived at the scene that day, five past 3 in the afternoon?

MS. LINEHAN: Yes, that's correct, yeah.

MS. O'BRIEN: And it says here departed scene at 1610. So does that indicate you would have left the scene at 10 past four?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

While you were there at the scene, had police officers blocked off access in front of Mr. Dunphy's home? I mean – or was there traffic still getting through? Was there anyone else in that area or was it just you and the police officers?

MS. LINEHAN: There was still traffic getting through. I think there was an RCMP officer making sure traffic was flowing through. There was nobody stopping in front of the house or anything like that.

MS. O'BRIEN: So while you were there, did you see anyone other than Constable Smyth and the other police officers at the scene?

MS. LINEHAN: No.

MS. O'BRIEN: Okay.

Now, I know you said you knew Meghan Dunphy. Did you see her at all while you were there that day?

MS. LINEHAN: Just as we were leaving the scene, yes, she arrived.

MS. O'BRIEN: Okay. I understand you had a brief interaction with her at that time. Can you just explain that to the Commissioner?

MS. LINEHAN: We stopped the ambulance just as she arrived, I think. She got out of her vehicle just as we were leaving, yes. And she came to the ambulance and we spoke briefly for a couple of minutes or a couple of seconds, maybe.

MS. O'BRIEN: Okay. Did you talk about anything that you had seen?

MS. LINEHAN: No, I wouldn't dare, no.

MS. O'BRIEN: So what was the conversation?

MS. LINEHAN: I just said, sorry, Meghan. And I hugged her and then I told her we had to leave.

MS. O'BRIEN: Okay, so –

MS. LINEHAN: And I haven't spoken about it since, not to this day.

MS. O'BRIEN: Okay.

Was Constable Smyth still there when you left the scene?

MS. LINEHAN: I don't recall. I don't think he was, but like I say, I can't be sure, but I don't think he was.

MS. O'BRIEN: The time that you were there, so it was over an hour, did you see Constable Smyth speaking to anyone or speaking to anyone on his cellphone while you were there?

MS. LINEHAN: He was in one of the police cars and he could have been on his phone, I don't know, but he was in one, the police car not far from where we were to.

MS. O'BRIEN: Okay.

MS. LINEHAN: Now whether he was on his phone or not, I didn't take notice.

MS. O'BRIEN: Okay. Was he in his, in the police car for most of the time you were there? I know you said you saw him in the driveway and –

MS. LINEHAN: After I did that first assessment on him, he was in the car for pretty much the entire time.

MS. O'BRIEN: Okay. So after you did the first assessment, we know from your notes you did that around 1520.

MS. LINEHAN: Yes.

MS. O'BRIEN: So 20 past three. And so you're saying after that –

MS. LINEHAN: I think he was pretty much in the car the entire time, yes.

MS. O'BRIEN: Okay. Did you, did you overhear him say anything to anyone?

MS. LINEHAN: No.

MS. O'BRIEN: Did you overhear any comments from him?

MS. LINEHAN: No.

MS. O'BRIEN: And were you speaking to him, other than the interactions you've described, did you –

MS. LINEHAN: No.

MS. O'BRIEN: – get any other information from him?

MS. LINEHAN: No.

MS. O'BRIEN: Did he make any comment to you about what had happened inside the house?

MS. LINEHAN: No.

MS. O'BRIEN: Okay.

MS. LINEHAN: No.

MS. O'BRIEN: While you were there, did you see anybody else enter or exit the house?

MS. LINEHAN: No.

MS. O'BRIEN: Did you have any further discussions with any of the other police officers there before you left the scene?

MS. LINEHAN: No, I didn't.

MS. O'BRIEN: Okay. Did you get any direction or instruction from them – how did you know when it was time to go?

MS. LINEHAN: I asked if we could leave.

MS. O'BRIEN: Okay. And you were told you could?

MS. LINEHAN: Yep.

MS. O'BRIEN: Okay. Were you given any instructions on leaving?

Do you recall who you asked, if you could –

MS. LINEHAN: No, I just asked one of the RCMP officers.

MS. O'BRIEN: Okay. Now, I know you did some paperwork on Mr. Dunphy, and we reviewed your paperwork on Constable Smyth already, but I'm going to ask Madam Clerk to bring exhibit C-0014 – again, it's a confidential exhibit – sorry, not C-0014 – C-0013; it's a confidential exhibit.

And just for the record, while Madam Clerk is bringing that one up, there was a second page, Commissioner, to Constable Smyth's medical record. It didn't have any – it was – nothing on it was completed in any – to give us any substantial information. But it was ultimately signed by Ms. Linehan, and it was also signed by your partner, Kevin Bishop.

MS. LINEHAN: That's correct.

MS. O'BRIEN: Yeah. So that's there on the second page, but that's why I didn't review it – there's – I think it speaks for itself.

MR. KENNEDY: My screen is black.

MS. O'BRIEN: Did you want to turn it on? Does that work?

MR. KENNEDY: (Inaudible) nothing happening.

THE COMMISSIONER: Can you try the other one next to you there, is that ...?

MR. KENNEDY: That one is coming on, yes.

MS. O'BRIEN: Maybe we have got a problem with that monitor. We will check it on the break.

Okay. So what you should have in front of you now, Ms. Linehan, this is the form that you would have filled out for Mr. Dunphy; is the right?

MS. LINEHAN: That's right.

MS. O'BRIEN: And would you have filled it out on the scene that day?

MS. LINEHAN: Oh yes.

MS. O'BRIEN: Okay. So it just records here, vendor number, the date, it's Gibbons Ambulance, that you left from base one, I take it, which would be Marystown. The plate of your –

MS. LINEHAN: St. Mary's.

MS. O'BRIEN: St. Mary's, sorry, and the plate of your ambulance.

Now, an MCP number is recorded there for Mr. Dunphy. How would you have known Mr. Dunphy's MCP number? And same with his date of birth – how would you have gotten that information?

MS. LINEHAN: I can't remember. I don't know if I got that – I might've gotten from dispatcher. I'm not really sure how I got it. I can't remember.

MS. O'BRIEN: Okay. Next of kin, Meghan Dunphy; would you have known that information? Or –

MS. LINEHAN: Yes, I would have known that, yes.

MS. O'BRIEN: You knew that, okay. You knew he didn't – his wife had passed away, did you?

MS. LINEHAN: Oh, yes.

MS. O'BRIEN: Okay, so, daughter – and you have his name there. You have Meghan Dunphy's phone number there. Would you have known that?

MS. LINEHAN: Yes, I probably would have, and I might have had it in my phone probably –

MS. O'BRIEN: Okay.

MS. LINEHAN: – from when she worked with us. Definitely, I probably would have had it in my phone.

MS. O'BRIEN: Okay. And you have his address as well as a phone number for him and his – who his family physician is. How would you have gotten that information?

MS. LINEHAN: Probably would have got it from my dispatcher as well.

MS. O'BRIEN: Okay.

MS. LINEHAN: Because he – maybe he had it from prior, I probably could have got it. I can't recall now.

MS. O'BRIEN: Okay.

So your pickup location was Mount Carmel is what you recorded here; destination was base. So that's when you left, you went back to (inaudible).

MS. LINEHAN: That's correct.

MS. O'BRIEN: Yeah, okay. And then you recorded your odometer here and it was an emergency response code. Emergency is what you have ticked. And medical codes, you have to 03 and from 02. What does that mean?

MS. LINEHAN: Well, it was an emergency en route to the call and then it was just routine back to the base.

MS. O'BRIEN: Okay, so that's what those codes mean. And then it's responsible for payment is other self there. What does that mean?

MS. LINEHAN: That means it's just –

MS. O'BRIEN: It's a bill.

MS. LINEHAN: Nobody is responsible, it's just the person themselves or whatever.

MS. O'BRIEN: Okay. So the time, the time call, so you were – so 1430 would have been when you were dispatched. And I think you would have been on the road then at 1435.

MS. LINEHAN: Yes.

MS. O'BRIEN: And we reviewed these numbers earlier, 5 past 3 you arrive on the scene, you left at 6:10. You arrived at your destination and then you have here base and you arrived back at base at 1655.

MS. LINEHAN: That's right.

MS. O'BRIEN: And when you say clear 1610, what does that mean?

MS. LINEHAN: That's for cleared the scene.

MS. O'BRIEN: Okay, cleared the scene. Okay.

And then you note here under the first check box that it was a DOA, so a dead on arrival?

MS. LINEHAN: That's right.

MS. O'BRIEN: And conditions on arrival, you said unchanged. What does that mean?

MS. LINEHAN: That nothing changed with the person.

MS. O'BRIEN: Okay, with Mr. Dunphy.

MS. LINEHAN: That's right.

MS. O'BRIEN: Okay, while you were with him?

And then for signs you have: DOA, unresponsive, no pulse, no respirations, allergies unknown, medications unknown, past history unknown, last ate unknown; and E for events you have signs of obvious death; and then clinical impression: penetrating wounds, gunshot to the forehead; comments: no palpable carotid pulse, no respiratory effort, non-reactive pupils, no heart sounds, blood from left ear, blood trail from the area.

So you would have recorded all that on the scene that day?

MS. LINEHAN: That's right.

MS. O'BRIEN: Okay. And then you have an assessment time here of 1515, so quarter past 3, and you have blanks for all those vital signs that we just went through with –

MS. LINEHAN: That's right.

MS. O'BRIEN: Okay. And he was unresponsive. I take his level of consciousness, U is unresponsive?

MS. LINEHAN: That's right.

MS. O'BRIEN: Okay. And the pupils both are listed as, I believe, non-reactive; is that what NR stands for?

MS. LINEHAN: That's right.

MS. O'BRIEN: Okay. And here we will go on to the next page or the next side of that page. So here mechanism of injury, you've ticked violence.

MS. LINEHAN: Uh-huh.

MS. O'BRIEN: And you did a couple of sections in the protective equipment where you put as non-applicable.

The support agency you've ticked police.

MS. LINEHAN: Yes.

MS. O'BRIEN: The location of incident: residence.

Non-transport you ticked dead on arrival again.

MS. LINEHAN: Yes.

MS. O'BRIEN: Some sections there you haven't checked for airway, but for breathing: absent. For effort you put absent. Circulation: absent

So this is – you're just going through your checklist and, again, not all boxes are ticked out here, and some of them you have marked as non-applicable.

MS. LINEHAN: That's right.

MS. O'BRIEN: Under treatment – for patient positioning, you ticked sitting.

For treatment before arrival, you ticked none.

MS. LINEHAN: That's right.

MS. O'BRIEN: And witnessed arrest, would that mean you witness the death? Is that what arrest means?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay.

So it's not like a police officer would use the word arrest. You use it –

MS. LINEHAN: Yes, cardiac arrest, yes.

MS. O'BRIEN: Cardiac arrest, okay.

So there was a witness. You ticked that it was a bystander. Whom, and you have police, RNC.

And I think you have here under the box whether CPR was performed, you've indicated no.

MS. LINEHAN: Right.

MS. O'BRIEN: Okay.

And then the rest you've ticked as non-applicable. And then at the bottom you signed it with your – is that your registration number?

MS. LINEHAN: Registration number, yes.

MS. O'BRIEN: Okay.

And your EMR partner, Kevin Bishop, also signed it, and that's his registration number.

MS. LINEHAN: That's correct.

MS. O'BRIEN: Okay.

Now, after you left the scene that day, did you – I know you were interviewed by the RCMP, is that right?

MS. LINEHAN: Yes.

MS. O'BRIEN: Okay, and then you were interviewed later by Commission counsel.

Did you have any other involvement in this matter?

MS. LINEHAN: No.

MS. O'BRIEN: Those are my – well, one more question. Did you ever have any discussions with any other – other than during your interview, did you ever have any discussions with any police officers or anyone else who had involvement in this matter after your involvement that day?

MS. LINEHAN: No.

MS. O'BRIEN: Okay.

Those are all my questions. Other counsel may have some questions for you.

Thank you, Ms. Linehan.

THE COMMISSIONER: Okay.

Who's to go first?

Mr. Kennedy.

MR. KENNEDY: (Inaudible.)

I just have a few questions for you, Ms. Linehan.

My name is Jerome Kennedy. I'm counsel for Constable Joe Smyth.

UNIDENTIFIED FEMALE SPEAKER: Your mic (inaudible).

MR. KENNEDY: Oh, mic, sorry. Thank you.

So, Ms. Linehan, when you arrive at the scene, there are a number of RCMP officers there, are there?

MS. LINEHAN: That's correct, yes.

MR. KENNEDY: Did they identify themselves to you?

MS. LINEHAN: They probably did. I don't recall.

MR. KENNEDY: Okay.

Do you remember or do you know if RCMP officers went into the house before you and your partner went in?

MS. LINEHAN: Yes, they did.

MR. KENNEDY: And how many of them went in? Do you know that?

MS. LINEHAN: Two.

MR. KENNEDY: So two police officers went into the house. Did they tell you they were clearing the house or they were just – they were going into the house?

MS. LINEHAN: Yes, they were.

MR. KENNEDY: And how long were they in the house before you –?

MS. LINEHAN: Not very long, a minute maybe.

MR. KENNEDY: Okay.

So the officers – does Corporal O'Keefe or Sergeant Foote or any of those names mean anything to you?

MS. LINEHAN: No, I can't say, no.

MR. KENNEDY: Okay.

So then you go in and you don't – one of the big things here is the tub. You don't remember the green tub.

MS. LINEHAN: The blue tub.

MR. KENNEDY: The blue tub, is it? Okay. You thought the gun was lying on the floor.

MS. LINEHAN: Pretty much, yes.

MR. KENNEDY: Now, when the tub is there – did you see the RCMP officers move anything while you were there?

MS. LINEHAN: No.

MR. KENNEDY: Did you or Mr. Bishop move anything while you were there?

MS. LINEHAN: Absolutely not.

MR. KENNEDY: No. So your job or your main focus would have been to check the body to ensure that the person was deceased?

MS. LINEHAN: Yes, that's correct.

MR. KENNEDY: Okay. And you didn't notice any smell in the house?

MS. LINEHAN: No.

MR. KENNEDY: Okay. And how long were you in there? When you say five minutes, is that an estimate?

MS. LINEHAN: Five, six minutes at the most.

MR. KENNEDY: Yeah, you went in, did you move anything?

MS. LINEHAN: No.

MR. KENNEDY: Okay. Is it possible you accidentally moved anything?

MS. LINEHAN: No, absolutely, I did not move anything.

MR. KENNEDY: So if I understand correctly, there's three things that you see in the picture that you think is different than what you saw that day.

One, you didn't see the tub.

MS. LINEHAN: No.

MR. KENNEDY: Okay. So if those RCMP officers said they saw the tub, would that surprise you, that when they went in the house the tub was there like that, the gun leaning against it?

MS. LINEHAN: It would surprise me, yes.

MR. KENNEDY: Yeah. And that's the testimony we have. So do you have – do you have a clear memory of this?

MS. LINEHAN: Well, the clear memory I have is that I stepped over the gun.

MR. KENNEDY: Okay. But the testimony again we have is that when the RCMP officers went in the gun was leaning against the tub. So that would surprise you?

MS. LINEHAN: Yes.

MR. KENNEDY: Okay. Or it just shows that your memory could be a little bit faulty.

MS. LINEHAN: Maybe my memory is faulty, but I do remember stepping over the gun.

MR. KENNEDY: Yes, and I'm not accusing you of anything.

MS. LINEHAN: No, no.

MR. KENNEDY: I'm just trying to explore because memory is – you're in there to do a certain job. I'm just trying to explore what you remember and how it would be different.

And so you remember the arm being different, Mr. Dunphy's arm, the position of his arm.

MS. LINEHAN: Yes.

MR. KENNEDY: Now, did you see any – either of the RCMP officers move his arm?

MS. LINEHAN: No.

MR. KENNEDY: Did you or your partner move his arm?

MS. LINEHAN: Absolutely not.

MR. KENNEDY: And then you think the heater is in a different position, or you don't remember the heater at all?

MS. LINEHAN: No.

MR. KENNEDY: Okay. So we have a heater and a tub, they're fairly big items.

MS. LINEHAN: Yes.

MR. KENNEDY: Again, would it surprise you that the RCMP officers, when they went in, saw both of those things?

MS. LINEHAN: It would surprise me, yes.

MR. KENNEDY: Okay. Because, Ms. Linehan, you're focused on getting in, doing your job and getting out, correct?

MS. LINEHAN: Correct.

MR. KENNEDY: You know the importance of not touching anything in the scene or not touching the body. You're trained – trained –

MS. LINEHAN: For sure.

MR. KENNEDY: Yeah, so you're trained with all that.

The RCMP officers, were two of them in the house while you were there?

MS. LINEHAN: Yes.

MR. KENNEDY: And were they, did they appear to you to be watching the whole time?

MS. LINEHAN: Yes.

MR. KENNEDY: Okay. So they were paying close attention?

MS. LINEHAN: To what I was doing, yes.

MR. KENNEDY: And in terms of – Ms. Linehan, I just want to focus just very briefly on this. In terms of memory, you were asked in the – police asked you if anything stood out. Do you remember that, being asked in your statement to the police a couple of days later about the scene? Do you remember?

MS. LINEHAN: Probably.

MR. KENNEDY: Yeah.

Okay, do you remember –?

MS. LINEHAN: It's a while ago when I gave my police statement, so I, you know.

MR. KENNEDY: Has your memory improved over time?

MS. LINEHAN: No, I'm talking about my police statement now and –

MR. KENNEDY: So in terms of – there would have been a lot of discussion in the community about this incident. Which community do you live in, sorry?

MS. LINEHAN: O'Donnells.

MR. KENNEDY: Yeah. And how far would that be away?

MS. LINEHAN: From Mount Carmel?

MR. KENNEDY: Yeah.

MS. LINEHAN: About half hour.

MR. KENNEDY: Yeah. So there would have been a lot of discussion in that whole area. Correct?

MS. LINEHAN: Yeah.

MR. KENNEDY: About the incident.

MS. LINEHAN: Not so much down our way but probably Mount Carmel area, yes.

MR. KENNEDY: Well, it was in the news everywhere.

MS. LINEHAN: Yes.

MR. KENNEDY: Yes. Okay.

MS. LINEHAN: For sure.

MR. KENNEDY: And is there, do you remember there being any discussion of, of what happened and what occurred in the house and things like that? Do you remember?

MS. LINEHAN: Oh, for sure. Yeah.

MR. KENNEDY: Yeah. So everywhere you went there was discussions like that. It was in the media all the time.

MS. LINEHAN: Yeah, for sure.

MR. KENNEDY: Okay.

So have you had any discussions with anyone in the, in the community, or listened to anything on the, in the media that could affect your memory of this in any way?

MS. LINEHAN: No.

MR. KENNEDY: Okay.

MS. LINEHAN: I discussed it with nobody.

MR. KENNEDY: Now in terms of Constable Smyth's blood pressure, the 180/90, I think you indicated – what was the standard? Or the normal would be 120/80?

MS. LINEHAN: 120/80, yes.

MR. KENNEDY: In terms of the pulse that you got, is – pulse, again, is there a normal rate or is that something that's individual for each person?

MS. LINEHAN: Anywhere between 60 and 80 would be normal.

MR. KENNEDY: Okay.

And so what were the readings here? We don't need to go back to them but what were the readings in the pulse?

MS. LINEHAN: It was 80 – 82 and 76 or something like that.

MR. KENNEDY: So his heart appears to be beating a bit fast, does it?

MS. LINEHAN: I wouldn't consider that fast, no.

MR. KENNEDY: He appeared to be very cold.

MS. LINEHAN: Yeah, he was –

MR. KENNEDY: Yeah. He appeared to be shaking to you.

MS. LINEHAN: Yeah, he was kind of pacing around a lot and, you know.

MR. KENNEDY: Now, I want, again, check your memory on this too. So you're saying that after 3:20, when you did your first test, he went in the police car.

MS. LINEHAN: Yes.

MR. KENNEDY: And he was in the police car, as far as you know, for the rest of the time you were there.

MS. LINEHAN: Yes, I think for the most part. Yeah,

MR. KENNEDY: Then you're leaving at 4:10. Correct?

MS. LINEHAN: Yes.

MR. KENNEDY: And that's when Meghan Dunphy is arriving?

MS. LINEHAN: Yes, she was coming. I think she was getting out of her car as I was leaving, I think.

MR. KENNEDY: So your understanding that Ms. Dunphy was arriving just as you were leaving?

MS. LINEHAN: Yes, we –

MR. KENNEDY: And Con –

MS. LINEHAN: – were pulling out. Yeah.

MR. KENNEDY: And Constable Smyth had been in the police car for a long time, or for a period of time prior to you leaving.

MS. LINEHAN: Yes.

MR. KENNEDY: How sure are you on that, that that's when you saw Ms. Dunphy, at 4:10?

You sure of that?

MS. LINEHAN: When I was leaving that's when I saw her, yeah.

MR. KENNEDY: (Inaudible.)

MS. LINEHAN: Now, I don't if she was just arriving but she got out of a car as I was leaving.

MR. KENNEDY: So she got out of a car.

MS. LINEHAN: Yes.

MR. KENNEDY: Well, that would indicate she was – did that indicate to you that she was arriving?

MS. LINEHAN: Well, she could have been there; she was up at the other end of –

MR. KENNEDY: Okay. And who was she there with? Do you know that?

MS. LINEHAN: Oh, I have no idea.

MR. KENNEDY: Okay.

Thank you very much. Those will be my questions, Ms. Linehan.

THE COMMISSIONER: Ms. Rasmussen, do you have any questions?

MS. RASMUSSEN: No.

THE COMMISSIONER: Thank you.

Mr. Simmonds.

MR. SIMMONDS: Ms. Linehan, your prime function for attending a scene like this would be to determine the status of the person injured, shot, hurt. Would that be a fair statement?

MS. LINEHAN: That's right.

MR. SIMMONDS: And when you get there your attention will be pretty much solely focused on your purpose; i.e. to view – oh, I'm sorry; sorry about that – to view the person injured or the deceased person.

MS. LINEHAN: That's right. That's what I'm there for.

MR. SIMMONDS: Now in this case you happen to know. Because of your dispatcher, you think you knew before you got there that Mr. Dunphy had been deceased.

MS. LINEHAN: That's right. I knew prior to arriving on scene.

MR. SIMMONDS: Okay.

When you get there you're with your driver, Mr. Kevin Bishop. Is that correct?

MS. LINEHAN: That's right.

MR. SIMMONDS: But you're the person that kind of takes the lead.

MS. LINEHAN: Yes.

MR. SIMMONDS: Okay.

Have you and Mr. Bishop discussed this since, what you saw in there or anything of that nature?

MS. LINEHAN: No, we don't, we don't discuss stuff like that.

MR. SIMMONDS: So you purposely kept this separate from him and he's kept it separate from you?

MS. LINEHAN: Yes.

MR. SIMMONDS: Okay. And I think you say something in your statement about that's the instructions you've been given over the years.

MS. LINEHAN: Yeah, it's not, it's not something we talk about.

MR. SIMMONDS: Okay.

So you go to the house, you get in the ambulance; you're immediately met by two police officers.

MS. LINEHAN: Yes.

MR. SIMMONDS: Okay.

And they – you're parked on the road, I believe. Are you not?

MS. LINEHAN: Yes, across – directly across from the house.

MR. SIMMONDS: And so you get out of the ambulance and you walk up towards the house. They meet you and they obviously know what your purpose is there, but you don't know which two officers it was?

MS. LINEHAN: No. I don't recall.

MR. SIMMONDS: Okay, it's two uniformed RCMP officers?

MS. LINEHAN: Yes.

MR. SIMMONDS: Okay.

And they say – you tell them you need to go into the house.

MS. LINEHAN: That's correct.

MR. SIMMONDS: And they say let us – we've got to clear it or check it or they use some phraseology like that before you go in.

MS. LINEHAN: Before you enter, yes.

MR. SIMMONDS: Okay. And they're gone in not more than a couple of minutes, I –

MS. LINEHAN: Oh, gosh no; not very long at all.

MR. SIMMONDS: Not very long at all. They went in, two of them come back out and then they beckon you to come on it.

MS. LINEHAN: Yeah. That's right.

MR. SIMMONDS: And you take the lead?

MS. LINEHAN: I do.

MR. SIMMONDS: And Mr. Bishop is behind you?

MS. LINEHAN: Right behind me.

MR. SIMMONDS: If I might approach that diagram, Mr. Commissioner.

THE COMMISSIONER: Sure. Go ahead.

MS. O'BRIEN: And Madam Clerk can bring up Scene 035 on the monitors just for people to see to assist.

MR. SIMMONDS: Okay. Thank you.

And my voice normally gets picked up on pretty loud. I don't mean to block you there.

THE COMMISSIONER: No, that's all right.

MR. SIMMONDS: So you go up over the rickety steps. There's tires there –

MS. LINEHAN: Yes.

MR. SIMMONDS: You recall that?

MS. LINEHAN: That's right.

MR. SIMMONDS: You had to be careful walking in. Then you said there was a little hallway here, right?

MS. LINEHAN: That's right.

MR. SIMMONDS: And you had to go in around that?

MS. LINEHAN: Yes.

MR. SIMMONDS: And you went in, and do I understand you to say you were somewhere in this area here?

MS. LINEHAN: Yes. Yes, by the side or the corner of his chair. That's where I was.

MR. SIMMONDS: By the side or the corner of his chair.

MS. LINEHAN: Yes.

MR. SIMMONDS: So that's right around here somewhere.

MS. LINEHAN: That's right

MR. SIMMONDS: Okay.

And the two RCMP officers were back of you? Were back –

MS. LINEHAN: In the hall. At least one of them was in the hall.

MR. SIMMONDS: Okay. And Mr. Bishop was somewhere in around –

MS. LINEHAN: He was right at the corner of the door. Yes, he was stood right there.

MR. SIMMONDS: Right –

MS. LINEHAN: Yeah.

MR. SIMMONDS: Right there?

MS. LINEHAN: That's right

MR. SIMMONDS: Okay.

So you had clearly an unobstructed view of Mr. Dunphy when you got in there.

MS. LINEHAN: Oh yes.

MR. SIMMONDS: Okay.

What was your prime focus when you got in there?

MS. LINEHAN: On Mr. –

MR. SIMMONDS: These may sound like stupid questions but please bear with me – and they may be stupid questions anyhow, but what was your prime focus when you got in there?

MS. LINEHAN: On Mr. Dunphy.

MR. SIMMONDS: You recall having to step over or don't you recall? What do you recall as you went towards Mr. Dunphy?

MS. LINEHAN: I had to step over a gun.

MR. SIMMONDS: You had to step over the gun?

MS. LINEHAN: Yes.

MR. SIMMONDS: And you don't remember any tub there?

MS. LINEHAN: No, I don't.

MR. SIMMONDS: Okay.

MS. LINEHAN: I had to step over the gun in order to assess Mr. Dunphy.

MR. SIMMONDS: Now, if we could bring up – and I think these are, at least one of them is a confidential picture. Photo 096 is on the copy that I got with the documentation. Yeah, Photo 096; do you have that on your screen, Ma'am?

MS. LINEHAN: Yes, I do.

MR. SIMMONDS: Was that the way you saw the gun when you stepped over it?

MS. LINEHAN: No. In order – when I walked in, in order to assist Mr. Dunphy, I had to step over the gun. Now, whether it was, it stayed between my legs like, while I was assessing him or I stepped both feet over it, but I remember I had to step over.

MR. SIMMONDS: You had to step over it?

MS. LINEHAN: Yes. And I didn't have to lift my leg very high to step over it. I just stepped over it.

MR. SIMMONDS: Yes, 'cause that was what you said in direct, I remember: I didn't have to lift my leg very high to step over it.

MS. LINEHAN: Yes. And as you can see in that picture, if I had to step over it right there, as it is right there, I would have to lift my leg high to step over that. I'm just –

MR. SIMMONDS: No, I don't mean to cut you off, I'm sorry. You were going to say something else?

MS. LINEHAN: As it sits there, against that tub right there, I would have to lift my leg a lot higher. And I didn't have to do that.

MR. SIMMONDS: And you appear to be fairly certain with respect to this testimony.

MS. LINEHAN: Oh, yes.

MR. SIMMONDS: Okay.

MS. LINEHAN: I remember having to step over it and, and the bolt action thing wasn't sitting up, that was, that was on the floor. It wasn't that high up; it wasn't sitting up on the tub. I –

MR. SIMMONDS: It wasn't sitting up on the tub and you don't recall the tub.

MS. LINEHAN: No.

MR. SIMMONDS: Okay. And you have not talked to Mr. Bishop about this either.

MS. LINEHAN: No.

MR. SIMMONDS: Okay.

MS. LINEHAN: I can remember, I do remember having to step over it. I remember going and I stepped over the gun.

MR. SIMMONDS: Okay. So you remember going and stepping over the gun and there was no tub there, that you saw.

MS. LINEHAN: No.

MR. SIMMONDS: Then –

MS. LINEHAN: If the tub was there –

MR. SIMMONDS: Yes?

MS. LINEHAN: – the gun wasn't up on it like that.

MR. SIMMONDS: The gun was not up on it like that.

MS. LINEHAN: No.

MR. SIMMONDS: Okay. Now your focus is still on the deceased, Mr. Dunphy.

MS. LINEHAN: Yes, that's correct.

MR. SIMMONDS: And you're now, pretty well, I would think, inches from him.

MS. LINEHAN: Yes.

MR. SIMMONDS: I would also believe that you're looking at his – if we go to Photograph 040, which again is a confidential photograph. You would have been right by the arm of that chair. Correct?

MS. LINEHAN: Yes.

MR. SIMMONDS: The arm that's nearest to us in the picture.

MS. LINEHAN: That's right.

MR. SIMMONDS: Okay, if you were sitting in the chair, it would be your left arm.

MS. LINEHAN: Yes.

MR. SIMMONDS: Okay.

And you have a clear recollection that his hand was not like that, it was hanging down over the arm of the chair.

MS. LINEHAN: Yes.

MR. SIMMONDS: If I said to you is that in fact what you told – that is in fact what you told the RCMP when you gave your statement –

MS. LINEHAN: Yes.

MR. SIMMONDS: – shortly after this incident.

MS. LINEHAN: Yes.

MR. SIMMONDS: And it was also what you told Commission counsel –

MS. LINEHAN: Yes.

MR. SIMMONDS: – when you met with them.

MS. LINEHAN: Yes.

MR. SIMMONDS: You're focusing on the deceased; you're there with a stethoscope –

MS. LINEHAN: Yes.

MR. SIMMONDS: – and you do, I think it was four types of assessments –

MS. LINEHAN: That's right.

MR. SIMMONDS: – to confirm your conclusion with respect to each.

MS. LINEHAN: Right.

MR. SIMMONDS: You're inches away from him.

MS. LINEHAN: Yeah.

MR. SIMMONDS: Correct?

MS. LINEHAN: That's right.

MR. SIMMONDS: And his hand is out over the arm of that chair hanging down.

MS. LINEHAN: Uh-huh.

MR. SIMMONDS: Is that correct?

MS. LINEHAN: Yes. Well, his whole – his whole arm wasn't hanging down –

MR. SIMMONDS: No.

MS. LINEHAN: – but his hand was.

MR. SIMMONDS: His hand was, but it was not in the position –

MS. LINEHAN: No.

MR. SIMMONDS: – you see in that photo.

MS. LINEHAN: Definitely not.

MR. SIMMONDS: Definitely not.

MS. LINEHAN: No.

MR. SIMMONDS: Would you be surprised if I said to you that's exactly how Mr. Bishop remembers it?

MR. KENNEDY: I – Mr. Commissioner, I don't – we haven't heard from Mr. Bishop.

MR. SIMMONDS: We're going to hear from Mr. Bishop. We have –

THE COMMISSIONER: Yeah, we're going to hear from him (inaudible) in any event.

MR. SIMMONDS: But – well, wait now, I don't want to go somewhere where I'm not supposed to but –

THE COMMISSIONER: No, let's just – let's just stop and think for a second now. The, why –

MR. SIMMONDS: Why is it important?

THE COMMISSIONER: – does this witness have to, have to supply their – she's given her testimony.

MR. SIMMONDS: Right.

THE COMMISSIONER: If somebody else says the same thing, that will be for argument afterwards.

MR. SIMMONDS: It will.

THE COMMISSIONER: (Inaudible.)

MR. SIMMONDS: But Mr. Kennedy put to her that the police officer's evidence is different and, you know, how sure is your memory. The police officers –

THE COMMISSIONER: Yeah, go ahead with it. I'll decide later whether I give any weight to it.

MR. KENNEDY: I'm not convinced that – I'd like to see the reference where he says it's the same thing.

MR. SIMMONDS: Uh.

THE COMMISSIONER: Both of you should keep in mind as well that there's – I don't know if it's in the coroner's report or where I saw it – there's some reference to the body probably or possibly, I'm not sure the way it's worded, slouching down as time passed.

MR. SIMMONDS: Page 57 – and there are more places in this; I'll take him through it when he gives his evidence. But page 57 of the transcript: Ms. O'Brien: And in your memory, is his arm in a different position in these photos? Yeah, his arm, like his left arm here, I'm almost sure it was hanging down over the arm of the chair. Page 57, 60, pardon me, of the transcript of the interview –

THE COMMISSIONER: That's Ms. Linehan in the –

MR. SIMMONDS: No, that's Mr. – Mr. Kennedy said –

THE COMMISSIONER: Bishop, Bishop, in the transcript with Commissioner counsel.

MR. SIMMONDS: And there are other places that I'll take you to when he gives his, his evidence.

MR. KENNEDY: Mr. Commissioner, I wonder if I could make a comment because part of the issue here we have is that this is a public inquiry where it's being watched by members of the public and we're having conspiracy theories all over the place. It's really – I would suggest we've got to watch it with that, Mr. Commissioner.

So are the RCMP officers now took that tub and they put the gun up against the tub, they fixed his hands up.

THE COMMISSIONER: Mr. Kennedy, look, that may be a good point for you to make during your submission, but please not, I don't think it's, now is the appropriate time to make it.

I know what you're saying. You'll be able to say what's the point of two police officers bringing a tub and putting the gun and stuff. All of that will be – sorry – all of that will be a fair argument, but Mr. Simmonds is entitled to cross-examine this witness and that's all is happening here. And at the end of the day, the chips will fall where they may in terms of whether I accept that Ms. Linehan's recall of the situation is correct or not.

And one of the factors I'll have to look at is do I think – there was a television, was there not – sorry, you were asked about the television. You said you didn't see the television.

MS. LINEHAN: That's right.

THE COMMISSIONER: Okay.

The heater, didn't see the heater. So it's – and this is not criticism of you, Ms. Linehan, I just have to test every witness to see if there's a conflict, whose testimony is most consistent with reality.

So, Mr. Kennedy, unless I'm missing something I don't see where – what do you ask me to do, cut Mr. Simmonds off from further questions for this witness? That wouldn't be appropriate.

MR. KENNEDY: No, I'm not, Commissioner.

One of the points, though, that has been of concern from day one, and I'm talking about from the time of this incident, have been the conspiracy theories that have been out there in the public that are being, the speculation that went on.

You've heard –

THE COMMISSIONER: I can't do anything –

MR. KENNEDY: I know you can't, Commissioner, but if there's going –

THE COMMISSIONER: I can comment on whether I believe them or not at the end of the, at the end of the evidence.

Go ahead, sorry.

MR. KENNEDY: But this kind of evidence can feed into those conspiracy theories. If Mr. Simmonds is saying the two police officers are making this up, that their evidence – they come in, they saw the tub and the saw the rifle, his hands were like they were. Are they making it up? Is that the allegation?

THE COMMISSIONER: Well, that's the – you know, that bottom line may be what Mr. Simmonds is asking that I accept, and you may view it as a conspiracy theory, and Mr. Simmonds says that's the correct scenario as explained by all the evidence, but we're far from there yet. I mentioned yesterday we're roughly halfway in the witness list, so there's lots of evidence yet to be heard, but that is one of the things that I have to consider in assessing Constable Smyth's suggested scenario.

Mr. Simmonds, on behalf of his client, is putting forth that Constable Smyth is not setting out the correct scenario, and that you may refer to as a conspiracy theory, in that the allegation is that Constable Smyth moved or manipulated the scene for whatever reason and that it's not correct, that he, following the shooting, changed the scene.

MR. KENNEDY: That was not put to him in cross examination.

THE COMMISSIONER: Sorry?

MR. KENNEDY: That was not put to him in cross examination.

THE COMMISSIONER: I'm saying that, as far as I'm concerned, that's the only inference that I can see, and we're going to be getting into that, if we ever get there this morning, when we look at the admissibility of that proposed experiment. But that's – do you not agree that that's the – that if Constable Smyth's testimony is not accepted, it is because of the allegation that there's another scenario which involved the manipulation of the evidence?

MR. KENNEDY: Commissioner, as you've stated on numerous occasions, and is outlined in both the case law and textbooks relating to inquiries, one of the – the primary goal is that of fairness. Well, if you're going to accuse someone of manipulating the scene, then it's got to be put to them in cross examination. I would suggest to you that the rule in Browne and Dunn, or the modified rule in Browne and Dunn, has to apply at an inquiry (inaudible).

THE COMMISSIONER: You'll have your chance, Mr. Kennedy.

MR. KENNEDY: Okay.

THE COMMISSIONER: Sorry, Ms. O'Brien, you have something?

MS. O'BRIEN: Yeah, I'll just make a couple of comments. I don't know if Mr. Kennedy is suggesting that as Commission counsel we shouldn't have called Ms. Linehan because her recall of events is different than somebody else's recall of events. I mean, she was a legitimate witness to come here. She can come here and she can testify as to what she recalls that she saw that day, and she's a completely legitimate witness to have here.

As for Mr. Kennedy's citing of the rule in Browne and Dunn, he did question his own witness about, you know, possibilities of moving. Mr. Kennedy has been aware, and long in advance of his client's testimony, as to what Ms. Linehan was expected to say today because she had been interviewed, of course, and he was privy to that. And I do believe that Commission counsel also put a similar line of questioning to Constable Smyth. So I think that the rule in Browne and Dunn has been properly met here and I think that Ms. Linehan is a legitimate witness and should be allowed to come here and give her testimony to this Commission.

THE COMMISSIONER: Mr. Kennedy, as I said at the beginning, I don't see where that is a valid objection. The effect of it would be for me, as Ms. O'Brien has said, for me to foreclose this witness answering questions because her memory is different than the police officers', and that is not the way the law of evidence works.

Mr. Simmonds, you are entitled to go ahead and now – not at length, I should point out, but you're entitled to follow up on that line of questioning. Go ahead.

MR. SIMMONDS: I'd like to make one comment, and I realize time is – firstly, so to satisfy Mr. Kennedy's concern, I would put on the record, and I said this at the meeting we had, Ms. Dunphy, we as counsel for Ms. Dunphy, do not accept Constable Smyth's version of what took place, number one. Number two, I thought very clearly I put that to him in my cross examination

THE COMMISSIONER: I will check the transcript.

MR. SIMMONDS: – went two days, with respect to the fact that we did not accept the gun came up. Number three, I believe in this situation it's a fair question to go through this. This is her recall. Mr. Kennedy raised the point with respect to the recall –

THE COMMISSIONER: I'm not sure which part of yes you don't understand. Yes, go ahead.

MR. SIMMONDS: I understand that, Mr. Commissioner, but I also understand Mr. Kennedy's issue with – or I think I understand – us not being upfront with respect to our conspiracy or our theory. Thank you.

Ms. Linehan, you've heard the discussion about this. Your recollection of events is important. You don't recall a TV. Can you tell us about that? You were questioned about that by the police officer.

MS. LINEHAN: Well, when I walked in to the living room, my initial focus was on Mr. Dunphy. So immediately, then, as I walked in, then my back would be turned to where the TV was. So then as I left the living room, I wouldn't have turned back to view where there was a TV.

MR. SIMMONDS: Do you believe your recollections are clear with respect to what you saw that day in relation to the body in the chair?

MS. LINEHAN: Yes.

MR. SIMMONDS: Now, we've dealt with where the – Mr. Dunphy's hand was, and that was his left hand, and it was over the arm of the chair.

MS. LINEHAN: Yes.

MR. SIMMONDS: We've dealt in part – the rifle was not where you see it in Photo 96, and that's – I don't think that's a confidential photo. Is it a confidential photo? Yeah, it is.

In Photo 96, that is not where you recall the rifle being, is that correct? It should be on your screen there now.

MS. LINEHAN: No. If that's where the rifle was when I walked in, I would not – in order for me to assist Mr. Dunphy, I would not have had to step over the rifle.

MR. SIMMONDS: Okay.

MS. LINEHAN: It would not have been in my way.

MR. SIMMONDS: And that's the thing that triggers your memory as to why you know –

MS. LINEHAN: I had to step over the rifle.

MR. SIMMONDS: Okay.

MS. LINEHAN: Without a doubt, I had to step over it. And where it is right now, I would not have had to step over it.

MR. SIMMONDS: We've heard from other witnesses that there were numerous cats inside the house.

MS. LINEHAN: Not when we got there.

MR. SIMMONDS: We heard from other witnesses that there was a horrible stench in the house that was noticeable as soon as you went through the door. Let's talk about the stench first. Do you recall any noticeable stench of cat feces or cat's pee in the house?

MS. LINEHAN: There was a lot of garbage around, so if there was a smell I wouldn't have taken notice of it 'cause there was so much garbage and stuff around.

MR. SIMMONDS: That's fair, that's fair. But you do remember – you remember cats in the sense that you were walking on cat food.

MS. LINEHAN: A lot of it, yes. It was crunching under our feet.

MR. SIMMONDS: Crunching under – but being aware of that, while you were in the hallway, which again is admittedly brief, five to six minutes, there were no cats inside that house.

MS. LINEHAN: No. And if they were they were in other rooms 'cause they weren't in the room where we were.

MR. SIMMONDS: But there were a significant number of cats –

MS. LINEHAN: Outside.

MR. SIMMONDS: – outside the house.

MS. LINEHAN: Yes.

MR. SIMMONDS: Okay.

Thank you very much, Ms. Linehan, I appreciate your time.

THE COMMISSIONER: Anything arising? All right.

Thank you, Ms. Linehan, you may step down.

Okay, it's 11 o'clock. I'm just – we have Mr. Bishop. We'll take our break now. We'll keep it no more than 10 minutes because we've got a short day here.

Ms. Rasmussen, you have a conference call, I understand, at 1:30. Is that still on?

MS. RASMUSSEN: (Inaudible) but I'll work around (inaudible).

THE COMMISSIONER: All right. I'm just, I'm just – and I also have notice that one of the staff has a medical appointment for, I think, has to be away before 2:30. So I'm a bit concerned as to whether we're gonna have time, if we start that discussion of the admissibility of the evidence whether we are going to have time to finish it.

MR. SIMMONDS: What would you suggest, Mr. Commissioner. I'm –

THE COMMISSIONER: Well, I'm – you know, I didn't think we were going to be that long with this witness.

MS. O'BRIEN: Mr. Bishop will be shorter I can tell you that because he – there won't be need to repeat –

THE COMMISSIONER: Yup. All right.

MS. O'BRIEN: – lot of what was –

THE COMMISSIONER: Well, let's see how it goes with Mr. Bishop but I'm just putting you on notice that we may have to reassess the – when we do our application, Mr. Simmonds – Mr. Kennedy.

Mr. Kennedy, you have any problem with that?

MR. KENNEDY: None whatever.

THE COMMISSIONER: Yeah. Okay.

All right, we'll recess for 15 minutes.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

MS. O'BRIEN: Thank you, Commissioner. I'd call the next witness, Kevin Bishop, and ask him to please come to the stand.

Madam Clerk will affirm your evidence. You can have a seat, Mr. Bishop.

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

MR. BISHOP: I will.

MS. SHEEHAN: Please state your full name.

MR. BISHOP: Kevin Gerard Bishop.

MS. SHEEHAN: Thank you.

MS. O'BRIEN: Thank you.

Mr. Bishop, good morning, I'm Kate O'Brien, co-counsel for the Commission. We've met before.

MR. BISHOP: Uh-huh.

MS. O'BRIEN: Commissioner, I have no new exhibits to enter at this time.

Mr. Bishop, I understand that you are an emergency medical responder and you work for Don Gibbons Ambulance services; is that right?

MR. BISHOP: That's correct, yeah.

MS. O'BRIEN: Okay, and how long have you worked as an emergency medical responder?

MR. BISHOP: Five years.

MS. O'BRIEN: Five years, okay.

Now, did you know Mr. Donald Dunphy prior –

MR. BISHOP: Not personally, no.

MS. O'BRIEN: Okay.

And did you know his daughter, Meghan Dunphy?

MR. BISHOP: Yes.

MS. O'BRIEN: And did you just know her because she worked with you as an EMR for a period of time?

MR. BISHOP: Yep, she worked with us for a little while, yep.

MS. O'BRIEN: Okay, so it was that your relationship with her was just restricted to knowing her through work, was it?

MR. BISHOP: Yes, basically, yes.

MR. O'BRIEN: Okay.

And I understand you were working on the afternoon of April 5, 2015; is that right?

MR. BISHOP: I was, yes.

MS. O'BRIEN: And I know you were working with paramedic Nancy Linehan on that date.

MR. BISHOP: Yes.

MS. O'BRIEN: Now, Ms. Linehan's already given us testimony here about how you came to this, you know, came be dispatched and ended up on the scene in Mitchells Brook, so I'm not going to need to go through that with you.

Prior to arriving at the scene, what information did you have as to what events had occurred?

MR. BISHOP: Well, we got the call around 2:30. George called and he said that Nancy was going to pick me up; he said get ready.

MS. O'BRIEN: Yeah, I just want to know what – I don't need to go through what happened because we know how you got picked up and took the ambulance.

MR. BISHOP: Yeah, okay.

MS. O'BRIEN: Just what information did you have prior to arriving on the scene, what you were going to face when you were, you know, what was there?

MR. BISHOP: The call that I got was just get ready, we're going. He said I'll give you all the information en route. So we left, Nancy picked me up, we left and we were inside of Riverhead, because we can't get cell service in there, so we're inside of Riverhead when George called back to Nancy. Nancy answered the phone in the ambulance because I was driving.

MS. O'BRIEN: Okay, so could you overhear that conversation or did the information go right to Nancy?

MR. BISHOP: No, no.

MS. O'BRIEN: Okay, so we've already heard from her what information she got.

MR. BISHOP: Yes.

MS. O'BRIEN: That's fine then.

Did you have any concerns for your safety when you were arriving?

MR. BISHOP: Well, yes, to an extent, yes.

MS. O'BRIEN: Okay. Can you explain that, please?

MR. BISHOP: Well, like George told us was a, was a gunshot wound. So, like, we didn't – we figured there was a gun involved but to what extent we didn't know, right.

MS. O'BRIEN: You figured it was –

MR. BISHOP: Pardon?

MS. O'BRIEN: You figured a gun was involved.

MR. BISHOP: Yeah, well, it was a gunshot wound so obviously, like, there was a gun involved, right.

MS. O'BRIEN: Okay. So you remember being, having some concern or apprehension as you're going?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay. And did that get resolved or how did you –

MR. BISHOP: Well, when we got there, yeah.

MS. O'BRIEN: Okay. So how did it get resolved when you got there?

MR. BISHOP: I think, I'm not 100 per cent sure, I think George called and said that the, the, the victim was deceased.

MS. O'BRIEN: Okay. All right. And who was –

THE COMMISSIONER: George is the dispatcher, is it?

MR. BISHOP: George is our dispatcher, yes.

MS. O'BRIEN: Were there others on site when you arrived?

MR. BISHOP: Yes, there was two police officers, plus the other guy.

MS. O'BRIEN: Who's the other guy?

MR. BISHOP: Well, Mr. Smyth now. I didn't know the guy when we got there.

MS. O'BRIEN: Okay. When you arrived, did you understand there'd been another person besides the deceased person involved in the shooting incident?

MR. BISHOP: Not right away, no.

MS. O'BRIEN: Okay. So you arrived and you saw two police officers. The two you saw, where they in uniform?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay. And you saw who you now know to be Constable Smyth.

MR. BISHOP: Yes.

MS. O'BRIEN: What was Constable Smyth doing at that time?

MR. BISHOP: He was basically standing by his SUV, Suburban, just standing there I think. He was on the phone I think.

MS. O'BRIEN: Okay. Could you overhear his conversation?

MR. BISHOP: No.

MS. O'BRIEN: Okay. And when you got there and the two uniformed police officers were on scene, who did you interact with first? Who did you talk to first?

MR. BISHOP: The two police officers.

MS. O'BRIEN: Okay. And do you recall if they were men or women?

MR. BISHOP: Two men.

MS. O'BRIEN: Okay. So what was your interaction with them?

MR. BISHOP: Well, we walked up the driveway and they were more or less in the driveway or just came out of the house, I'm not sure. There were in the driveway and they just told us to hang on for a minute, they were, they went in and then one of the guys came back out and other guy stayed in the door. And he said we could go on in.

MS. O'BRIEN: Okay. So when you say they went in. They went into the house.

MR. BISHOP: They went in ahead of us, yes.

MS. O'BRIEN: They went in the house ahead of you. Did you understand what they were doing in the house?

MR. BISHOP: No.

MS. O'BRIEN: Okay. So they just told you to wait while they went in and then how long was it before they said you could come in then?

MR. BISHOP: Maybe, maybe a couple of minutes.

MS. O'BRIEN: Okay.

You said that Constable Smyth, or who you now know to be Constable Smyth, was standing by his vehicle.

MR. BISHOP: Yes.

MS. O'BRIEN: Where was his vehicle parked?

MR. BISHOP: It was parking in the driveway behind, well, Billy's, Billy's vehicle.

MS. O'BRIEN: Okay. I was going to ask you is there was another vehicle there. So you said Billy's vehicle. What was Billy's vehicle and where was it?

MR. BISHOP: Billy's is a Jeep Cherokee, and Mr. Smyth was driving a Suburban, Chevy Suburban.

MS. O'BRIEN: Okay. And where was –

MR. BISHOP: Billy's was kind of up closer to the house, as Mr. Smyth's was parked behind.

MS. O'BRIEN: Okay, so you already knew that to be Billy –

MR. BISHOP: Yes, I knew Billy's, I knew Billy's.

MS. O'BRIEN: And when you say Billy, it's Billy Corcoran you're talking about.

MR. BISHOP: Billy Corcoran, yeah.

MS. O'BRIEN: Meghan Dunphy's partner.

MR. BISHOP: Yes. Yes.

MS. O'BRIEN: Okay. Now, while you were waiting for the police to clear the house, did you have any conversation or interaction with Constable Smyth?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

So what did you – and did you know Constable Smyth previously at all?

MR. BISHOP: No.

MS. O'BRIEN: Okay. What was he wearing? Do you have any recollection of that?

MR. BISHOP: As far as I can remember, he had on dark pants, like a light colour coat and like almost the same colour boots.

MS. O'BRIEN: So he was in, what you'd call, plain clothes.

MR. BISHOP: Yes.

MS. O'BRIEN: He wasn't in uniform.

MR. BISHOP: Yes.

MS. O'BRIEN: So you're saying dark pants, light-coloured coat?

MR. BISHOP: Yes.

MS. O'BRIEN: And same –

MR. BISHOP: Almost the same colour boots. Like a light colour boots.

MS. O'BRIEN: Light boots. Okay.

Did you make any notes at the scene that day?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

And what – so you say he was on his cellphone but you couldn't hear him, is that what you're saying?

MR. BISHOP: Yeah.

MS. O'BRIEN: All right.

Did you know at that point whether or not he was a police officer?

MR. BISHOP: Not at first, I didn't. No.

MS. O'BRIEN: Okay.

Do you recall when you found out he was a police officer?

MR. BISHOP: Well, when we were going in the house, like his jacket was open and I see the holster and the gun on the side. So I assumed he was an officer then, I still wasn't sure.

MS. O'BRIEN: Okay, so before you went into the house you saw his holster.

MR. BISHOP: Yeah.

MS. O'BRIEN: And do you have a memory that there was the gun inside the holster at that time?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay.

MR. BISHOP: Yeah.

MS. O'BRIEN: Anything else that you noted about his behaviour or what he was doing?

MR. BISHOP: No, no, he was just, he was just standing by the Suburban.

MS. O'BRIEN: Okay.

All right, so you – then you entered the house. Who went into the house with you?

MR. BISHOP: Well, me and Nancy.

MS. O'BRIEN: And what about the police officers?

MR. BISHOP: Yes, they were in there, like he went in ahead of us too, right. Well, the other guy was in and the fellow that came out and told us to come on in, he went in ahead of us too.

MS. O'BRIEN: Okay. And what were your first impressions on entering the house?

MR. BISHOP: Well, when we went in, like you know, really we didn't know what to expect. And I mean when we went in, like it was – you know, well, basically at our work you don't know what to expect I suppose, right. Yeah. Yeah.

MS. O'BRIEN: So what were your first impressions about the house?

MR. BISHOP: Like it was rundown a little bit, you know. But I don't really like, you know, talking about people's living conditions or anything like that but, you know, it was a bit letdown, yes.

MS. O'BRIEN: Okay. And I know, I understand you don't want to be speaking about people's living conditions, but it's important that you give your, you know, what you recall seeing.

MR. BISHOP: Yeah, well, when you went in through the door the first thing was a bag of cat food on the side of the wall and there was cat food all over the floor. I mean we literally walked on the cat food going in, right. So there was a short hallway and then we just – we turned to the right and that's where Mr. Dunphy was in behind, more or less in around the wall, right.

MS. O'BRIEN: Okay.

Did you notice any smell in the house or anything stand out to you that way?

MR. BISHOP: No, I can't say I did. No.

MS. O'BRIEN: Okay. So you're saying it was run down, there was cat food on the floor. That's what you remember?

MR. BISHOP: Cat food on the floor and that, yes.

MS. O'BRIEN: Okay.

And so you say you went in to the right and you went around and you found Mr. Dunphy. What was – where was Mr. Dunphy at that point?

MR. BISHOP: He was sitting in the chair just around the corner, you know.

MS. O'BRIEN: All right.

I'll ask Madam Clerk to bring up P-0035, please.

Okay –

MR. KENNEDY: My monitor is still not working, Commissioner.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. O'BRIEN: So we have here –

THE COMMISSIONER: Can you use the other one, Mr. Kennedy, until we see what's wrong with that one?

MS. O'BRIEN: So you entered in through the front door, did you?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay. So that would have been around – sorry, Mr. Bishop, bear with me, my mouse.

Okay, so that would have been around here?

MR. BISHOP: Yes.

MS. O'BRIEN: And you came in and you would have gone to the right into what's here marked as the living room. Is that right?

MR. BISHOP: Yes.

MS. O'BRIEN: And you're saying Mr. Dunphy was there in the chair?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay. And so what did you do at that time?

MR. BISHOP: Well, I just stood up by the archway as Nancy went in and stepped over the – stepped around and checked Mr. Dunphy.

MS. O'BRIEN: Okay, so where did you stand?

MR. BISHOP: I stood right by the archway.

MS. O'BRIEN: On which side of the archway?

MR. BISHOP: On the right side.

MS. O'BRIEN: On the right side as you're entering the room?

MR. BISHOP: Yes.

MS. O'BRIEN: So sort of in this area?

MR. BISHOP: Yeah. Right there, yes.

MS. O'BRIEN: Okay, in that area.

Do you – so, okay, so you recall – and then Nancy went in to check Mr. Dunphy.

MR. BISHOP: Yes.

MS. O'BRIEN: Okay.

Did you see any signs of injury on Mr. Dunphy – on Mr. Dunphy?

MR. BISHOP: Pardon?

MS. O'BRIEN: Did you see any signs of injury on Mr. Dunphy?

MR. BISHOP: Yes.

MS. O'BRIEN: What did you see?

MR. BISHOP: I just see his – like shoot – a bullet in the forehead.

MS. O'BRIEN: A bullet wound in the –

MR. BISHOP: A bullet wound in the forehead.

MS. O'BRIEN: – in the forehead. Okay.

And did you see any weapons in the room?

MR. BISHOP: Yes.

MS. O'BRIEN: What did you see?

MR. BISHOP: I seen an old type gun laying on the floor.

MS. O'BRIEN: And what position was it in?

MR. BISHOP: It was leaning – it was on the floor, the handle was on the floor and the barrel was pointing towards the chair.

MS. O'BRIEN: Okay.

Did you see any other weapons in the room?

MR. BISHOP: No.

MS. O'BRIEN: So you say the gun – it was on the floor with the barrel pointing towards the chair.

MR. BISHOP: Yes.

MS. O'BRIEN: In relation to Mr. Dunphy when he was sitting in the chair – Madam Clerk, you can take down that exhibit

And when Mr. Dunphy is sitting in the chair, where was it in relation to him?

MR. BISHOP: Say, like Mr. Dunphy was sitting straight in the chair, it was on his left. It was on his left, it was pointing, say, towards the left arm of the chair.

MS. O'BRIEN: Okay. So was it right on the left-hand side of the chair?

MR. BISHOP: It was like almost again – the leg of the chair. It was pointing up against the leg of the chair. It was either on – against the leg of the chair or leaning on Mr. Dunphy's foot. I'm not quite sure.

MS. O'BRIEN: So in terms of how flat it was to the ground, how flat was it to the ground?

MR. BISHOP: It was roughly probably four to six inches off the floor.

MS. O'BRIEN: And you don't recall seeing any other weapons?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

Do you recall seeing a stick or a bat?

MR. BISHOP: No.

MS. O'BRIEN: Okay. What else do you recall seeing in the room?

MR. BISHOP: Well, as Nancy was checking Mr. Dunphy I was more or less – I was more or less focused on the gun. Like, I was thinking, you know, how would that even work, it looked that old, right. That's – because I'm not like – like I said before, I don't know nothing about guns. I knows a handgun from a rifle but that's about it.

MS. O'BRIEN: Okay.

MR. BISHOP: You know, but I knew the gun looked really old, right.

MS. O'BRIEN: How did – what did you, at that time when you were in the room what was going through your mind as to what had happened in that room?

MR. BISHOP: Well, I figured it was from the – like the wound, I figured it was probably self-inflicted. I didn't know, right.

MS. O'BRIEN: Okay.

So you recall looking at the gun and it being an old gun and focused on that.

MR. BISHOP: Yeah.

MS. O'BRIEN: Do you recall anything else in the room?

MR. BISHOP: There was – like the tables. There was a table there and there was some looked like bags of garbage or something over to the side of Mr. Dunphy, right.

MS. O'BRIEN: So you're pointing towards the right of Mr. Dunphy.

MR. BISHOP: Towards the right of Mr. Dunphy, yeah.

MS. O'BRIEN: And you recall bags of garbage or something over there.

MR. BISHOP: Yeah.

MS. O'BRIEN: And the table that you're talking about, where was that in relation to Mr. Dunphy?

MR. BISHOP: That was like kind of back from where Mr. Dunphy was sitting.

MS. O'BRIEN: But –

MR. BISHOP: Like towards the fireplace, like there.

MS. O'BRIEN: Okay. So it would have been in front of Mr. Dunphy.

MR. BISHOP: Yes.

MS. O'BRIEN: How far away from him?

MR. BISHOP: Probably two, three feet maybe.

MS. O'BRIEN: Okay.

And do you recall anything else in the room?

MR. BISHOP: No.

MS. O'BRIEN: Okay. Do you recall a television being in the room?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay.

MR. BISHOP: I could see the TV but –

MS. O'BRIEN: Where was the TV?

MR. BISHOP: Just on the wall there by the mantel, by the fireplace. I'm not quite sure. Like I said my focus was mainly on the gun; like I didn't look around a lot to be honest.

MS. O'BRIEN: But you think there was a TV by the mantel place, is what you're saying, or fireplace?

MR. BISHOP: I think the TV was probably up there, yeah.

MS. O'BRIEN: Okay.

Do you recall seeing a heater in the room?

MR. BISHOP: No.

MS. O'BRIEN: No?

Do you recall seeing any containers or tubs in the room?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

Do you recall seeing a white garbage can or tub in the room?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

What about a green Tupperware or blue Tupperware tub. Do you recall seeing that in the room?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

Do you recall seeing another table in the room, a coffee table in the room, besides the one in front of Mr. Dunphy?

MR. BISHOP: No, I don't. No.

MS. O'BRIEN: No? Sorry, you're going to have to keep your voice up, Mr. Bishop.

MR. BISHOP: Okay.

MS. O'BRIEN: No?

MR. BISHOP: No. No. I never seen it, no.

MS. O'BRIEN: All right.

And do you recall any other furniture in the room besides Mr. Dunphy's chair and the table you did mention.

MR. BISHOP: I'm not 100 per cent sure. I think there was a chair to the left – I think. Now, I'm not 100 per cent sure.

MS. O'BRIEN: No. Okay, but there might have been a chair to the left.

MR. BISHOP: Yeah.

MS. O'BRIEN: Okay.

Where were – you say where you were, and I understand Ms. Linehan was there checking, assessing Mr. Dunphy. Did she go any further in the room other than where she had to go to assess Mr. Dunphy?

MR. BISHOP: No, no.

MS. O'BRIEN: Okay.

And where were the two police officers? What were they doing while you were doing this?

MR. BISHOP: One guy was standing out in the hall with me; the other guy was in facing, more or less, you know, past Nancy in by the side of the table.

MS. O'BRIEN: Okay. So he was in that room by the side of the table.

MR. BISHOP: He was in more or less facing Mr. Dunphy. Yes.

MS. O'BRIEN: More or less facing Mr. Dunphy. And did you see anyone go any further into the room than that?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

And about how long were you in there?

MR. BISHOP: Maybe three, four minutes, five tops. Yeah.

MS. O'BRIEN: Okay.

What were you wearing in terms of protective wear? Like were you wearing a protective suit or booties or gloves? Or what protective wear were you wearing?

MR. BISHOP: No, no, just my ambulance outfit.

MS. O'BRIEN: Okay.

MR. BISHOP: My ambulance suit.

MS. O'BRIEN: Were you wearing, like latex gloves or anything like that on your hands?

MR. BISHOP: I – no, I can't recall.

MS. O'BRIEN: Okay.

MR. BISHOP: I don't – I'm not sure.

MS. O'BRIEN: Okay.

Did you touch anything while you were in there?

MR. BISHOP: No, no.

MS. O'BRIEN: Did you see anyone else touch anything while you were in there?

MR. BISHOP: No. Just Nancy like checked Mr. Dunphy. That was it.

MS. O'BRIEN: Okay. So she had to touch his body to check him.

MR. BISHOP: Yeah.

MS. O'BRIEN: Did you see her – did she, you know, did you see her having to touch the gun or did she need to touch the gun and move it?

MR. BISHOP: No, she just stepped over the gun.

MS. O'BRIEN: Okay. Do you have a memory of her stepping over the gun?

MR. BISHOP: Yes. Yeah.

MS. O'BRIEN: Did you see any cats while you were inside?

MR. BISHOP: No.

MS. O'BRIEN: No cats inside. Did you see any cats while you were outside?

MR. BISHOP: Outside there was but none inside, no.

MS. O'BRIEN: Okay.

Did anyone else enter the house while you were inside?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

And when you were done and you left, did – who left with you? Did everyone go together?

MR. BISHOP: Me and Nancy went out first and then I think the officers came out after, yeah.

MS. O'BRIEN: Okay.

I'm going to show you a couple of photos. I'll ask, Madam Clerk – and these are the two confidential photos we've already seen this morning – confidential exhibit 0001, Photo 040, please.

Is that photograph in front of you Mr. Bishop?

MR. BISHOP: (Inaudible.)

MS. O'BRIEN: Sorry I'm – I'm going to ask you to look at that photograph and just tell me is there anything in that photograph that you're seeing there that is not consistent with your memory of how things were that day.

MR. BISHOP: That blue tub wasn't there.

MS. O'BRIEN: Okay, so the blue tub wasn't there. Anything else?

MR. BISHOP: I don't think the heater was there, either. I don't think.

MS. O'BRIEN: Okay. You don't think the heater was there. Anything else?

MR. BISHOP: The table, the coffee table there in front of Mr. Dunphy seemed to be towards, further over towards, over away from him, right.

MS. O'BRIEN: So you thought the table was – in your memory it was further away from him?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay. What about Mr. Dunphy's position of his body, anything different there?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay. So please tell us what that is.

MR. BISHOP: His left hand, his left arm was kind of out over his, out over the arm of the chair. His right arm, his right arm seems to be – yes, the right arm seems to be like, seemed to be more down to his leg, I think. But definitely his left arm was out over the arm of the chair.

MS. O'BRIEN: Okay. So his left arm was out over the arm of the chair.

MR. BISHOP: Yes.

MS. O'BRIEN: Other than that, the position of his arm, does everything in his positioning look the same as in your, as you recall it?

MR. BISHOP: Well, yes.

MS. O'BRIEN: Yes. And what about what Mr. Dunphy is wearing?

MR. BISHOP: Yeah, I think, I always thought he had on something light but I could be wrong. I'm not going to – but he did have on like pajama pants type thing, right.

MS. O'BRIEN: Okay. When you gave your interview to myself and Ms. Chaytor, what did you recall Mr. Dunphy wearing at that time?

MR. BISHOP: I thought he had on a light coloured sweater. Like, I thought it was a light sweater. I could be wrong, I'm not 100 per cent sure.

MS. O'BRIEN: Okay.

MR. BISHOP: But I thought it was a light sweater he had on. I'm not sure.

MS. O'BRIEN: Okay, all right.

And, so you're not sure but you thought then it was a light coloured sweater.

MR. BISHOP: Yeah, I did. I thought so, but I think I could be wrong.

MS. O'BRIEN: Anything else there different from what you remember?

MR. BISHOP: Like the tub from the gun, where the gun was, the gun definitely wasn't there.

THE COMMISSIONER: The gun was what?

MR. BISHOP: The gun wasn't there, not in that, not in that – my recollection, it wasn't there.

THE COMMISSIONER: Okay. Where did you think it was?

MR. BISHOP: It was –

THE COMMISSIONER: First of all, was it pointed in the direction you remember?

MR. BISHOP: No, no. No, it was pointed – the barrel of the gun was right against the left arm of the chair. It was either leaning on Mr. Dunphy's foot or up against the arm of the chair. Because like when Nancy went in, she had to more or less lift her foot over the gun in order to check Mr. Dunphy, right.

MS. O'BRIEN: Okay. I'm going to bring you to another photo, maybe get you to describe it, which will maybe help you describe better the position of the gun, because it's taken on a sort of a slightly larger area. But before I leave this photograph, anything else there that's inconsistent with your memory of the scene?

MR. BISHOP: It's gone there now. There's no picture there now.

MS. O'BRIEN: Oh, sorry. Okay. We'll get you to bring up Photograph 096 then, please, Madam Clerk, C-0001 Photograph 096.

Is that photograph up before you now, Mr. Bishop?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay.

So here's another scene from, I think, the vantage point that would have been more like your vantage point on that day, because did you ever enter that room?

MR. BISHOP: Before?

MS. O'BRIEN: That day. Did you ever enter that – you never went inside the room that night, that afternoon, did you?

MR. BISHOP: No, I just stood in the archway.

MS. O'BRIEN: You always stood in the archway.

MR. BISHOP: Yeah.

MS. O'BRIEN: So the photograph we just looked at, you would never have looked at the scene from the perspective of the photo we looked at a couple of minutes ago, right?

MR. BISHOP: No, only like, say, from – I stood by the – from the archway. Like I was –

MS. O'BRIEN: Okay, so this is a bit more – the photo you're looking at now, Photo 096, it's a bit more from that perspective, from within the archway –

MR. BISHOP: Yes.

MS. O'BRIEN: – closer to your perspective.

MR. BISHOP: Yes.

MS. O'BRIEN: So looking at this photograph, is there anything inconsistent than what you remember seeing that day?

MR. BISHOP: Yeah. Like the table that's there in front of Mr. Dunphy, that seemed to be further away. And the gun, like was kind of lying flat on the floor pointing towards the arm of the chair.

MS. O'BRIEN: Okay. So you're saying the gun was more flat on the floor. And when you say pointing towards the arm of the chair, what do you mean by that?

MR. BISHOP: The barrel of the gun, like was up against the arm of the chair here on Mr. Dunphy's left side, the barrel.

MS. O'BRIEN: The – okay, so the gun was – the barrel was more towards Mr. Dunphy than was –

MR. BISHOP: Yes.

MS. O'BRIEN: – the stock of the gun.

MR. BISHOP: Oh, in my recollection that gun was no way like that.

MS. O'BRIEN: Okay, so it was in no way like that, but you're saying it was more flat on the floor.

MR. BISHOP: With like the handle of the gun, the handle I calls it, there is a name on it, but that –

MS. O'BRIEN: Okay, the –

MR. BISHOP: – was flat on the floor.

MS. O'BRIEN: – the handle was flat on the floor.

MR. BISHOP: And the barrel –

MS. O'BRIEN: And which –

MR. BISHOP: Pardon?

MS. O'BRIEN: Which side, where was the handle pointing?

MR. BISHOP: She was to – well, it's there on this side, but like the gun was straight with the chair, like straight out on the floor. And it was either was up – like it was either leaning on Mr. Dunphy's foot like or up against the arm of the chair. It was like elevated probably.

THE COMMISSIONER: So the barrel was either against Mr. Dunphy's foot or elevated.

MR. BISHOP: Or up against the arm of the chair, yes.

MS. O'BRIEN: Okay. And the handle of the gun was further away from Mr. Dunphy.

MR. BISHOP: The handle of the gun was laying flat on the floor, yeah.

MS. O'BRIEN: Okay, but it was further away from Mr. Dunphy than the barrel was.

MR. BISHOP: Yes.

MS. O'BRIEN: Is that what you're saying?

MR. BISHOP: Yeah. Yeah.

MS. O'BRIEN: Okay, any other differences there?

MR. BISHOP: No. Like I say, I can't recall that heater in there either.

MS. O'BRIEN: Okay.

All right and after you left the house, what did you do next?

MR. BISHOP: We went back out and I went to the ambulance and then Nancy checked out Mr. Smyth.

MS. O'BRIEN: Okay. Were you there when she checked out Mr. Smyth?

MR. BISHOP: I was, yes.

MS. O'BRIEN: Constable Smyth.

Okay. And did you have any conversation with Constable Smyth?

MR. BISHOP: No, I didn't.

MS. O'BRIEN: Okay. And now Ms. Linehan has testified that she asked Constable Smyth some questions as part of her assessment.

MR. BISHOP: Yes. Yes.

MS. O'BRIEN: Other than that, did you hear him speaking with her or speaking at all, other than in the course of the assessment for the purposes –

MR. BISHOP: No.

MS. O'BRIEN: – of the assessment?

MR. BISHOP: No.

MS. O'BRIEN: Okay. Did you hear him talk about any details about what had happened –

MR. BISHOP: No.

MS. O'BRIEN: – inside the house?

MR. BISHOP: No.

MS. O'BRIEN: Did you understand at that time that Constable Smyth had been involved in the shooting incident inside the house?

MR. BISHOP: I really can't recall. I don't know, like, how it came out that Mr. Smyth was involved. I'm not sure. Like, I really can't recall.

MS. O'BRIEN: Okay. And after that assessment was done, what do you recall next?

MR. BISHOP: We just waited there on the scene then for a while and then – I think after maybe 20, 25 minutes, I think Nancy checked Mr. Smyth out for the second time.

MS. O'BRIEN: Okay. And were you there when she checked him the second time?

MR. BISHOP: Yes.

MS. O'BRIEN: Okay. And we've heard her evidence, what she did with him, but that time, did you hear any other conversation between the two of them as to what had happened? Any other conversation –

MR. BISHOP: No.

MS. O'BRIEN: –not related –

MR. BISHOP: No.

MS. O'BRIEN: – to the assessment.

MR. BISHOP: No.

MS. O'BRIEN: No? Okay. All right.

Do you know how long, approximately, you were at the scene?

MR. BISHOP: Probably an hour.

MS. O'BRIEN: Were there – during that period of time, were there other people on the scene? What was going on?

MR. BISHOP: There was another police car came there. Another lady officer came there, but she was down on the road more-or-less directing traffic, yes.

MS. O'BRIEN: Okay. And was any traffic coming through the area?

MR. BISHOP: Yes, some, yes.

MS. O'BRIEN: Okay. Was anybody stopping or they just –

MR. BISHOP: No, they were mostly, like, just driving past.

MS. O'BRIEN: In the area of the scene, other than Constable Smyth, did you see anyone else there who wasn't a police officer, wasn't a uniformed police officer?

MR. BISHOP: No.

MS. O'BRIEN: Okay. Did you see – after you came out of the house, did you see anyone else enter the house?

MR. BISHOP: No.

MS. O'BRIEN: Okay. And did you – what – during the time you were there, what was Constable Smyth doing?

MR. BISHOP: He was just standing there. And then when he came over, Nancy said to him about checking him out, so she brought him over to the ambulance – he came over to the ambulance, and she checked him out. He got out of the ambulance and basically went back over towards his Suburban, right.

MS. O'BRIEN: So after she checked him out the second time, he went towards his Suburban?

MR. BISHOP: No. After the second time I think he went over – one of the police officers came over and took him in the police car.

MS. O'BRIEN: Took him in the police car. That's after the second assessment?

MR. BISHOP: Yes.

MS. O'BRIEN: Where was he prior to – right before the first assessment, where was he? Do you remember?

MR. BISHOP: Officer Smyth?

MS. O'BRIEN: Yes.

MR. BISHOP: He was up – still up by the Suburban.

MS. O'BRIEN: Okay. And then after the first assessment, do you recall where he went?

MR. BISHOP: No, I don't. I think he was talking to one of the officers, I'm not sure.

MS. O'BRIEN: Okay. And again, did you hear – overhear any of that conversation?

MR. BISHOP: No, I did not.

MS. O'BRIEN: When you left the scene, was Constable Smyth still there?

MR. BISHOP: No.

MS. O'BRIEN: Did you see him leave the scene?

MR. BISHOP: Yes, he left, yeah.

MS. O'BRIEN: Okay. Did you see him – how did you see him leave the scene?

MR. BISHOP: He left in one of the police cars, yes.

MS. O'BRIEN: Okay.

Did you have any further discussion with any of the other police officers at the scene before you left?

MR. BISHOP: No.

MS. O'BRIEN: Okay. Did you get any direction from them as you were leaving?

MR. BISHOP: No.

MS. O'BRIEN: Okay.

Do you recall getting any directions with your lights and sirens?

MR. BISHOP: I thought first that one of the officers told us like to leave as we were going on an emergency, but I don't know if that's right or not. I don't know; I can't recall that part.

MS. O'BRIEN: So you had said that before that you –

MR. BISHOP: Yeah.

MS. O'BRIEN: – that you recall being told that –

MR. BISHOP: I thought the officer that took Mr. Smyth; I thought he told us to leave like as we were going on another emergency. I'm not 100 percent sure on that –

MS. O'BRIEN: Like to put on your lights and sirens.

MR. BISHOP: Yeah.

MS. O'BRIEN: – is that what you would mean by leaving?

MR. BISHOP: Yeah.

MS. O'BRIEN: So you earlier had said, I think you said in your interview that an officer had told you that –

MR. BISHOP: Yes.

MS. O'BRIEN: – you should leave with lights and sirens on?

MR. BISHOP: Yeah, but like I said, I'm not 100 percent sure on that. I can't, but I think, you know – I don't know.

MS. O'BRIEN: Okay.

So today you're not as confident about that –

MR. BISHOP: No, I'm not as confident. Liked I said, I don't know for sure.

MS. O'BRIEN: Okay.

And you said you knew Meghan Dunphy. Did you see here while you were at the scene?

MR. BISHOP: As we were leaving, Meghan and Billy came, yes.

MS. O'BRIEN: Okay, and did you have any interaction with them?

MR. BISHOP: We stopped – Meghan – as we were coming up the road, Meghan got out of Billy's car and more or less came over to the ambulance. Like, we had no other choice only to stop 'cause there was a vehicle on that side. And like when Meghan got out, she opened the door, like we had no choice but to stop because she was kind of out on the road a bit. So yes, we stopped, yes.

MS. O'BRIEN: Okay. And did you speak with her?

MR. BISHOP: Nancy I think she just hugged into Nancy or something and they said they would talk later or I think that's all.

MS. O'BRIEN: Did you hear any discussion about – was there any –

MR. BISHOP: No.

MS. O'BRIEN: – conversation about what you'd seen in the house?

MR. BISHOP: No. There was no, no, no, no – I don't think, no.

MS. O'BRIEN: Okay, you don't think, is that what you are saying?

MR. BISHOP: No, she said, no, she never said – like Meghan was crying and Nancy never said nothing, I don't think. And she just said that she would talk later.

MS. O'BRIEN: Okay. And so you recall Nancy saying we'll talk later?

MR. BISHOP: I think so, yes.

MS. O'BRIEN: Okay.

And did you speak to Meghan Dunphy at all?

MR. BISHOP: No.

MS. O'BRIEN: Now, we know that Nancy Linehan completed some paperwork, which we've already seen.

MR. BISHOP: Yes.

MS. O'BRIEN: And I understand you signed that paperwork, did you?

MR. BISHOP: Yes.

MS. O'BRIEN: Did you complete any other paperwork of your own?

MR. BISHOP: No.

MS. O'BRIEN: So the only other paperwork you had would be the ones –

MR. BISHOP: Yeah.

MS. O'BRIEN: – that we have your signature on?

MR. BISHOP: Yeah.

MS. O'BRIEN: Okay.

And after you left the scene then and I think the documents record that was around 10 past 4 that afternoon?

MR. BISHOP: Yes.

MS. O'BRIEN: I know you were interviewed by the RCMP; is that right?

MR. BISHOP: Yes.

MS. O'BRIEN: And you were interviewed by Commission counsel. Other than that, have you had any other involvement in this matter?

MR. BISHOP: No.

MS. O'BRIEN: Have you discussed with anyone what you saw there that day?

MR. BISHOP: No.

MS. O'BRIEN: Have you ever discussed with Ms. Linehan what you saw in the room that day?

MR. BISHOP: No.

MS. O'BRIEN: Okay. And have you had any other interactions with police officers?

MR. BISHOP: No.

MS. O'BRIEN: All right; those are my questions for you, Mr. Bishop. The other counsel will have some questions.

Thank you.

THE COMMISSIONER: Who's going first?

MR. KENNEDY: The default order would apply.

THE COMMISSIONER: Sorry?

MR. KENNEDY: The default order would apply, wouldn't it?

MR. SIMMONDS: (Inaudible) go first.

THE COMMISSIONER: Mr. Simmonds.

MR. SIMMONDS: Good morning, Mr. Bishop. My name is Bob Simmonds and I represent Meghan Dunphy.

Mr. Bishop, you gave a statement to the police.

MR. BISHOP: Yes.

MR. SIMMONDS: And then you – sorry, and then you came in and were interviewed by Commission counsel.

MR. BISHOP: Yes.

MR. SIMMONDS: And has your evidence been consistent or the information you've told us here today, has that been consistent with the other two interactions you had?

MR. BISHOP: Yes.

MR. SIMMONDS: Three things of particular importance for Ms. Dunphy here. Firstly, you recall going in the house –

MR. BISHOP: Yes.

MR. SIMMONDS: Okay.

And you recall a bag of cat food up against the wall.

MR. BISHOP: Yes.

MR. SIMMONDS: And you were walking on cat food.

MR. BISHOP: Yes.

MR. SIMMONDS: But you didn't see any cats in the house?

MR. BISHOP: No.

MR. SIMMONDS: Saw cats outside.

MR. BISHOP: Cats outside, yes.

MR. SIMMONDS: But none that were in the house for the – you said you were only there for three to five minutes.

MR. BISHOP: I never see no cats in there, no.

MR. SIMMONDS: Okay.

Secondly, your evidence today was that Mr. Dunphy was seated in the chair, you were by the archway, so your view would have been – if we can go to the Photo 096, exhibit 0001 which is a confidential photo that I think Ms. O'Brien referred to. If you can blow that up a little tiny bit, Madam Clerk? There you go, perfect.

Would that depict the view you had into the room?

MR. BISHOP: No.

MR. SIMMONDS: What part – would you have had more of a view than that?

MR. BISHOP: Like I said the gun was not there on –

THE COMMISSIONER: No, but is that the angle you were looking from I guess he is asking you –

MR. BISHOP: Yeah, like I was standing almost by the side of Mr. Dunphy, yes.

MR. SIMMONDS: Okay. And the things that are problematic for you with respect to this, I understand, is firstly, you don't recall that tub being there at all.

MR. BISHOP: No, I never seen that. No.

MR. SIMMONDS: And you in fact said that to Ms. O'Brien when you met with her and gave a statement previously.

MR. BISHOP: Yes.

MR. SIMMONDS: She asked you was there anything in these pictures that doesn't seem to line up.

MR. BISHOP: Yeah.

MR. SIMMONDS: And that was one of the things you pointed out.

MR. BISHOP: Yeah.

MR. SIMMONDS: Correct?

MR. BISHOP: That's right.

MR. SIMMONDS: Secondly, the gun was not in that position when you saw it.

MR. BISHOP: No. No, definitely not.

MR. SIMMONDS: The gun was, what I'll call a stock, the wooden handle –

MR. BISHOP: (Inaudible.)

MR. SIMMONDS: – that was on the floor and the barrel was up, up on his foot or up against the leg of the chair, the arm of the chair.

MR. BISHOP: Yes.

MR. SIMMONDS: So definitely not in that position –

MR. BISHOP: No, definitely not.

MR. SIMMONDS: Okay.

And of equal importance, your focus that day, yours and Ms. Linehan's, was on the deceased, I take it.

MR. BISHOP: Yes.

MR. SIMMONDS: Your job, for the two ye to check him out, see if there's any signs of life. She has to do certain checks.

MR. BISHOP: Yes.

MR. SIMMONDS: And if there is, obviously get him to a hospital as quick as possible.

MR. BISHOP: That's right.

MR. SIMMONDS: Okay.

So when you went in you were paying attention to Mr. Dunphy.

MR. BISHOP: Yes.

MR. SIMMONDS: Okay.

The picture – and, again, if we could go to picture number 040 and that's a confidential picture. Do you have that picture before you? Yes, you do.

MR. BISHOP: Yeah.

MR. SIMMONDS: Okay.

You see the positioning of Mr. Dunphy's left hand.

MR. BISHOP: Yes.

MR. SIMMONDS: In your interview with Ms. O'Brien you indicated that's not where it was when you arrived there that day.

MR. BISHOP: No. No, it was laid over the, it was laid over the arm of the chair.

MR. SIMMONDS: He was hanging over the left arm of the chair.

MR. BISHOP: Yeah, well, not hanging as such but like –

MR. SIMMONDS: Just out over.

MR. BISHOP: Out over the chair, yeah.

MR. SIMMONDS: Okay.

THE COMMISSIONER: So you're demonstrating now with about four or five inches –

MR. BISHOP: Yeah, just like so much –

THE COMMISSIONER: – of your forearm over the –

MR. BISHOP: Yeah.

THE COMMISSIONER: – over the side of the chair there.

MR. BISHOP: Yeah.

MR. SIMMONDS: Okay.

Mr. Bishop, how certain – I mean you've been consistent in your statements, how certain are you?

MR. BISHOP: I'd say 100 per cent. I'm – like from my recollection there and from what I can remember in my head that is not, that's not handy to what the way it was.

MR. SIMMONDS: Not handy to the way it was.

MR. BISHOP: No, he was – like I said he was kind of – his arm was out over the arm of the chair here, the gun was laying right straight on the floor pointing directly at the arm of the chair.

MR. SIMMONDS: Okay.

MR. BISHOP: And like I said it was elevated. It was either probably four or five inches either.

MR. SIMMONDS: And you told the Commissioner during Ms. O'Brien's examination of you that you were – first when you got there you were focusing on the gun.

MR. BISHOP: Yes, yes, yeah. 'Cause, like, I looked at the gun, and like I said before, I don't know much about guns, but it looked really an old gun and I was kind of saying, you know, do that even work, you know, because I don't know.

MR. SIMMONDS: And the second place you focused was on Mr. Dunphy.

MR. BISHOP: Yes, yeah, yeah.

MR. SIMMONDS: And Ms. Linehan has told us, and you've also told us, that she didn't touch anything or you didn't touch anything in that room.

MR. BISHOP: No.

MR. SIMMONDS: The only way – only thing she did in relation to the body was the four checks she has to do. She put her stethoscope outside the clothes.

MR. BISHOP: Yeah.

MR. SIMMONDS: And opened one of his eyelids.

MR. BISHOP: That's right, and checked his pulse in his neck, yeah.

MR. SIMMONDS: Check the pulse in his neck. And then ye left.

MR. BISHOP: Then we left, yeah.

MR. SIMMONDS: And when you left, the scene was the same way you saw it when you came in.

MR. BISHOP: Yeah, yes, oh yes, yeah. Yeah, because, like, when Nancy came in, I stood by the archway here and Nancy came in, the gun, like, was here by the arm of the chair. Nancy kind of stepped over it and like checked him.

MR. SIMMONDS: Uh-huh.

MR. BISHOP: And then she kind of stepped back over the gun and we went out.

MR. SIMMONDS: And you went out.

MR. BISHOP: Yeah.

MR. SIMMONDS: Okay.

You and Nancy have not talked about this.

MR. BISHOP: No, we have not.

MR. SIMMONDS: You have not.

Thank you very much, Mr. Bishop.

Counsel will have some other questions.

THE COMMISSIONER: You can go.

MR. KENNEDY: Thank you, Mr. Commissioner.

So, Mr. Bishop, just if I can put this in perspective. You know that Constable Smyth, or Joe Smyth, the individual, he's outside the house.

MR. BISHOP: Yes.

MR. KENNEDY: He did not come in the house after you went in.

MR. BISHOP: No.

MR. KENNEDY: The RCMP, two RCMP officers, went into the house before you and Ms. Linehan came in.

MR. BISHOP: That's right.

MR. KENNEDY: These RCMP officers, at least one has testified and the second will testify that the scene as depicted in the pictures is what they found.

MR. BISHOP: From what they found, like, if they found that like that, there's something definitely wrong with me.

MR. KENNEDY: So are you saying the RCMP staged the scene, Sir?

MR. BISHOP: I'm not saying that. I'm not saying nothing, but it don't seem, like, it was like it when I recall.

MR. KENNEDY: Because Smyth is out of the house.

MR. BISHOP: Yes.

MR. KENNEDY: The RCMP officers come in. That's the scene they find. The gun against the tub, the hands the way they are, the heater there. And you're saying when you come in after the RCMP that's not the scene anymore.

MR. BISHOP: Well, it wasn't the scene when I went in there, no.

MR. KENNEDY: Sir, you say you parked behind Billy's vehicle, you saw Billy's vehicle. Do you remember saying that?

MR. BISHOP: The Suburban was, not us.

MR. KENNEDY: Okay. Do you remember referring to Billy's vehicle?

MR. BISHOP: Yes.

MR. KENNEDY: How would you know Billy?

MR. BISHOP: Me and Billy have been friends over the years.

MR. KENNEDY: Have you ever discussed this?

MR. BISHOP: No, we did not.

MR. KENNEDY: Sir, do you believe that something happened in that house that day that is not as it appears?

MR. BISHOP: I'm not going to say that. I don't know.

MR. KENNEDY: 'Cause Mr. Simmonds put it to you that you've been consistent in your statements and in your interview with the police.

MR. BISHOP: Uh-huh.

MR. KENNEDY: Let's go to that. You made no notes.

MR. BISHOP: No.

MR. KENNEDY: Okay. When you – and I'm not saying this is anything to do with you, but when you're asked by the RCMP, a lot of the questions you're asked by Commission counsel a year and half later, you weren't asked by the RCMP, were you?

MR. BISHOP: I don't know. I don't know.

MR. KENNEDY: Did you read your statement before you came into court, before you came here today to the Commission?

MR. BISHOP: No, I didn't.

MR. KENNEDY: Sorry?

MR. BISHOP: No, I didn't.

MR. KENNEDY: Okay.

So the two male officers went into the house. They were in there for how long?

MR. BISHOP: Before we went in?

MR. KENNEDY: Yup.

MR. BISHOP: Maybe a minute or two.

MR. KENNEDY: Yeah? How clear is your recollection on that?

MR. BISHOP: Almost – well, good, yeah.

MR. KENNEDY: It was quite a mess in the house, wasn't it?

MR. BISHOP: Yeah, to some extent, yup.

MR. KENNEDY: No. Was it quite a mess in the house?

MR. BISHOP: Well, yes.

MR. KENNEDY: So you didn't get any smell?

MR. BISHOP: No, not really, no.

MR. KENNEDY: Well, not – did you get a smell, Sir, or not?

MR. BISHOP: No.

MR. KENNEDY: You didn't see a green tub.

MR. BISHOP: No.

MR. KENNEDY: The rifle is not in the position in those pictures that – when you saw it.

MR. BISHOP: No.

MR. KENNEDY: The hands are changed.

MR. BISHOP: Yeah. Well, they're not the way they were when I saw them.

MR. KENNEDY: You saw no white garbage bucket.

MR. BISHOP: No.

MR. KENNEDY: You saw no heater.

MR. BISHOP: No.

MR. KENNEDY: You didn't see the bat on the floor.

MR. BISHOP: No.

MR. KENNEDY: Was the gun raised off the floor at all or was it flat on the floor?

MR. BISHOP: The barrel was up probably four to six inches off the floor.

MR. KENNEDY: What was it up – what was it leaning against?

MR. BISHOP: Well, it was either leaning on Mr. Dunphy's foot or up against the arm of the chair.

MR. KENNEDY: Mr. Dunphy's foot wouldn't have been four to six inches off the floor.

MR. BISHOP: Well, no, probably not.

MR. KENNEDY: Okay, so what was it leaning on, Sir?

MR. BISHOP: I'm not sure.

MR. KENNEDY: Okay. Well, I'm going to ask you now to think about it and to try to help us understand what the gun – how the gun was placed. If it's four to six inches off the floor, what is it leaning on?

MR. BISHOP: It's either – well, it was either leaning on Mr. Dunphy's foot or up against the arm of the chair.

MR. KENNEDY: Do you want me to bring the picture up, Sir, to show you? It's not going to be four to six inches off – Mr. Dunphy's foot is not four to six inches off the floor, is it?

MR. BISHOP: Well, I'm just estimating four to six inches off the floor. I don't know for sure.

MR. KENNEDY: So you're saying it could be resting against the chair. What do you mean by that?

MR. BISHOP: Up against the arm, like the arm, the front of the chair.

MR. KENNEDY: So, perhaps if we could have – could Commission counsel help me with one of those pictures? Is it 040 or 044? It's a confidential exhibit.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. KENNEDY: No, the one with the chair, showing the chair.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. KENNEDY: Okay.

So you're saying the gun was leaning up against the chair.

MR. BISHOP: Yes.

MR. KENNEDY: Okay, so where that gun is there bears no resemblance to what you saw?

MR. BISHOP: No.

MR. KENNEDY: So when the RCMP officers testified that's how they found the gun ...?

MR. BISHOP: Probably they did.

MR. KENNEDY: Well, no, did they find the gun like that or not, Sir?

MR. BISHOP: Well, from my recognition of it, the gun was not there.

MR. KENNEDY: Now, you just said you were 100 – was it, you're 100 per cent sure of the gun or you're not 100 per cent sure of the gun?

MR. BISHOP: Yes, I'm sure, the gun was not there.

MR. KENNEDY: Okay. So Mr. Smyth is not in the house. The RCMP come in and check the house. They see the gun there.

MR. BISHOP: Okay.

MR. KENNEDY: It must have moved after they came in the house.

MR. BISHOP: I never said that. I just said the gun wasn't there when I seen it.

MR. KENNEDY: Well, okay. Again, let's – Sir, the RCMP say that's where they found the gun.

MR. BISHOP: Probably they did.

MR. KENNEDY: Well, no, probably –

MR. BISHOP: Well, like, I'm just telling you what I can remember. I don't know – I know the gun was not there. I know the gun was not there. And all I can say for regards to that blue tub, I don't where that came from.

MR. KENNEDY: The blue tub and the gun, the heater, the table is moved.

MR. BISHOP: The table wasn't as close to him as –

MR. KENNEDY: Do you remember seeing the things on the table there, the blowtorch and the bottle and what appears to be some kind of container?

MR. BISHOP: Yes.

MR. KENNEDY: You remember seeing that, do you? And what about all the garbage to the other side, do you remember seeing that?

MR. BISHOP: No.

MR. KENNEDY: Do you remember seeing the table there that's shown in the bottom of that picture, Sir?

MR. BISHOP: No.

MR. KENNEDY: No.

You thought Mr. Dunphy had something light on?

MR. BISHOP: That's what I thought, yeah.

MR. KENNEDY: Yeah. And what did you think he was wearing? You know, we see here appear to be pajama bottoms. Is that what you thought he was wearing?

MR. BISHOP: Yeah, I figured he was wearing something plaid like that, yeah.

MR. KENNEDY: And what did you think he was wearing up top?

MR. BISHOP: Seemed to be a light sweater, or that's what it seemed like. I don't know. I could be wrong.

MR. KENNEDY: Okay, so ...

Now, when you were leaving, did you see Ms. Dunphy arrive, Meghan Dunphy arrive?

MR. BISHOP: Yes.

MR. KENNEDY: So she was just coming to the scene as you were leaving?

MR. BISHOP: Yes.

MR. KENNEDY: That's correct, is it?

MR. BISHOP: Yes.

MR. KENNEDY: Now, Sir, Mr. Simmonds suggested to you that you'd been consistent in your testimony, but would you agree with me that a lot of questions were asked to you by Commission counsel were not asked to you by RCMP, were they?

MR. BISHOP: I really can't remember my statement to the RCMP.

MR. KENNEDY: I don't see – and I could be wrong on this, Sir, but I don't think I am; it's a short statement. The statement you give to the RCMP begins at 4:26 on April 8 and it ends – I'll find it in one second, Sir. Let me find the last page. It ends at 4:40, so it's a 14-minute statement. Do you remember any reference to the blue or green tub?

MR. BISHOP: Like I said, I can't remember seeing –

MR. KENNEDY: The heater? Do you remember any of those references in the RCMP –?

MR. BISHOP: No. I can't. I know I can't remember the statement I gave to the RCMP.

MR. KENNEDY: You can't remember giving a statement to the RCMP on April 8.

MR. BISHOP: I can remember giving the statement, yes.

MR. KENNEDY: Do you know what you said in the statement?

MR. BISHOP: No.

MR. KENNEDY: No. So you come in then to Commission counsel on November 10, 2016, a year and a half after the event, and you give all of these details.

MR. BISHOP: Yeah.

MR. KENNEDY: Had you told anyone any of this before?

MR. BISHOP: No.

MR. KENNEDY: Had you made any notes for your own –

MR. BISHOP: No.

MR. KENNEDY: No.

And you and Ms. Linehan never talked about this?

MR. BISHOP: No.

MR. KENNEDY: Never talked about it with anyone?

MR. BISHOP: No.

MR. KENNEDY: Have you had any discussions with – what community do you live in, Sir.

MR. BISHOP: St. Mary's.

MR. KENNEDY: You live in St. Mary's. You would be aware of the chatter in the community, the discussions in the community.

MR. BISHOP: Yes.

MR. KENNEDY: Yeah.

You would be aware there was a community coalition for Donald Dunphy.

MR. BISHOP: I heard it on the news, yes.

MR. KENNEDY: Yeah, but you had no discussions with anyone.

MR. BISHOP: No.

MR. KENNEDY: Okay.

And what – so you're not only saying that the gun is not in position but the gun, the barrel, if I understand correctly, was on – you're saying the barrel was on the floor. When you say the barrel, that's the thinner part –

MR. BISHOP: No, barrel – the handle was on the floor.

MR. KENNEDY: The handle was on the floor, unlike that picture again.

MR. BISHOP: No, nothing like that at all.

MR. KENNEDY: Okay.

And you said here in your testimony today that your first thought was that this gun wouldn't even work.

MR. BISHOP: It looked like it. It looked old. An old, faded handle and you know.

MR. KENNEDY: Okay, but that's what you said, the gun, you thought –

MR. BISHOP: Yeah.

MR. KENNEDY: Now did you tell anyone else that before or is today the first time you've said that?

MR. BISHOP: No.

MR. KENNEDY: Pardon?

MR. BISHOP: No, I told – I think I told the Commission and I told the officer that evening when he came. I told him I said I didn't think the gun even worked.

MR. KENNEDY: Okay. So you told the officer that, too, did you?

MR. BISHOP: Well, he asked me about the gun and like I told him the same thing I told before, I don't know nothing about guns but it looked like a really old gun.

MR. KENNEDY: Uh-huh.

Now do you remember telling Commission counsel when you first saw the gun you figured he must have pulled a gun on him or something? In other words, Mr. Dunphy must have pulled the

gun on the police officer. Do you remember telling the Commission counsel that, that was your first thought?

MR. BISHOP: No.

MR. KENNEDY: Okay.

In your testimony, Sir, of November 10, 2016, at page 38, Ms. O'Brien, the counsel who examined you today said: So when you first arrived in the house and saw Mr. Dunphy, did you have any impression in your mind of what had happened? Mr. Bishop: No, well, when I seen the gun on the floor I figured, you know, I said it must be, he must have pulled a gun or something, you know. I don't know really what. No, I don't really know what happened. He must have pulled a gun or something.

You were talking about Mr. Dunphy, weren't you?

MR. BISHOP: Well, I suppose.

MR. KENNEDY: No, were you talking about Mr. Dunphy?

MR. BISHOP: Well –

MR. KENNEDY: It's your words.

MR. BISHOP: Yeah.

MR. KENNEDY: So that was your first thought, that Mr. Dunphy must have pulled a gun on the officer, wasn't it?

MR. BISHOP: I see the gun on the floor, I didn't know if it was self – like if it's self-inflicted or what. I didn't know what – really happened.

MR. KENNEDY: No, I just read you your statement, Sir: No, well, when I seen the gun on the floor I figured, you know, I said it must be – he must have pulled a gun or something.

You said you were referring to Mr. Dunphy?

MR. BISHOP: Okay.

MR. KENNEDY: So your first thought was that Mr. Dunphy must have pulled a gun on a police officer, wasn't it?

MR. BISHOP: Yeah, if that's what I said.

MR. KENNEDY: Was it your first thought when you saw the scene?

MR. BISHOP: Oh, I suppose. I didn't know. Like I said I didn't know really what happened.

MR. KENNEDY: Yeah.

So you suppose, is it – this is you testimony that you gave before Commission with Commission counsel, your examination.

MR. BISHOP: Okay.

MR. KENNEDY: I've read you your words.

MR. BISHOP: (Inaudible.)

MR. KENNEDY: Are those words accurate?

MR. BISHOP: Well, yes.

MR. KENNEDY: So when you first saw the gun your initial impression was that Mr. Dunphy must have pulled a gun on the police officer. Is that what you told Commission counsel?

MR. BISHOP: Yes.

MR. KENNEDY: Is that your answer today?

MR. BISHOP: I – well, I suppose. I don't know – like I suppose. I don't know.

MR. KENNEDY: You also thought that there was two other possibilities; it could have been – the wound could have been self-inflicted.

MR. BISHOP: Yeah.

MR. KENNEDY: Or the officer could have shot the, could have shot him. Is that what you're saying?

MR. BISHOP: Yeah.

MR. KENNEDY: And you would have had – you would have been – would have that impression looking at the scene, looking at Mr. Dunphy sitting in the chair?

MR. BISHOP: Yes.

MR. KENNEDY: Yeah.

Now, in your interview with Commission counsel they showed you a picture; page 50, it's marked as KB #1. It appears to me, counsel, if you could just look at pages 49, 50; it appears to me to be the photograph of Mr. Dunphy, the confidential photograph that we've shown him earlier, Scene 040. Is that – would you know, Ms. O'Brien, if that's correct?

MS. O'BRIEN: Sorry, I missed your question.

MR. KENNEDY: Yeah, the – page 49, he's shown a photograph. It's referred here as KB #1, it appears to me, or is that a diagram that he drew? Can you tell?

It says this is a photograph of Mr. Dunphy in the chair. So is that consistent with how you remember seeing Mr. Dunphy?

MS. O'BRIEN: I cannot confirm for you –

MR. KENNEDY: Okay.

MS. O'BRIEN: – right now which photograph that was.

MR. KENNEDY: Okay.

You go on to say: Okay, what were the differences you would say? Your answer: I don't think all this mess was here, I don't think.

So you refer to the cat food. So was all the mess there or are you saying there was – the mess was different than what you saw that day?

MR. BISHOP: No. Like the cat food and that was there, yes.

MR. KENNEDY: Okay.

But the mess being – do you remember we showed you the photograph –

MR. BISHOP: Yeah, I know on the right-hand side of Mr. Dunphy. I can't recall that being there, no.

MR. KENNEDY: Okay.

When you were asked, Sir, about the gun, when you said it's to his left what did you mean by that?

MR. BISHOP: To his left side, pointing up –

MR. KENNEDY: Okay.

MR. BISHOP: – to his left side.

MR. KENNEDY: So not only was it not on the tub, leaning against the tub, but it was in a different –

MR. BISHOP: Yes.

MR. KENNEDY: – over towards a different part of the chair. Okay.

Ms. O'Brien asked you at page 19: Do you recall whether it was flat on the floor or was it leaning against anything? No, it wasn't flat on the floor, it was maybe four to six inches off the floor –this is your answer. It was either leaning against Mr. Dunphy's foot or on the arm of the chair is what you said there.

I'm not sure, right. I'm not sure on that because Nancy went in. Nancy kind of stood over the gun and like, to check she stood over the gun.

What did you mean by that?

MR. BISHOP: She had, like the gun was between her legs as she was checking Mr. Dunphy.

MR. KENNEDY: Well, I know the gun wasn't laid flat on the floor is what you said.

MR. BISHOP: Yeah.

MR. KENNEDY: Okay.

When you were asked, Sir, about the officer by Commission counsel in your interview of November 6 – November 10, excuse me – you indicated, the question was: Do you remember

anything else unusual about his checkup other than the elevated blood pressure – that’s the police officer.

MR. BISHOP: Uh-huh.

MR. KENNEDY: Your answer was: No, he was like kind of dazed type thing. He wasn’t himself type of thing. You know, he was kind of like the fellow who was in deep thought or something, you know, just, you know, someone, you know.

Were you talking about indications of shock or? When you use the word “dazed,” what do you mean by that?

MR. BISHOP: Well, he was – like he was just there on the phone and, you know, I don’t know if he was listening intently to the call he was on or if he was or he was just, you know.

MR. KENNEDY: You used the word “dazed.” He was kind of dazed.

MR. BISHOP: Yeah, like you know, kind of to himself type thing. Yeah.

MR. KENNEDY: Okay.

Do you remember the names of the police officers who went in, Sir?

MR. BISHOP: No, I don’t.

MR. KENNEDY: Had you ever met them before, before you went in the house?

MR. BISHOP: I can’t recall, no.

MR. KENNEDY: Was there a Corporal O’Keefe? Do you remember that?

MR. BISHOP: I don’t know.

MR. KENNEDY: Was there a Constable Cox?

MR. BISHOP: Don’t know.

MR. KENNEDY: A Corporal Foote – any of these names ring any bells with you, Sir?

MR. BISHOP: No. I don’t know. Like I said, I don’t know who the officers were. I don’t know.

MR. KENNEDY: Okay.

Those will be my questions. Thank you, Sir.

THE COMMISSIONER: Ms. Rasmussen, do you have anything?

MS. RASMUSSEN: No, Mr. Commissioner.

THE COMMISSIONER: Thank you.

All right –

MS. O’BRIEN: Sorry, arising, Mr. Commissioner.

THE COMMISSIONER: Sorry. Go ahead, Ms. O'Brien.

MS. O'BRIEN: I would like to clarify; Mr. Kennedy was quoting Mr. Bishop from his transcript with Commission and I think for fairness we should have the full put in.

THE COMMISSIONER: Go ahead.

MS. O'BRIEN: Question from O'Brien: So when you first –

MR. KENNEDY: Sorry, what page is that?

MS. O'BRIEN: Sorry, page – starting at page 38 and I'll continue through 39 and part of 40.

So when you first arrived in the house and saw Mr. Dunphy, did you have any impression in your mind of what happened?

Answer: No, well, when I seen the gun on the floor I figured, you know, I said it must be – he must have pulled a gun or something like, you know, I didn't know really what. No, I didn't really know what happened.

Question: Okay, when did you become aware that there was this – another officer, a police officer that might have been involved?

Answer: Well, when we came back out, like I said, I seen him with the gun on his side. I figured, you know, must have been him, like we didn't really know, right.

And there is a typo there: gun is recorded as guy.

Question: Yes, but when did you get the information that a police officer had been involved in the incident?

Answer: God, I don't really know to tell you the truth. I can't answer that. I don't know. I don't know how we – like, we assumed he was involved. I don't know. No, I think one of the other officers said that this was the officer who was involved. I think that's what he said, like, I'm not sure. So this is why when he said that Nancy asked him did he need to be checked out, right?

And then Ms. Chaytor asks a question: Just following up there, you said when you saw the gun on the floor you figured – you said words to the effect that he must have – did you say pull the gun, he must have pulled the gun?

Answer: Yeah, when I seen the gun on the floor, I figured there must have been another gun involved, so like I didn't know at that time, like, if it was self-inflicted or if the officer was after finding a gun. I didn't know, I just seen the gun on the floor, right.

Question from Ms. Chaytor: Okay, did it dawn on you that it might be suicide?

Answer: Yeah, yes, yes.

Question: The gun – and then she goes on to get him to describe the gun. So I just wanted to clarify that for the record.

Thank you.

THE COMMISSIONER: Do you have anything, Ms. Chaytor? No, okay.

All right.

Thank you.

You may step down, Mr. Bishop.

Now, it's 12:10. We're going to – I think we'll have time to do the examination and check on the – I think we'll be able to continue until after 2:30, shortly after 2:30, if necessary, but I don't know how long counsel are anticipating they're going to need.

You'll be going first, Mr. Simmonds. This is with respect to the application to admit the evidence of an experiment, and a proposed experiment, I should say.

So should we break now and give you a chance for – to get a bite to eat or what do you propose?

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

UNIDENTIFIED MALE SPEAKER: Sure, that'd be fine.

THE COMMISSIONER: Sorry?

MR. SIMMONDS: That will be fine.

THE COMMISSIONER: If we started at 12:30, Mr. Kennedy, would that be –

MR. KENNEDY: That's fine.

THE COMMISSIONER: That all right with you?

Ms. Rasmussen, that all right with you?

MS. RASMUSSEN: That's fine.

THE COMMISSIONER: I just note for the record that it's only Mr. Kennedy and Mr. Simmonds and Ms. Rasmussen who are going to be participating, I take it, in the application.

Okay. So we'll recess now and resume at 12:30.

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: I apologize for the brief delay. I got tied up there.

Okay. Now, Mr. Simmonds, this is to deal with your application for –

MS. RASMUSSEN: Commissioner, if I could just – I will be stepping out shortly after one, but if worse comes to worse, I did not have a lot to say and I will send my comments in an email, if that's okay?

THE COMMISSIONER: That'll, that'll be fine.

Thank you, Ms. Rasmussen.

And we can always, if there's something that counsel wants to address that's raised in the email we can set another time briefly to deal with it.

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: Counsel have no problem with that?

MR. SIMMONDS: I have no problem with that.

THE COMMISSIONER: Mr. Kennedy?

MR. KENNEDY: That's fine.

MR. SIMMONDS: And I take it the Commission has received the email that Mr. Avis sent last night.

THE COMMISSIONER: The –?

MR. SIMMONDS: Email that Mr. Avis sent last night.

THE COMMISSIONER: From Mr. Avis. And what else?

MR. SIMMONDS: He sent an email last night with 10 or 12 points on it.

THE COMMISSIONER: Yeah, I have, I have Mr. –

MR. SIMMONDS: Okay. Oh, I got it. I got it here.

THE COMMISSIONER: I have Mr. Avis's, yeah.

So just one second now, Mr. Simmonds, I get organized here.

MR. SIMMONDS: No problem.

THE COMMISSIONER: Okay. Well, you go ahead, it's your application there.

MR. SIMMONDS: Yes, it is.

Thank you, Mr. Commissioner.

As we said in our letter of January 13, 2007, we submit that Dr. Czarnuch's opinion would be assist – will assist the Commission with respect to sections 1(f) – 3(1)(f) and (j). And succinctly put there, (f) is the circumstances that lead up to Constable Smyth discharging his firearm; and (j), whether there's any material deficiency in the RCMP investigation.

Now, I think you have to view that in light of the situation that you're being asked to decide the unique features of this. This is an event – and I'm not going to belabour it. This is an event, though, that took place in a 13 by 14 room where a trained police officer maintains that a man seated in a chair was able to bring up and put into a pointing position – I don't recall it a firing position, but at least into a pointing position – a 38½ inch firearm, and he did not see it until, basically, the barrel was pointed at him. He generally knows it came from the right side and the gentleman – or the man who pulled the – took out the rifle was seated in a chair.

I think the issues of: didn't see the gun, which is not – is one question that you will have to decide. But the body movements and the time that that would take are two issues where assistance from an expert would be very helpful.

I think, Mr. Commissioner, you indicated that you thought the chair, on reflection, perhaps provided useful information to you with respect to the scenario and the uses that we are grappling with in this Commission.

THE COMMISSIONER: Well, I think the experiment with the chair established, at least tentatively until I hear from you, that there were a number of different ways in which that chair could be placed, around the chair or in the –

MR. SIMMONDS: Yes.

THE COMMISSIONER: – outside pocket of the chair –

MR. SIMMONDS: I agree. I agree.

THE COMMISSIONER: – which would affect the possible measurements from –

MR. SIMMONDS: Exactly.

THE COMMISSIONER: – where the tip of the barrel might be to where Mr. Smyth would be at a particular time.

MR. SIMMONDS: That's right. And –

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: I'm sorry; you were going to say something else, Mr. Commissioner?

THE COMMISSIONER: No, It's – I think – the concern I have has to do with the number of variables.

MR. SIMMONDS: Ms. Breen told me of this yesterday.

THE COMMISSIONER: Which, even with a "Successful Experiment" along the lines of what the professor is proposing, I'm having difficulty seeing how it would promote or further the issues upon which I have to decide. In other words, I have very real questions about the probative value of a successful experiment –

MR. SIMMONDS: Okay.

THE COMMISSIONER: – as far as it comes to my deciding the ultimate issues here.

And I'll just go and say one thing further – I've said this before I think earlier – I have to keep in mind what the purpose of putting forth the experiment is and you're starting to do that now, I understand that. But the, I guess the – I'd like to see it put in terms of questions –

MR. SIMMONDS: Okay. Okay.

THE COMMISSIONER: – that you think the professor is going to be able to answer.

MR. SIMMONDS: Okay. Well, perhaps I'll start – I was going to start and I had one (inaudible).

THE COMMISSIONER: No, you start whichever, wherever you want.

MR. SIMMONDS: But I think maybe – I don't think there's any disagreement amongst counsel that the – if we go to Tab 3, and I put the book together. Some of this you already had but I thought it'd be convenient to have it all in the one (inaudible).

THE COMMISSIONER: This is helpful, yeah. Thank you.

MR. SIMMONDS: Mr. Kennedy and I – he gave me a handout this morning from Mr. Ratushny's book, actually I think it's the same page, where he talks about at Tab 3, on page 323: "The major exception, however, is 'expert opinion.' Persons who are qualified by some special skill, training, or experience may give opinions on matters within their expertise. Usually, it is a combination of such qualifications. It is usually desirable that commissions of inquiry follow the rules of evidence when dealing with" the "expert testimony. This means that the subject matter of the opinion truly requires expertise that it is within a recognized discipline, and not within the 'common stock of knowledge' of the public. Nor should an expert opinion be ... directly as to the key finding the commissioner must make. That could be seen as abandoning the role of" the "commissioner in favour of the expert.

"The qualification of the expert to give an opinion ..." is "... defined subject area should be presented and an opportunity given to the parties to test the strength and scope of that expertise. Usually, it will be acknowledged without question and the expert's report disclosed The factual basis on which the opinion rests should be clearly established."

I think – I believe that all counsel are likely in agreement that the two cases from our Supreme Court of Canada that are Mohan and the more recent one of White Burgess –

THE COMMISSIONER: White Burgess, yeah.

MR. SIMMONDS: – and Abbott and Haliburton and there's 10s of parties to that. Mohan – and I'm not going to go through it, you've obviously read this many times. If we go just to the headnote on the second page at Tab 4, Expert evidence, and it sets out the four criteria: relevance; necessity in assisting the trier of fact; the absence of any exclusionary rule; and a properly qualified expert. Well, I think we can deal with three of those fairly quickly.

I think it is relevant, if this experiment could be conducted, and it could be done scientifically, the results would clearly be relevant to your decision. I don't know of any exclusionary rule that would say no, this can't go in. And I believe, while I do note Mr. Avis has made some comment that this is the first time this expert's done it and he's not really an expert, with the greatest of respect to Mr. Avis' comments, I don't believe that. It may be his first time; everybody has to start a first time. His supplementary letter, which I'll refer to in a minute, clearly sets out that he has the expertise to do that.

So I think we're left with number two, being expert evidence to be necessary must likely be outside the experience and knowledge of a judge and jury, and must be assessed in light of its potential to distort the fact-finding process. Necessity should not be judged by too strict a standard. The possibility that the evidence will overwhelm the jury and detract them from their task can often be offset by proper instructions. Experts, however, must not be permitted to usurp the function of the trier of fact, causing a trial to degenerate to a contest of experts.

I don't, we don't have that worry here. Mr. Commissioner, you've heard this, this type of argument many times in the Court of Appeal, and probably in the Trial Court. You're not going to be blown away by any expert. You are going to factually assess it, logically assess it. So the concern that's set out with respect to perhaps a judge and jury trial doesn't apply in this case. So the question we have is: Is there a necessity here?

The last, the second case, and again, I won't go through this in detail, but this talks about whether or not the expert is, is unbiased, objective, whether there's any conflict of interest concerns, and it sets out sort of a new format as to where that comes in, that it really is a gatekeeper function that that's the second (inaudible).

THE COMMISSIONER: What are you referring to now, the?

MR. SIMMONDS: The tab 5, the –

THE COMMISSIONER: White, White Burgess?

MR. SIMMONDS: White Burgess case.

And Justice Cromwell sets out that, yes, the four Mohan criteria are still important, but there's also a criteria that both goes to admissibility, and even if it is admissible, you still have to be a gatekeeper and determine whether or not there may be overwhelming prejudice, number one, or whether or not there is some impartiality of bias there such that not one that would rule it to be inadmissible, but would go to the weight.

We don't take issue with all of those. I think if we then go back –

THE COMMISSIONER: I am sorry, the headnote in White Burgess, I didn't get a chance to finish reading the whole thing. Did you have a reference in that (inaudible).

MR. SIMMONDS: Yes, I can make a couple of references.

THE COMMISSIONER: Just give me –

MR. SIMMONDS: If you go to paragraph 23.

THE COMMISSIONER: Okay, just to save time.

MR. SIMMONDS: And this was a case where they were saying an auditor, because it was from the same firm that was part of this, doing the audits there and they come in –

THE COMMISSIONER: This was more the independence –

MR. SIMMONDS: Right, exactly.

THE COMMISSIONER: – impartiality and so forth of the auditor –

MR. SIMMONDS: But they did recognize, they recognized that and at paragraph 23: “At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four Mohan factors – relevance, necessity, absence of an exclusionary rule and a properly qualified expert – and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose. Relevance at this threshold stage refers to logical relevance. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement. And he cites a number of studies and articles there.

Then if we go to what I believe is the nub of the case with respect to the independence on page, the end of paragraph 47 and paragraph 48. While I would not go so far as to hold that the expert’s independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert’s attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that threshold.

Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert evidence should not be received because the expert is unable or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rules under the Mohan framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden to establish.

Taking that quote and if we go back to – I’m sorry to jump around, but if we go back to tab 2 and I think this issue, I really do think it would be put to bed fairly quickly. Awareness – and this is the original statement, preliminary statement of Dr. Czarnuch. Under the paragraph entitled: Awareness and understanding of the role of an –

THE COMMISSIONER: Where are you, sorry?

MR. SIMMONDS: I’m sorry, tab 2.

THE COMMISSIONER: I have that, which page?

MR. SIMMONDS: Second page.

THE COMMISSIONER: Page 2, yeah.

MR. SIMMONDS: And he has a, he has a heading there: Awareness and understanding of the role of an expert.

THE COMMISSIONER: Questions being asked, okay.

MR. SIMMONDS: I understand that my role as an expert witness is to maintain impartiality. With respect to my involvement in the Dunphy case I understand that all of my correspondences are to be documented, ideally in written form, to the greatest extent possible. Furthermore, any methodology that I employ and opinions that I express must be scientifically based and unbiased towards my result. Now I think that’s –

THE COMMISSIONER: I’m sorry I’m still – is it page 2 of the first letter or the second letter?

MR. SIMMONDS: Page 2 of the – tab 2, page 2 of the first letter.

THE COMMISSIONER: Which is January –

MR. SIMMONDS: It says Introduction at the top, I'm sorry.

THE COMMISSIONER: January the 12, Introduction, then I got your –

MR. SIMMONDS: Awareness and understanding of the role of an expert in that same page.

THE COMMISSIONER: On the same page, I thought it was the next page, okay, awareness and understanding, good.

MR. SIMMONDS: And I think when you read that, and I'll give you a moment to read it.

THE COMMISSIONER: Yeah, just let me see. Right, okay.

MR. SIMMONDS: When you read that, that's a very high-level statement from an expert, that I believe would certainly meet the concerns that's set out in the White Burgess case as to what's expected from an –

THE COMMISSIONER: Yeah, I don't, I don't really think that's really the issue here.

MR. SIMMONDS: And I don't think it is either. You know and I'm not going to belabour it; I don't think it is either.

THE COMMISSIONER: So the issue, it seems to me, I think you properly noted, is necessity, or we can group it under that heading for now.

MR. SIMMONDS: Yeah.

THE COMMISSIONER: And it can be put in different ways. The first is: Do I need it? Does what's being proposed go beyond the common experience of mankind, or personkind? Can I not, or anybody else who's not a scientist, obtain the same information?

And the references to novel science or junk science, well, it may just be – and there's no, the statement if there's no body of expertise, it may just resolve down to what expertise do you need. It's a measurement and a stopwatch that we're dealing with. Where, where I have the problem is assuming everything is done here –

MR. SIMMONDS: Uh-huh.

THE COMMISSIONER: It's aimed at answering what questions –

MR. SIMMONDS: Okay.

THE COMMISSIONER: – and what are the conclusions that he says he's likely to get. And if there's a range of conclusions, because of the large number of variables, how is that going to help me?

MR. SIMMONDS: How's that helpful to you? Fair enough, I understand.

THE COMMISSIONER: That, that I think is –

MR. SIMMONDS: It's the nub of where you're to.

THE COMMISSIONER: The crux of it from where, from where I'm coming. That –

MR. SIMMONDS: And that's a fair question.

THE COMMISSIONER: I don't – I'm having difficulty seeing how, when he brings in the results of his experiment –

MR. SIMMONDS: Okay.

THE COMMISSIONER: – and if it's been done properly.

MR. SIMMONDS: Uh-huh. How it was –

THE COMMISSIONER: I think he indicated himself it's going to be a range of –

MR. SIMMONDS: And that's where I'm going to next.

THE COMMISSIONER: – a range of answers and he doesn't include – well, I shouldn't say doesn't include. He points out that one of the variables has to do with the degree of disability.

MR. SIMMONDS: Disability of Mr. Dunphy, yeah.

THE COMMISSIONER: So you've got a range of variables imposed on a range of variables imposed on another range of variables.

MR. SIMMONDS: Okay, let's back up for a second.

THE COMMISSIONER: So I'm – I'll leave it at that. I just want to make you know what my concern was –

MR. SIMMONDS: Okay, no, I understand where you're coming from.

THE COMMISSIONER: – so you could address it.

MR. SIMMONDS: Let's back up a second, then.

So we have the expertise issue out of the way. Then we go to, again, that same –

THE COMMISSIONER: Well, you might have it out of the way. I'm raising that tentatively. I'm not sure that Mr. Kennedy is going to be –

MR. SIMMONDS: Well, Mr. Kennedy –

THE COMMISSIONER: – that quick to accept it as being out of the way.

MR. SIMMONDS: I think at the end of the day that those concerns and issues can be met by Mr. – by Professor Czarnuch and his resume, which is, again, at the third part of tab two. There's a full resume there under the blue.

THE COMMISSIONER: I have it, yeah.

MR. SIMMONDS: Okay. But I think he grapples and deals with those concerns on page 2 of his letter. The one we just referred to, on the second page of that, firstly, under the understanding of the question being asked to consider for the Commission.

THE COMMISSIONER: Uh-huh.

MR. SIMMONDS: “I am confident I fully understand the question I am being asked to consider for the Commission.”

THE COMMISSIONER: Well, he’s way ahead of me. Because I’m not sure I understand what the question is.

Go ahead.

MR. SIMMONDS: “Namely, I am being asked to consider: 1. What physical movements were required for Mr. Dunphy (with the parameters outlined below) to obtain the rifle from his right hand side while seated in his chair? 2. How long, time wise, could these actions take?”

Now, the evidence that we have today, that – when officer Smyth was on the stand, is that, I think we have agreement, you reflect and read the transcript and your notes, but I think we have agreement that the gun couldn’t have been in the pocket, in the side of the chair next to him. That –

THE COMMISSIONER: Unlikely that it was – well, in the side of the chair next to him –

MR. SIMMONDS: In the side, in the – between him and the arm.

THE COMMISSIONER: Oh, sorry, inside the chair. Yes, that –

MR. SIMMONDS: In the cushion.

THE COMMISSIONER: There seems to be agreement of subject to what Mr. Kennedy has to say, agreement on that.

Go ahead.

MR. SIMMONDS: Okay. So we’re then left with: Was it into the side pocket? And then we put the rifle in there.

The one set of important photos were the ones taken by Sergeant Foote, which show the chair right back tight to the wall. So the chair can be measured. We know the measurements of the rifle. That clearly would set out whether it could have been in that pocket in either direction, stock pointing forward, stock pointing back, barrel pointing whichever way. The overall length of the gun and the size of the chair would clearly give a determination as to whether that was likely a hiding place.

If that’s not the place that the gun was, then you’re left with two options, both of which Officer Smyth referred to: on the floor or up against the wall.

So if we know those are the two options –

THE COMMISSIONER: Barrel, barrel ahead, barrel down, barrel up.

MR. SIMMONDS: Okay. We will take – from the point of view of Ms. Dunphy, we would accept the most favourable set of variables to – it’s like any experiment. You manipulate the variables, you’re gonna get a different outcome. We’re prepared to accept, on the professor’s scientific methodology, the most reasonable, those most beneficial set of parameters as to the

location of the gun, and then have him do the tests. The tests would then be as he sets out in the methodology and proposed results.

THE COMMISSIONER: You say the most favourable parameters. Most favourable for ...?

MR. SIMMONDS: Officer Smyth.

THE COMMISSIONER: All right. Go ahead, and –

MR. SIMMONDS: Because one thing is certain, if you sit in that chair – and no one's, obviously, going to sit in the chair for a whole raft of reasons, but if you had a similar chair and sat in it, it is clear that sitting in the chair, unless you move your body, your hand cannot reach the floor. You have to have what he refers to: posture and pose deformation required to reach the weapon. You would have to have some movement – I think that's fancy terms for saying some movement of the body – to be able to grasp the gun. That's important.

If we go to his methodology and proposed results, "I propose three main steps: 1) identifying possible classes of locations for the rifle," and the two that are predominant are on the floor or leaning against the wall. He can still – he could still do one with the gun in the pocket of the chair. Those are definitive, discreet locations.

We can see from the pictures where the general area of the gun must be. An inch or two either side is not going to make a whole lot of difference. If it's leaning against the wall, it's 38 and a half inches high. If it's on the floor, it's 38 and a half inches long, and it's going to be along somewhere along the side of the chair, or if it's in the cushion. And the fact that we know the chair, from the photos of Sergeant Foote, is back tight to the wall gives us a benchmark as to where to start. So identifying possible classes of location for the rifle.

Biomechanical modelling of a young and full-bodied adult male. Now, we know Mr. Dunphy is not a full-bodied adult male, but we're prepared, for the purposes of this exercise, to assume he is. Dr. McGarry gave us evidence with respect to some degree of disability. I think we can have the expert comment on that, but that's ultimately when you get the other information, if you accept this application, that will be information you could factor in. That if the man is disabled to the point that Dr. McGarry indicates and had these difficulties and here's how long it would take an able-bodied young, full able-bodied man – or person, pardon me – then –

THE COMMISSIONER: Do you not see that there might be a difference in terms of the intention of the individual, whether it's to take it out slowly, surreptitiously, or whether it's intended to –

MR. SIMMONDS: Absolutely.

THE COMMISSIONER: – take it out quickly. Now, how do we get – just there the number of variables that are involved in terms of the speed with which –

MR. SIMMONDS: What if we –

THE COMMISSIONER: – someone is taking out in terms of the disability of Mr. –

MR. SIMMONDS: Well, put the disability aside for a second.

THE COMMISSIONER: Yeah, okay.

MR. SIMMONDS: The disability can come into your consideration.

THE COMMISSIONER: Okay, leave it as a young adult male. Okay.

MR. SIMMONDS: Right, and we go with the young adult male.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: And we say to Dr. Czarnuch: You tell us the quickest way this will come out. Again, the most beneficial –

THE COMMISSIONER: What are you going to end up with? What is your question? This is –

MR. SIMMONDS: What –

THE COMMISSIONER: I've been putting this to you now, I think it's the third time we've gotten into this and I have yet – other than somehow it relates to credibility – I haven't heard specifically what question or questions you expect the professor to answer by coming in with his report.

MR. SIMMONDS: I expect him to answer, one, what body movements would be required as if Mr. –

THE COMMISSIONER: I don't care. I don't care whether he had to move his left thumb or his right index finger or –

MR. SIMMONDS: No, but with greatest –

THE COMMISSIONER: – bend his elbow or –

MR. SIMMONDS: With the greatest respect, Commissioner –

THE COMMISSIONER: Why does that matter?

MR. SIMMONDS: Because once you know the movements that are involved, if they are – take a while. If it required the man to get up, walk from the chair and pick something up, that would be something you could factor in and say, well, not seeing that. And this is the – this is the band of movements that this expert tells us would be required, well, it's not reasonable to believe that someone in a 13 by 14 room would not see that.

Secondly –

THE COMMISSIONER: We're not going there. There's nobody yet that posed that surely as a –

MR. SIMMONDS: No, but I'm taking it to a far example to make the illustration.

The other question that would be answered would be, well, this would – allowing it's the fastest time possible from the closest location, here are the time that would be taken. Again, that factors into whether or not the information that you have received from Officer Smyth is reasonable and probable in that situation.

Those are two questions that would – I would believe would clearly assist you in reaching a decision as to whether or not Officer Smyth's rendition of what took place –

THE COMMISSIONER: When Constable –

MR. SIMMONDS: – is credible.

THE COMMISSIONER: When Constable Smyth said he saw the barrel up and either pointing or about to point at him –

MR. SIMMONDS: At him. Yeah.

THE COMMISSIONER: – then everything let loose.

MR. SIMMONDS: Correct. No issue on that. Correct.

THE COMMISSIONER: He's heading out of the room –

MR. SIMMONDS: Yeah, gone.

THE COMMISSIONER: – and shooting his way out.

MR. SIMMONDS: Gone.

THE COMMISSIONER: And –

MR. SIMMONDS: It's (inaudible).

THE COMMISSIONER: – he speaks in terms of it being less –

MR. SIMMONDS: Yeah –

THE COMMISSIONER: – less than a second –

MR. SIMMONDS: Yes.

THE COMMISSIONER: – if I recall.

MR. SIMMONDS: Yeah, something like that.

THE COMMISSIONER: If I recall correctly.

MR. SIMMONDS: I agree.

THE COMMISSIONER: Now you're saying it's what went on before that.

MR. SIMMONDS: Before that.

THE COMMISSIONER: And he's looking at his folder.

MR. SIMMONDS: Correct.

THE COMMISSIONER: And he says – I don't recall the exact time but it's there.

MR. SIMMONDS: Well, this is important, the (inaudible).

THE COMMISSIONER: Oh, I know. I know it's important, I just – I know you're going to point it out to me or Mr. Kennedy, I just haven't gone to it –

MR. SIMMONDS: No.

THE COMMISSIONER: – to refresh my memory on it.

Whether it is – he’s looking at a second –

MR. SIMMONDS: Uh-huh

THE COMMISSIONER: – or whether he’s actually looking at it longer than he realizes because he’s estimating –

MR. SIMMONDS: Correct.

THE COMMISSIONER: – we are speaking seconds here.

MR. SIMMONDS: Absolutely. I take no issue with that.

THE COMMISSIONER: Or when – getting it from the floor to –

MR. SIMMONDS: There. Yeah.

THE COMMISSIONER: You’re speaking milliseconds.

MR. SIMMONDS: But, no, seated in that chair – this is the experiment he will have to do. Firstly, as I’ve said, if you sit in that chair, your hand cannot reach the floor.

THE COMMISSIONER: So this is –

MR. SIMMONDS: If the gun is on the floor –

THE COMMISSIONER: So this is why in my little demonstration in my chair here, I’m leaning over to my left.

MR. SIMMONDS: But you’re leaning over noticeably to the –

THE COMMISSIONER: And the other series of variables is: Do I start off on the left side of my chair; do I start off on the right side of my chair?

MR. SIMMONDS: All movement in the chair, all – but we’ll pick the ones that are most beneficial, closest to the arm.

THE COMMISSIONER: Close –

MR. SIMMONDS: The distance that you’d have to go down to get it.

THE COMMISSIONER: Closest to the arm; is it sticking out, possibly barrel in towards the wall?

MR. SIMMONDS: Again –

THE COMMISSIONER: And sorry – sorry stock in –

MR. SIMMONDS: Towards the wall.

THE COMMISSIONER: – towards the wall, the wooden stock, and the barrel out towards –

MR. SIMMONDS: Yeah. Yeah.

THE COMMISSIONER: I don't have to bend very far. Mr. Dunphy did not –

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: Mr. Dunphy did not, arguably, have to bend very far.

MR. SIMMONDS: Bend very far.

THE COMMISSIONER: And by the way, don't take what I'm saying as findings of fact or anything.

MR. SIMMONDS: No, no, I –

THE COMMISSIONER: I'm just testing your –

MR. SIMMONDS: I appreciate – I appreciate the questions.

THE COMMISSIONER: But I'm leaning over now and I see Constable Smyth is starting to look at his folder so I lean down. I know one of your arguments is he should have seen Mr. Dunphy in that movement, but he's –

MR. SIMMONDS: And you remember his phrase –

THE COMMISSIONER: – commenting that Mr. Dunphy has been moving around in his chair (inaudible).

MR. SIMMONDS: But you remember the phrase when you take him to – and I can't tell you which statement it is but I can certainly bring it back – that he was acutely aware. That was his statement: acutely aware. Even though it may not appear I'm looking, I'm acutely aware of what you're doing. You have to factor in –

THE COMMISSIONER: Except that he concludes rightly or wrongly that because Mr. Dunphy is becoming agitated that it would help break the tension, or lessen the tension or whatever, if he glances away and looks down at his folder.

MR. SIMMONDS: All the time keeping him in his peripheral vision and being acutely aware.

THE COMMISSIONER: Well –

MR. SIMMONDS: And that's – but –

THE COMMISSIONER: I'll look carefully at the testimony –

MR. SIMMONDS: And that's the –

THE COMMISSIONER: – in that regard but is there –

MR. SIMMONDS: That's where the common sense comes in, with the greatest respect, Commissioner. A trained police officer in this situation –

THE COMMISSIONER: Sometimes it's lacking, I agree.

Okay, go ahead.

MR. SIMMONDS: I won't take that as a shot but I'll move right on.

If that's where his rendition of being acutely aware, looking through the peripheral vision, but knowing he's a trained police officer who went there with this level of risk aware, which has increased, he said, somewhat by the events that had taken place in there, go to your making a decision, well, whether he's – you know in light of the fact that the expert now tells me that Mr. Dunphy, if he was an able-bodied male, would have to move four to five inches up off the chair, his buttock would, to get his arm down low enough to the floor to get the rifle.

And if that was the case the normal –

THE COMMISSIONER: Do we know that?

MR. SIMMONDS: I know from sitting in the chair that you cannot touch the floor with just your hand. You have to move your body to the side to do it.

THE COMMISSIONER: You have to move your body to the side, okay. But do we know where – how far he has to reach? If the barrel is pointing out –

MR. SIMMONDS: Out.

THE COMMISSIONER: – towards the front –

MR. SIMMONDS: Uh-huh.

THE COMMISSIONER: – and if the barrel is elevated, if the firearm is in there at an angle so that the barrel is tipped up, then he's not reaching down to the floor.

MR. SIMMONDS: But then that's not – but that's not what we – the evidence we heard is that it's – of the four possibilities, the two most likely is that it's on the floor –

THE COMMISSIONER: But –

MR. SIMMONDS: – or it's up against the wall. That was the evidence.

THE COMMISSIONER: There were four possibilities having –

MR. SIMMONDS: Yeah.

THE COMMISSIONER: I'm just thinking of the pocket now.

MR. SIMMONDS: Right.

THE COMMISSIONER: There were four possibilities as far as the pocket was concerned.

MR. SIMMONDS: Could be the stock –

THE COMMISSIONER: The bar – and two of them with the barrel out and two of them with the barrel –

MR. SIMMONDS: In.

THE COMMISSIONER: – in towards the wall.

MR. SIMMONDS: Right.

THE COMMISSIONER: The two of them with the barrel out, if it's, if it's – I think the conclusion was that if the, if the barrel was pointing down, that was more likely than if the barrel was pointing up because Constable Smyth might have been quicker to see it if the barrel was up. This is my, my recollection.

MR. SIMMONDS: But –

THE COMMISSIONER: And the other two scenarios there, if the stock – excuse me. If the stock of the rifle was pointing out, if it was pointing up is one thing, if it was pointing down it's another. And, again, I think the, the indication was most likely it would have been pointing down or else it would have –

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: – stuck out past the front of the chair –

MR. SIMMONDS: Correct.

THE COMMISSIONER: – and more easily seen.

MR. SIMMONDS: Yeah. So –

THE COMMISSIONER: Is that fair?

MR. SIMMONDS: That's fair. And the expert would be able, I would think, as part of a report, would do photos of the rifle or something simulating the same size as the rifle, in the pocket on the floor and up against the wall.

THE COMMISSIONER: But why do I need a photo? I sat here and watched it. That's the thing.

MR. SIMMONDS: Well, you don't have the chair up against the wall. And if you had the chair tight to the wall, then there's a very small portion of the gun that could go out the back; the balance would be out the front. That would make the gun viewable, clearly viewable, particularly if you're looking at Mr. Dunphy, which we understand for part of the time it was a full front-on view.

THE COMMISSIONER: Go ahead.

The – I'm not, just because I'm quiet doesn't mean I'm accepting what you're saying.

MR. SIMMONDS: No, I didn't get that. I didn't get that.

THE COMMISSIONER: Just to get the other – not to have any misunderstanding.

MR. SIMMONDS: So I believe two of those questions that he says he can provide information on, be they some that had variables in them – then when you're equipped with what he says is

the movement that would be required and the time that would be required, taking the most beneficial –

THE COMMISSIONER: I'm failing to see why the movement is relevant and why it isn't simply the time that we're –

MR. SIMMONDS: The movement –

THE COMMISSIONER: – we're looking at here.

MR. SIMMONDS: The movement is relevant because of Officer Smyth's evidence that he moved in the chair but, you know, he – in fact I took him to one place where I do believe he said he stood up. That's again a matter of –

THE COMMISSIONER: Now, arguably, the thrust of that evidence is that he might have been standing up –

MR. SIMMONDS: Yeah.

THE COMMISSIONER: – or he might have been leaning ahead.

MR. SIMMONDS: Well, those would be scenarios that the expert would look at. And that would provide you, if he says these are the – because part of what he –

THE COMMISSIONER: But remember now my question is: Why are the movements relevant as opposed just to figuring out how long it would take him to do it?

Time, time, time.

MR. SIMMONDS: Time is important. Time is important, but also – and I'm just looking for the position in his

THE COMMISSIONER: You're referring to –

MR. SIMMONDS: I'm referring to page 3 now of his report, first report, under the heading: How this opinion would assist the Commission –

THE COMMISSIONER: Right.

MR. SIMMONDS: – in carrying out its mandate.

THE COMMISSIONER: Right.

MR. SIMMONDS: Okay. Part ways down to it: "These data could also be compared across possible rifle locations. From these data, in conjunction with the biomechanical modeling of the posture and pose deformation potentially required to reach the weapon, and from a review of the timing trails, one could also gain an evidence-based understating of what Mr. Smyth may have seen, directly or peripherally, if a young, able-bodied adult male were reaching for and drawing the rifle from Mr. Dunphy's seat."

And is that not, that information, be it you are given five or six possibilities, and it would be urged upon you or said to you, you have to accept the one that's most beneficial, because that could be the one that happened, but if – even in the most beneficial, if the expert says here's the

movement and here's the time, then does that not bring into question if that, if that doesn't line up –

THE COMMISSIONER: All I'm saying to you is that the first part of that question arguable is irrelevant. What I'm interested in is only the time, is it not?

MR. SIMMONDS: That's, that's your decision, Mr. –

THE COMMISSIONER: But it is – what's wrong with that?

MR. SIMMONDS: I think what's wrong with it is that –

THE COMMISSIONER: That's not my decision; it's my question to you.

MR. SIMMONDS: Okay. If I'm a trained police officer, highly-trained police officer, in that situation, and even if I am looking at my files to try and de-escalate the situation, looking down at it, but at the same time keeping the person in my peripheral view, arguably, acutely aware, was one phrase, then if there is significant body deformation posture or posed deformation, that goes to whether or not it's credible to say no, I wouldn't have seen any of this. I would not have seen this man – and we haven't brought in the disability, but I wouldn't have seen this man move or I wouldn't have seen his posture or his pose in anyway move mechanically. This gentleman is an expert with respect to the human skeleton and the movements and things he tells us here.

If he's able –

THE COMMISSIONER: I think I'm an expert and you're an expert on that as well.

MR. SIMMONDS: Well, I don't think I'm an expert on very much, but (inaudible).

THE COMMISSIONER: Well, you're talking in terms of pose or posture deformation is – well, you're talking about the fact that Mr. Dunphy may have shuffled a bit over to his right side.

MR. SIMMONDS: Yeah.

THE COMMISSIONER: And may have leaned over.

MR. SIMMONDS: Right.

THE COMMISSIONER: And you're suggesting that Constable Smyth –

MR. SIMMONDS: Should have saw it.

THE COMMISSIONER: – should have seen that if it took any longer than X seconds or milliseconds.

MR. SIMMONDS: I'm suggesting that Constable Smyth should have seen that and if the expert tells us here's the amount of posture movement of deformation of the, of your normal –

THE COMMISSIONER: I'm going to – if I assume again, for the sake of argument, that this posture and position movement going on all over the place you know, there's deformations all over the place, it's still going to come down to what's the maximum and minimum time we're talking about here, do you know?

MR. SIMMONDS: But wouldn't it – okay, let's go with zero.

THE COMMISSIONER: And I don't see where you need an experiment on the, the movements that are required 'cause I mean, we're making those movements all the time. They all become one movement.

MR. SIMMONDS: We are making them – they all become one movement, and yet we're, you're asked to accept, you're asked to accept in a room of that dimension, in a focus of that type that a gun that length can be brought up and I'm not going to see it until the barrel is pointed at me. I find that, with the greatest respect, a very difficult rendition of what could have happened here, okay.

THE COMMISSIONER: Okay, I'll note that carefully, that you find that difficult. And I'm going to be looking at that to see how difficult I find it, frankly, if I don't put in the expert. But if I bring the expert in –

MR. SIMMONDS: And you bring the expert in –

THE COMMISSIONER: If I bring the expert in, I'm at a loss –

MR. SIMMONDS: Well –

THE COMMISSIONER: – to see how his references to the movements that are involved –

MR. SIMMONDS: I think it's a combination of the two criteria.

THE COMMISSIONER: Sorry? The what?

MR. SIMMONDS: I think it's a combination of the two. I think two of those pieces of data are important. The movements involved, the most streamlined set of movements to achieve that gun, along with the time those most streamlined set of movements would require are two things that would assist you in determining whether or not you accept the rendition of events that Mr. Smyth puts forward. And I will grant you there may be some variation in it. But I also believe within that tolerance of variation, there is very useful evidence or very useful information that could assist you.

THE COMMISSIONER: The –

MR. SIMMONDS: I mean I can beat it some more but I don't believe there's any point in it.

THE COMMISSIONER: Sorry, no I understand your point, and I'm not –

MR. SIMMONDS: No, no, I hear you, thank you.

THE COMMISSIONER: – and I'm not trying to belabour it, but just a few thoughts that I'd like you to address. We've talked about one of the variables being the angle of the firearm, whether on the floor –

MR. SIMMONDS: Against the wall.

THE COMMISSIONER: – or by the side of the chair, and that gives us probably eight different possible locations, methods of where the four in the pocket and four outside the pocket.

MR. SIMMONDS: And part – oh, fair enough.

THE COMMISSIONER: Right.

MR. SIMMONDS: But would you not agree, Mr. Commissioner, then, in reaching a decision with respect to that, you also have to factor in why – if it was in the pocket or if it was in this position in the pocket, which we would hear from the expert, why would Officer Smyth not have seen it previously –

THE COMMISSIONER: Yeah. Yeah.

MR. SIMMONDS: – particularly if you factor in the chair is tight to the wall.

THE COMMISSIONER: Yeah and, you know, that brings into play the significance of the amount of garbage that was around on the floor and the significance of that whether it was a jacket or a piece of clothing or a piece –

MR. SIMMONDS: Absolutely.

THE COMMISSIONER: – of fabric that was, that was there –

MR. SIMMONDS: Absolutely.

THE COMMISSIONER: – by the chair but further back towards –

MR. SIMMONDS: But you have a photograph. You have a number of photographs that Commission counsel have introduced which show the garbage and show, you know, a clearer line –

THE COMMISSIONER: A void, they call it.

MR. SIMMONDS: – a void, we'd say.

THE COMMISSIONER: An area which looks –

MR. SIMMONDS: Right.

THE COMMISSIONER: – like there might have been something lying in the middle of the garbage when the bucket tipped over, if it did –

MR. SIMMONDS: If it did indeed tip over.

THE COMMISSIONER: And when, then, whatever was there was moved, it left –

MR. SIMMONDS: Right. Yeah.

THE COMMISSIONER: – an area that was clear of garbage.

MR. SIMMONDS: And indeed if the gun was disguised under the garbage – and this is, this is common sense, I would agree, as opposed to asking the expert. If the gun is under the garbage, then you would expect some movement of the garbage that would have been audible –

THE COMMISSIONER: Well –

MR. SIMMONDS: – for the gun to come up.

THE COMMISSIONER: Well, the possibility is also that the gun wasn't under the garbage. The garbage –

MR. SIMMONDS: Yeah. Right, could have been on top of the garbage.

THE COMMISSIONER: I'm saying on the garbage but there was a fabric over it whether – whatever it was.

MR. SIMMONDS: Well, if that's the case, then certainly the expert could look at that to get the fabric off of the gun that would be another flag as to what you would expect to see.

THE COMMISSIONER: Well, if it came.

MR. SIMMONDS: Coming up –

THE COMMISSIONER: If the fabric is back behind, then it would be a –

MR. SIMMONDS: Come up –

THE COMMISSIONER: – arguably a – not necessarily coming up a flicking off and rebranding whatever –

MR. SIMMONDS: Another movement.

THE COMMISSIONER: – is underneath the –

MR. SIMMONDS: Another movement that you're going – if it's a flicking up –

THE COMMISSIONER: Where – I didn't need a professor to tell me there are two movements to call there or more.

MR. SIMMONDS: But I think what you do need the professor for is to take the combination of those two, give you the raw data on it in the best situation for the officer and then you, after hearing the evidence, apply your judicial reasoning to it.

THE COMMISSIONER: Okay. Okay, let's move on to another thing now.

The sort of questions that come to mind, I mentioned it earlier, I don't have much on the way of the scientific background for this but I believe that from my own experience, that I can move my arm slowly or I can move it quickly.

MR. SIMMONDS: Fairly quickly, yeah. Uh-huh.

THE COMMISSIONER: And there's a great number of variations in terms of the speed.

MR. SIMMONDS: Okay, well, you have –

THE COMMISSIONER: So how –

MR. SIMMONDS: Well, you have to factor in that you're picking up a gun which he would obviously weigh. You're picking up a gun that's 38 in weight –

THE COMMISSIONER: Which is why I lifted it when it was here, yeah.

MR. SIMMONDS: – and it will determine how quickly, that will be, I would think –

THE COMMISSIONER: There'd be a maximum speed, but there'd be a great –

MR. SIMMONDS: – I would think he'd be able to respond.

THE COMMISSIONER: – yeah, but there'd also be a minimum and there'd be a considerable variation –

MR. SIMMONDS: There might be –

THE COMMISSIONER: – a sliding scale as it were.

MR. SIMMONDS: But you don't know that there would be. If you made it so slow, beyond a certain level, then it's gonna clearly become obvious. So obviously the one we would take would be the fastest way that you could lift that gun, whatever weight it is and length it is. That would be the one that would be put forward by the expert, or one of the ones, and you'd be able to factor that in again and say, okay, I know this is the movement that's going to require, here's the weight of the gun, here's how it would have to be manoeuvred mechanically to get it up there and here's the time it's gonna take.

THE COMMISSIONER: Uh-huh.

MR. SIMMONDS: Would that not be the assistance?

THE COMMISSIONER: Yeah, I'll consider that.

The other question arises, as we've seen in common experience again, sometimes because individuals have disabilities they develop in one portion of their anatomy, they develop more strength –

MR. SIMMONDS: In the other parts.

THE COMMISSIONER: – or flexibility or whatever in another part.

MR. SIMMONDS: Uh-huh.

THE COMMISSIONER: Now the question arises, do we have an understanding, or would the professor have an understanding of Mr. Dunphy's ability to lift the firearm slowly or quickly.

MR. SIMMONDS: Well, I would think as part of that opinion he would want to review the evidence of Dr. McGarry.

THE COMMISSIONER: Which is quite general, you know –

MR. SIMMONDS: Quite general, but over a long period of time and gives an indication of what he believes is the level of disability. That would certainly be something the expert, I would think, who's an expert in mechanics of the skeleton would be able to –

THE COMMISSIONER: Well, he's – one of the things he says, and I agree with him, he'd need a lot more information about Mr. Dunphy's disability than as here.

MR. SIMMONDS: Absolutely. If we're going to factor in and say, now you got to add five seconds to this or three seconds to this because Mr. Dunphy is disabled. What we're saying, take the most beneficial set for a start. Ask the expert if he feels – if his integrity is without question, if he feels that the evidence from Dr. McGarry is sufficient for him to make an assessment.

THE COMMISSIONER: Well, I'm sorry, but I don't need to hear him on that. I can tell you right now, it's not. And Dr. McGarry gave what he had –

MR. SIMMONDS: He did.

THE COMMISSIONER: – but it's not sufficient evidence regarding – there were no functionality tests taken to that extent so.

MR. SIMMONDS: But he may be able to offer us information on that. But I understand there's nothing definitive that –

THE COMMISSIONER: It was put to him and he properly stated that he could speak to what he had in his records –

MR. SIMMONDS: On his chart.

THE COMMISSIONER: – and there was nothing noted in that regard.

We also have the possible effect of – although in the autopsy, Dr. Avis mentioned that the exposure to marijuana did not really affect the outcome, I think, whatever his words were, but he was not thinking in terms of whether it might have affected Mr. Dunphy's coordination.

MR. SIMMONDS: And –

THE COMMISSIONER: Yeah, I don't think he was anyhow, so that might have an impact as well in terms of –

MR. SIMMONDS: That may have an impact, but that would be information that again upon reading the medical examiner's evidence, that he would be able to factor in.

THE COMMISSIONER: But this is so, this is so, that's just one minor point that we don't have right now. But go ahead.

MR. SIMMONDS: I understand, I think I understand the gatekeeper role and the issues with letting in expert evidence. You don't want the expert to take over the process. But in this situation –

THE COMMISSIONER: In this case, I'd point out also, it's going to be experts if you succeed in your application because this is going to be –

MR. SIMMONDS: Well, if the experts take over, experts take over –

THE COMMISSIONER: Mr. Kennedy is going to be here proposing –

MR. SIMMONDS: To have an expert.

THE COMMISSIONER: – and maybe Mr. Avis as well. We're into a possible battle of experts, which in terms of –

MR. SIMMONDS: And, and, you know, can I speak to that?

THE COMMISSIONER: Yeah, but just let me finish the, what we have to consider. Is the potential prejudice to the hearing because of any additional complexity or extension of time.

MR. SIMMONDS: Time and cost.

THE COMMISSIONER: Yeah. Go ahead.

MR. SIMMONDS: I believe, and I can only indicate this as a solicitor, I believe that by making contact with Dr. Czarnuch, and not having any – having everything recorded that was said in that contact, through either his notes or –

THE COMMISSIONER: Sorry, having –?

MR. SIMMONDS: Everything recorded that was said. I asked the doctor when we spoke to him –

THE COMMISSIONER: Who?

MR. SIMMONDS: The professor; the professor.

THE COMMISSIONER: Oh, year.

MR. SIMMONDS: I said take detailed notes, if everything after the first was done in print, so you will have copies of it, and we've had one conversation with him when we asked him to do the second letter. So I would think all of that information and the fact that he understands I'm not hired by either side here, I'm coming in to give evidence for the Commission, I question why, you know, we're calling in experts in a number of other fields but we're not going to end up – either side is not going to be calling experts to combat that expertise, or at least not likely –

THE COMMISSIONER: Well, the entitlement is there.

MR. SIMMONDS: Yeah. I mean that was the envisaged matter, that was the thought process I had, that this expert would be beyond reproach, as far as being biased either side, and would be employing method – qualified to do it, employing scientific methodology which would be accepted by both sides.

THE COMMISSIONER: Well, it's up for, it's up to –

MR. SIMMONDS: It's up for debate.

THE COMMISSIONER: – counsel for the other parties to decide whether they're –

MR. SIMMONDS: I hear you.

THE COMMISSIONER: – prepared to do that or not on a crucial area like this.

Have you given thought to the burden of proof that I have to apply?

MR. SIMMONDS: From what I can see from the materials –

THE COMMISSIONER: The test – sorry?

MR. SIMMONDS: From what I can see from the materials, Mr. Kennedy provided some information from Sopinka and another –

THE COMMISSIONER: Can I have that?

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: Oh yeah, there's no rush. No that's okay.

MR. SIMMONDS: Another portion from Mr. Ratushny's book, I think it's on the balance of probability.

THE COMMISSIONER: The, what I have to ask is whether the evidence to some degree advances the inquiry. That's only part of it, whether it has a bearing on any issue to be resolved, or would be of assistance for myself in reaching a conclusion as to matters that were referred to the Commissioner.

In terms of the sufficiency of evidence, do I not have to consider that this would in effect be an adverse ruling against Constable Smyth in terms of, if I conclude that it could not have happened the way Constable Smyth said it did –

MR. SIMMONDS: Said, yeah.

THE COMMISSIONER: – then I am inferring that Constable Smyth staged the scene.

MR. SIMMONDS: We are, we are inferring that the rendition offered by Constable – as I said, you asked Meghan Dunphy early on what was her scenario.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: We –

THE COMMISSIONER: I asked you too –

MR. SIMMONDS: No, no, but –

THE COMMISSIONER: – but you limited your comments to credibility. You held your cards close to your chest, okay.

MR. SIMMONDS: I don't accept – for the reasons I've stated, and I'm not going to go through them all again. I don't accept Officer Smyth's rendition of what happened in there. That may lead to –

THE COMMISSIONER: So then, then the necessary inference, it would seem to me from that, is that Constable Smyth lied about what he said and in fact had staged the scene.

MR. SIMMONDS: And the –

THE COMMISSIONER: So that would be finding of misconduct –

MR. SIMMONDS: It would.

THE COMMISSIONER: – which the law says, as I understand it, I should only draw when the, when I have –

MR. SIMMONDS: Strong evidence.

THE COMMISSIONER: – something more than speculation or rumours or innuendo or guesses or unreliable evidence.

MR. SIMMONDS: But, but this is not speculation, rumours or unreliable evidence.

THE COMMISSIONER: No, I know that. I know that, but, but is it enough?

MR. SIMMONDS: That's –

THE COMMISSIONER: Is there any way that that evidence can be enough to –

MR. SIMMONDS: Can it be enough –

THE COMMISSIONER: – meet the –

MR. SIMMONDS: – with all the other evidence you've heard? Can it be enough? I believe it can be enough. But, you know, I'm not –

THE COMMISSIONER: What is all the other evidence I've heard that in any way would –

MR. SIMMONDS: You've heard –

THE COMMISSIONER: – would relate to the credibility of Constable Smyth's testimony?

MR. SIMMONDS: You've heard his testimony.

THE COMMISSIONER: The one aspect would be that Mr. Dunphy was not violent, okay, so not – in the past has not been shown to be violent.

MR. SIMMONDS: You will determine whether you accept his reasons for going there. You will determine whether or not you accept the information –

THE COMMISSIONER: Well, let's assume he didn't have good reasons for going there.

MR. SIMMONDS: But that goes to his credibility, then, doesn't it?

THE COMMISSIONER: One second. If he didn't – no, that might be just a disagreement in terms of what he believed was proper policing and those consequences and what someone else might conclude. There will be experts called in this regard in terms of how investigations should be carried out and so forth.

MR. SIMMONDS: Absolutely. And if you accept any of the cross examination or what I believe are some inconsistencies in his evidence, if you accept that the scenario of, in light of the expert evidence, it would take these many seconds, if you accept that he's a trained police officer with significant expertise in these situations, whether that then, on a balance of probability or whatever level you feel is appropriate, determines that the evidence he's given just does not add up here.

THE COMMISSIONER: When arguably there's nothing else to challenge the evidence when –

MR. SIMMONDS: But –

THE COMMISSIONER: – when we know that he was, he's the only eyewitness –

MR. SIMMONDS: He's the only witness.

THE COMMISSIONER: – and he has stated certain things.

MR. SIMMONDS: And he's the only witness.

THE COMMISSIONER: And when there doesn't appear to be any motivation or any reason why the –

MR. SIMMONDS: Well, motive is not something normally that we have to make a ruling on with respect to Canadian law, as I understand it. But if indeed –

THE COMMISSIONER: But just in terms of a matter of common sense –

MR. SIMMONDS: Sense. If –

THE COMMISSIONER: – why is a police officer going to go in –

MR. SIMMONDS: Okay. Let –

THE COMMISSIONER: – and shoot a person in the head –

MR. SIMMONDS: Okay.

THE COMMISSIONER: – without having some reason to do it?

MR. SIMMONDS: Let me put one scenario to you.

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: Okay. Officer Smyth goes down there. Officer Smyth knocks on the door and Mr. Dunphy invites him in. Mr. Dunphy has just come from the Woodstock and he's – and he's got his friend coming up for a toke so –

THE COMMISSIONER: He should be fairly laid back and calm –

MR. SIMMONDS: A fairly laid back turkey. You know, got his buddy coming up; they're going to have a toke.

THE COMMISSIONER: A good Easter Sunday morning after that.

MR. SIMMONDS: He's going to hang back now and kick back and has a – the officer comes. He has no particular issue with that. Comes in and the first question the officer asks is, okay, the same question he asked the other people: Do you have a firearm? Dunphy says: Yeah, I got one.

THE COMMISSIONER: Okay, let's say that was done and Mr. Dunphy honestly answered, yes, I do.

MR. SIMMONDS: And get it, we can bring it out, so we got that put to the side. So Dunphy goes and gets this old gun which is probably behind the couch or on the floor where –

THE COMMISSIONER: Do you really think a police officer, even a rookie police officer, is going to permit an individual who's admitted to having a firearm to go and get it and bring it to him?

MR. SIMMONDS: He may have said: Where's it to? I'll get it. Point it out to me. It comes out; it's laid on the table. A discussion takes place where things fall out.

THE COMMISSIONER: And you think – so you’re asking me then to infer that the rookie police officer, even a rookie police officer –

MR. SIMMONDS: He’s not a rookie.

THE COMMISSIONER: Okay, I’m just going to the extreme here for – as you said, to make a point. That a police officer would leave a rifle, a firearm, in that position?

MR. SIMMONDS: He may find that the – it probably was not in that position. It could have been in another position, okay.

THE COMMISSIONER: Such as –?

MR. SIMMONDS: Such as once Officer Smyth got it, it may have been laid on the chair or the couch.

You’re asking me to speculate, I’m –

THE COMMISSIONER: No, I’m testing the inferences that might be drawn or would have to be drawn in order to support one scenario or another.

MR. SIMMONDS: Okay.

THE COMMISSIONER: I’m doing this to test you, to – and maybe we’ll be coming back to this at the end of the case, when there’ll be further evidence at certain points, but not as far this experiment is concerned.

MR. SIMMONDS: Officer Smyth has the gun brought out, gets the gun out, lays it down, it’s an old gun. You got any ammunition for it? And there’s a couple or three bullets brought out, okay.

And then –

THE COMMISSIONER: Remember, there’s a bullet in the –

MR. SIMMONDS: There’s a bullet in the chamber.

THE COMMISSIONER: – chamber.

MR. SIMMONDS: When the police get there.

THE COMMISSIONER: Although the bolt action is not brought back.

MR. SIMMONDS: Right, the bolt action is not back, so it couldn’t have been fired. And the stick that’s normally on the right-hand side where he can grab it from, a conversation takes place.

THE COMMISSIONER: You think that the police officer is going to leave the individual in the chair that close to the stick, even though it’s a –

MR. SIMMONDS: Yeah, I think –

THE COMMISSIONER: – a reach away and go over by the mantel?

MR. SIMMONDS: That is no sloppier –

THE COMMISSIONER: It's no what?

MR. SIMMONDS: That is no sloppier than standing five feet back and letting the person be able to pull a rifle up from the floor and point it at you.

THE COMMISSIONER: Well, we know what the consequences of that were, but –

MR. SIMMONDS: Right, we do.

THE COMMISSIONER: – in terms of trying to draw inferences from –

MR. SIMMONDS: The stick comes up.

THE COMMISSIONER: Remember, what we're doing here now is you're putting a scenario forward and I'm testing it with inferences that you're asking me to draw on that regard.

MR. SIMMONDS: I don't have a crystal ball, but I think that scenario does not seem to be absolutely unbelievable. The stick comes up, that explains why it's on the wrong side of the chair. If it's on the floor, on the left side where he would never have it, where you got to walk right in.

THE COMMISSIONER: The stick comes up and the firearm has already been left on the table.

MR. SIMMONDS: The firearm is out on the table over here somewhere, somewhere away from where Officer Smyth has any – the stick comes up; the conversation goes bad. Dunphy uses the stick, as he normally would. Now, look, get out of my house, get out of my house. Something like that.

Officer Smyth tells him: Put the stick down. Things go from bad to worse there. That's how a firearm gets drawn. That's how the stick gets flicked on the other side of the desk or on the other side of the chair.

I don't know if that's what happened, but I –

THE COMMISSIONER: If – well, again, questions I'd have on that which we'll hear by the end of things, by the end of the evidence, is whether Constable Smyth would have felt so concerned about the stick as to conclude he had no choice but to use his firearm.

MR. SIMMONDS: He may have been taken off guard, but the stick comes up, he pulls the firearm, saying: Look, drop it. As he's pulled the firearm before, never had to use it. In this case, the stick hits him in the hand, hits him on the wrist, something like that. I don't know, I wasn't there, but I do believe that, as Meghan said when you asked her, we don't accept Officer Smyth – I don't think that scenario –

THE COMMISSIONER: Okay, I understand your point, but the – that is what I have to consider as well, the fact that if –

MR. SIMMONDS: No –

THE COMMISSIONER: Sorry, go ahead.

MR. SIMMONDS: I can't give you what happened in that room. What I can say is that our position is – you may not accept it – that Officer Smyth's rendition of how this gun came out in a man that's fairly laid back with an experienced police officer in a room that he's not more than

seven feet away from him, eight feet away from him, and it comes out such that, even though I'm maybe trying to de-escalate the situation with my file folder, it comes out and gets pointed at me, I think is patently unbelievable.

THE COMMISSIONER: And what I'm going to have to look at, as I mentioned, the balancing of the evidence. And it seems to me that the question you're seeking to have the experiment address comes down to whether it was possible for, in the realm of the evidence relating to the chair and so forth – let me word this – whether the evidence that would be gathered by the experiment would be sufficient in the whole context – sorry – in the whole scenario to enable sound conclusions to be drawn on the balance of probabilities.

MR. SIMMONDS: But how – okay, I'm sorry.

THE COMMISSIONER: And if the evidence is not sufficient, then arguably at the end of the day the evidence would be consistent with Constable Smyth's version.

If the evidence is no, then you have a situation where – sorry – the issue addressed by the experiment would be: Could Donald Dunphy have brought up the rifle from the side of the chair quickly enough to prevent Constable Smyth from escaping the room? Was Constable Smyth left with no choice –

MR. SIMMONDS: Or –

THE COMMISSIONER: – to, but to fire?

MR. SIMMONDS: Or Donald Dunphy never ever had an intention of firing the rifle.

THE COMMISSIONER: The –

MR. SIMMONDS: The bolt is not up in a position by anybody's understanding of –

THE COMMISSIONER: Now, you're asking me to make a finding of misconduct by a police officer or against a police officer based on the assumption that when a gun is coming up and pointing at him –

MR. SIMMONDS: No, I'm not saying that. What I'm saying is –

THE COMMISSIONER: Yeah, but that's –

MR. SIMMONDS: – all of these things together, all of these things together lead to a requirement that we try and gather the best information we can to see if Officer Smyth's version is believable.

THE COMMISSIONER: Okay, let me go, let me go back again and see if I can work out the question that this evidence is going to be directed at. Could Mr. Dunphy have brought up the rifle from the side of the chair, for example –

MR. SIMMONDS: Fair enough.

THE COMMISSIONER: – or from somewhere on the right-hand side –

MR. SIMMONDS: Fair enough. Yeah.

THE COMMISSIONER: – quickly enough to prevent Constable Smyth from escaping the room? Isn't that what's at the essence of it? If he could have brought it up quickly enough to prevent Constable Smyth from leaving, then that evidence supports Constable Smyth's position. But you're seeking to establish that he could not have brought it up quickly enough –

MR. SIMMONDS: I –

THE COMMISSIONER: – in order to show that that, then that is some evidence that is inconsistent with Constable Smyth's position, are you not?

MR. SIMMONDS: Yeah, two positions or two points: number one, I'm attempting to show that the rifle could not have come up to the position that Officer Smyth says in the manner he says without him being aware of it and able to take evasive action other than shooting Mr. Dunphy; and secondly, that you can't get to the question of whether or not he could have got it up fast enough to shoot Officer Smyth because he never, ever had an intention of shooting Officer Smyth. He never, ever brought the rifle up to begin with. You don't get to your second question in my scenario.

THE COMMISSIONER: I'm missing it. I'm missing something here.

MR. SIMMONDS: No, if –

THE COMMISSIONER: You're –

MR. SIMMONDS: If indeed we're saying Officer Smyth's rendition is not the truth, not correct –

THE COMMISSIONER: Right. Right.

MR. SIMMONDS: That something else took place.

THE COMMISSIONER: Right.

MR. SIMMONDS: And that indeed Mr. Dunphy never pulled a gun on him, that the gun was brought out in possibly one of the ways that we spoke of.

THE COMMISSIONER: Well there, the problem I have there is just visualizing the different scenarios and whether it's a reasonable inference, you know, the police officer would have left the firearm close enough to be –

MR. SIMMONDS: But –

THE COMMISSIONER: – to be –

MR. SIMMONDS: No, but he –

THE COMMISSIONER: Right.

MR. SIMMONDS: – didn't have to leave it close enough. The firearm could have been on the mantelpiece, the firearm could have been – after the end of this, if things went wrong and if the stick entered into it and it was a lapse in judgment, if it was something that concerned – and that's how Mr. Dunphy got shot, the gun could have been placed there. What we're saying is you don't get –

THE COMMISSIONER: He could have gone in, be told, and be told by Mr. Dunphy yes, I have a gun; it's over there behind the couch.

MR. SIMMONDS: He gets it.

THE COMMISSIONER: Constable Smyth, Constable Smyth goes over –

MR. SIMMONDS: Gets it out.

THE COMMISSIONER: – takes the firearm, and goes back away from the exit and leaves the firearm back by the mantel somewhere.

MR. SIMMONDS: Leaves it somewhere. I don't know where. But what I'm saying –

THE COMMISSIONER: (Inaudible) the furthest place away –

MR. SIMMONDS: What I'm saying is –

THE COMMISSIONER: – from Mr. Dunphy would have been by the mantel arguably or the television or whatever, go ahead.

MR. SIMMONDS: I can tell by the look on your face you're saying that that's just not a believable scenario.

THE COMMISSIONER: Well, that's the sort of thing that I'm going to have to consider and I'm giving you a chance to show me why I'm wrong in considering it.

MR. SIMMONDS: And what I'm saying is you can't come to the inference that Mr. Dunphy should have been able to get it up quick enough to shoot him, because we're maintaining Mr. Dunphy, who had no history of violence of this type, who indeed, had nothing to make him particularly angry that day, who indeed had just come home and was expecting a friend up, and the friend could have arrived right in the middle of this confrontation –

THE COMMISSIONER: So he didn't, there was no, there was no pulling of the gun at all. That's your position there.

MR. SIMMONDS: Yes.

THE COMMISSIONER: So there's nothing to measure –

MR. SIMMONDS: I don't –

THE COMMISSIONER: – no need to measure.

MR. SIMMONDS: It is needed to measure, to determine whether or not Officer Smyth's version stands up to logic, time and scientific method.

THE COMMISSIONER: Okay, okay I have your – I think I understand your position.

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: If you have anything further to add, I think I understand what you're putting –

MR. SIMMONDS: You understand where we're coming from, Mr. Commissioner? (Inaudible.)

THE COMMISSIONER: And I do, the last question I had was how to tie all this in with the position of the stick, where the stick –

MR. SIMMONDS: I believe the stick was on the right-hand side and at the end of the confrontation ended up on the left-hand side. I don't believe it would be left lying in there, which runs counter to every piece of evidence we've had. All the evidence has been consistent that it was on his right-hand side, against the wall or against the side of the chair, it's left out right in the walkway where you'd have to walk in. That seems (inaudible).

THE COMMISSIONER: Just one final, one final point in terms of helping me getting my scenarios, we may or may not have to consider if they're proven. The stick – I lost my train of thought now, just give me a – the stick ends up, yeah – in terms of Constable Smyth, if he has done what you're suggesting, which is that he, after the shooting, placed the firearm from where he had previously placed it.

MR. SIMMONDS: Wherever it was previously.

THE COMMISSIONER: Why would he have placed it with, with the barrel of the, of the firearm pointing towards –

MR. SIMMONDS: Perhaps we'll hear –

THE COMMISSIONER: – Mr. Dunphy rather than towards where he was?

MR. SIMMONDS: Perhaps we'll hear from Dr. Avis and perhaps this is knowledge he's equipped with, I don't know, that if someone is shot with something in their hand that could go any number of places I mean I – it may –

THE COMMISSIONER: Yes, but if, if, remember now we're talking about in your theory, Mr. Dunphy is not lifting a firearm.

MR. SIMMONDS: No, he's not at all.

THE COMMISSIONER: So Constable Smyth shoots him, the firearm is where Constable Smyth had put it –

MR. SIMMONDS: And for whatever reason –

THE COMMISSIONER: – after he found it behind the couch, and then he brings it over and places it, and my question there is: Why would you place it in that direction?

MR. SIMMONDS: I, I can't answer why it would be placed in that angle.

THE COMMISSIONER: But that's, that's the problem, you see, with putting up a scenario. You're trying to – my job, I think, has to be to find logical –

MR. SIMMONDS: To fit everything in.

THE COMMISSIONER: – complete inferences to go, you know, to follow a particular path, and when I come to –

MR. SIMMONDS: And maybe Constable –

THE COMMISSIONER: – a bridge that’s been blown up because there’s no explanation, I can’t keep following that path.

MR. SIMMONDS: No, maybe Constable believed that is the position the gun would likely have come in if someone was shot with it in their hands.

THE COMMISSIONER: And if he had believed that, just to follow on in that same scenario, why would he have left the stick there just inside the –

MR. SIMMONDS: I suspect that this was, whichever thing took place, a traumatic moment. I don’t think it’s something where you would be able to take all kinds of time, particularly when he indicates he phoned within two to three minutes after the event. The shots likely would have been heard, or could have been heard by other people, so there would be an onus to be very expeditious on this.

THE COMMISSIONER: Okay. I appreciate your, your comments, Mr. Simmonds, and I should point out that I’m getting you to help me do my job in terms of giving my, giving you my – sorry, giving me your views of various scenarios that might arise.

MR. SIMMONDS: I don’t know what took place.

THE COMMISSIONER: We’ve gone, we’ve gone a bit more widely, but I think it will help me in terms of when I come to the question of deciding whether or not this evidence is of, of your engineer is going to help me to any –

MR. SIMMONDS: I don’t know –

THE COMMISSIONER: – to any significant degree.

Go ahead.

MR. SIMMONDS: I don’t know what took place now.

THE COMMISSIONER: Right.

MR. SIMMONDS: I don’t accept Officer Smyth’s rendition for a whole lot of logical reasons with respect to stick placement, gun never seen before, Mr. Dunphy not being in a bad mood, invites him in, is going to take on an armed police officer that he’s just met who’s in far better shape than he is, he’s going to try and do this from seated in a chair. All of those things cry out for this, this just doesn’t fit right.

And then on top of that, you have to factor in that this trained police officer, whose duty it is to protect, somehow, in this size of a room, let this scenario go down so that his only option was to shoot the man. I think that, with the greatest of respect, is a very difficult set of circumstances to accept as what could have happened there.

THE COMMISSIONER: Thank you.

Mr. Kennedy?

MR. KENNEDY: I’m only going to be two or three minutes, Commissioner. There’s a couple of references I want to make, and I’ll just leave them with you. There’s one excerpt from Sopinka and one excerpt from Ratushny.

THE COMMISSIONER: Thank you, thank you.

MR. KENNEDY: Obviously, the facts are outlined, so I'm not going to belabour those. Your discussion with Mr. Simmonds indicates that in terms of making the decision on the admissibility of the expert evidence, that that's something that you're more than in a position to determine.

As for the issue I want to deal with Commissioner, is the one I think that you've been discussing, and that's the probative versus prejudicial value, or not only the logical relevance but what's Sopinka et al referred to as the legal relevance.

The first comment I'd refer you to Commissioner, and I haven't included down the rabbit hole comment that I had before you the last time we discussed this, but pages 309, 310. I apologize for repeating what you've said on numerous occasions yourself Commissioner, but I just want to point out to you, because I think that this –

THE COMMISSIONER: That's Ratushny right?

MR. KENNEDY: This is Ratushny.

THE COMMISSIONER: Yeah.

MR. KENNEDY: I think this is an important quote Commissioner which guides all inquiries but one that you're obviously familiar with. "A commission of inquiry is also bound" – the last paragraph of page 309 – "by the principle of fairness when considering evidentiary issues. The rejection of relevant evidence may have such an impact on the fairness of the proceeding as to constitute a breach of that principle. Although many specific rules of evidence are not binding, they may provide a helpful frame of reference for assessing fairness in a particular situation. Assessing the admissibility of evidence" – top of the next page – "from the perspective of evidentiary principles provides some structure for determining fairness.

"If a commissioner is faced with evidence that is not admissible according to an exclusionary rule of evidence, that should be a warning that the evidence might be unreliable to some degree. This warrants the further examination as to whether it would be unfair to receive that evidence. And that examination must take into account the context in which the evidence is tendered. If it is" supported in support of an allegation of serious misconduct –

THE COMMISSIONER: If it's submitted in support of an allegation.

MR. KENNEDY: Sorry, "submitted in support of an allegation of serious misconduct against an individual, then special care must be given as to whether or not to receive it."

That's just a general principle, Commissioner, I'd ask you to consider.

THE COMMISSIONER: All right.

MR. KENNEDY: The last point I would make on Ratushny is at page 323, and Mr. Simmonds has already referred to this quote.

THE COMMISSIONER: Right.

MR. KENNEDY: The last paragraph there after the one that Mr. Simmonds referred to, there's a comment four or five lines into that next paragraph, two lines in but it's four or five lines down. "The factual basis on which the opinion rests should be clearly established."

THE COMMISSIONER: That is in which paragraph there?

MR. KENNEDY: That's – the quote that Mr. Simmonds refers to is, "The major exception, however, is 'of expert opinion.'"

THE COMMISSIONER: Okay, all right.

MR. KENNEDY: You go to the next paragraph, the first line is: "The qualification of the expert."

THE COMMISSIONER: Right.

MR. KENNEDY: Then the next sentence: "Usually, it will be acknowledged ... The factual basis on which the opinion rests should be clearly established."

THE COMMISSIONER: Right, but which has to do with my point in terms of such a large number of variables relating to what might be the factual basis. Okay.

MR. KENNEDY: And I think that Sopinka, Lederman and Bryant – I'm assuming that's the way we still, it's *The Law of Evidence in Canada*. The editors are different but it's still – I still refer to it as Sopinka, Lederman and Bryant.

There's an excerpt there, Commissioner, that deals with this evidence in terms of the expert evidence, probative versus prejudicial value. At page 787, paragraph 12.4(1).

THE COMMISSIONER: 787. 787, yeah, go ahead.

MR. KENNEDY: Page – paragraph 12.4(1): The party tendering the expert evidence has the evidential and legal burden to satisfy the Mohan admissibility criteria through a balance of probabilities.

And I'm glad that you're – Commissioner, you've had that discussion in terms of burden here today because at times an inquiry is a different type of – it's a different type of legal proceeding. We know that in a civil proceeding, a pure civil litigation, it's a balance of probabilities. We know in criminal law it's proof beyond a reasonable doubt. It was going to be my submission at some point that the burden that has to be applied here is on the balance of probabilities because this is a –

THE COMMISSIONER: And the burden, the burden is on the one alleging the misconduct –

MR. KENNEDY: Right.

THE COMMISSIONER: – presumably, yeah.

MR. KENNEDY: Right. And that's a very important point, Commissioner.

If I could refer you next to paragraph – pages 788, 789, paragraphs 12.44, 45 and 46.

THE COMMISSIONER: One second now. 780 – go ahead.

MR. KENNEDY: 788, 789, the last line in paragraph 7 – page 788, it's in paragraph 12.44.

THE COMMISSIONER: Right.

MR. KENNEDY: And although it's dealing with novel science, it becomes the, I would suggest to you, the basis of the extension of the Mohan criteria as we see in later cases. The last line there refers to Justice Sopinka's comments: His Honour also reasoned in Mohan, that a trial judge has a residual discretion to exclude logically relevant opinion evidence if its probative value is overborne by its prejudicial effect.

THE COMMISSIONER: Uh-huh.

MR. KENNEDY: The jurisprudence since Mohan has recognized that threshold reliability and the prejudice probative test are important basis for admitting or excluding opinion evidence.

One of the – and it's interesting to note, Commissioner, just by way of notation, is that this text is now edited by three judges of the Superior Court of Justice. I don't know if any of them have since gone to the Court of Appeal, but you'll see that is that, I call him Professor Lederman, but –

THE COMMISSIONER: I have a soft spot for Professor, or Justice Sopinka; I used to play squash with him –

MR. KENNEDY: Oh, did you?

THE COMMISSIONER: – whenever he visited the province, yeah.

MR. KENNEDY: He was a –

THE COMMISSIONER: Go ahead.

MR. KENNEDY: – a judge who I had the utmost respect for, Commissioner. But what he goes on, what the authors go on to state, these three judges, Michelle Fuerst, Sidney Lederman and Alan Bryant, the jurisprudence since Mohan has recognized that threshold reliability and the prejudice probative test–

THE COMMISSIONER: Where – what part now?

MR. KENNEDY: That's the top of page 789, the second sentence there, the jurisprudence since Mohan has recognized that threshold reliability and the prejudice probative test are important basis for admitting or excluding opinion evidence.

THE COMMISSIONER: Uh-huh.

MR. KENNEDY: The last point, Commissioner, and I think this is the important one for the purposes of what – I would suggest to you, it's a helpful one, if not an important one, for the purposes of what you have to decide. Paragraph 12.46: the expanded Mohan criteria for the admissibility of expert opinion evidence are: one, a properly qualified expert; two, relevance; three, necessity; four, reliability. But then there's two more added. And that's if you remember Mohan, we have the four-part test: prejudice probative analysis, and the absence of an exclusionary rule.

The criteria of necessity, reliability and the prejudice probative test are often interrelated and overlapping in their application. If I understand the questions that you are putting to Mr. Simmonds is essentially in that, that test. That's the, essentially the test to summarize there what you have been discussing. And part of this stems, I would suggest, Mr. Commissioner, to the approach of the Supreme Court of Canada – we often think it begins with Smith in terms of the

principal analysis, but what we see in other areas of law is the adoption of that principled analysis.

And this is, I would suggest, the principal analysis to the admission of expert opinion evidence. Unless you're, you have any particular questions for me on the facts, I don't plan to either rebut or reiterate anything that's been said. I would suggest that's not a matter – there are just simply too many variables here to make this experiment worthwhile.

Other counsel have argued on the, on the issue of the, of the expertise. I don't even think I even need to go there, Commissioner, I would simply suggest to you that there is the number of variables present, and I didn't even realize the number of variables until you started going through them. There are too many to make this reliable, necessary and where the prejudicial value would outweigh the probative value, especially where the inference that you essentially be asked to draw is one, that as outlined in Professor Ratushny's book, would be one of serious misconduct against Constable Smyth.

Unless you have any questions on the fact, I don't – we've discussed this a number of times, I don't know if there's anything –

THE COMMISSIONER: No, thank you, Mr. Kennedy. I'll have an opportunity to go through your scenarios another time, I think. But I think I've – I'm going to ask Ms. Rasmussen if she has anything she'd like to say on it in this regard.

MS. RASMUSSEN: I can be very brief, Mr. Commissioner. And probably anything I'm going to say it's probably already been said.

I think suffice it to say we just have reservations based on common sense. And, again, when I came in, you were talking about variables and that is the basis of our objection.

There just seem to be too many variables. We don't know definitely where the gun was, how it was situated, what the exact seating position was, whether Mr. Dunphy's medical conditions or mobility issues could be understood in any degree of specificity, whether – well, certainly we couldn't replicate any sort of adrenalin effect that might have been in his body. There are just too many variables for this evidence to be probative.

And again, Mr. Simmonds said he would take the best case scenario or the most beneficial, I think, to Constable Smyth. And he mentioned the quickest way that Mr. Dunphy might have raised the gun, but how do we know that he would have raised it the quickest way. That's an assumption right there so, again –

THE COMMISSIONER: Well, I think he was – that might have been, to be fair in response to my questions the – I'm just thinking back on it. I'll make a note of your point. I'll check back on my notes there.

MS. RASMUSSEN: Okay, but that's basically my objection. It's just based on there are too many variables to make this evidence –

THE COMMISSIONER: Right.

MS. RASMUSSEN: – reliable in any way or probative.

THE COMMISSIONER: Okay.

MS. RASMUSSEN: And that's all we have to add.

THE COMMISSIONER: Okay.

Now, Ms. O'Brien, do you have anything?

MS. O'BRIEN: Thank you, Commissioner.

Commission counsel takes no position on this application; however, there are a couple of questions that I was wondering if Mr. Simmonds might be able to answer to help Commission counsel more fully understand your application. So that's what I'm requesting.

I understand from Mr. Simmonds's submissions and the materials he's provided, that the ultimate result here is that Dr. Czarnuch would I know give details about biomechanics, but I'd like to focus on Dr. Czarnuch would give a time, whether it's a range of times or a time that it would have or could have possibly taken Mr. Dunphy or a healthy-bodied young man to take up the rifle from a position to pointing it. So we're going to get a time.

And the question I really would like to understand is what then are you asking the Commissioner to do with that time? And we have had testimony from Constable Smyth and it has ranged in the amount of time he has said that he likely, what I'm going to say now, took his eyes off Mr. Dunphy – I know the evidence is that, you know, he was seen, you know, there's evidence of peripheral vision, but right now let me just say he took the main focus of his eyes off Mr. Dunphy.

He's given different times, but in his testimony here before the inquiry he said it could have been up to five seconds. So I just put the question to you: Dr. Czarnuch gives a time, given Constable Smyth's evidence, that it might have been up to five seconds his eyes were diverted away; what is it that you're requesting the Commissioner do with the time?

Thank you.

MR. SIMMONDS: I would hope that if the professor comes back with a range of times and we apply the most beneficial situation, that the times and the movement, because I believe both of them are, are linked, very clearly linked, that then goes to say, in light of the time it would have taken, the movements you would have had to have seen to do this, to accomplish the mechanics of the movement to accomplish this task, put against what Officer Smyth says, just – comes to the conclusion that it is not possible, it is not acceptable to accept that version of what he's putting forward.

THE COMMISSIONER: But, you'd have to –

MR. SIMMONDS: Go ahead.

THE COMMISSIONER: The only way that can happen is if the professor came in with the conclusion that it could not have, what – it couldn't have been longer than or less than five minutes.

MR. SIMMONDS: I'm trying to think where Officer Smyth said the five seconds. I, my recollection of that was that was but I have to refer to the – counsellor?

THE COMMISSIONER: Yeah, we could –

UNIDENTIFIED FEMALE SPEAKER: Ms. Chaytor can (inaudible).

THE COMMISSIONER: – check that, but let's assume for the moment, rather than delay, let's assume that, let's assume it was – go ahead.

MS. CHAYTOR: I think his evidence was two to three in his interview, but here he did say it could be up to five; that's what I recall.

MR. KENNEDY: If I could interject there, I think what he said, looking at the file, when he said he was looking around before that, so there's no exact time as to when he last looked at Mr. Dunphy. It's more than – he didn't say it was five seconds. He said he was looking down at the file.

MS. CHAYTOR: But he was looking at the file folder, that's right.

MR. SIMMONDS: I didn't understand, but perhaps –

THE COMMISSIONER: That's what, that's what we're – okay –

MS. CHAYTOR: Sorry.

THE COMMISSIONER: – we've got another exposed nerve here somewhere, I think, for everybody.

Mr. Kennedy, your last point was that you understood Constable Smyth to be saying up to five minutes he was looking down –

MR. KENNEDY: No, up to five to six seconds –

THE COMMISSIONER: Oh, five seconds; sorry, I am saying minutes.

MR. KENNEDY: – it could have been two to three to five to six seconds he's looking at the file folder –

THE COMMISSIONER: Right.

MR. KENNEDY: But there's a period of time when he's looking around the room prior to that and he's not looking at Mr. Dunphy, that's why he looks down at the file to try to stop the agitation. So it could actually be longer than five seconds, or it is longer. It's not a question. We don't know exactly how long but it's more than five seconds since he's looked at Mr. Dunphy.

THE COMMISSIONER: So, I'm just –

MR. KENNEDY: I can give you the reference –

THE COMMISSIONER: Well, I'm just stopping now to figure out what the – if the experiment indicates that it would've – Mr. Dunphy could not have raised the rifle in less than five seconds, then that might raise a question about Constable Smyth's testimony. But if the result of the experiment is that he could have brought the rifle up in five seconds, where are we?

MR. SIMMONDS: I did not understand, and that is not to say the rendition that the evidence is –

THE COMMISSIONER: Well, let's say it's two to three seconds. We'll check the transcript.

MR. SIMMONDS: And I'm sure you will.

THE COMMISSIONER: If it's – let's say the result of the experiment is that he could have done it within two to three seconds – I keep saying minutes, sorry – two to three seconds –

MR. SIMMONDS: Well, in that case, if that is the evidence that he could have done it within two to three seconds then that would support Officer Smyth's version of the facts.

THE COMMISSIONER: Right.

MR. SIMMONDS: Okay.

THE COMMISSIONER: And if he couldn't have done it then –

MR. SIMMONDS: He couldn't have done it in that time frame.

THE COMMISSIONER: Within two to three seconds, then where are we there?

MR. SIMMONDS: Well, if he couldn't have done it in two to three seconds, if it would have taken appreciably longer than that – and appreciably has to be defined within the terms we're talking here in seconds as opposed to as minutes. And in conjunction with that, the following movements would have been required, pronounced movements, then that goes again, and I'm coming right back –

THE COMMISSIONER: No, I'm – well, I'm bringing then, regarding the time as including movement and time –

MR. SIMMONDS: But movement and time are important. Both components of that are important, to accept the evidence of Officer Smyth.

THE COMMISSIONER: All right.

Okay, I don't think there's – I think we've pretty well covered what has to be said here. Unless there's one final point; Mr. Simmonds or Mr. Kennedy, you might want to –

MR. KENNEDY: No, I'm fine.

THE COMMISSIONER: All right, we're going to adjourn now; 9:30 is it on Monday?

MR. KENNEDY: Commissioner, I'd just like to indicate, I won't be here on Monday morning. I understand that Constable Tilley or Staff Sergeant Tilley will be a witness and then Kim Harding will follow. I will be here Monday afternoon. Amanda (inaudible) from my office, our office will be here, and the same thing on Friday morning, Commissioner.

THE COMMISSIONER: Okay.

Thank you.

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry closed.