



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 18

Commissioner: Honourable Justice Leo Barry

Tuesday

7 February 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry opened.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Good morning.

I see everybody has their warm clothing on. I apologize for the temperature; we've called to see if we can have it fixed but if anybody just can't bear it anymore let me know and we'll take an adjournment for a warm up phase.

Now, we are ready to proceed counsel?

MS. O'BRIEN: Yes.

Good morning Commissioner.

THE COMMISSIONER: I see Mr. Simmonds there. I should mention; Mr. Simmonds in terms of the decision on the application on Friday, I'm going to wait for the – it should be in shortly, the transcript of the argument. I want to make sure I haven't missed anything in terms of dealing with the matter. I just wanted to let you know. So as I say, the transcript should be ready in the next day or so.

Go ahead, Ms. O'Brien.

MS. O'BRIEN: Thank you, Commissioner.

Our witness this morning is Corporal Steve Burke from the RCMP. Corporal Burke, Madam Clerk will get you to affirm your evidence. If you could just hit the button there on the front of your mic it will activate.

Thank you.

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

CPL BURKE: Yes, I do.

MS. SHEEHAN: Could you please state your full name.

CPL BURKE: Steven Burke.

MS. SHEEHAN: Thank you.

MS. O'BRIEN: Thank you.

Before I begin my questioning of Corporal Burke, Commissioner, I'd ask that you please order into the record Exhibits P-0308 through to P-0328, P-0330, P-0360, P-0426, P-0432 through to P-0437 inclusive.

THE COMMISSIONER: So ordered.

MS. O'BRIEN: Thank you.

Corporal Burke, good morning; Kate O'Brien, one of the Commission co-counsel.

We're going to begin this morning with some questions about your police training and experience. How long have you been a member of the RCMP?

CPL BURKE: Almost 15 years, 14 years.

MS. O'BRIEN: All right. Since approximately 2002?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And is Corporal your current rank?

CPL BURKE: Yes, it is.

MS. O'BRIEN: Okay. That's the rank that you held on April 5, 2015, as well.

CPL BURKE: Yes, it was.

MS. O'BRIEN: Okay.

Can you please tell the Commissioner just a bit about your educational background?

CPL BURKE: I have a – I obviously have the RCMP training at depot in Regina.

MS. O'BRIEN: Yes, sorry, I should have been clear Corporal Burke; just your educational background prior to entering the RCMP.

CPL BURKE: Okay, sorry. I have a Bachelor of Arts degree from Memorial University, along with a criminology certificate from Memorial University and I'm trained as a, I was trained in Corrections prior to joining the RCMP.

MS. O'BRIEN: Okay. And prior to joining the RCMP, I understand you did have some employment background in Corrections. So can you just tell the Commissioner about that?

CPL BURKE: Yeah. I started out in 1998 with provincial detention centre in Quinte, Ontario. In Napanee, Ontario, sorry, it was the Quinte Detention Centre. And I moved – I was there a couple of years and I moved to Kingston Penitentiary in Kingston, Ontario. I worked there as a correctional officer and a parole officer.

MS. O'BRIEN: Okay, so –

THE COMMISSIONER: How long were you there?

CPL BURKE: I was there until 2002; maybe two-and-a-half years.

MS. O'BRIEN: Now, I know that –

MR. SIMMONDS: Excuse me, Mr. Commissioner; apparently the microphones are not working. The microphones are not working at all.

THE COMMISSIONER: The microphones or –

MR. SIMMONDS: The speakers here are not on, they can't hear anything.

THE COMMISSIONER: Okay.

MS. O'BRIEN: Well, just –

MR. SIMMONDS: Hello. No, it's working.

THE COMMISSIONER: It's probably frozen.

MR. SIMMONDS: Maybe it's just a volume issue.

THE COMMISSIONER: Testing, can you hear?

MS. O'BRIEN: Corporal Burke – oh, mine's certainly louder. Can you do a –

THE COMMISSIONER: Oh, we got it now.

CPL BURKE: Mic test.

MS. O'BRIEN: Here we go.

Thank you.

MR. SIMMONDS: Thank you.

MS. O'BRIEN: All right. So I know that as an RCMP officer you've received a certain amount of basic training that all RCMP officers receive, but I'd like you to go over any specialized training you've had with the RCMP that would be relevant to the work that you did in the case of Mr. Donald Dunphy.

CPL BURKE: I guess it would be my training when I was posted at the Major Crime Unit. There's three main courses that Major Crime investigators take early in their posting I guess. That would be Major Crime Investigative Techniques Course. It's a two-week course at – I did it at CPC, Canadian Police College in Ottawa. There's also an investigative techniques course –

MS. O'BRIEN: Sorry, I'm just going to interrupt there. The Major Crimes Investigative Techniques, you did that in 2010? Does that sound right?

CPL BURKE: Probably 2010 or early in 2011.

MS. O'BRIEN: Okay. Thank you.

CPL BURKE: 2010 I think, yup.

MS. O'BRIEN: Okay.

CPL BURKE: And, investigative interviewing is a two-week course also. I completed that at the Canadian Police College, and that would have been in 2010 as well or early in 2011. And a third one is, I guess information to obtain drafting. It's commonly referred to as a search warrant course. And I did that maybe in 2011, 2012. Along with that, I did the wiretap part six course for intercepting private communications, and that was completed in 2012 maybe. I did the team commander's course.

All these – I guess most of these courses are, I completed in Ottawa, most of them at the Canadian Police College. The search warrant courses were outside the Canadian Police College, but also in Ottawa. For the most part, they are two-week courses. I also did the team commander course, which is a team commander to lead major investigations, and that's a two-week course. I guess –

MS. O'BRIEN: Sorry; where did you do the team commander course?

CPL BURKE: At the Canadian Police College in Ottawa.

MS. O'BRIEN: And when did you complete the team commander course?

CPL BURKE: I completed that in 2000, and late in 2015.

MS. O'BRIEN: Okay. So at the time of this investigation, or for the most part through this investigation with Mr. Dunphy you would not have had the team commander course. Is that right?

CPL BURKE: No, I wouldn't have.

MS. O'BRIEN: Okay. So it was late 2015. Okay.

CPL BURKE: There's other courses maybe not really applicable to the investigation of major crime, but surveillance courses and human source courses, things like that, that are you know – and disclosure, advanced disclosure courses.

MS. O'BRIEN: Okay.

CPL BURKE: They're not investigative based but, you know, essential to have when you are in Major Crime.

MS. O'BRIEN: Of course.

Now, another course I'd like to talk to you about is, I understand you had some VIP protective services training. Can you tell the Commissioner about that please?

CPL BURKE: I think it was in 2008; it was before I was in the Major Crime Unit. I was in Whitbourne, posted at Whitbourne detachment at the time. It's a VIP course, we call it, is a three-week course and it was held in Ottawa. The first portion of the course is driving techniques course. And another two weeks what we, I guess our training then is driving, body guard and operational plans, and scene security, I think it is.

MS. O'BRIEN: Okay.

Have you had any active duties in VIP protection?

CPL BURKE: Yeah, since that time I was kind of new to the VIP world, I guess, and our VIP duties come as off-the- side-of-our-desk type situation where if there's a VIP attending Newfoundland, we will be called upon to offer assistance.

MS. O'BRIEN: Okay, so that could be like if the prime minister was visiting or some other dignitary was visiting. Is that the idea?

CPL BURKE: Exactly, yeah.

MS. O'BRIEN: So just to give it some sense to the Commissioner, since 2008, how often, like with what frequency would you have performed those VIP duties? Approximately like how many times a year would you be doing that or how many days a year and would that have continued right up to the present day?

CPL BURKE: Yeah. First off, it was probably two or three times a year. And then when Prime Minister Harper came into power, his visits to Newfoundland were very seldom so there was, I guess, a dry spell in VIP duties for that period. And then the election for Prime Minister Trudeau came about and our duties were much more frequent. And since that time, I've been kind of the person to lead the visits, lead the office plans and co-ordinate visits as of late as six months ago.

MS. O'BRIEN: Okay. When you're doing that work, is it only bodyguard or close protective type work that you're doing or would you be doing part of the intelligence gathering threat assessments, that kind of work as part of the VIP visits?

CPL BURKE: Part of the – not the, not as a bodyguard or scene security or a driver but in the last little while I was doing the operational plans, and part of the operational plan is risk assessment for any risk to the dignitary or the VIP that's visiting.

MS. O'BRIEN: Okay.

CPL BURKE: I wouldn't personally do the risk assessment or I wouldn't personally do the checking of any potential persons of interest, but I would call upon our Criminal Intelligence Unit and they would obviously do the checks and visit anyone that was of any concern or potential concern for safety to the VIP.

MS. O'BRIEN: Okay. All right. Thank You.

Have we covered now the training and educational background that you have that you think would be relevant to the work you done?

CPL BURKE: I think so, yes.

MS. O'BRIEN: Okay. Thank You.

So let's move a little forward in time to April 5, 2015, and to what unit or division were assigned on that date, Corporal Burke?

CPL BURKE: RCMP, Major Crime Unit, B Division.

MS. O'BRIEN: And are you still with the Major – so it's the major crimes unit, which we'll refer to today sometimes as the MCU, right?

So are you still with the MCU?

CPL BURKE: No, I'm not.

MS. O'BRIEN: Okay.

When did you leave the MCU?

CPL BURKE: On December 2016.

MS. O'BRIEN: Okay. And when did you first join the MCU?

CPL BURKE: In October 2009.

MS. O'BRIEN: Okay.

So you joined the RCMP, I think you said in 2002. Can you just give us a very brief overview of the positions that you had with the RCMP from joining up until you when you joined the MCU?

CPL BURKE: From 2002 to 2005, I was a general duty constable at Bell Island, and from 2005 to 2009 I was general duty constable in Whitbourne.

MS. O'BRIEN: So then you went to MCU and then where have you moved since December of 2016?

CPL BURKE: I'm currently at the general investigative unit in Harbour Grace.

MS. O'BRIEN: Okay.

In April 5 of 2015 who was your immediate supervisor?

CPL BURKE: Sergeant Kent Osmond.

MS. O'BRIEN: Did that remain the same throughout this investigation?

CPL BURKE: No. Sergeant Kent Osmond was promoted and – well, during the initial investigation, but the investigation has been going on for two years, Sergeant – I'll get her name in a second, sorry about that – Sue Efford, sorry – Sergeant Sue Efford was the Sergeant at Major Crime Unit which would be my immediate supervisor, and she has since moved on as well.

MS. O'BRIEN: All right.

Do you recall when the change went from Kent Osmond to Sergeant Sue Efford?

CPL BURKE: I think it might have been in the fall of 2015 or 2016.

MS. O'BRIEN: Or early 2016, is that what you're saying?

CPL BURKE: Yeah, I think it was in the fall of 2015.

MS. O'BRIEN: Okay.

Looking back at April 5, 2015, at that time when you were with the MCU, how many officers did you supervise there?

CPL BURKE: That was a time of transition for us, but it would have been four officers I think, four members, which is now six, so it varied at that time.

MS. O'BRIEN: Okay.

And of those officers that you were supervising at that time – and these would be constables, would they?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Can – do you recall which ones worked on this file?

CPL BURKE: Well –

MS. O'BRIEN: Constable Nippard, maybe?

CPL BURKE: Constable Mike Nippard, yeah, and Corporal Monty Henstridge who was in a transition state as well.

MS. O'BRIEN: Yes, can you explain that please for the Commissioner, because you and Monty – Corporal Monty Henstridge, were of the same rank at that time, but I understand that he was, sort of, serving under you at the MCU. And it was because of the transition – can you explain that?

CPL BURKE: Without getting into anything personal –

MS. O'BRIEN: No.

CPL BURKE: – he was scheduled to go with the truth verification section, and the training for that is three months. He was supposed to go to Ottawa. Due to medical bills and his family, I guess, that was delayed, and it's only offered once a year, so he had to wait a full year to – I think it was a full year, or six months at least to get that training again. So, in the meantime, he was at – still in Major Crime Unit.

MS. O'BRIEN: Okay, so he was still in Major Crime Unit, and kind of doing the work of a constable there; although, he was a corporal, he was kind of acting in one of those –

CPL BURKE: Sure.

MS. O'BRIEN: – a role. Is that accurate?

CPL BURKE: I would say, yeah.

MS. O'BRIEN: Okay.

Prior to April 5, 2015, had you ever been involved in the investigation of a homicide, previously?

CPL BURKE: Yes, I have.

MS. O' BRIEN: Okay, so we will just take – just go through those. I understand that you were involved in a murder in Nain, in 2010; is that right?

CPL BURKE: Yes, that's correct.

MS. O'BRIEN: Okay, and you would have been the primary investigator on that case?

CPL BURKE: Not initially, but I was the primary investigator after; maybe a couple of weeks after.

MS. O'BRIEN: Okay, so you transitioned into –

CPL BURKE: Yep.

MS. O'BRIEN: – the primary investigator position –

CPL BURKE: Yep.

MS. O'BRIEN: – and in a few minutes, we'll go through exactly what it means to be a primary investigator.

CPL BURKE: Sure.

MS. O'BRIEN: So everyone knows that.

CPL BURKE: Yeah.

MS. O'BRIEN: And then I understand, also, another murder in Labrador, in Sheshatshui, in 2013.

CPL BURKE: Correct.

MS. O'BRIEN: And you were also primary investigator on that one?

CPL BURKE: Yes, I was.

MS. O'BRIEN: Okay. And then, more recently than in 2014, there was a murder investigation in North Harbour.

CPL BURKE: Yes.

MS. O'BRIEN: Took place in North Harbour.

CPL BURKE: No.

MS. O'BRIEN: I'm sorry?

CPL BURKE: North River.

MS. O'BRIEN: North River, sorry.

CPL BURKE: Yeah.

MS. O'BRIEN: My apologies.

And you were the primary investigator on that one?

CPL BURKE: Yes.

MS. O'BRIEN: Had that file concluded at the time that you became the primary investigator in the Donald Dunphy matter?

CPL BURKE: No, but I was no longer primary investigator on the North River matter.

MS. O'BRIEN: Okay.

THE COMMISSIONER: When did that one start?

CPL BURKE: North River started June 2014.

THE COMMISSIONER: Thank you.

MS. O'BRIEN: So you had transitioned from that file –

CPL BURKE: Yes.

MS. O'BRIEN: – at the time of Mr. Dunphy's death? Okay.

Have I given a list now of the – a list of – complete list of the homicides you've previously been involved with?

CPL BURKE: I think so.

MS. O'BRIEN: Okay. And of those, I understand only one of them was a firearm's related homicide, and that would have been the one in North River. Is that –

CPL BURKE: No, sorry, there's one in North Harbour that I was a primary on. That happened in –

MS. O'BRIEN: Okay, that's –

CPL BURKE: Right.

MS. O'BRIEN: – sorry –

CPL BURKE: Yeah.

MS. O'BRIEN: – that's where my notes are going wrong. So there was a North River and a North Harbour?

CPL BURKE: Yes.

MS. O'BRIEN: When was the North Harbour one?

CPL BURKE: That was in, I think, March 30, 2010.

MS. O'BRIEN: Okay. And were you the primary on that one?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: Not initially, but I since was the primary.

MS. O'BRIEN: Okay. So of the ones – so that's four now we've talked about; and of those, how many of those were firearms related homicides?

CPL BURKE: One.

MS. O'BRIEN: One, okay. And that was North Harbour.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Prior to April 5, 2015, Corporal Burke, had you ever been involved in the investigation of an incident involving use of force by a police officer in the course of duties?

CPL BURKE: Yes, I have.

MS. O'BRIEN: Okay. And just briefly, can you tell the Commissioner about that. And I understand it involved an RNC officer, is that right?

CPL BURKE: Yes, that's right.

MS. O'BRIEN: Okay. So when did that take place?

CPL BURKE: There was one in particular, the other one I don't think I was involved in that much. It was out of our office but one I was a tasker on, which the primary investigator would tell me to do something and I would go do it, take a statement or surveillance or whatever. And that – I don't know how much I can say about it –

MS. O'BRIEN: Okay, but it was a criminal investigation involving a use of force by an officer of –

CPL BURKE: Yes.

MS. O'BRIEN: – and it involved a firearm did it?

CPL BURKE: Yes.

MS. O'BRIEN: But no one was injured.

CPL BURKE: No.

MS. O'BRIEN: Okay. So you had been involved –

CPL BURKE: Minor injuries.

MS. O'BRIEN: Minor injuries, okay.

CPL BURKE: A mix up.

MS. O'BRIEN: So you'd been involved in that –

CPL BURKE: Yes.

MS. O'BRIEN: – but you weren't the primary investigator on that. You were one of the taskers, and we're going to talk a bit about that.

CPL BURKE: Sure.

MS. O'BRIEN: So you would have been assigned to do specific tasks on that investigation –

CPL BURKE: Yes.

MS. O'BRIEN: – at the behest of the primary investigator, okay.

Have you ever had any special, any training that would be specific to doing investigations of police officers?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay.

This is a bit of an open – it might sound at first like an open-ended question, but we had discussed it in your interview. At that time I'd asked you if there was any particular challenges or did you consider there to be any particular challenges or considerations to doing criminal investigations of police officer, you know, compared to ones where the subject of your investigation is not a police officer. And at that time one of the ones I note, one of the answers you gave me was that there was a difference because section 25 of the *Criminal Code* came into play. So that might remind you of what we were talking about then.

CPL BURKE: Sure.

MS. O'BRIEN: So can you go through that for me, please.

CPL BURKE: When you investigate, I guess, another police officer, you have to take into consideration special circumstances involving that person. It's, you know, it's not a member of the general public, and, you know, I realize that. When you have to consider that, you know, in this incident or whether they're in, in – they're actually doing their duty at the time, which is a consideration, and that's what we would be involved in, you know. And you have to consider section 25 of the *Criminal Code*, which, you know, I guess gives authority or some sort of allowance for a police officer to use force in the line of his duty. And, but other than that, if it's a homicide investigation things are pretty well the same. We look for the same evidence, we go about our investigation the same way, but those are considerations that are, you know, to the aside.

MS. O'BRIEN: Okay. One of the other when we – when I'd asked you that question in the interview, the pre-hearing interview we did with you on December 1, 2016, you also spoke about a couple of other aspects, and one of them was that you had an awareness that this type of investigation may be exposed to higher scrutiny. Do you recall that?

CPL BURKE: I do, and it was in consideration – it is a consideration in our investigation, but it's a kind of a looking back kind of thing. You know, that wasn't a – wasn't in the forefront of our mind when we initiated this investigation for example. We didn't think about the public or the scrutiny that we would have, but it does obviously come into play at some point. But for our investigations, it's we look at the *Criminal Code* and our duties as investigators. That's, you know, the investigation is the first thing we, we consider. Public perception or scrutiny is, you know, something that comes into play but not in our investigation, basically.

MS. O'BRIEN: Okay. So it doesn't change the way you do your investigation is what you're saying.

CPL BURKE: I don't think so, no.

MS. O'BRIEN: Okay. I'm just going to bring you to an answer that you gave on December 1. So I had asked you if, I had put the question to you coming from an answer you'd given that, whether you were saying that in investigating a police officer you may be more vigilant, and this is your answer that I'm going to read out. Answer: Not more vigilant, I guess more aware of being unbiased. You shouldn't be biased towards anyone really but you know that, you know that these questions are going to be posed, you know, where you are buddy-buddy with this guy,

you know. Just so you got to be wary of that with a police officer investigation as compared to the normal person off the street investigation, you know.

I can't say it doesn't come into play, it does. But as for a *Criminal Code* investigation of a police officer, it's like any other homicide that I've investigated or any other major crime that I've investigated. There's no difference. All the techniques, all the methods you use in a homicide investigation is the same basically as for a police officer.

Is that an accurate statement?

CPL BURKE: Yeah, exactly. That's what I was saying, but – and I – it is, you're – it's a heightened awareness but, you know, it's a heightened awareness now because in hindsight and looking back on our investigation, obviously the public, you know, are interested in that.

And but it wasn't, you know, it plays a role but it's not a big role. We just have to be aware that we are being looked upon as being, you know, it's police officers investigating police officers and that does have an impact.

MS. O'BRIEN: It does have an impact, is that what you're saying? Yes?

CPL BURKE: Yes.

MS. O'BRIEN: Yeah. Sorry, I just have to remind you, you always have – a nod won't do –

CPL BURKE: Yes.

MS. O'BRIEN: – because we do get transcripts of these proceedings.

Okay, Corporal Burke one other question about your background as a police officer. Have you ever had any complaints or commendations, so good or bad, about any investigation you have conducted previously, either by the courts or by your arrests by – or internally in the RCMP by your superiors?

CPL BURKE: I'll say no to you, both.

MS. O'BRIEN: Oh, to both.

CPL BURKE: Just, commendations–

MS. O'BRIEN: Okay.

CPL BURKE: I don't think we would call them commendations but –

MS. O'BRIEN: Okay.

THE COMMISSIONER: The courts are not very quick about giving out commendations, I don't think.

MS. O'BRIEN: Yes, fair enough. But in some points there can – you know, there can be, courts do make some comments about the work of an officer. That's what I would have been getting at, that point. In case there was anything you wanted to bring to our attention.

I'm going to ask you a couple of more questions now really that go to independence on the file. In a few moments we're going to get into the MCU and how the MCU works and how they're

assigned their duties. But first I'd like to know who assigned you to be the primary investigator on this file?

CPL BURKE: Sergeant Kent Osmond.

MS. O'BRIEN: Okay.

Had you ever been on any joint operation or task force with a member or members of the RNC previously?

CPL BURKE: I guess not official task force but for our 2010 investigation in North Harbour, a lot of the persons, witnesses or, you know, players in that file were from the St. John's area. And members of the RNC had much more knowledge about those people than we did, so we seconded two members of the RNC to assist with our investigation.

MS. O'BRIEN: So you were the primary on that one at that time?

CPL BURKE: Not at the time.

MS. O'BRIEN: Not at that time, you weren't the primary. So you were working with two – you were working alongside of two seconded RNC officers.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And for roughly how long would that have been?

CPL BURKE: I think it was three months, maybe, a couple of months. I can't really remember now.

MS. O'BRIEN: Okay. And what about doing your VIP duties? Did you ever work with the RNC in doing your, your VIP protective duties?

CPL BURKE: When we're in St. John's, when the visit is in St. John's, or most recently in Corner Brook, we would have a liaison officer from the RNC, or the – I guess the police, police jurisdiction, which in those cases were the RNC.

MS. O'BRIEN: Okay. Would that be the limit of your, sort of, joint work with RNC?

CPL BURKE: Yeah, I think so.

MS. O'BRIEN: Okay. Have you ever done any training with members, or a member of the RNC?

CPL BURKE: Yes, I have.

MS. O'BRIEN: Okay. So can you just tell the Commissioner about that?

CPL BURKE: At the Canadian Police College it's open to all, all police services in Canada, as far as I know. And I was on a couple of courses where there are RNC members on the course as well. And most recently, I coordinated a search warrant course at our headquarters in St. John's and there was a couple of RNC members on that and I think they are from the CFSEU, Combined Forces Special Investigations Unit, I think, or Enforcement Unit?

MS. O'BRIEN: Is that the drug unit, the joint drug unit?

CPL BURKE: Yeah, yeah, I guess it's the drug unit –

MS. O'BRIEN: That's a joint drug unit with the RNC and RCMP in this province?

CPL BURKE: Yes. Yup.

MS. O'BRIEN: Okay. And when did you coordinate that search warrant course?

CPL BURKE: That would have been in November of 2016.

MS. O'BRIEN: Okay. Prior – was that the extent of your training with RNC?

CPL BURKE: Yeah, I'm trying to just go back –

MS. O'BRIEN: Okay.

CPL BURKE: – and that's about it.

MS. O'BRIEN: Okay. Prior to April 5, 2015, did you know Constable Smyth?

CPL BURKE: Yes, I did.

MS. O'BRIEN: Okay. Can you tell the Commissioner how you knew him?

CPL BURKE: I met him a couple of times. One time it was, I was doing an investigation in Whitbourne and the subject that I was looking at was from the St. John's area. And I contacted the RNC to get some information on this person and I was kind of forwarded to the Criminal Intelligence Unit. And the member I dealt who is Joe Smyth.

MS. O'BRIEN: Okay. And what did, what, how did you – what were your dealings with Joe Smyth?

CPL BURKE: I met with him at RNC headquarters and he gave me information on a person I was looking into.

MS. O'BRIEN: Okay. Did you also do any work with him in VIP, when you were in VIP?

CPL BURKE: Yeah. Early on – and there was, I think Joe Smyth was the RNC VIP liaison at the time, which would have been in 2008, 2009, and I think I met him during that time. I wasn't too involved in that visit. I was – I think I was a spare limo driver or something. So I never had a whole lot of coordination with the RNC but I met him, I think.

MS. O'BRIEN: So you met him you're just saying, just the once or –

CPL BURKE: Yeah.

MS. O'BRIEN: Doing that VIP work, you only met him once –

CPL BURKE: Yeah, it might have been, I think a –

MS. O'BRIEN: I mean you were both working in that area.

CPL BURKE: Yeah, there might have been a couple of visits that – you know, I didn't really have any dealings with him, I just met him.

MS. O'BRIEN: Okay.

So when – prior to April 5, 2015, when would have been the last time that you had seen or dealt with Constable Smyth?

CPL BURKE: I think I met him at a gas station at my place. He was in there with Premier Dunderdale and I just said hello to him.

MS. O'BRIEN: Okay. So roughly when would that have been, what year?

CPL BURKE: I'm going to say 2012, 2013 maybe.

MS. O'BRIEN: Okay.

When Constable Smyth testified, he testified as to having done a home visit with you. Do you recall that? It might have been related, I don't know. I think he said that it was when he was in the CIU –

CPL BURKE: Right.

MS. O'BRIEN: – and that you had come to him or contacted him about an investigation that you were doing that had some –

CPL BURKE: Yeah.

MS. O'BRIEN: – involvement in St. John's and he recalled doing a home visit. Does that ring any bells for you?

CPL BURKE: It doesn't ring any bells, not saying it didn't happen. That would have been the investigation I spoke of. I don't remember it, and I'm not saying it didn't happen.

MS. O'BRIEN: Okay. So you've just forgotten about that?

CPL BURKE: Yeah.

MS. O'BRIEN: All right.

CPL BURKE: I don't remember it.

MS. O'BRIEN: So when, so you had some knowledge of Constable Smyth prior to being assigned to this case some – you knew him to say hello (inaudible) had done some limited work with him. Did Kent Osmond, prior to assigning you as primary investigator, did he ask you whether or not you knew Constable Smyth?

CPL BURKE: Yes, he did.

MS. O'BRIEN: Okay. And did you tell him about your involvement. Just explain to the Commissioner what happened. He asked, what happened?

CPL BURKE: He said, you know, Joe Smyth was involved in this incident and he said: do you know him? I said: yeah, I know him. He said: well, how do you know him? I said: well, when I was in Whitbourne I had an investigation with him and I, I remember doing some VIP work with him.

MS. O'BRIEN: Okay. And what did, what did Sergeant Osmond say about that?

CPL BURKE: I think he said something like: so, would this be in any conflict for you? And I said no.

MS. O'BRIEN: Okay. So at that point you think you might have forgotten about doing a home visit with him?

CPL BURKE: Yeah, I still don't remember that.

MS. O'BRIEN: You still don't remember that. Okay.

And you didn't have any personal relationship with Constable Smyth did you, other than –

CPL BURKE: No, absolutely not.

MS. O'BRIEN: – the one you're talking about. And what about any member of his family?

CPL BURKE: No.

MS. O'BRIEN: Did you know any other member of his family? Okay.

Now, you've looked at the full RCMP file, I'm sure, as the primary investigator. This discussion that you had with Kent Osmond where he asked you did you have any knowledge of Constable Smyth and you tell him that you have some and you don't feel it's a conflict. Was that ever recorded anywhere in the RCMP file?

CPL BURKE: I would assume that Sergeant Osmond would record it. I didn't record it.

MS. O'BRIEN: Okay. So you don't know whether or not it's been recorded?

CPL BURKE: And I don't remember seeing it.

MS. O'BRIEN: You don't remember seeing it. Okay.

Do you know if it's considered good practice to document those types of – you know, any potential conflicts that have been explored, even if it's been determined they're not a conflict. Is it good practice to record that in the investigative file?

CPL BURKE: Yes.

MS. O'BRIEN: Do you know whether your prior knowledge of Constable Smyth was ever communicated to the Dunphy family?

CPL BURKE: No, I, I don't know. Not by me.

MS. O'BRIEN: Okay. Prior to April 5, 2015, did you know Mr. Dunphy or any members of his family?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. Were you asked by Kent Osmond about whether or not you knew Mr. Dunphy or any member of his family prior to being assigned to the case?

CPL BURKE: I don't remember him asking specific if I knew the Dunphy family, but, you know, if I knew anyone in Mitchells Brook even, I think that would have come out for sure.

MS. O'BRIEN: Okay. So you don't remember specifically being asked, but you think you would have been –

CPL BURKE: I think it was assumed, or.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Assumed that you would have mentioned it if you knew someone?

CPL BURKE: Of course, yeah. I didn't even know how to get to Mitchells Brook.

MS. O'BRIEN: Okay. I think the Commissioner's question, though, was would it have been assumed, like, if you had known, would – do you think Kent Osmond would just be assuming you would come forward and give him that information?

CPL BURKE: Yeah, I think so. Like, we were talking about Mitchells Brook and the Dunphys and none of us knew who these people were.

MS. O'BRIEN: Okay.

Now, we're going to talk about, you know, all the other officers who were assigned to this case in a few minutes and how they got to be assigned; but in terms of your role as a primary investigator, would it have been your obligation to check whether or not any officers, any other officer, had conflicts on the file or would that have been something that was the responsibility of Kent Osmond?

CPL BURKE: I feel it is a team commander role with Kent Osmond –

MS. O'BRIEN: So Kent Osmond. So he would be – okay.

Do you know, having looked at the file and been involved in the file, if any of these conflict checks were done or recorded?

CPL BURKE: No, I don't.

MS. O'BRIEN: So you don't – you have not seen them recorded anywhere in the file; is that right?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay.

Okay, so let's – if you can just talk to the Commissioner now and explain exactly what the major crimes unit, or MCU is, how it works, what its mandate is and just kind how it fits in the, in the RCMP organization structure.

And to assist you with this, I'm going to ask Madam Clerk to bring up Exhibit P-0308. And this is just an organizational chart that, after you kind of give a higher of the MCU, we can maybe go through the different positions, but we can start with what does the MCU do.

CPL BURKE: The Major Crime Unit would be – its mandate is to investigate suspicious deaths, serious sexual assaults, anything that would, I guess, be of high profile. Investigations where there's a need for significant disclosure and deaths that are offshore –

MS. O'BRIEN: And I think you previously mentioned like barricaded persons.

CPL BURKE: Sure.

MS. O'BRIEN: That would also come under your purview. Okay.

And so just explain how the MCU is maybe organized, and I'll make that just a bit bigger for you in just a moment, Corporal Burke, but in – I understand in Newfoundland we have an MCU East and an MCU West or if you could just explain that.

CPL BURKE: Yes. There's – when I first started there was three MCU; one in St. John's, one in Gander and one in Corner Brook. They've since kind of amalgamated to two; one in St. John's and one in Corner Brook.

The unit in St. John's is made up of a sergeant, a corporal and it was three constables, now it's four. In Corner Brook there's a sergeant, a corporal and two constables, which I think now is going to be three or is three.

MS. O'BRIEN: Okay. And so MCU East is the St. John's and MCU West is Corner Brook.

CPL BURKE: That's correct.

MS. O'BRIEN: Okay. And between the two, east and west, you get the whole province covered?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So I think what we have here is a bit of a organization chart for, as it existed at the relevant time period, on April 5, 2015, for MCU East. So I think you just said then, if we – I'll take you through it here but I understand at the top would have been Assistant Commissioner Tracy Hardy and at that time she would have been, am I right to say, the most senior RCMP officer in the province? Is that –

CPL BURKE: Highest rank, yes.

MS. O'BRIEN: Highest ranking RCMP officer in the province. And we're going to go down the chain of command now. And so reporting to her would have been what sometimes I think you guys refer to as the CROPS or the criminal operations officer and at the time relevant to this investigation that was Chief Superintendent Andrew Boland.

CPL BURKE: Correct.

MS. O'BRIEN: Okay.

And then reporting directly to Chief Superintendent Andrew Boland would have been superintendent – this would be the provincial policing officer, who would have been Superintendent Pat Cahill at the time. And then –

CPL BURKE: (Inaudible.)

MS. O'BRIEN: Sorry.

CPL BURKE: It might have been the other way around. He was an inspector and the superintendent was vacant.

MS. O'BRIEN: Okay. All right. So yes, there was – I understand that the one right below this was actually a vacant position, so you're saying Pat Cahill was filling the inspector role at this time.

CPL BURKE: No, he was an inspector in Major Crime and the operational support services provincial policing officer would have been vacant.

MS. O'BRIEN: Okay, so you're saying this one here that I have the mouse hovering over here was vacant and, to your knowledge, Pat Cahill would have been in this box right below.

CPL BURKE: Yeah, and probably acting in the vacant spot above.

MS. O'BRIEN: And maybe acting – at the same time, acting in the vacant spot above. Okay, so this is where – it's at this level that we get into the MCU itself.

CPL BURKE: Yes.

MS. O'BRIEN: Right? So this would have been – so it's headed up by an inspector and so that would be the – this would be the major crimes operations officers, that would have been at the time Inspector Pat Cahill –

CPL BURKE: Yes.

MS. O'BRIEN: And then I think when you described the MCU, sorry, you said it involved – the top position was a sergeant. So that would have been – for the major crimes unit east at the time that would have been Sergeant Kent Osmond.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And then you said each MCU then also had a corporal. So at the time that would have been you here at this position here, Corporal Steven Burke?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And then reporting, direct reports to you also in major crimes unit would have been four constables, as you just said. And at the time it looks, according to this chart, if it's accurate, one of those positions was vacant. And I think – I don't know how accurate this is because you said Constable Mike Nippard was there at the time and he is not on this org chart that we were provided, but he would have been in one of those positions.

CPL BURKE: Yes, he was seconded for an investigation in our unit.

MS. O'BRIEN: Okay. So he was there on a temporary basis; is that the idea?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Okay. So is it – and just to go – I know we just talked about Corporal Monty Henstridge – so at the time, he would have been kinda in one of these roles on a temporary basis waiting to go truth verification.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

I take it that a police-involved shooting of a civilian would be one of those types of high profile or serious crimes that would come under the purview of the MCU?

CPL BURKE: Yes, but it was also sudden death that happened in RCMP jurisdiction.

MS. O'BRIEN: Okay.

So when the call comes in – so the first call, the report of something like this, who makes the decision to contact MCU? How does that happen? How does the MCU get engaged?

CPL BURKE: It would come from the detachment commander in that area, Holyrood, and it would have been Staff Sergeant Rod Tiller. He would call the on-call Major Crime member, or he would call Inspector Pat Cahill. He might even call his district policing officer.

MS. O'BRIEN: Okay.

And it would be by that call then that MCU would get engaged.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Now, I know you've gone over your training but just to get some sense – I understand that you said earlier that all MCU – you've told me prior to today that all MCU members, at some point, will receive the major crimes investigative techniques course.

CPL BURKE: Yes.

MS. O'BRIEN: And they'll also – it's standard training for MCU members to do the investigative interviewing course –

CPL BURKE: Yes.

MS. O'BRIEN: – as well as the wiretap and ITO courses; is that right?

CPL BURKE: The ITO, the wiretap is not necessarily – it's a specialized training that not all MCU members have.

MS. O'BRIEN: Okay.

But they'll all get it, for the information to obtain, so the seeking search warrant courses.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. All right.

Now, I understand that when MCU members are working on a file they might also, on the investigation, they may work with other officers from other units. So we're going to go – for example, in this case we're going to talk about how you relied on the services, or used the services of the Forensic Identification Section.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And we've also had some testimony from Sergeant Foote who is the General Investigation section in Holyrood detachment.

CPL BURKE: Yes.

MS. O'BRIEN: And so he described that unit as a bit of a support unit, so I understand that MCU may sometimes draw on officers or resources from the General Investigation section to assist them in carrying out their Major Crimes investigations.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And here I think, I understand that Sergeant Dion Foote was actually assigned from GIS to this case.

CPL BURKE: Yes, he was.

MS. O'BRIEN: Okay.

And – okay. And as well, I think was John Galway also with the GIS as well?

CPL BURKE: Yes, he was.

MS. O'BRIEN: Okay, so he was also assigned to the case.

Now, I'm going to ask Madam Clerk, to bring up Exhibit P-0309. And this is the Major Case Management Command Triangle. And this, you know, you have this actual – I've taken this particular schematic from your final report.

Madam Clerk, can I ask you just to make it a little bit smaller so I can get the full schematic on the screen? Yeah, that should do us. Thank you.

So up top it's the Major Case Management Command Triangle. Now, does the MCU always use this Command Triangle as a model for its investigations?

CPL BURKE: Yes, it does.

MS. O'BRIEN: Okay.

And where does this come from? I mean is it something that was locally developed, nationally developed, is this used internationally? I mean where do you get this from?

CPL BURKE: Well, I got it from my major case investigative techniques course. It's in our RCMP policy.

MS. O'BRIEN: Okay.

CPL BURKE: And it's policy for a Major Crime Unit to use this model in major investigations.

MS. O'BRIEN: Okay. And that's within the RCMP, is that what you're saying?

CPL BURKE: Yes, the RCMP.

MS. O'BRIEN: Okay. Do you know if other police forces also use it or is this an RCMP model, or do you know?

CPL BURKE: I haven't been on courses with other police departments. I can – it is used by other police services –

MS. O'BRIEN: It is –

CPL BURKE: – besides the RCMP, yes.

MS. O'BRIEN: – to your knowledge. Okay.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

All right, so I'm going to – we're going to maybe go over the triangle because I think it's important for us to understand, you know, how you do your work and how you did your work in this case.

CPL BURKE: Yes.

MS. O'BRIEN: So I'm going to ask you to go through the triangle and explain the roles and responsibilities of each position. And so I understand the top of the triangle is the team commander. Can you describe the role of the team commander for us?

CPL BURKE: The team commander is the overseer of the investigation basically. He would be responsible to obtain resources or anything that we needed to do our investigation. He'd also be responsible for reporting to RCMP senior management in the, I guess, the investigation, investigation updates, things like that. He also, you know, obviously would maintain some sort of, you know – he keeps the investigation on track and keeps the triangle together and –

MS. O'BRIEN: Okay.

CPL BURKE: – that's about it, I guess. I –

MS. O'BRIEN: Okay, so when you say resources, so would the team commander be responsible for making sure you had the right people in the right positions that you needed –

CPL BURKE: Yes.

MS. O'BRIEN: – giving you the right help?

And I think you said earlier that would be the team commander who'd be responsible for clearing conflicts and those kinds of things.

CPL BURKE: Yes.

MS. O'BRIEN: All right. And you, you're saying he, because in this case it was Sergeant Kent Osmond who –

CPL BURKE: Sure, yes.

MS. O'BRIEN: – who has that role. Okay.

And so he would have sat here at the top of the triangle. So the next position I'd like you to talk to is the role that you played as the primary investigator. What does the primary investigator do?

CPL BURKE: The primary investigator, I guess, controls the speed, flow and direction of the investigation. He would be, I guess, in control of the investigation and assigns tasks to other investigators and goes through the investigational plan and makes decisions on investigational steps that should be taken next.

MS. O'BRIEN: Okay.

CPL BURKE: And responsible for reviewing the file and the evidence that comes in and reports to the team commander. And if the direction – when I say speed, flow and direction, if the direction is going the wrong way, the team commander and the triangle will, you know, put you back on course, or kind of as team commander and the triangle itself is kind of like a second set of eyes that, you know, sometimes you're so focused on something as a investigator or as a primary you can't, you know, can't see any further than that. And the triangle helps you out with, you know, making sure that what you're doing is logical and in line with the evidence that's received.

MS. O'BRIEN: Okay. And so the other, the other corner of the triangle is filled by the file coordinator position. And in this case we've already heard from the file coordinator, that was Sergeant Dion Foote. So can you tell the Commissioner what the file coordinator does?

CPL BURKE: The file coordinator is the person that takes in all the material, information, documents, information to be held on the file itself. He would assign tasks. We would have, like, the primary and the file coordinator would discuss tasks that are to be assigned and discuss who they should be assigned to. And he would be involved in actually physically assigning the task.

MS. O'BRIEN: Okay.

CPL BURKE: The file coordinator is responsible for disclosure. So while he's, he's the gatekeeper for the information, I guess, and he's also responsible to disclose that information in a logical, searchable, practical format, I guess.

MS. O'BRIEN: Okay. And so when you are talking about the triangle, you know the triangle's responsible, you're talking about these three corners of the triangle working together. Is that what you're saying?

CPL BURKE: Yes. Yeah.

MS. O'BRIEN: Okay. And we'll talk a little bit in a few minutes about sort of, how the information flows in the triangle. But we have a few other roles here that are not part of the triangle itself but that support the triangle. So let's talk about those. Here we see on this, on the left-hand side, a media officer. And in this case who is the media officer assigned?

CPL BURKE: Staff Sergeant Greg Hicks.

MS. O'BRIEN: Okay, and I take it that the media officer does the, you know, does the interactions with the media and press releases, and those kinds of things. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: And would the media officer, would do that in consultation with the triangle? Is that fair to say?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And I take it not every case would have a media office – not every major crime would have a media officer, there'd have to be, you know, sufficient public interest, media interest. Is that fair to say?

CPL BURKE: Yes, I guess so.

MS. O'BRIEN: All right. The next one, we have the family/community liaison, and I understand – we've already heard testimony from Constable John Galway, who is with the GIS in Holyrood. And I understand he initially filled the role in this case of family liaison but after a certain period of time you actually ended up filling that family liaison role. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And just briefly, what does the family liaison officer do?

CPL BURKE: Family liaison is exactly what it says, I guess. They would, if there's any concerns from the family or people involved he would take those concerns and address them in some sort of way.

MS. O'BRIEN: Okay. And I think Constable Galway's given us, you know, pretty significant evidence on that and he was point of contact and that kind of thing, for the family. All right.

So now when we look at the triangle we see these arrows going, you know, two-headed arrows going up and down the sides of the triangle. And so, is that, you know, to talk – to illustrate that information flows back and forth around the triangles?

CPL BURKE: Yes, it is.

MS. O'BRIEN: So it's a bit of a collaborative approach, although you all have your distinct responsibilities. Is that fair to say?

CPL BURKE: Yes, exactly.

MS. O'BRIEN: Okay. Now down here we have some further reports, so we have a number of boxes here that are all I think, is it – is this illustrating that these all report up to the primary investigator?

CPL BURKE: Kind of report to the primary investigator and then report to the triangle, basically.

MS. O'BRIEN: Okay, so they go to the triangle, though, through the primary investigator. Is that –?

CPL BURKE: Yeah, I would – that’s fair to say.

MS. O’BRIEN: Okay. So the exhibit custodian, and we’ve already had evidence from – that was also Constable John Galway.

CPL BURKE: Yes, it was.

MS. O’BRIEN: And so he’s already told us about what the exhibit custodian does. You know, takes custody of the exhibits and tracks them through the PROS system, for continuity purposes.

CPL BURKE: Yes.

MS. O’BRIEN: Then we have the Forensic Identification Section, and I understand that we are going to get more testimony, ’cause next week we are going to hear from Sergeant Chris Saunders and Corporal Kelly Lee who are the two FIS members involved here, but they do analysis of the scene and capturing and processing of the crime scene itself, right? Then we have investigators, so what do the investigators do?

CPL BURKE: Investigators are what we call taskers, I guess. They would be the person, the people, that are out doing, taking statements, neighbourhood inquiries. Whatever, you know, investigation steps that we consider, they would be the actual doers of those steps.

MS. O’BRIEN: Okay. Sort of the worker bees, getting the jobs done that would be assigned to them. Is that fair to say?

CPL BURKE: Yes.

MS. O’BRIEN: And when you say investigators, taskers, those are – you are using those terms interchangeably here.

CPL BURKE: Yes.

MS. O’BRIEN: Okay. And in the present case, your investigators or taskers would have been Corporal Monty Henstridge?

CPL BURKE: Yes.

MS. O’BRIEN: Constable Mike Nippard?

CPL BURKE: Yes

MS. O’BRIEN: Any others that you can think of?

CPL BURKE: Not that I can think of initially. No.

MS. O’BRIEN: Okay, so they were the two major taskers involved on this case?

CPL BURKE: Yes

MS. O’BRIEN: Okay.

And the next, we have subject matter experts, so I understand in this case – and we will hear from them later on that you made use of these two subject matter experts, one in the use of force who was Corporal Wayne Knapman?

CPL BURKE: Yes.

MS. O'BRIEN: And we will hear from Corporal Knapman eventually, but I understand he was engaged to do a, to give an opinion as to Constable Smyth's use of force in the present case?

CPL BURKE: Yes

MS. O'BRIEN: Okay. And another subject matter expert you engaged would have been Darryl Barr; is that right?

CPL BURKE: Yes

MS. O'BRIEN: And Darryl Barr is not a police officer, but he is with, I think, another police – he works with another police force –

CPL BURKE: Yes.

MS. O'BRIEN: And he did some ballistic analysis, trajectory bullet analysis of the scene for you.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Those are the two subject matter experts that you had involved in this case?

CPL BURKE: That I can recall, yeah.

MS. O'BRIEN: Yep, and we may get to some other minor ones like the person who looked at the gun and the forensics lab and things like that, okay?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. All right. So that's who was on work here, and in the final box here is criminal analyst.

CPL BURKE: Yes.

MS. O'BRIEN: So what does a criminal analyst do?

CPL BURKE: A criminal analyst would take the information in the file and make – and they would analyze it basically and make some sort of logical sense out of it. They are responsible for time lines and analysis of maybe phone records or whatever else we deem necessary.

MS. O'BRIEN: Okay. And in this case, we'll hear a little more testimony from you later on but you used Wanda Richards –

CPL BURKE: Yes.

MS. O'BRIEN: – to do some analysis for you on this file. Okay, and then the last position that I want to talk about here on the diagram is this Major Case Management box. And this one actually links not to the primary investigator, but it links up to the file coordinator. Can you just explain what that is?

CPL BURKE: Major Case Management is the unit that provides disclosure. In this case, it's the unit that would provide electronic disclosure through Evidence & Reports III – it's a program. So any information that is in our file and needs to be disclosed, it would go through their section to put it in electronic format and disclose in a manner that's, I guess, easy or workable for anyone that receives a disclosure.

MS. O'BRIEN: Okay.

Now this is referred to as a Major Case Management Command Triangle and you are the Major Crime Unit. Is there any difference between major crimes/major cases; are those two terms interchangeable?

CPL BURKE: There pretty well interchangeable but Major Case Management section, that unit is just, they're civilian – I think they're public service employees that they don't do anything investigative; they just provide electronic disclosure.

MS. O'BRIEN: Okay. So this is –

CPL BURKE: Yeah.

MS. O'BRIEN: – Major Case Management.

And you just mentioned something in Reports III program; I've seen it in the file as E&R III –

CPL BURKE: E&R III, yes.

MS. O'BRIEN: – a program, and I know that if I – if we go up to Exhibit P-0004. Could we bring that up Madam Clerk?

And there is an independent observer on that diagram, but we're gonna come back to that later on, okay.

CPL BURKE: Sure.

MS. O'BRIEN: I understand the independent observer is not a standard part of the Major Case Management or the Major Case Command Triangle; is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So just – thank you, I can go up here. I just noted at page 3 of this report there's a note here that this is the Alberta Serious Incident Report. This is their report review that they did of the RCMP investigation, and we'll get to this a little bit more as we go through your testimony but on page 3 they note that: "A careful review of the completed investigation confirms that it was thorough, complete and conducted in a manner consistent with current investigative standards. Principles of Major Case Management were followed including the use of an electronic major case management program."

So when there talking there about Major Case Management principles, do you understand them to be saying that essentially that triangle that we just looked at was what you followed?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And the use of an electronic Major Case Management program, that would have been what you're referring to as the E&R III program that organized all the disclosure in a somewhat easy-to-follow manner –

CPL BURKE: Yes.

MS. O'BRIEN: – for those of us who had to go through all that information?

And I understand in this case that you did not start out using that E&R III program; can you just explain that for the Commissioner, please?

CPL BURKE: The investigation started out in PROS which is our, I guess, national program for police investigations that are used in every detachment. I think maybe British Columbia doesn't use it. The RCMP in British Columbia uses another format, but it's a national police program that's used. That's the way it started out; it started out in PROS initially because the investigation was being investigated in PROS before we got there basically. There was some general reports on that program.

So we continued using PROS. Another thing about PROS for us in using it in this investigation is that Sergeant Dion Foote was more familiar with PROS than E&R III and he was our file coordinator. So he was more experienced with PROS than I was, so we kept it in PROS for the time being, to see how it went.

And as the file grew bigger, disclosure was being disclosed on a regular basis, it was increasingly more difficult to –with PROS it's paper disclosure, not electronic disclosure, so it was more difficult for us to provide disclosure that was, I guess, professional and basically harder for people to follow. So we changed the investigation over to E&R III.

MS. O'BRIEN: Okay. So you basically migrated all the work that had been done in PROS up to that time and moved it over to the E&R III software program.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

I understand that would have been around four to six months after the investigation started.

CPL BURKE: Yes, correct.

MS. O'BRIEN: Okay, around that time.

Okay, thank you. I'm done with that exhibit, Madam Clerk.

The investigation that you conducted here, Corporal Burke, was it a homicide investigation?

CPL BURKE: Yes, it was.

MS. O'BRIEN: Okay.

And was it a criminal investigation?

CPL BURKE: Yes, it was.

MS. O'BRIEN: Okay.

And I understand – and I'm going to ask Madam Clerk to please bring up P-0003 and ultimately here I understand that you drafted and submitted a report of your investigational findings in relation to this matter, and this is the report here that we're bringing up and has been entered into evidence now as P-0003. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: So you're the author of this report and this is basically the culmination of your work and states what your findings are, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Now, this report actually wasn't dated. Do you know, recall what date you completed the report?

CPL BURKE: It was an ongoing report. I completed it, I think it was, just after the ASIRT findings came back, and that might have been the end of March.

MS. O'BRIEN: Okay.

I think the ASIRT report was actually dated August 30 of 2016, so that's when ASIRT did their review and gave their report.

CPL BURKE: Way off, then.

MS. O'BRIEN: Yeah.

So maybe you completed this report, maybe, around September 2016. Does that sound right?

CPL BURKE: Yeah, I guess so. I had it completed and I was told to wait for the ASIRT findings to come back before I actually submitted it.

MS. O'BRIEN: Okay.

Once the ASIRT findings came back, did you make any changes to your report before doing a final submission?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay.

So, Madam Clerk, can you go to page 33 of the exhibit, please?

I'm just going to – we're not going to go through your whole report here, Corporal Burke, but I'm just going to your conclusions and – okay. So I'm just going to go over just two paragraphs here from your conclusion section. It says:

“The mandate of the RCMP investigation pertains only to a potential violation of the Criminal Code by Cst. SMYTH. In offering these conclusions, Cst. SMYTH's adherence to RNC policies and procedures was not considered, other than if an egregious delineation from training methodology or use of force protocols existed. If that violation of policy or procedure was

serious enough that it could have potentially contributed to a criminal offence it would have been considered.”

Okay.

I think we go through a little review here in your conclusion, but I want to go down to the last paragraph.

“It is the findings of the RCMP investigative team that Cst. SMYTH was lawfully in the execution of his duties as a Peace Officer when, confronted by the threat of grievous bodily harm or death by DUNPHY, he used the appropriate level of force to defend his life. There is no evidence to support any criminal charges in this matter.”

So do those paragraphs accurately reflect your findings and your conclusion of this investigation?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And so no charges were laid in this matter against Constable Smyth, is that right?

CPL BURKE: Right.

MS. O'BRIEN: Okay.

Until you'd completed and submitted this report, would this have still been an ongoing criminal investigation, until you'd really completed your work on it and come up with your conclusion?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And I understand, though, it was ongoing up until that point, but at that point, at any time, if new evidence –

CPL BURKE: Of course.

MS. O'BRIEN: – arose, that that – the investigation could have been reopened.

CPL BURKE: Exactly, yes.

MS. O'BRIEN: Okay, and I understand that actually did happen in this case, after the –

CPL BURKE: Yes.

MS. O'BRIEN: – inquiry started, and that had to do with an anonymous letter that was received, right?

CPL BURKE: Yes.

MS. O'BRIEN: And we'll talk a bit about the end of your evidence – at the end of your testimony, but to clarify now, having that new piece of evidence came to light, you reopened your investigation, you investigated that new evidence.

CPL BURKE: Yes.

MS. O'BRIEN: And, ultimately, was there any change in your conclusion on this file?

CPL BURKE: No, there wasn't.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Before you start a new area, we'll break for the mid-morning break.

MS. O'BRIEN: And warm up.

THE COMMISSIONER: Hmm?

MS. O'BRIEN: And warm up.

THE COMMISSIONER: And warm up.

Are you ready – are you starting another –

MS. O'BRIEN: I was going –

THE COMMISSIONER: – right now?

MS. O'BRIEN: – on to another –

THE COMMISSIONER: Okay –

MS. O'BRIEN: – section.

THE COMMISSIONER: – well, we will recess then for 15 minutes.

MS. O'BRIEN: Thank you.

THE COMMISSIONER: Thank you.

LADY SECRETARY: 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: Go ahead when you're ready.

MS. O'BRIEN: Thank you.

Corporal Burke, I just want to go through a little list of duties of the primary investigator, and I think you've covered these mostly but I understand that as the primary investigator it would have

been your responsibility to determine what investigative avenues should be explored. So what, what –

CPL BURKE: Yes, based on the evidence.

MS. O'BRIEN: Based on the evidence, of course. And would you have been also then responsible for determining what interviews should be conducted?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: In consultation with the triangle.

MS. O'BRIEN: Okay. So always in consultation with the triangle I understand, but then it ultimately would have been your responsibility. Is that fair to say?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And again, would you have in consultation with the triangle but then ultimately been responsible for determining who conducted key interviews?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And I guess in this case the key interview would be, would have been Constable Smyth.

CPL BURKE: Yes.

MS. O'BRIEN: All right. Now, so in that case the interview, I know you sat – you were there and participated in the interview with Constable Smyth but it was primarily conducted by Corporal Monty Henstridge, right?

CPL BURKE: Yes.

MS. O'BRIEN: Why did you choose Corporal Henstridge to do that interview, was there a reason?

CPL BURKE: Corporal Henstridge was an experienced interviewer and he was available, obviously. And I thought he would do a good job with it.

MS. O'BRIEN: Okay. And would all officers working on the file have had full access to the electronic file whether it would be in PROS or when it ultimately migrated to E&R II?

CPL BURKE: In the RCMP, you mean?

MS. O'BRIEN: Yes. All RCMP officers working on the file.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And I understand that the file was access-controlled –

CPL BURKE: Yes.

MS. O'BRIEN: – so that people in the RCMP who were not involved in the investigation at all would not have had access to it, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. As the primary investigator, would you have reviewed the work of the taskers or the investigators as it was coming in? Would that have been your responsibility?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And just, can you explain for us, you know, how does that work? Do they send you their notes or send you their reports directly, or do they just upload them to the system and you just go in there and check them when you have the opportunity?

CPL BURKE: Both, I guess. Electronically they would put the task in for conclusion or further investigation and they would say, they would provide a synopsis of a statement electronically and they would also provide their notes and an audio or a video of a particular statement.

MS. O'BRIEN: Okay. And so when you had the opportunity you would review all of the information there.

CPL BURKE: I would try, yes.

MS. O'BRIEN: Okay.

And when you're reviewing all the evidence that's coming in and the officers' notes, I take it you'd be looking for, you know, evidence that would be of relevance, looking for new avenues – potential avenues of investigation, that type of analysis.

CPL BURKE: Yes.

MS. O'BRIEN: And would you also be looking for errors or omissions on the part of the taskers?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Now you answered earlier that this was a criminal investigation. You answered that question really immediately: Was this a criminal investigation? Yes.

Did you understand that from the moment you got involved in this file?

CPL BURKE: Yes, we wouldn't be there if it wasn't a criminal investigation.

MS. O'BRIEN: Okay.

Did you ever have any concern that other RCMP members who are involved in the investigation did not have such a clear understanding, that they might be – might have been under – you know, operating under a different assumption as to whether or not this was a criminal investigation?

CPL BURKE: Are you saying – what was the question?

MS. O'BRIEN: Did you ever have any concerns –

CPL BURKE: No.

MS. O'BRIEN: I know you're saying I was very clear right from the get-go, I knew this was a criminal investigation; otherwise I wouldn't have been there. That's what I understood your answer to be.

CPL BURKE: Yes.

MS. O'BRIEN: So did you ever have any concern – when you're reviewing all the work and the – that's being carried out by the other RCMP members working on the file, did you ever have a concern that some of those members might not have understood as clearly that this was a criminal investigation?

CPL BURKE: It didn't concern me at the time, no.

MS. O'BRIEN: Okay. So at the time it didn't concern you? You didn't have that concern or worry at the time.

CPL BURKE: No.

MS. O'BRIEN: Okay.

Since – you know, since then, not at the time but now looking back on it, do you have any concern that some of the members involved did not understand that they were involved in a criminal investigation?

CPL BURKE: Not a whole lot, no.

MS. O'BRIEN: Not a whole lot. Okay.

So I'd like to, Madam Clerk, to bring up Exhibit P-0313.

THE COMMISSIONER: Did you or are you going to raise with Corporal Burke the question or the protocol of treating it as a criminal matter until otherwise? Do we have that document?

MS. O'BRIEN: The RCMP –

THE COMMISSIONER: Protocol.

MS. O'BRIEN: The RCMP –

THE COMMISSIONER: Or the policy, whatever it is.

MS. O'BRIEN: – policy we do. I will be addressing with that with him but not in this stage, but at some –

THE COMMISSIONER: No, that's all right then, I just want to make sure.

MS. O'BRIEN: – I will.

Okay. So, Madam Clerk, can you go to page 3 of this exhibit. So this is a – this is an email by Constable Nippard who I understand was a member of the MCU.

CPL BURKE: Yes.

MS. O'BRIEN: And this is an email from him to the Royal Bank of Canada. And at that time he was trying to get some security camera footage of Mr. Donald Dunphy, and this is an email that you and I reviewed together in your –

CPL BURKE: Yes.

MS. O'BRIEN: – prehearing interview.

So I want to take you to – yeah, so this is the, part of the interview and it's on April 20 – sorry, part of the email, April 20 from Constable Nippard to Corporate Investigative Services, and I think that's at RBC. And he says: Good day, I'm – he says who he is with the RCMP, and he's requesting some digital imagery that they would have from those RBC locations. Please be advised that there are no reasonable expectations of privacy in this matter, as the investigation is not a criminal one at this time.

Looking at that email, it seems that Constable Nippard is saying that it's not a criminal investigation.

CPL BURKE: Well, the investigation that Constable Nippard is referring to is the investigation of the glasses and that did not – that was not part of a criminal investigation.

MS. O'BRIEN: You mean you had a separate investigation with regards to the glasses?

CPL BURKE: I guess you can call it a separate investigation. They're glasses that were found at the scene, believed to be, belong to Mr. Dunphy. I assessed them. We assessed them as investigators and they're deemed not to be evidence.

THE COMMISSIONER: So that was yourself and the forensics unit, was it?

CPL BURKE: Well, I think Sergeant Saunders did comment on the glasses in his assessment, but I looked at the glasses and Sergeant Kent Osmond looked at the glasses and we discussed the glasses and we felt they were not part of our investigation or were they evidence.

MS. O'BRIEN: Okay. So we're going to talk about the glasses in some detail, but right now, did you see – first of all, did you see this email? Prior to myself and Ms. Chaytor showing it to you in your pre-hearing interview, had you seen this email in the course of your review and investigation on this file?

CPL BURKE: I would assume I did.

MS. O'BRIEN: All right. When we interviewed you, is it fair to say you did not recall seeing it at that time?

CPL BURKE: Exactly, yes.

MS. O'BRIEN: Okay. And if you had seen it or recalled seeing it, would this email, at the time, have caused you some concern that Constable Nippard might not have fully understood that he was engaged in a criminal investigation?

CPL BURKE: Looking back at it, no, it's not a concern.

MS. O'BRIEN: Not a concern. Okay.

Now, that's different than your answer that you gave us in the interview.

CPL BURKE: I know.

MS. O'BRIEN: Okay. So now, today, you're saying that what Constable Nippard is referring to is not the investigation of the shooting of Mr. Donald Dunphy.

CPL BURKE: Exactly.

MS. O'BRIEN: You're saying he was involved in a – referring to a separate investigation that the RCMP was conducting specifically into glasses.

CPL BURKE: Yes.

MS. O'BRIEN: The finding of the glasses.

CPL BURKE: Which is something along the lines of what I said in the interview, but I didn't distinguish I guess enough. There is no expectation of privacy for Mr. Dunphy and that's –

MS. O'BRIEN: I understand.

CPL BURKE: The images we're seeking and the glasses were not considered evidence in our investigation. So him saying it's not a criminal investigation, he's exactly right.

MS. O'BRIEN: If a charge had been ultimately – first, let's be clear. There was only one investigation file opened on the RCMP records, right?

CPL BURKE: Yes.

MS. O'BRIEN: You didn't open a separate investigation regarding Mr. Dunphy's glasses, right?

CPL BURKE: Right.

MS. O'BRIEN: Right. So everything having to do with the glasses is all contained in your investigative file –

CPL BURKE: Sure.

MS. O'BRIEN: – into the shooting of Mr. Donald Dunphy.

CPL BURKE: Yes.

MS. O'BRIEN: And had your ultimate conclusion been different and had you recommended charges –

CPL BURKE: Right

MS. O'BRIEN: – against Constable Smyth, this information would all have been provided to Constable Smyth's counsel as part of disclosure as the case that the RCMP had collected against him, right?

CPL BURKE: Yes –

MS. O'BRIEN: Yeah. So you would have supplied that video that you received, you would have supplied those emails, that it would have all been 'disclosable' to Constable Smyth?

CPL BURKE: Yes.

MS. O'BRIEN: And that would have been all evidence that the Crown could potentially have used against Constable Smyth in a prosecution.

CPL BURKE: Not evidence towards any charges that were laid.

MS. O'BRIEN: How do you know that at the time?

CPL BURKE: Because the glasses, we didn't have continuity of those glasses. And those glasses – we didn't seize them. So in order to use those glasses as evidence I would have to have continuity of those glasses and for me to do anything with those glasses, I know that any defence counsel would see that as – you know, I shouldn't base any of my evidence upon those glasses; any of my reasonable grounds on those glasses because I had no idea where those glasses came from. We lost continuity. So they are not evidence to us.

MS. O'BRIEN: Okay. But we're talking here not about the glasses; we're talking about video footage that you are seeking from the Royal Bank of Canada, right?

CPL BURKE: Right.

MS. O'BRIEN: Right, and so you don't, wouldn't have known on that day what that footage might have revealed or disclosed or how it might have been useful to the investigation.

CPL BURKE: The footage was being obtained to see if we could see Mr. Dunphy wearing glasses.

MS. O'BRIEN: Okay, but you don't know what else might have been there.

CPL BURKE: We weren't looking for anything else other than an image of Mr. Dunphy.

MS. O'BRIEN: Okay.

So I'm going to read, take you to your transcript of your pre-hearing interview, Corporal Burke, on December 1, and I'm going to be referring to page 87 and 88 of this. So I say – so I'm going to start actually on page 86.

I say: so Constable Nippard is wrong here when he's telling the RBC that, that it's not a criminal investigation. Is that what you're saying to me now? And you said yes. So I said: so he was incorrect? And you said: uh-huh. I said: okay, would you have seen that email, would have seen that email as part of, I know, as the primary that you're reviewing communications. And you answered: yeah. I said: do you know whether you, do you, do you recall seeing that email. And you answered: I don't recall that email in particular, but I recall getting footage from RBC.

So I asked the question: so you don't recall seeing this. I'm wondering, you know, you see this, would you not, if you had seen this, would you not have been concerned that Constable Nippard doesn't understand that what he is doing here is a criminal investigation? And you answered: yeah, I would have been concerned about it. Question: would you have followed up with him had you seen it at the time? Answer: I would say yes.

So that was your, that was your evidence on December 1 of 2016. Do you recall that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And you're saying your evidence today is different, is it?

CPL BURKE: Yes.

MS. O'BRIEN: You know we have had testimony from a number of officers who were involved in this investigation, both as first responders – in other words, officers who came to the scene immediately after the shooting; and also we've heard from officers who were active investigators on this file. And some of those officers have given testimony that they did not understand this to be a criminal investigation, or even a homicide investigation. They – words that have been used by a number of the officers is they understood it to be an officer-involved shooting. Okay, but you – your evidence, I hear, is that you're not concerned that anyone had any misunderstandings about what they were involved in.

CPL BURKE: I wasn't concerned at the time and it didn't come up. I didn't know it was an issue.

MS. O'BRIEN: Okay. And you haven't seen it as an issue since?

CPL BURKE: Not to my knowledge, no.

MS. O'BRIEN: Okay. And, you know, I realize that we don't want to get too much caught up in words. It might just be, you know, what words are being used, you know officer-involved shooting as opposed to criminal investigation or homicide investigation to determine if it's culpable or not culpable.

CPL BURKE: Yes.

MS. O'BRIEN: But I think the issue here, the point that's being explored is that by not understanding that it is a criminal investigation that they're involved in, officers might not be treating it as seriously or in the exact same way that they would if the subject was a civilian member of our society. When in this case, in an officer-involved shooting it's a police officer and that they might not be treating the two investigations in the exact same way because of that difference as to who the subject, subject is. So do you appreciate that that could be a concern if officers don't understand that what they're doing is a criminal investigation?

CPL BURKE: I appreciate it could be a concern, but it wasn't a concern to me at the time.

MS. O'BRIEN: Okay.

At any time during your investigation in this matter, did you have any concern that Constable Smyth was being granted any special treatment because he was another police officer, or that he was being treated differently than he would have been had he been a civilian member of society?

CPL BURKE: No.

MS. O'BRIEN: Okay. So you didn't have that concern during the investigation, how about since your conclusion of the investigation now that it's been undergoing a little more scrutiny – has that changed? Do you have any concerns since you completed your investigation that there may have been some special treatment afforded Constable Smyth?

CPL BURKE: No, not to the outcome of the investigation or how we ran our investigation.

MS. O'BRIEN: Oh, I understand – so you're saying your outcome of your investigation would have been the same, but leaving aside whether or not it affected the outcome, looking back at it

now, do you have any concerns that Constable Smyth might have been afforded special treatment because he was a police officer?

CPL BURKE: I can only speak for the investigation and the impact that it had on the investigation, and I'm going to say no.

MS. O'BRIEN: Well, you could speak whether you thought he had special treatment. You could say that.

CPL BURKE: I can give an opinion, but I don't want to give an opinion.

MS. O'BRIEN: Well, as the primary investigator, you are responsible to making sure that it was an unbiased, impartial investigation, right?

CPL BURKE: Yes.

MS. O'BRIEN: So your views as to whether someone was afforded special treatment are relevant views, Corporal Burke. So I would like to have your opinion on it.

CPL BURKE: I don't feel they're, only what I see in the news or whatever, special treatment. I don't think he had special treatment – special treatment because of the fact he is a police officer; he had special treatment because of the *Criminal Code*. So that's as far as it goes for me.

MS. O'BRIEN: When you say the *Criminal Code* you're referring to section 25 of the *Criminal Code* –

CPL BURKE: Yes.

MS. O'BRIEN: – that allows a police officer to use force, reasonable force in the line of his or her duties.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Corporal Burke, if we go back to when the ambulance drivers, the ambulance driver and the attendant coming up to the scene – and just a hypothetical now. A police officer, in this case, supposedly Constable Smyth had a breakdown, had a crisis, had in fact committed a shooting offence, do you not see this as a concern if when the ambulance driver and attendant arrive and they see the person out walking around unattended or at least not closely attended and they're just told, well, don't worry about it, you know, it was a police officer who did the shooting? Then it's an obvious, immediate assumption of self-defence before anybody's really had a chance to check it out. Isn't that treating Constable Smyth differently because he's a police officer in that sense?

CPL BURKE: I think the issue was that we knew a lot of information before we attended the scene, not Major Crime but the RCMP itself. Constable Smyth advised the RCMP that he was attending Mitchells Brook. He told us why he was going there and he told us where he was going. He made checks on Mr. Dunphy. So we had all this information I can –

THE COMMISSIONER: But none of that would go to whether there was a culpable homicide as opposed to a non-culpable homicide or a justifiable use of force.

CPL BURKE: No, but it would, it would put him in Mitchells Brook and a reason to put him in Mitchells Brook. And I think the first responders didn't – it wasn't a surprise to them that Constable Smyth was in Mitchells Brook. Another investigation or another incident of homicide where it's a civilian person, we would have no knowledge of that person being in that area and it would come to a surprise and we'd have to learn all this information when –

THE COMMISSIONER: But it was –

CPL BURKE: – we got there.

THE COMMISSIONER: But it was a surprise that the person had been shot?

CPL BURKE: It was, yes.

THE COMMISSIONER: And at that point, you didn't know whether, in fact, the homicide, which it was, would have been culpable or non-culpable?

CPL BURKE: Right.

THE COMMISSIONER: And you wouldn't have known whether there was a justifiable use of force under section 25 of the *Criminal Code*?

CPL BURKE: Right, but the utterances and, you know, people that commit homicides don't usually discuss what they did immediately. And, in this case, there was discussion. So we are gaining a lot of information fairly quickly when we attended that scene, so that would be a difference, I guess.

THE COMMISSIONER: Okay, thank you. Sorry for the –

MS. O'BRIEN: No.

THE COMMISSIONER: – intervening there, Ms. O'Brien. If you want to go back to where you were or –

MS. O'BRIEN: No, I'll go back to where I was –

THE COMMISSIONER: – add anything there.

MS. O'BRIEN: – and we will discuss a little further later on about the first responders, Commissioner.

THE COMMISSIONER: Uh-huh.

MS. O'BRIEN: In conducting this investigation, Corporal Burke, do you feel at all times you were sufficiently resourced? Did you have what you needed to do the investigation thoroughly?

CPL BURKE: When the MCU unit attended, yes.

MS. O'BRIEN: What do you – are you making a distinction there? Was there another time you did not feel sufficiently resourced?

CPL BURKE: No. In major investigations with MCU, there's no issue with resources.

MS. O'BRIEN: Okay so –

CPL BURKE: At any time.

MS. O'BRIEN: At any – no time in this investigation did you feel that you didn't have the resources you needed.

CPL BURKE: That's true.

MS. O'BRIEN: Okay.

CPL BURKE: That's true.

MS. O'BRIEN: Okay. All right. So, in this case, we have an incident that involved two people; only one of whom lived, survived the incident and was able to give his statement about what happened in the living room that day in Mitchells Brook.

And one of the subject matter experts that we talked about earlier was Darryl Barr, who is a ballistic forensic expert, and he was used by the RCMP in this case. And he examined the shooting, physical evidence, and gave a report on that that we'll explore. But, in his report, he said that he was – what he was doing was really examining that physical evidence of the shooting, in order to determine if that evidence either supported or refuted the statement of Constable Smyth – Constable Smyth's account of events.

Is that the same approach that you would have used as the primary investigator? I mean, you have the statement that Constable Smyth gave. Here's what Constable Smyth said happened.

CPL BURKE: Right.

MS. O'BRIEN: And then, would you have been looking at all the other evidence in it, analyzing it to see whether it supported or refuted that statement? Is that a fair way –

CPL BURKE: Yes.

MS. O'BRIEN: – to summarize what you –

CPL BURKE: Yes.

MS. O'BRIEN: – would have been doing? Okay.

So you're looking for things that are consistent and inconsistent with the statement, and doing an analysis that way. All right.

Just a bit on scene processing, we've already talked about how the role of the FIS, the Forensic Identification Section of the investigation, is to record the scene by video, photo, measurement. That's what they do, and they do some analysis there on the scene. And I know they don't actually seize the exhibits; they identify exhibits that they feel are relevant, and then the exhibit custodian goes and seizes those exhibits.

CPL BURKE: Yes.

MS. O'BRIEN: That's how that works. And we've had testimony on that.

In this case, what was the scene that the Forensic Identification Section processed?

CPL BURKE: The residence of Donald Dunphy.

MS. O'BRIEN: Okay, and it was the residence of Donald Dunphy – and with a particular focus on the living room itself, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And who would have been responsible for determining what the scene was – in other words, what area was going to be examined.

CPL BURKE: FIS, in consultation with MCU triangle.

MS. O'BRIEN: Okay, and whose decision was – so FIS would determine that in consultation with the triangle. Who was ultimately responsible for making the determination of what the scene was? Was that you as the primary investigator?

CPL BURKE: Yes.

MS. O'BRIEN: Yes it was?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Now, is it possible to have – I assume it is possible to have crimes with multiple scenes. For example, a murder could have taken place or a killing could have taken place in one room and a body is found, you know, four blocks away. You could have two scenes involved in the same crime?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

In this case, was Constable Smyth's vehicle ever considered as part of the scene?

CPL BURKE: I don't know if it was considered or not. I think we might have talked about the vehicle as part of the scene.

MS. O'BRIEN: Who do you think we – when you say I think we?

CPL BURKE: I think myself and Sergeant Saunders.

MS. O'BRIEN: Okay. So what do you think you and Sergeant Saunders would have talked about as the vehicle is part of the scene?

CPL BURKE: Do you want the vehicle searched, and I would have said no.

MS. O'BRIEN: You said no. Okay. So the vehicle was not searched.

CPL BURKE: No.

MS. O'BRIEN: Okay. Was it photographed on the inside?

CPL BURKE: Not to my knowledge, no.

MS. O'BRIEN: Okay. You as primary investigator would know, would you not, if it had been photographed on the inside?

CPL BURKE: Yes.

MS. O'BRIEN: So it was not photographed on the inside.

CPL BURKE: No.

MS. O'BRIEN: Was there any inventory of its contents taken?

CPL BURKE: No.

MS. O'BRIEN: Okay. Do you know if the vehicle had GPS data with it?

CPL BURKE: No, I don't.

MS. O'BRIEN: So you don't know whether it did or didn't.

CPL BURKE: No.

MS. O'BRIEN: Okay. Do you know if it had a dash camera?

CPL BURKE: No.

MS. O'BRIEN: So you don't know whether it existed or not.

CPL BURKE: No.

MS. O'BRIEN: Now, we understand from Constable Smyth's evidence is that the first place he went – you know, the shooting happened, he left the house and actually the first place he went was his vehicle. Do you recall that from his statement?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. I mean, is it possible that that vehicle might have contained relevant evidence to your investigation?

CPL BURKE: It's possible. I didn't feel it had any relevant evidence at the time.

MS. O'BRIEN: Why, at the time, did you not feel it might have had any relevant evidence?

CPL BURKE: It wasn't searched. So I can only bring my mind back to what I was thinking at that time.

MS. O'BRIEN: Okay.

CPL BURKE: And I made a decision not to search the vehicle and it would have been – there was no, I didn't feel there was any reasonable grounds to believe that there would be any evidence towards the incident in that vehicle.

MS. O'BRIEN: Okay. You know there might have been notes in that vehicle or gloves or alcohol or – I mean there's any number of things that could have been inside that vehicle that might have had impact on your investigation, isn't it possible?

CPL BURKE: I guess so, but those are not the things I was thinking about.

MS. O'BRIEN: You didn't think about that at the time. Did you consider GPS data at the time?

CPL BURKE: No.

MS. O'BRIEN: Like you might have wanted to know where Constable Smyth was that day, the GPS data might have been – helped you with that?

CPL BURKE: I didn't consider it.

MS. O'BRIEN: You didn't consider it. Okay.

Do you think if Constable Smyth had been a civilian who had just been involved in a shooting and had left the room the shooting had taken place and gone immediately to the inside of their vehicle, do you think if, if that had been the case, Constable Smyth was a civilian, you might have thought to take a look inside that vehicle?

CPL BURKE: I can't answer that question.

MS. O'BRIEN: No, you can't. Okay.

Now the keys to the vehicle were seized, were they not, by the RCMP?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And but then they, you – the vehicle was turned back over to the PSU, the Protective Services Unit, without ever having had it searched.

CPL BURKE: Yes.

MS. O'BRIEN: Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: All right. Okay.

What authority did the – so let's talk about authorities for the work that you did – like, and when we talk about authorities, we're talking about legal authority. So what authority do the RCMP rely on to do the search and the seizure of Mr. Dunphy's home? The search of Mr. Dunphy's home and the seizure of items from his home, what, what legal authority were you acting under?

CPL BURKE: We were acting under the *Criminal Code of Canada* and the *Fatalities Investigations Act*.

MS. O'BRIEN: Okay. And the *Fatalities Investigations Act*, that would have to do with the investigation that was carried on by the, carried out by the chief medical examiner, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And we're going to hear, actually, from the chief medical examiner, Dr. Simon Avis, later on in the inquiry. And from what I under– you know, what we understand from our pre-hearing interviews with Dr. Avis is that the, the authority under the *Fatalities*

Investigations Act allows you to go in and search and seize, so far as is necessary for the chief medical examiner to complete his investigation into the cause and manner of death.

CPL BURKE: Yes.

MS. O'BRIEN: And now, Dr. Avis, when we interviewed him, he had told us that for homicide investigations it would have been usual for the police to go and get a general search warrant. So even when he's involved as the chief medical examiner and we have a fatalities investigation going on, that often what, in his experience, what would happen, then the police would go and get a general search warrant under the *Criminal Code* to enable them to do the other searching that they needed to do.

CPL BURKE: Correct.

MS. O'BRIEN: Is that consistent with you, with how you –

CPL BURKE: Yes.

MS. O'BRIEN: – understand it's gone in other cases?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So was a general search warrant obtained in this case?

CPL BURKE: No, it was not.

MS. O'BRIEN: Okay. So can you just explain to the Commissioner why you chose or decided not to get a general search warrant in this case?

CPL BURKE: A general – a search warrant under 487 of the *Criminal Code* you would have to have a expectation of privacy or some interest in that property to obtain a search warrant. In this case, Mr. Dunphy was deceased and there was no expectation of privacy with respect to that residence.

MS. O'BRIEN: Okay. So if, if – just to be clear so people understand, you know, the distinction. So if Mr. Dunphy had been injured and not died, would you have, would you then have gone to obtain a general search warrant?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So the different was, was because he passed away nobody else lived in the home, there was no expectation of privacy for anyone at that point in the home. Is that fair to summarize?

CPL BURKE: Exactly. He couldn't be charged with a criminal offence and any evidence on his property would go towards a criminal offence for Mr. Dunphy basically, so....

MS. O'BRIEN: Okay. And, and the idea being that Constable Smyth had no privacy interest in that home, so even if you were collecting evidence for a case against Constable Smyth, because he had no privacy interest there the warrant wasn't necessary. Is that fair to summarize?

CPL BURKE: Exactly. Yes.

MS. O'BRIEN: Okay. At the time, did you know whether or not anybody else lived in that home?

CPL BURKE: No.

MS. O'BRIEN: Okay. If someone else had lived in the home, could that have complicated things if you had not gone and gotten the general warrant?

CPL BURKE: It could have. We had reasonable grounds to believe that no one else lived in the home and Mr. Dunphy was the only resident.

MS. O'BRIEN: Okay, and what were your reasonable grounds to believe that?

CPL BURKE: The information we collected at the scene.

MS. O'BRIEN: From the scene itself. While you were conducting the searches –

CPL BURKE: I can only – yeah, it's a, it's a decision that we made, it's a reasonable grounds decision. I believed that Mr. Dunphy was the only resident of that house.

MS. O'BRIEN: Okay. And for that you didn't get the warrant. All right.

Now, I know you seized Mr. Dunphy's phone from the scene itself, but you ultimately did a search of that. In other words, when we talk about search of the phone, you went and extracted all the, or extracted data from the phone and did an analysis of that. What authority did you use to get the data from the, Mr. Dunphy's cellphone?

CPL BURKE: Consent search.

MS. O'BRIEN: Okay, and who gave the consent?

CPL BURKE: Meghan Dunphy.

MS. O'BRIEN: All right. And we don't need to review it Commissioner, but just for your information the Consent to Search form completed by Ms. Dunphy was P – has been entered into evidence as P-0325. And I understand this is because Meghan Dunphy was actually the owner of that cellphone. Is that right?

CPL BURKE: I think so.

MS. O'BRIEN: So that's why you got her consent to do the search of it?

CPL BURKE: Either she was the owner or I had reason to believe that she had some ownership of that phone, whether it was her phone or his phone.

MS. O'BRIEN: She had some interest in it that you wanted to get her consent.

CPL BURKE: Yes, yes.

MS. O'BRIEN: Okay. And you also did the same thing for Constable Smyth's phone, so you got his phone and took certain data from that phone and looked at it.

CPL BURKE: Yes.

MS. O'BRIEN: Did you get a consent for that as well?

CPL BURKE: Yes.

MS. O'BRIEN: Okay, and that would have been consent that you got from Constable Smyth, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: All right. And that has been entered, Commissioner – again, I don't need to see it, but is exhibit P-0326. And is it fair to say that any time you went to Constable Smyth to seek his consent for any aspect of this investigation, whether to search his phone, or to get his clothes or those various things, he consistently gave his consent to the RCMP throughout this investigation, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. All right.

I would like to go back to the Command Triangle now and talk a bit about the independent observer. If we could have Exhibit P-0309, please, Madam Clerk. Great.

So here we see over on the right-hand side here, we have a box with the Independent Observer on it. Is an independent observer a standard position on the major crimes Command Triangle?

CPL BURKE: Not to my knowledge, no.

MS. O'BRIEN: Had you ever worked on a file with an independent observer previously?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. To your knowledge had an independent observer ever been used in this province, in Newfoundland and Labrador, previously?

CPL BURKE: Not to my knowledge.

MS. O'BRIEN: Okay.

Did you make the decision to use an independent observer in this case?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. Do you know who made that decision?

CPL BURKE: No, I can't say for sure, but I think it might have been Chief Superintendent Andrew Boland.

MS. O'BRIEN: Did you have any involvement in the selection of the independent observer?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. Did you have any involvement in drafting the terms of reference or contract with the independent observer?

CPL BURKE: No, I did not.

MS. O'BRIEN: So how did you first learn about the independent observer's appointment?

CPL BURKE: I learned from Kent Osmond. I don't know if he met with the CROPS officer or RCMP management and let us know that they were considering having an independent observer for our investigation.

MS. O'BRIEN: Okay, so you heard that from Kent Osmond. When you say CROPS officer, that would be Andrew Boland, right? That who you're referring to?

CPL BURKE: Yes, that's correct.

MS. O'BRIEN: Okay.

And so do you recall when you would have heard that, that they were considering having an independent observer?

CPL BURKE: It was just a couple of days into the investigation. I know it was before the first re-enactment by Constable Smyth.

MS. O'BRIEN: Okay, so just before the first re-enactment?

CPL BURKE: Yeah, I know that's when he was supposed to attend the first re-enactment, but I think it was the day before that we learned that we were going to have an independent observer.

MS. O'BRIEN: Okay.

CPL BURKE: We didn't know who it would be.

MS. O'BRIEN: Okay.

So that first re-enactment took place on April 8 –

CPL BURKE: Yes.

MS. O'BRIEN: – so you think you might have had the first knowledge that someone, although you didn't know who, would be appointed on the day before, so April 7. Okay.

Did Kent Osmond explain to you or did Kent Osmond or anybody else explain to you what the independent observer was going to be doing?

CPL BURKE: Yeah, in general terms, a person would be an oversight in our investigation to ensure unbiased, thoroughness, independence and professional, I guess.

MS. O'BRIEN: Okay. Did you review the contract or the terms of reference that were ultimately completed for Judge Riche, who was the independent observer?

CPL BURKE: Yes, I did.

MS. O'BRIEN: Okay. Did you discuss them with anyone? Or would you just have reviewed them in the file?

CPL BURKE: Yes, reviewed them in the file.

MS. O'BRIEN: Okay. All right.

And just for your information, Commissioner, those terms of reference are in exhibit at P-0315 but I don't need to review them at this point with Corporal Burke.

So what was your first interaction with Judge Riche?

CPL BURKE: I think my first interaction with Judge Riche was at the first re-enactment.

MS. O'BRIEN: Okay, so that would have been your first time seen with him.

And I just want to understand what your responsibilities were with respect to the independent observer. So, you, as primary investigator, what your responsibilities were. And I have a few listed here that I've collected from our interview earlier and I just want to confirm those.

So you would have been the primary contact for Judge Riche with respect to the investigation file? Is that fair to say?

CPL BURKE: With respect to the investigation part itself, I wasn't really the primary contact but I ended up being that way because I was the primary investigator. His primary contact, I think, was Inspector Cahill.

MS. O'BRIEN: Okay.

CPL BURKE: But he would contact me more than he would Inspector Cahill, basically.

MS. O'BRIEN: Because Inspector Cahill wasn't involved with the investigation, is that fair to say?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. All right. And were you responsible for ensuring that Judge Riche was provided with all disclosure, all documents generated in the course of the file?

CPL BURKE: Yes, between me and the file coordinator.

MS. O'BRIEN: Okay. And how was that done? Like, how was Judge Riche provided with the documents? How did he receive them?

CPL BURKE: He would have received – everything would have been printed off and he was provided binders of information.

MS. O'BRIEN: So he didn't get it electronically. He got hard copies?

CPL BURKE: No, exactly, hard copies, yes.

MS. O'BRIEN: Hard copies, paper and binder?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Do you have any sense at the end of it, like how many binders of paper would Judge Riche have received?

CPL BURKE: It's in my desk. He gave it all back to me. I think there's seven or eight binder for sure.

MS. O'BRIEN: Okay. The thickness of binders, what are we talking about, seven or eight thick binders?

CPL BURKE: The biggest ones you can get.

MS. O'BRIEN: Seven or eight of the biggest binders you can get?

CPL BURKE: Uh-huh.

MS. O'BRIEN: Okay. So would this have included all internal emails?

CPL BURKE: Yes.

MS. O'BRIEN: All police officers' notes?

CPL BURKE: Yes.

MS. O'BRIEN: Everything there. Okay.

Would you have given Judge Riche oral updates, like verbal updates, as to the progress of your investigation as it was going?

CPL BURKE: Yeah, I think so. As in, you know, we've sent for lab analysis, we haven't received them yet. When we receive them, you'll get them as soon as we get them basically.

MS. O'BRIEN: Okay.

Did you ever sit with Judge Riche and explain to him – no, sorry, if you could just keep that up. Sorry, Madam Clerk. Did you ever explain to him the Command Triangle, the major case Command Triangle and how MCU works and carries out an investigation? Did you ever have that discussion with him?

CPL BURKE: I can't remember.

MS. O'BRIEN: So you don't remember doing that?

CPL BURKE: No.

MS. O'BRIEN: Okay. Do you have any knowledge of anyone else doing that with Judge Riche?

CPL BURKE: No, I don't.

MS. O'BRIEN: Okay.

Did you, do you recall ever sitting down with Judge Riche or explaining to Judge Riche what, you know, what your investigative plan was? You know, the steps that you were taking, how you were going about your work?

CPL BURKE: Yeah, probably more informally than formally but, yes.

MS. O'BRIEN: Okay.

CPL BURKE: What we're, you know – about where we were going with our investigation basically, what we're – what our plan was.

MS. O'BRIEN: Okay, so you would have done that. Was that like one meeting sit down and go over that with Judge Riche or was that where you're talking informally, you know, as you were going on when you were speaking to him you would communicate –

CPL BURKE: Yeah, it'd be more informal than formal.

MS. O'BRIEN: Okay.

CPL BURKE: I think so.

MS. O'BRIEN: All right.

So would you have had fairly regular interactions with Judge Riche as the file progressed?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Did Judge Riche ever ask any questions?

CPL BURKE: Yes.

MS. O'BRIEN: All right.

And would you have answered all his questions? Is that ...?

CPL BURKE: To the best of my ability, yes.

MS. O'BRIEN: Okay.

Any times that you felt he added to the investigation, you know, gave – you know, gave you information or help, assistance that you felt, you know, added to its thoroughness or suggested avenues of investigation that you thought were helpful.

CPL BURKE: Sure. And there may be instances where he wasn't fully aware of what we were doing and why we were doing it. So that interaction, you know, even helped me say, okay, yeah, maybe we should look at our – take a second look at this or a more thorough look at something, a piece of evidence.

MS. O'BRIEN: Okay. Can you give the Commissioner some examples of where you found the interaction with the independent observer helpful?

CPL BURKE: I think when we looked for fingerprints on the firearm, we didn't find any. And that's basically the way Corporal Lee submitted her report. And Justice Riche in turn, asked: Well, why didn't we find any fingerprints? And so I went back to Corporal Lee and she described in detail why we didn't find any fingerprints and it gave me some insight. I just took – you know, we didn't find any fingerprints but she explained why we didn't find any fingerprints.

So I thought that was a good indicator and I think there's another one where, in his interview Constable Smyth used, he referenced that couch when he should have – when he referenced the couch, it wasn't a concern to me at the time because he was referring to the chair for the whole

interview and then he says couch. And Justice Riche asked us why Constable Smyth said couch instead of chair. All I could say was: I don't know. And I went and spoke to Constable Smyth about the use of the term chair versus couch and it was explained to me so.

MS. O'BRIEN: Okay. And you're referring to in one of his interviews, Constable Smyth had referred to the gun as coming up – the gun in reference to being by the couch, or coming up from the side of the couch. Is that what you're referring to? You used the word couch.

CPL BURKE: Yeah, I –

MS. O'BRIEN: Okay. And had you noticed that in the interview that he'd used the word couch when previously he'd been speaking about a chair?

CPL BURKE: I can't say I didn't notice it but it didn't concern me. But, you know, he obviously used two different terms, so it was good to clarify that.

MS. O'BRIEN: Okay. Any other examples that you'd like to give the Commissioner?

CPL BURKE: That's all I can – I'm sure there's other examples but I can't think of them off the top of my head right now.

MS. O'BRIEN: Okay.

Did Judge Riche ever raise any concerns with you about the independence of the investigation, or did he ever raise any concerns for you that there may be some bias or potential for bias?

CPL BURKE: No, I don't think so, no.

With Justice Riche's concerns were – he had other theories about what happened. I don't think he was ever concerned with the thoroughness or the unbiased or independence of the investigation.

MS. O'BRIEN: Did you ever have any concerns about whether Judge Riche was staying within his mandate?

CPL BURKE: Yes, I had concerns.

MS. O'BRIEN: Okay. Can you just explain those to the Commissioner? When did you have those concerns and what were they?

CPL BURKE: Well, I guess they weren't concerns. It's just that I noticed that he was acting outside his mandate on a couple of occasions, and I brought that up with Sergeant Osmond and – who would have brought it up with Inspector Cahill.

MS. O'BRIEN: Okay. I think we can maybe go to the daily log here to review this part of your evidence. Madam Clerk, can we have the daily log, which has been entered as P-0359, and I'm going to ask you to go to page 408 of that document.

Commissioner, very shortly I'll explain what the daily log is in a bit more detail but right now what we're going to be looking at, Corporal Burke, are notes that you took and others –

CPL BURKE: Sure.

MS. O'BRIEN: – took on this particular issue.

Thank you. So these are some notes that you took, is what I understand is here. And that, here you're saying that Corporal Burke spoke with Justice Riche and advised him of what Dunphy said in her statement. So, actually, I maybe need to go back a little bit. Can we go back to page 400 first please, Madam Clerk.

Yes. So this is taking place, these events are taking place on August 6 of 2015. Is this right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And here this is notes taken by Sergeant Kent Osmond, but Corporal "Burke advised Sgt Osmond that he had been speaking to Judge David Riche and Riche mentioned an investigative 'gap' that he wanted clarified. The 'gap' specifically pertained to when Megan Dunphy states she last saw her father's rifle in the residence. Osmond remembered that in her interview Dunphy had clearly offered a memory of last seeing the gun when she was clearing the house on her father's behalf during the time he was in the hospital. This was some time before the shooting."

Originally, she had told the police that she didn't know if he had a gun, and goes on. So this was the issue that Judge Riche had raised I understand at that time.

CPL BURKE: Yes.

MS. O'BRIEN: So in response to that Corporal Burke, I understood that you reviewed Meghan Dunphy's statement and looked at it, what she had said about the gun and when she'd said it.

CPL BURKE: Right.

MS. O'BRIEN: And I don't need to go into all that now.

So this is your notes of your review of her statement is what we're looking at here. Okay. And here on – we get another note from Kent Osmond on April 6, says: Sergeant Osmond was approached by Corporal Burke who had some concerns about the review of David Riche. He stated he had told Riche where to find the material about the rifle. So you pointed him to Meghan Dunphy's statement, is that what you'd done?

CPL BURKE: Yes.

MS. O'BRIEN: And that Riche wants the police to re-interview Meghan Dunphy to ask her if the day before the shooting she had seen the gun by the side of her father's chair, where Smyth states it was obtained, or if she could have seen the rifle in that location. Riche also told Burke he feels there was a confrontation of some kind, that Dunphy obtained the rifle from behind the couch, that Smyth was angry and would not leave the residence and shot Dunphy. Burke was concerned that 1, Riche was well outside his mandate of oversight by developing investigational theories and directing the police; and 2, his theory made no sense and had the potential to unduly cast doubt on the investigation. Osmond agreed.

So is this the incident that you were recalling earlier when you were talking about your, your testimony, is that when you had the concern?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So you brought this concern forward to Sergeant Osmond for those reasons.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And now, I understand that ultimately you determined that you did not want to re-interview Meghan Dunphy on the topic. Can you just explain for the Commissioner why you did not want to re-interview Meghan Dunphy?

CPL BURKE: Well, Ms. Dunphy's statement was quite thorough and I reviewed it and made notes on it, obviously. So I felt I had Meghan Dunphy's information on the firearm. To go back and ask her specifics about the gun or anything like that would be almost like leading questions. So if I were to go say, so could you have saw it by the chair, or could you have saw it behind the couch, or – those are things that, you know, we avoid when we interview people. So Meghan Dunphy gave a thorough statement, a detailed statement and talked about the gun. So I felt I had her information regarding the gun.

MS. O'BRIEN: Okay. So and here – and this entry here that you made on, on August 6, and again we're back to your notes. I think you essentially give that type of information that what you just said, to Justice Riche.

Corporal Burke spoke with Justice Riche and advised him of what Dunphy said in her statement. Judge Riche responded that this was nothing new to him, and I think he was aware of the contents of her statement. Justice Riche then said he has a theory of what happened in the residence when Dunphy was shot. He feels there was a confrontation between Donald Dunphy and Joe Smyth, clarified as verbal, and Dunphy proceeded to go behind the couch and retrieve his gun and tell Smyth to get out of his house and that was when Smyth shot him. Corporal Burke does not feel this theory described by Justice Riche is logical of – or maybe you mean or there – in line with the known evidence of this case for the following. And so then you go through the reasons why you think this is, it does not essentially coincide with the evidence. Is that fair to say?

CPL BURKE: Yes.

MS. O'BRIEN: Yes, okay. So, and I don't need to review all your, your statements here.

One of them you wrote, though: Unless Mr. Dunphy was aware that police were looking for him he would not have had time to get the gun before Smyth's arrival. Corporal Burke does not have any information to suggest that Dunphy was tipped off that the police were in Mitchells Brook looking for him. So that was one of the pieces of evidence that you pointed to. And also I think you pointed to that there was no signs of a – there was no signs of a confrontation in the room. No evidence of a confrontation.

CPL BURKE: Yes.

MS. O'BRIEN: Is that fair to say? All right. Okay.

So this was your concern here. And so you met with Sergeant Osmond about this concern. And I understand then you and Sergeant Osmond went and spoke with Inspector Pat Cahill, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: And you raised the concern with Pat Cahill?

CPL BURKE: Yes.

MS. O'BRIEN: All right. And what was the next action taken then? You went to Pat Cahill. What would happen then? You spoke to Pat Cahill about it.

CPL BURKE: Yes.

MS. O'BRIEN: Did you meet then with Judge Riche –

CPL BURKE: At some point, yes.

MS. O'BRIEN: – do you recall that? Okay. Maybe I can assist you with your notes here 'cause I'm not trying to – so then I see here –

CPL BURKE: Yes.

MS. O'BRIEN: – these are Kent Osmond's notes of it, but it takes place the next day. There's a meeting on April 7, the next day, where Sergeant Osmond, Inspector Cahill and you met with Judge Riche.

CPL BURKE: Yes.

MS. O'BRIEN: Sorry, August; my apologies, August 7. So the next day where the three of you met with Judge Riche and discussed several issues at that time.

CPL BURKE: Yes.

MR. KENNEDY: Excuse me, Mr. Commissioner, I wonder if I could just get a point of clarification from counsel?

I'm also following along with Corporal Burke's general reports, but I can't find if they are actually entered as an exhibit. Do you know if they are an exhibit?

MS. O'BRIEN: Yes.

MR. KENNEDY: I know task 54 is there, but I'm looking at his general –

MS. O'BRIEN: Yeah, as Exhibit P-0312, Mr. Kennedy. Corporal Burke's general report has been entered into evidence.

MR. KENNEDY: And that would be the full one right up to, is it, Ms. O'Brien?

MS. O'BRIEN: That would be – it is a, I can tell you very quickly –

MR. KENNEDY: 25 pages?

MS. O'BRIEN: It is a – yes, a 25-page document.

MR. KENNEDY: Okay. So thank you very much.

Sorry to interrupt, Commissioner.

MS. O'BRIEN: No, no problem. Okay.

So it's probably better, I was at Constable, or was at Sergeant Osmond's notes of the incident but now I've moved on –

CPL BURKE: Yes.

MS. O'BRIEN: – to your notes –

CPL BURKE: Yes.

MS. O'BRIEN: – notes of it 'cause you're here on the stand. It's better to have your notes. So you say that you met, you met with him and you noted the following –

CPL BURKE: Uh-huh.

MS. O'BRIEN: – and you review some items that were talked to about the evidence and when Meghan saw the gun, and the things that were – that you talked about with Judge Riche on that. And here I note that, one note you have here is: Wants to ask Erin Breen to ask Meghan Dunphy why she didn't see the gun in the chair. And when you write that, are you saying that that's Judge Riche who wanted you to do that?

CPL BURKE: Yes. There are notes, kind of jot notes that I made during the, during the meeting, I think.

MS. O'BRIEN: Okay. So during this meeting, essentially you're having discussions with Justice Riche about what his concerns were on this file.

CPL BURKE: Yeah.

MS. O'BRIEN: All right.

And I think at page 412 we also see he raises another issue where he raises this couch/chair issue, actually, that you just referred to on this page. Sorry. In his statement Smyth says couch when he is referring to chair. So that's when Judge Riche raised that concern with you.

CPL BURKE: Yes.

MS. O'BRIEN: All right. So you have these discussions. During this meeting, did anyone say to Judge Riche: Sir, we think you're outside your mandate?

CPL BURKE: I don't know in this particular meeting, but I know that Inspector Cahill had discussions with Justice Riche about being outside his mandate.

MS. O'BRIEN: Were you there for that, for that meeting?

CPL BURKE: I don't think so.

MS. O'BRIEN: Okay, so –

CPL BURKE: There was meetings between Inspector Cahill and Justice Riche that I was not (inaudible).

MS. O'BRIEN: Okay. So I don't – we'll hear from Inspector Cahill if we need to about what happened at those meetings.

CPL BURKE: Sure.

MS. O'BRIEN: But I'm just going to ask you about meetings that you were at. So at this meeting where you were present, do you recall whether anyone spoke to Judge Riche about the concern that you had initially raised to Sergeant Osmond, I think he's going, he's well outside his mandate here.

CPL BURKE: I don't know if I made notes. I don't know, I can't remember.

MS. O'BRIEN: Okay. I mean in fairness, I don't see, I don't see any notes that you say that that was addressed.

CPL BURKE: Right.

MS. O'BRIEN: Okay. So you don't recall it being addressed independently?

CPL BURKE: No.

MS. O'BRIEN: Okay. As a result of this meeting – and I should say to be fair, we're going to hear from Sergeant Osmond and I think Sergeant Osmond is going to talk about the delicateness or the concern he had about giving direction to someone who is supposed to be an independent observer.

CPL BURKE: Sure.

MS. O'BRIEN: So we'll get that. But after this meeting, do you recall whether any, you took any further investigative steps as a result of that meeting?

CPL BURKE: I guess at the end, task created for a second statement with Smyth to ask why he said couch, he said – when he was referring to the location of the gun.

MS. O'BRIEN: Okay, so you did that. And I think you also might have asked Dick Dunphy to be re-interviewed to – about the possibility of him calling the police to give a tip off.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So that was another thing that was done.

Now, you said clearly you did not want to re-interview Meghan Dunphy.

CPL BURKE: Yes.

MS. O'BRIEN: All right. But you did re-interview Constable Smyth?

CPL BURKE: Yes.

MS. O'BRIEN: So you didn't – you went and re-interviewed Constable Smyth with respect to why he said couch when he previously said chair –

CPL BURKE: Yes.

MS. O'BRIEN: – but you didn't want to re-interview Meghan Dunphy as to, in her statement she said she last saw the gun in one position –

CPL BURKE: Yes.

MS. O'BRIEN: – and you didn't want to re-interview about whether it was possible on her last visit to her father's house she'd seen it by the chair. Can you explain for the Commissioner what the distinction is between these two, for you?

CPL BURKE: So I reviewed Meghan's statement, and I felt I had all the information she had to offer about the location and the firearm that she saw at her father's residence. So I was not, I was not confused, or I didn't feel I was missing anything.

When the word couch was said by Constable Smyth in his statement, and Justice Riche asked me about it, I couldn't say that he, I guess he must have meant chair, or I guess – I couldn't put those words in Constable Smyth's mouth. So I couldn't say to Justice Riche: oh, well I think he must have meant couch. I couldn't say those words. So I went back and interviewed Constable Smyth.

MS. O'BRIEN: Okay. So you saw them as distinct.

Did you ever have any discussions yourself with Justice Riche about his, what his role was?

CPL BURKE: I – not, not to my knowledge. That was his terms and his terms of reference or terms of engagement or what he was supposed to be doing in the file, was outside my responsibilities as a primary investigator.

MS. O'BRIEN: Okay. So that wouldn't have been your role to do that.

CPL BURKE: No.

MS. O'BRIEN: Okay. And I know we'll talk about it a bit later, but Judge Riche ultimately was able to speak to Meghan Dunphy about his concerns with the gun, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Did you ever have any concerns that Judge Riche was really acting as more of an investigator than an observer?

CPL BURKE: Yes.

MS. O'BRIEN: Any other that, we just went through one in detail in August of 2015 when you had, had those concerns. Was there any other times that you recall specifically having concerns about Judge Riche and, you know, bringing them to Osmond's attention?

CPL BURKE: I can't remember. I think there may have been other incidents. And they should be in my notes, but I can't remember them offhand. I know this one in particular, yeah.

MS. O'BRIEN: This one was the most significant one, is that fair to say?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: There's also a meeting with Sergeant Saunders and Sergeant Sue Efford, Sergeant Osmond and myself with Justice Riche regarding the evidence and parts of the file that we wanted to discuss. I can't – I don't know where that is but that's another meeting I remember having with Justice Riche about, you know, his theories or, you know, maybe concerns that we had.

MS. O'BRIEN: Okay.

And so that would have been after this. It would have been – that would have been –

CPL BURKE: Yeah. Yes.

MS. O'BRIEN: – because Sergeant Efford was involved at that point, right?

CPL BURKE: Yes. Yeah.

MS. O'BRIEN: Okay.

And at that meeting do you specifically recall anyone saying to Judge Riche we feel you're outside your mandate?

CPL BURKE: No, but I think – and I'm, you know, I don't want to speak outside what I, what's fact, but I think Inspector Cahill had a meeting with Justice Riche that day or prior to our meeting or after our meeting about his mandate.

MS. O'BRIEN: And but you weren't there for that meeting.

CPL BURKE: No.

MS. O'BRIEN: Okay. So we'll hear from Inspector Cahill on that.

All right. Did you understand that Judge Riche would be submitting a final report?

CPL BURKE: Yes, I did.

MS. O'BRIEN: Okay. And did you understand that you would ultimately be doing a final report of your investigation?

CPL BURKE: Yes.

MS. O'BRIEN: All right.

What was your expectations as to the timing of these reports? Like, were you expecting that you'd get Judge Riche's report and look at that and then you'd do yours? Or were you expecting it to be the other way around or had you even thought about it?

CPL BURKE: I never really turned my mind to it until Justice Riche asked me for my report prior to submitting his report. And I wasn't really comfortable with that and I never really gave it a whole lot of thought but I said, you know, he's an independent observer, I have my, you know, investigational thoughts and evidence and what I thought of the investigation, where I was going with it. And I thought it would be separate, like he would submit his – I don't know, submit it at the same time. I didn't know really know how it would work out, but I thought his report should be independent from mine basically so.

MS. O'BRIEN: Okay. So ultimately how did it work out? How did the order of the reports go?

CPL BURKE: Justice Riche submitted his report before we – when we got the 3-D imaging back and before the ASIRT report – before the file was sent to ASIRT I think. I think ASIRT even had Justice Riche's report in it.

MS. O'BRIEN: Okay, so his report was done ultimately before yours?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. But it's fair to say that on the appointment of Justice Riche, as you were working the file, you had not really turned your mind to what orders the reports would happen. And I take it, none of your superiors, not Andrew Boland or Kent Osmond or Pat Cahill had ever told you this is how the order of the reports, this is how it's going to work.

CPL BURKE: No.

MS. O'BRIEN: No. Okay.

And towards the end of your evidence we'll – I know you did a review of Judge Riche's final report, and we will review that later on what you did.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

I've got a couple of sections I think I can get through fairly quickly before lunch, and maybe I'll start with – I'm going to just talk about, quickly, about the task report and the daily log so that the Commissioner and the others watching can have an appreciation of what those two documents are.

Madam Clerk, could you please bring up Exhibit P-0060. And, Commissioner, I'm going to lead the witness through the evidence here fairly quickly because it's really just an explanatory piece. So we've put into evidence a document of 414 pages that's called the task report, and Madam Clerk is bringing it up there now.

And you referred to, your investigators, sometimes as taskers and you've talked about – you, in consultation with the triangle, creating tasks, giving those tasks to the file coordinator and the file coordinator assigning those tasks to the investigators, or taskers to carry them out. So I understand that that's a principle of Major Case Management, that you organize your file in terms of tasks; they're little jobs that have to be done.

CPL BURKE: Right.

MS. O'BRIEN: And then what I understand that happens is this report is you collect all the typed notes of all the different officers that they've collected as they were performing these tasks, and this document here really organizing all those notes by task.

CPL BURKE: Yes.

MS. O'BRIEN: So you can look up a specific task – and Madam Clerk if you could just go to page 216 for me, we'll see an example of a task.

So here's the task because we were just talking about the independent observer, so here was the task assignment. It was task number 54, and it was labelled Independent Observer Riche, David Justice. And so underneath here we would see all the notes that officers took – and the notes here are listed then in chronological order in relation to task 54 that had to do with the independent observer. So some of the notes are yours and some of them are Osmond's.

Okay. So just to see how that works. And – I can hear my co-counsel shivering. So if this one happened to be a very long task and then task 55, when we come to it, would be a different task that's been assigned – and it seems to be taking a while to get to it; this is certainly a long one. Let's see if I can speed this –

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. O'BRIEN: Yes, if you could just go down to the next task.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible) from freezing.

MS. O'BRIEN: There you go.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

THE COMMISSIONER: 216, we're gone past it I think.

MS. O'BRIEN: Okay. There. Yeah, so this was the end of this task here, so 54, then the next one here then comes – the next task would have been 55 which was a statement that was taken from a Patricia Dodd, fair to say? Okay.

And so there's a couple of acronyms that we see in this report. Sometimes we see CH. What does CH mean when we see that?

CPL BURKE: Concluded here.

MS. O'BRIEN: Okay. So what does that mean?

CPL BURKE: That means the task is concluded.

MS. O'BRIEN: Okay. So that would be the end for that task? Sometimes we see SUI. What does that mean?

CPL BURKE: That's still under investigation.

MS. O'BRIEN: Okay. So that would mean the task is still an active, ongoing task.

CPL BURKE: Yes.

MS. O'BRIEN: Sometimes I've seen FIR. Do you know what that means?

CPL BURKE: Not something I use, but I don't know what that means.

MS. O'BRIEN: Okay, so that would have been something one of the officers typed in their notes as an acronym –

CPL BURKE: Yeah.

MS. O'BRIEN: – and they use it. You weren't necessarily aware of what they meant.

CPL BURKE: Further investigation required maybe?

MS. O'BRIEN: Okay, yes, I think that might be the –

CPL BURKE: Yeah.

MS. O'BRIEN: – the evidence we've had from other officers who have used that.

CPL BURKE: Yeah.

MS. O'BRIEN: So, yes, so when we see further – FIR, other officers have said, you know, that would have been their note for further – in other words, this task is not concluded.

CPL BURKE: Yes.

MS. O'BRIEN: Still more work needs to be done.

CPL BURKE: Yes.

MS. O'BRIEN: And also we see here, a number of times we see a slash and the initials JL. Can you just explain what that is?

CPL BURKE: That's Jill Lunnan, and what Jill Lunnan did was take the PROS file and migrate it into E&R III.

MS. O'BRIEN: Okay.

CPL BURKE: So what she would have did was take notes from my general report, cut and paste it into a task action just so we would have a daily log at the end of the day.

MS. O'BRIEN: Okay.

And Jill Lunnan is with the –

CPL BURKE: Major Case Management.

MS. O'BRIEN: – Major Case Management. So she's a civilian member with Major Case Management?

CPL BURKE: She's a corporal with the RCMP.

MS. O'BRIEN: Oh, she's a corporal. Okay.

CPL BURKE: But she's the overseer of Major Case Management which are civilians.

MS. O'BRIEN: Okay. And just to say here if you had been using E&R, that software from the first place, that would have automatically generated a task report, right?

CPL BURKE: Yeah, members would have put their notes in.

MS. O'BRIEN: And it would have come up that way automatically?

CPL BURKE: Correct.

MS. O'BRIEN: Because you were using PROS, PROS does not automatically generate a task report.

CPL BURKE: Right.

MS. O'BRIEN: So what Jill Lunnen was doing was she was taking everyone's notes and organizing them and putting them in this task report form.

CPL BURKE: Yes.

MS. O'BRIEN: And so her little initial says that she's had involvement in these notes and sometimes she will note – we'll see in here like if she had to fix a time because she noted an error or something like that –

CPL BURKE: Right.

MS. O'BRIEN: – she will have noted that as she was going through.

All right, another document that we've put into evidence, Madam Clerk, is P-0359. And this is the one we just had up a few minutes ago and it's the daily log.

CPL BURKE: Uh-huh.

MS. O'BRIEN: And in this document we see the same officer- type notes that we saw in the task report.

CPL BURKE: Right.

MS. O'BRIEN: But in the task report where they were organized by task, in the daily log, they're organized chronologically from day one –

CPL BURKE: Right.

MS. O'BRIEN: – on April 5, 2015 right up until the conclusion of the file.

CPL BURKE: Uh-huh.

MS. O'BRIEN: So it's the exact same information, just organized differently.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So as you go through here, we see that the first notes put in here – and it does let you know as you are going through what task assignment but these notes are (inaudible), but the first notes we see are from Constable Kelly Downey. And she, her notes were created at – her time-stamp on her notes is the time these events took place. She had put down as 2:28 in the afternoon on April 5. So just for – when we go to the next page, same time-stamp, these would be the notes of Corporal O'Keefe. So these are the first responders on the scene and we can go through – then Constable Adrian Cox would have been another one of the first responders, so they're organized that way.

When we look at these documents, just to be clear, we see the notes essentially of all RCMP officers who were involved in this file, except for the Forensic Identification Section –

CPL BURKE: Right.

MS. O'BRIEN: Their notes are not here. They have a separate file, right? And the subject matter experts that you would have engaged, the criminal analysts, none of their notes are on this file; is that fair to say?

CPL BURKE: No, I – yeah, it’s fair to say.

MS. O’BRIEN: Yeah, they have a separate – they keep their notes separately, okay.

Commissioner, I’m now coming up to – I can go for another 15 minutes, but I’m now coming up to the events of April 5, 2015. So I’ve laid all the background work now with Corporal Burke.

Corporal Burke, how did you first become involved in this matter?

CPL BURKE: I was at home, it was a Sunday and I was called by, I think it was Corporal Henstridge to say that we had a sudden death. I don’t know if he said Mitchells Brook or – had a sudden death in our area and it involved a police officer – or member of the RNC, I should say.

MS. O’BRIEN: Okay. And having reviewed those notes, I understand that call came to you at around 3 o’clock in the afternoon.

CPL BURKE: Sure.

MS. O’BRIEN: Okay. And so I take it then the next thing you did was actually you went to headquarters, MCU headquarters here at the White Hills, RCMP headquarters.

CPL BURKE: Yes.

MS. O’BRIEN: Okay. And from your notes, I understand you would have arrived at headquarters at RCMP at around quarter to 4 that afternoon; does that sound about right?

CPL BURKE: Yes, I guess so, yeah –

MS. O’BRIEN: Okay. I have to use your notes –

CPL BURKE: It took me about an hour to get to work so

MS. O’BRIEN: Okay. So that’s where MCU’s offices are, is that correct?

CPL BURKE: Yes, it is.

MS. O’BRIEN: On the White Hills?

CPL BURKE: Yes.

MS. O’BRIEN: Okay.

And then you would have collected your things and whatnot but then I understand the next place you headed would have been to the Holyrood detachment; is that right?

CPL BURKE: Yes.

MS. O’BRIEN: And you would have arrived there around 5 o’clock that evening; does that sound right?

CPL BURKE: Yes.

MS. O’BRIEN: When you arrived at Holyrood, was Constable Smyth there?

CPL BURKE: As far as I knew he was, yes.

MS. O'BRIEN: Okay. And having reviewed your general report, I understand that you had noted at that time that Constable Smyth was there.

CPL BURKE: Okay.

MS. O'BRIEN: Do you know what he was doing there at the time?

CPL BURKE: What do you mean?

MS. O'BRIEN: Do you know –

CPL BURKE: I knew that he was the officer involved, yes.

MS. O'BRIEN: Yeah, but do you know – yes, sorry. But when you arrived in Holyrood what was Constable Smyth doing at the Holyrood detachment?

CPL BURKE: I don't know.

MS. O'BRIEN: Do you recall that your notes indicated that he might have been meeting with other RNC members? Do you recall him meeting with other RNC members?

CPL BURKE: Sure. Yep.

MS. O'BRIEN: Okay. I mean I can take you to your notes to assist, but if you, if you remember that –

CPL BURKE: Yep, no, no, I just –

MS. O'BRIEN: – you can just say so.

CPL BURKE: Yep, yep.

MS. O'BRIEN: Okay. Did you know what are, who the RNC members he was with were? Did you know who those people were?

CPL BURKE: Did I know their names or did I know of them?

MS. O'BRIEN: Yep. Did you know their names?

CPL BURKE: I think so. At some point, yes.

MS. O'BRIEN: Okay. Can you tell us today who he was meeting with?

CPL BURKE: It was Sullivan, I think it was Warren?

MS. O'BRIEN: Yes, Constable Warren Sullivan.

CPL BURKE: And Mike Adams.

MS. O'BRIEN: Okay. And I think at the time he was an Acting Inspector Mike Adams.

CPL BURKE: Yep.

MS. O'BRIEN: And were you aware there were two other RNC officers there as well?

CPL BURKE: I learned after, I didn't know, when I knew that they were there. Yep.

MS. O'BRIEN: Okay. So after –

CPL BURKE: I think so.

MS. O'BRIEN: Okay.

So we've had evidence that at this time Constable Smyth was in, had been given a meeting room, to meet with those four members of the RNC. Two of them arrived first; two of them arrived a little bit later.

CPL BURKE: Okay, uh-huh.

MS. O'BRIEN: But you correctly named two of them and there was also Constable Scott Harris and then there was Staff Sergeant Reg Tilley as well.

Did you have any input, Corporal Burke, in the decision to provide a private room for Constable Smyth to meet with fellow members of the RNC?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. Upon learning that, when you arrived, did it cause you any concern?

CPL BURKE: Not at the time, no.

MS. O'BRIEN: Okay. Since? Have you thought back on that and has it caused you any concern?

CPL BURKE: No.

MS. O'BRIEN: At this point, Constable Smyth had not provided a statement yet to the RCMP; is that right?

CPL BURKE: Correct.

MS. O'BRIEN: Okay. Any concern that, you know, him speaking about the incident with other, in this case RNC members, but any other people brought with it a risk that he might corrupt or taint his memory by discussing it with other people?

CPL BURKE: I guess there was – I didn't have the concern at the time but there could be a concern that yes, that could happen.

MS. O'BRIEN: Okay. So you didn't, you didn't think of it at the time but you acknowledge now that that is a concern?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. What about the risk that this might be seen as preferential treatment to Constable Smyth?
Any concern there?

CPL BURKE: No, not at the time, and not knowing the investigation, no.

MS. O'BRIEN: Sorry, not at the time it did not concern –

CPL BURKE: I can see if someone else looking at it, yes, they could say yes, it could have been preferential treatment but it's not something that came into my mind.

MS. O'BRIEN: Not at the time, it didn't come into your mind, but you can now see why someone might have that concern?

CPL BURKE: Somebody, but not me.

MS. O'BRIEN: But not you. Okay.

In your experience have you ever seen a person who is being investigated for a serious criminal matter being provided with a meeting room, to meet with people, other than legal counsel at an RCMP detachment or at RCMP headquarters?

CPL BURKE: No.

MS. O'BRIEN: No, so you had never seen that happen before?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Did you ask any of the officers, the RNC officers before that evening what Constable Smyth might have said to them about the incident?

CPL BURKE: Did I ask them?

MS. O'BRIEN: Yeah.

CPL BURKE: That evening or ...?

MS. O'BRIEN: Uh-huh, that evening, we'll get to subsequently.

CPL BURKE: Not that I recall, no.

MS. O'BRIEN: Okay. But you ultimately, not that you interviewed, but you tasked other officers to interview with all four of those RNC officers who had met with Constable Smyth?

CPL BURKE: Yes, yes.

MS. O'BRIEN: What was the purpose of that? Why did you task them to be interviewed?

CPL BURKE: Just to ensure that we had all the information that they would have had. They were speaking with Constable Smyth, so I didn't know if they uttered something else that would be of concern for our investigation.

MS. O'BRIEN: Okay, so you had them interviewed to find out essentially what statements that Constable Smyth had made to them about the incident. Is that right?

CPL BURKE: Sure. Yes.

MS. O'BRIEN: Okay.

I guess by doing that you are, in fact, getting a statement from Constable Smyth that night to the extent that he had spoken to those RNC officers, right, getting it through them?

CPL BURKE: Sure. Yes, yes.

MS. O'BRIEN: If things had turned out differently, I mean, I mean, this is a decision that is being made like that, that night –

CPL BURKE: Right.

MS. O'BRIEN: – April 5, very little information, I know that you had said to the Commissioner earlier you felt you had a lot of information, but at this point you had not even been in the house, right?

CPL BURKE: No, no.

MS. O'BRIEN: So there's a lot of work left to be done.

CPL BURKE: Yes.

MS. O'BRIEN: So if, if ultimately the investigation had turned out differently and at the end of your investigation, you had concluded that criminal charges should be laid here, if that had been your recommendation, any concern that you might have had difficulty using those statements that had been captured through the RNC members of Constable Smyth? Any concerns that you might have had difficulty in using those in ultimately a prosecution of Constable Smyth?

CPL BURKE: Never considered it.

MS. O'BRIEN: No.

CPL BURKE: First time I've actually considered it, so

MS. O'BRIEN: When I put it to you now, like, you know, can you see that there might have been concerns about well, questions –

CPL BURKE: The statement of admissibility you mean, or –?

MS. O'BRIEN: Exactly. Like, was he detained at the time? Was he not detained? Did those officers ask him any questions to elicit his answers? Can you see that there could be, it could be legally complicated using the statements?

CPL BURKE: Yes, you know, his jeopardy or if these members were not in support of him but actively investigating an offence that he may have committed, sure.

MS. O'BRIEN: But they could have just inadvertently asked questions to him and elicited information from him, right? I mean they wouldn't have to been wearing hats as investigators to do that.

CPL BURKE: Yeah, I really don't know the answer. It's the first time I've considered it.

MS. O'BRIEN: Okay, that's fair enough.

I mean those four officers didn't take any notes while they were in the room with Constable Smyth and one of them said they left the room and took some limited notes, but we've had testimony from them and most of them did not take notes and the notes that there are fairly limited. And you're aware of that, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And you're also aware that what Constable Smyth said to them wasn't recorded –

CPL BURKE: Right.

MS. O'BRIEN: – that evening.

Ultimately, when we hear the evidence from those officers, those RNC officers, there were a number of inconsistencies between what those officers recalled Constable Smyth saying and what Constable Smyth said in his statement to the RCMP. Okay. Were you aware of that?

CPL BURKE: No, I wasn't.

MS. O'BRIEN: Okay. Is that because you had not reviewed their interviews to the RCMP or you just – you just don't recall there being any inconsistencies?

CPL BURKE: Where are the inconsistencies?

MS. O'BRIEN: Okay. Well, I'm going to give you a couple.

CPL BURKE: Between each other you mean?

MS. O'BRIEN: Yeah, I'll give you a couple.

CPL BURKE: Okay.

MS. O'BRIEN: So, for example, I think Constable Warren had a recollection of Constable Smyth saying that the rifle may have come from under a table.

CPL BURKE: Okay.

MS. O'BRIEN: Okay. Do you recall that?

CPL BURKE: Not – no, and I don't recall that now, no.

MS. O'BRIEN: Okay. And I think Staff Sergeant Mike Adams was quite certain that Constable Smyth had said the bat was on the chair.

CPL BURKE: Okay.

MS. O'BRIEN: Okay. So what we're getting here as a result of, I guess, four additional statements that come –

CPL BURKE: Sure.

MS. O'BRIEN: – from Constable Smyth, and these are statements are really dependent on the memories of these RNC officers who were there speaking with him, and they didn't take notes.

CPL BURKE: Okay.

MS. O'BRIEN: Any concerns about that from Constable Smyth's perspective? You know, you go interview these officers, you kept your four statements. They haven't been taken under ideal conditions in that no notes, no recordings. Now there's four statements that could be ultimately used against Constable Smyth to challenge his credibility.

CPL BURKE: Yeah.

MS. O'BRIEN: Do you see any concern about that?

CPL BURKE: I can see the concern but, you know, we took the statements for what they are worth. We knew the conditions, the statements were – you know, the information that was gained by these RNC members, we knew that it was a meeting. They didn't – it wasn't formal interviews with Constable Smyth. So we wanted to get anything that they had to offer regarding their conversation with Constable Smyth and take it under consideration, have that as information.

MS. O'BRIEN: Right. Do you see that by doing – you know, that this adds a layer of complication to the file?

CPL BURKE: It may have added a layer of complication but I would have – if looking back, I would have taken those statements again, you know what I mean.

MS. O'BRIEN: Under –

CPL BURKE: Like I don't feel sorry for taking those statements and I never really considered that side of it. But, yeah, so I'm glad we took those statements basically.

MS. O'BRIEN: Are you – right, I understand that.

CPL BURKE: Yeah.

MS. O'BRIEN: And, you know, you're glad you went and captured what those –

CPL BURKE: Of course.

MS. O'BRIEN: – RNC officers learned from Constable Smyth.

CPL BURKE: Yes.

MS. O'BRIEN: But I'm just, you know, putting these questions to you because, you know, arguably – you've said that no – you've never known a civilian subject of an investigation to be given a private meeting room –

CPL BURKE: Yeah.

MS. O'BRIEN: – to meet with people who are not legal counsel like this.

CPL BURKE: Yeah.

MS. O'BRIEN: And I'm just putting it to you by giving this, what some might term to be, special treatment –

CPL BURKE: Yeah.

MS. O'BRIEN: – to Constable Smyth, it added a layer of complication potentially to the file, particularly if you had ultimately ended up with criminal charges. Do you see that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

THE COMMISSIONER: It might be a good time to break.

MS. O'BRIEN: Thank you.

THE COMMISSIONER: We'll resume at 1:30. Thank you.

We'll try and have a bit more heat. Someone is out looking for heaters but it's not that easy to do quickly. Anybody who wants to bring their coffee in, they're free to do so or anything else to warm them up.

So we'll adjourn.

MS. SHEEHAN: All rise.

The inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Thank you.

Go ahead when you're ready.

MS. O'BRIEN: Thank you, Commissioner.

Corporal Burke, when Constable Smyth was brought back to the RCMP detachment in Holyrood on April 5 by Constable X, was the plan at that time to interview Constable Smyth that evening?

CPL BURKE: From my memory, I guess if Constable Smyth was at the detachment we would have liked to have talked to him, yes.

MS. O'BRIEN: Okay. So your plan at that time was to interview him?

CPL BURKE: I would assume, yes.

MS. O'BRIEN: Okay. You're saying you would assume. I can bring you back; I asked you that question when I interviewed you on December 1. The question I put to you – and I'm at page 240 of the transcript. Okay, in this case when you brought Constable Smyth back to the detachment in Holyrood, when he was brought back by Constable X, was the intention at that time you were going to interview him that evening? Answer: Yes.

So was that accurate at that time?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Who was going to do that interview? Had you already determined that it would be Corporal Monty Henstridge?

CPL BURKE: I think so.

MS. O'BRIEN: Okay. And now you ultimately attended at the interview. Why would you have attended as well?

CPL BURKE: What interview are you referring –?

MS. O'BRIEN: The interview of Constable Smyth, when you did the interview of Constable Smyth.

CPL BURKE: The next day?

MS. O'BRIEN: The next day when you did it. It was you and Corporal Monty Henstridge. Why would you have participated as well?

CPL BURKE: No real reason. I guess he was our most important interview at that time and I was present for it.

MS. O'BRIEN: Okay. And as the primary investigator to be present for a key, the key interview, I guess.

CPL BURKE: Not always but in this case, yes.

MS. O'BRIEN: Okay. So that wouldn't always be the case –

CPL BURKE: No.

MS. O'BRIEN: – but in this case yes. Okay.

In any of your training, have you ever been trained or told to allow witnesses to have a period of time after they've experienced a traumatic event before you interview them?

CPL BURKE: No.

MS. O'BRIEN: Okay. Have you ever heard that the best evidence is the freshest evidence in that you're trying to get information from witnesses as soon as possible?

CPL BURKE: I've heard of it, yes.

MS. O'BRIEN: Okay, and do you agree with that?

CPL BURKE: Somewhat. It all depends on the circumstances, of course.

MS. O'BRIEN: Okay.

I'm just going to bring you back again to when I asked you those questions, similar questions on your interview. Question, so I – this is me posing a question about the best evidence is the

freshest evidence. So you're trying to get information as soon as possible from witnesses. Have you heard that, too? And your answer is yes. Okay. And do you agree with that or disagree with that? Answer: I agree with that.

So was your answer correct on that day? Is that true? Do you agree with it?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Can I see – I'm going to ask to see page 29 of the daily log, Madam Clerk, and the daily log has been entered as Exhibit P-0359. And you can go to page 29 of that exhibit.

So this is a note in the daily log by Corporal Monty Henstridge, and it's on April 5, 2015, at 5:30 in the afternoon. "Cpl Henstridge spoke briefly with Cst Smyth who had several RNC members with him for support including Warren Sullivan of the RNC Association. Smyth was shaken but cooperative. He stated he very much wanted to provide a statement immediately but would prefer to wait until tomorrow once he settled. Sullivan noted that he advised Smyth of this given the research which showed recall was stronger and more accurate the following day. Cpl Henstridge agreed and advised that this would not be problem. Cpl Henstridge provided his business card and asked Cst Smyth to contact him as soon as he was up to it in the morning."

So that's the note that Corporal Henstridge made. Had you ever read or been informed of any research to support the position that was put forward by Constable Sullivan as mentioned by Corporal Henstridge?

CPL BURKE: I hadn't read anything at the time but I've since read information regarding that.

MS. O'BRIEN: Okay. So when I asked you that question on December 1 of your interview you had not read anything at that time.

CPL BURKE: That is correct.

MS. O'BRIEN: So you've been doing some reading since?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So what have you read since?

CPL BURKE: I just read a couple of articles. I think one was by the FBI and it was in line with that philosophy, I guess, to wait 24 or 36, 72 hours before – after a critical incident to provide a statement because it would be the most accurate statement that you could obtain.

MS. O'BRIEN: Okay. How did you come across this article by the FBI? Did you do it yourself or did someone –

CPL BURKE: No, I –

MS. O'BRIEN: Did you look for it yourself or did someone provide it to you?

CPL BURKE: No, I researched it myself.

MS. O'BRIEN: Okay. On the Internet?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And when was the article dated?

CPL BURKE: I don't know.

MS. O'BRIEN: Okay. Do you know who the author of the article was?

CPL BURKE: No, I don't.

MS. O'BRIEN: Okay. Was it referring to police officers specifically?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And was it on the FBI website?

CPL BURKE: I don't know.

MS. O'BRIEN: So that's what you found just by doing an Internet search?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Did you, or to your knowledge did any other RCMP officer that night put any effort in persuading Constable Smyth to take a statement, just saying to him, look, we'd really like to have your statement tonight if you can.

CPL BURKE: Not to my knowledge.

MS. O'BRIEN: Okay. Any concern, did you have any concern with Constable Smyth waiting to give his statement?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. You didn't have any concern. Did you see any risks associated with it?

CPL BURKE: I guess there's always risks when you wait to do things. You know, there's obviously a risk of him being tainted by other things, other people – I have no idea. But I had to take that into consideration but I really had no authority at that time to compel Constable Smyth to provide a statement.

MS. O'BRIEN: Yes. No, I understand that. But you didn't – also didn't, you know, say to him look, we'd really like to have your statement, so you didn't put any effort into persuading him.

CPL BURKE: No.

MS. O'BRIEN: Okay.

So what about the risk that you're saying there may have been some risk with his evidence being corrupted, or tainted over the passage of time, is that what you're saying, that's a concern?

CPL BURKE: Well, just passage of time, you just talk to people – you know, I have no idea; it's just like any witness.

MS. O'BRIEN: The FPI article that you read, did that address that concern?

CPL BURKE: No, I don't know. I didn't read the whole article. I just found it there, that's all, and read portions of it.

MS. O'BRIEN: So you found an article online and you read part of it?

CPL BURKE: Yep.

MS. O'BRIEN: Okay.

CPL BURKE: Just, you know, with that question in mind, that's all.

MS. O'BRIEN: Okay. But you didn't bother to read –

CPL BURKE: I don't want to enter it as evidence or – it was a Google search. I don't want to put a whole lot of faith into it, that's all.

MS. O'BRIEN: Okay. And you didn't read the full article?.

CPL BURKE: No.

MS. O'BRIEN: Okay.

Is it accurate that the chief medical examiner actually did not complete the autopsy on April 6, that was originally scheduled, and I understand that was because Constable Smyth's statement had not yet been concluded – is that right?

CPL BURKE: Yes, as far as I can remember, yes.

MS. O'BRIEN: Okay. So the chief medical examiner wanted that information before he concluded his work.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Did you get an opportunity to feed any information back to the Forensic Identification Section that you learned from Constable Smyth's statement when you did take it on the late afternoon of April 6?

CPL BURKE: I'd be going by memory, but I would assume, yes.

MS. O'BRIEN: You assume he did?

CPL BURKE: Yes, so we would have provided Dr. Avis with a synopsis of the statement I would imagine.

MS. O'BRIEN: Okay.

I don't know that I see that in a file, but maybe we'll come back to that later on in your questioning, Corporal Burke, okay?

CPL BURKE: Yeah, sure.

MS. O'BRIEN: So you might, on a break, get a chance to review your notes.

Constable Sullivan was a representative of Constable Smyth's association, so it's the equivalent of a union, what many of us would understand. When we look at this note here that was entered by Corporal Monty Henstridge, do you consider that Constable Sullivan might have been having some influence here on how you conducted your investigation?

CPL BURKE: I can only say, yes, he – I wasn't there. I was at the detachment but I didn't speak to Constable Sullivan or any member of the RNC. But he suggested, I guess, to Constable Smyth and to Corporal Henstridge that wait to provide a statement. And we couldn't force Constable Smyth to provide a statement, so there you have it.

MS. O'BRIEN: Okay.

CPL BURKE: He – I think and I think Corporal Henstridge said he would have probably provided a statement had Constable Warren, Constable Sullivan not provided that advice. So I can only say it affected it.

MS. O'BRIEN: Okay.

Did you know if by RNC policy, Constable Smyth was required to give any statement, either a written statement or an oral statement – a written account of the incident and what happened prior to ending his shift that night?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Did you ask anyone at the RNC whether or not that was a requirement for Constable Smyth to give that kind of – some kind of a statement on the incident?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay.

Did you or any other member of the RCMP ask Constable Smyth not to discuss the incident with anyone until he had a chance to give his statement to the RCMP?

CPL BURKE: I didn't personally. No.

MS. O'BRIEN: Okay.

Are you aware that anyone else from the RCMP would have said that to Constable Smyth?

CPL BURKE: No, I'm not aware.

MS. O'BRIEN: Okay.

Now, I know you had said earlier that you interviewed the four RNC officers who spoke to Constable Smyth at the RCMP detachment in Holyrood that evening. And I think before lunch, you were quite clear that you still felt that was the absolute right thing to do –

CPL BURKE: Yes.

MS. O'BRIEN: – 'investigatively' speaking. What about other RNC officers or people who might have spoken to Constable Smyth, prior to him giving his statement to you that didn't take place until 3:30 the following day on April 6, did you speak to any of those people?

CPL BURKE: Not to my recollection.

MS. O'BRIEN: Okay.

Did you ask any questions to determine who those people were or might have been?

CPL BURKE: I don't think so.

MS. O'BRIEN: So you didn't ask Constable Smyth have you spoken to anyone prior to coming in here today –

CPL BURKE: No.

MS. O'BRIEN: – to give your interview to us.

CPL BURKE: No, I don't think so.

MS. O'BRIEN: Okay.

One of the pieces of – one of the things that has been uncovered through the course of the inquiry process certainly is that we've learned that Staff Sergeant Mike Adams and Constable Warren Sullivan, between the two of them on that night of April 5, they had had communicated to Constable Smyth statements that had been said by Dick Dunphy.

So Dick Dunphy was a friend of Staff Sergeant Mike Adams, and Staff Sergeant Mike Adams spoke to Dick Dunphy that night and told him words to the effect of, you know, he felt concern or sympathy or whatnot for Constable Smyth and was sorry he hadn't told him about the gun and words to that effect. And Staff Sergeant Mike Adams had handed that information along to Constable Warren Sullivan, and Warren Sullivan had contacted Constable Smyth on the night of April 5 to give him that information. Okay? Follow all of that?

CPL BURKE: Yes.

MS. O'BRIEN: Were you aware of that?

CPL BURKE: No. No.

MS. O'BRIEN: Okay. Had you been aware – I mean, what we have here, Dick Dunphy was a witness, in this case. Was he not?

CPL BURKE: Yes. Yes.

MS. O'BRIEN: So here we have an RNC officer getting information from a witness, and handing it on to the subject of the criminal investigation.

CPL BURKE: Right.

MS. O'BRIEN: Do you see that as a problem or a concern?

CPL BURKE: It's the first I'm hearing about it; I guess it could be a concern. I don't know what angle it could be, but yeah, it would have been nice to know.

MS. O'BRIEN: I mean – again, would you see that possibly as an interference in the investigation, having the RNC, having a member of the RNC pass along information from a witness to the subject of the investigation, particularly prior to that –

MR. AVIS: I'm going to have to object here. I don't believe in the first place that any information in relation to the offence was passed on. It was an apology that was passed on. It wasn't about the investigation at all. It was sympathy; sorry I didn't tell you something. It has absolutely no bearing on anything the man is going to say the next day, and the idea that he was interfering with the investigation, it's not the law.

THE COMMISSIONER: I think –

MR. AVIS: With all due respect.

THE COMMISSIONER: – in addition to, in addition to the apology as you put it, from Mr. Dick Dunphy, there was also I think a reference to the attitude of the community, whether correctly or not, if I believe

MS. O'BRIEN: That came a bit later, Commissioner; I think that came through Staff Sergeant Tiller –

THE COMMISSIONER: Did it?

MS. O'BRIEN: – about the attitude of the community, but I think that night was also, it was, it was – I agree with Mr. Avis that it was primarily sympathy of this witness and also maybe a regret that he hadn't given him more of a warning. It's been reported different ways, different places. But that is, that is the type of information that was handed on.

THE COMMISSIONER: Right. Yeah, so Mr. Avis, arguably in terms of regretting not having – I forget how it was worded. Ms. O'Brien suggested giving more information. I think there was some reference letting him go down there alone or something, but that could be considered evidence relating to Mr. Dunphy, Mr. Donald Dunphy's demeanour or temperament. However much weight would be given to it, I wouldn't say that there was no relevant evidence at all in that regard.

But your point is noted and you'll be able to make your submissions, I'm sure, in that respect. I'm not saying that you can't – you won't have an argument there. I'll listen to it on submissions, but right now I think there's no problem with having Ms. O'Brien finish that line of questioning.

MR. AVIS: Thank you, Commissioner.

MS. O'BRIEN: Corporal Burke, I'm just more – you know, from your perspective as the – you're the investigator here in charge of this investigation, do you find that concerning?

CPL BURKE: Concerning, but not a whole lot of weight put into it.

MS. O'BRIEN: So what do you mean by that, concerning but not a whole lot of weight?

CPL BURKE: It would have been noted, but I don't know what weight I would have given it. I have no idea, like

MS. O'BRIEN: What the consequence would have been, is that what you're saying?

CPL BURKE: Yeah, or, you know, if I would have known at the time – it's hard to – you got to put yourself back in the investigation and what you're thinking at that time and the things that were going on, so I can't now speculate what I would have thought of it back then. It's hard to do that.

MS. O'BRIEN: Okay.

And I guess because you hadn't asked – you didn't uncover that information at the time and in part of that would have been because you didn't ask Constable Smyth who he was speaking to prior to giving his statement.

CPL BURKE: Sure.

MS. O'BRIEN: Okay.

I'd like to bring up Exhibit P-0134, please. Thank you.

Corporal Burke, these are Constable Smyth's phone records. And I'm going to go down – you had these as part of your investigation; is that right?

CPL BURKE: Yes.

MS. O'BRIEN: And would you have reviewed these?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So I am looking for at 1:27. So here we have at 1:27 p.m. on April 4 – sorry April 6, 2015, there is an entry there. Can you see that?

CPL BURKE: Yes.

MS. O'BRIEN: All right. So that would have been before you interviewed Constable Smyth, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay, and this is a text from Constable Smyth to actually – I believe it is James McLeod who's a reporter with *The Telegram*.

CPL BURKE: Okay.

MS. O'BRIEN: Where Constable Smyth is telling Mr. McLeod: You should speak to the brother, lives next door to the deceased. And there is earlier, you know there is earlier ones there that establishes that that is Constable – that is James McLeod.

You weren't aware of that? Were you aware of that before today?

CPL BURKE: What?

MS. O'BRIEN: That Constable Smyth had been in communication with a reporter telling him to speak, that he should speak to Dick Dunphy before he gave his interview to the RCMP?

CPL BURKE: I didn't know it was a reporter, no.

MS. O'BRIEN: Okay. All right, but you were aware he told somebody he should, they should speak to Dick Dunphy, is that what you're saying, you just didn't know who?

CPL BURKE: I didn't have that information at the time.

MS. O'BRIEN: Okay.

CPL BURKE: Do you know what I mean? These are text messages or communications from Constable Smyth's phone and we didn't have his phone or his information at that time.

MS. O'BRIEN: Okay. So you're saying you later found out he'd said that to somebody, you didn't know who, you're just finding out it was James McLeod today?

CPL BURKE: Yes, yes

MS. O'BRIEN: Okay. All right.

Looking at it now, does that cause you some concern that Constable Smyth was getting in touch with a member of the media, directing him to speak to a witness in the investigation? You know, this is, this is immediately the day after. Does that cause you any concern?

CPL BURKE: It's hard for me to say that now, I guess. It's probably concerning but I don't know how it would have affected our investigation.

MS. O'BRIEN: Okay.

Did Constable Smyth know at that time whether or not you'd had the opportunity to interview Mr. Dick Dunphy?

CPL BURKE: Not to my knowledge.

MS. O'BRIEN: Okay.

When Constable Smyth was at the detachment that evening in Holyrood, did you keep any record of his activities that evening?

CPL BURKE: I didn't, no.

MS. O'BRIEN: Okay. Do you know if any other RCMP officer did?

CPL BURKE: Not to my knowledge.

MS. O'BRIEN: Okay.

Thank you, Madam Clerk; I'm finished with that exhibit.

Did you note – did you have to chance to actually speak to Constable Smyth that evening?

CPL BURKE: Not to my recollection. I think I bumped into him in the washroom, actually, and that's the only time I had contact with him.

MS. O'BRIEN: Okay. Did you speak to him then?

CPL BURKE: No, not really.

MS. O'BRIEN: Okay.

Was Constable Smyth asked to give a voluntary blood sample that evening?

CPL BURKE: Absolutely not.

MS. O'BRIEN: Okay. When you say absolutely not, are you suggesting that that would not have been an appropriate ask?

CPL BURKE: No.

MS. O'BRIEN: Why would that not have been an appropriate ask?

CPL BURKE: I have no idea what it would do – how that would be evidence to our investigation.

MS. O'BRIEN: Okay. But a blood sample might show that if someone had alcohol in their system or other drugs or substances that might have affected their behaviour, would it not?

CPL BURKE: We're doing a *Criminal Code* investigation and, you know, it was a homicide investigation and any homicide investigation I've did previous to this, we didn't ask for a blood sample or were concerned with a breath sample for alcohol or anything like that.

MS. O'BRIEN: You've never been concerned about that in a homicide investigation, whether the subject may have been under the influence of drugs or alcohol?

CPL BURKE: No, or we wouldn't have authority to get that anyway.

MS. O'BRIEN: I'm not ask– talking about authority, but you're saying that would not be relevant information on a homicide investigation?

CPL BURKE: Not according to the elements of the offence.

MS. O'BRIEN: Okay. But, but, just because it's – I know it's not an element of the offence of, of any of the homicide offences – impairments not – but you wouldn't consider that could be relevant information for an investigation?

CPL BURKE: Not for a *Criminal Code* investigation, no, unless we're doing a driving, impaired driving investigation or something like that.

MS. O'BRIEN: Okay.

CPL BURKE: I know you asked me that question in the interview and I was – it came out of left field for me, because that's something that would never entered my, my mind doing a homicide investigation.

MS. O'BRIEN: But here, you know, under, under section 25 you're looking at the reasonableness of Constable Smyth's actions.

CPL BURKE: Yes.

MS. O'BRIEN: So would, couldn't, you know, you don't think that evidence of impairment might bear upon that issue about as to whether or not he was acting reasonably in the circumstances?

CPL BURKE: That's not how it reads in the *Criminal Code*, and I never turned my mind to it, and looking back on it I don't think I would have, you know, I mean, in hindsight, I wouldn't have asked for those. Would ask for a breath sample or a blood sample or anything like that.

MS. O'BRIEN: Okay. And again, I know you'd have to ask for it, that's the point you just made, because you know, it would, it would have to be by Constable Smyth's consent.

CPL BURKE: Yes.

MS. O'BRIEN: Right, okay.

Did you ask Constable Smyth if you could seize his cellphone that night?

CPL BURKE: No.

MS. O'BRIEN: Why not?

CPL BURKE: It didn't come up; it wasn't something that we thought of, I guess.

MS. O'BRIEN: Okay.

He ultimately consented to give it to the RCMP, but you did not receive it until April 24, which is some 19 days later. Why did you wait so long to get the cellphone?

CPL BURKE: No reason, I can't offer an answer for that.

MS. O'BRIEN: Was it just low priority?

CPL BURKE: No, I don't think so. Things were happening fairly quickly and it was, we're doing other investigative steps. Cellphones at that time, and it was changing all the time, the information would remain there and we're – that was, you know, to get the cellphone that night or get the cellphone two weeks later, the information on the phone wouldn't have changed, to my knowledge.

MS. O'BRIEN: What about if Constable Smyth had deleted items?

CPL BURKE: To my knowledge, deleted items, we would still be able to capture that.

MS. O'BRIEN: Okay. You know, having interviewed Sergeant Luther, my understanding from him, and he'll give testimony, is that even items that are deleted are – can be removed from the memory of the phone over time –

CPL BURKE: Yes.

MS. O'BRIEN: – so that the longer you wait the more likely it is that items disappear.

CPL BURKE: Right.

MS. O'BRIEN: So is it possible that you're incorrect, that there would be – could be no prejudice by waiting so long to get that phone?

CPL BURKE: That could be. Yeah.

MS. O'BRIEN: Okay.

Was Constable Smyth photographed on the day of the incident?

CPL BURKE: No, he wasn't.

MS. O'BRIEN: Okay. Why not?

CPL BURKE: No reason, I guess.

MS. O'BRIEN: Okay. Should he have been?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Was he examined for injury that evening?

CPL BURKE: Yes, by the paramedics on scene.

MS. O'BRIEN: Okay.

Now, our understanding of the evidence – my understanding, anyway, of the evidence of the paramedics on scene – is that they only – that the paramedic Nancy Linehan has given testimony here today or here at the inquiry, just tested his vital signs. Were you on the understanding that she actually examined him for injury?

CPL BURKE: She did, I guess, an overall assessment of him. And any obvious injuries I guess she would have noted but –

MS. O'BRIEN: Do you know that from speaking to her or her interview?

CPL BURKE: I thought it was from her statement.

MS. O'BRIEN: Okay.

Do you think if Constable Smyth had not been a police officer you would have taken his, or at least thought to take his cellphone that night?

CPL BURKE: No. We would have had to have consent for his cellphone and, you know, we probably would have got it. But if he wasn't a police officer, we probably wouldn't have obtained consent nor did we have any legal right to, you know, seize his cellphone.

MS. O'BRIEN: Okay.

What interviews were conducted that evening on April 5?

CPL BURKE: I know myself and Corporal Henstridge were the first Major Crime members on the scene and, you know, obtained as much information as we could from responding officers and members that were at the scene. We were advised that Constable Smyth attended Richard and Debbie Dunphy's residence prior to attending Mr. Dunphy's residence. So I think that was the first two statements that we obtained.

MS. O'BRIEN: Okay. And you also got a statement from Meghan Dunphy that night as well. Is that correct?

CPL BURKE: Correct.

MS. O'BRIEN: Okay.

Prior to going and interviewing Dick and Debbie Dunphy, did you develop – you were involved in that interview, is that right, in those interviews?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Was an interview plan developed prior to –

CPL BURKE: No.

MS. O'BRIEN: – going in and doing those interviews?

CPL BURKE: No, our interview plan for Richard and Debbie Dunphy were to obtain pure version statements.

MS. O'BRIEN: So what does that mean, obtain pure version statement?

CPL BURKE: It means asking people, you know, giving them a context of the event that had happened. The sudden death of Donald Dunphy, and maybe you understand that your visit by a member of the RNC, tell me about that. And they just tell me everything about that. They may say, maybe talking for 20 minutes or they may be talking for two minutes. But it's whatever – when we say, tell me about that, it's an open-ended question and we obtain their pure version without us asking any questions.

MS. O'BRIEN: Okay. And I understand at first, that's one interview technique to let someone give their pure version but I – you know, do you typically then after someone is finished, go back and ask them more pointed questions to get the information that you, as an investigator, need?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So at that, are you saying that your plan that night was just to let them to do pure version and you weren't planning to put any questions to them?

CPL BURKE: That's, that's where we were, yes. Yeah, it's a witness statement.

MS. O'BRIEN: Okay, but even on witness statements are you saying you don't actually put questions to the witness to, to get further information or further details that you feel would be relevant?

CPL BURKE: Yes, after the – after the pure version there's a question and answer part, yes.

MS. O'BRIEN: Okay. And was that the case for Richard and Debbie Dunphy?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So you were planning to ask them questions?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. All right.

So what kind of information, you're saying you were just looking to get information from them from, about their interaction with Constable Smyth.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And was that the focus of the interview then?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And were they interviewed separately?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: As best as we could.

MS. O'BRIEN: Okay. Now, we have transcript of – as best as we could, sorry, what did you mean by that?

CPL BURKE: We're in the residence of Richard and Debbie Dunphy and we told them that we'd like to get separate statements from them. And I think Richard went upstairs and we took Debbie's or vice versa.

MS. O'BRIEN: Okay. All right. So you're saying you don't know if one could overhear the other one or that kind of thing. You're not sure.

CPL BURKE: Exactly.

MS. O'BRIEN: Not certain about that.

CPL BURKE: Yeah.

MS. O'BRIEN: Okay.

Now, we have the transcripts of the statements, and, Commissioner, for your reference, I don't need them brought up, they've been entered as Exhibit P-0095. That's for Richard Dunphy. And Exhibit C-0003, that's for Debbie Dunphy.

Corporal Burke, in reviewing those statements, I think it's fair to say that you got a, a lot of information about the background of Mr. Donald Dunphy. Would you agree with that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Do you think that the issues relating to their interaction with Constable Smyth were fully explored in those interviews?

CPL BURKE: Looking back at it no, but that's where, kind of, they led the interview, was down – the history between them and Don Dunphy.

MS. O'BRIEN: Okay. But you were there as an investigator and you're saying your focus for them was to get the details of their interaction with Constable Smyth, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Did you ask them about Constable Smyth's demeanour?

CPL BURKE: No.

MS. O'BRIEN: Okay. Did you ask them in any detail about what they had specifically said to Constable Smyth?

CPL BURKE: No, but I think they, in their pure version, they would've told us that. I can't remember, but that information came out on their pure version portion of the statement.

MS. O'BRIEN: Well, I can certainly say – maybe on the break you can review those statements. When you look at them it's very, I would say it's very difficult to determine what exactly – they're saying, they're just reporting to you and what they're reporting they said to Constable Smyth.

CPL BURKE: Right.

MS. O'BRIEN: It's, I was unable to parse out that information.

CPL BURKE: Right.

MS. O'BRIEN: Did you ask them what Constable Smyth was wearing?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Did you ask them whether or not he took any notes while he was there with them?

CPL BURKE: No.

MS. O'BRIEN: Did you ask them whether or not he was carrying anything?

CPL BURKE: No.

MS. O'BRIEN: Did you ask them whether or not he'd used a phone while he was there in their house?

CPL BURKE: No.

MS. O'BRIEN: Did you ask them whether or not they smelled alcohol on his breath?

CPL BURKE: No.

MS. O'BRIEN: Did you ask them what he was driving?

CPL BURKE: No.

MS. O'BRIEN: Okay. So you didn't get the full information of what they, what he told – what they told him, right?

CPL BURKE: No.

MS. O'BRIEN: Okay. All right.

So is it fair to say now that you didn't ask them sufficient questions on that day to really flesh out what, what their interaction with Constable Smyth was on April 5? Fair to say?

CPL BURKE: A lot of those questions I wouldn't have asked anyway, looking back at it. I don't know what you want me to say, but –

MS. O'BRIEN: Okay.

CPL BURKE: – we obtained witness statements from these people without any agenda. So that's what they told us, so that's what we had to take into account.

MS. O'BRIEN: But what do you mean without any agenda? I mean, didn't you have an agenda to investigate the shooting of Mr. Donald Dunphy?

CPL BURKE: These were two people that interacted with Constable Smyth, you know, minutes before the shooting. And we're aware of that. We had limited information, but we knew that he visited them and we just wanted to obtain statements from them without, you know, any influence, I guess.

MS. O'BRIEN: But is asking someone a question and getting an answer, do you think – is that influencing them?

CPL BURKE: I think asking them if they smelled alcohol on Joe Smyth's breath is not a question I would have asked at all.

MR. KENNEDY: Excuse me Commissioner; I'd like to interject for one second.

On numerous occasions now there have been questions asked about alcohol and blood samples. Commissioner, there has been no evidence before this inquiry from all the witnesses that there was any alcohol on Joe Smyth's breath from the police officers who had interaction with him at the beginning, to the paramedics, to the people, to the RNC officers. So I'm just concerned that this line of questioning, which has gone on now a number of times, leaves the impression that somehow or other there was alcohol or drugs involved.

THE COMMISSIONER: No, I don't think that's intended or necessarily inferred from the questions. I believe the questions are going to whether there was a rigorous investigation or whether it was less than rigorous because we had a police officer involved. And Ms. O'Brien is I think establishing that there were certain questions not asked and there'll be, I take it, submissions made regarding whether or not investigation was sufficiently thorough as a result of certain questions, including the ones she just mentioned.

So you're correct, that I haven't seen any reference to any suggestion of alcohol. There's no indication that anyone smelled alcohol on Constable Smyth's breath. He had been attended by the ambulance driver and the emergency responder with him, and they did not indicate there was any smell of alcohol. The officers who were attending at the scene, the first responders did not indicate anything relating to alcohol, but I think Ms. O'Brien is entitled to have an answer to the question for the purpose of submissions as to whether or not it was an adequate, thorough, rigorous investigation.

Do you have anything else, Mr. Kennedy, on that?

MR. KENNEDY: No, that's fine.

THE COMMISSIONER: Okay.

MS. O'BRIEN: Thank you, Commissioner.

And I can certainly state to Mr. Kennedy that the Commissioner is correct; I'm not suggesting that there is any evidence there at all. It really is – these questions are directed towards the thoroughness of the RCMP's investigation of Constable Smyth.

Do you know how long your interviews were with Richard and Debbie Dunphy that evening?

CPL BURKE: No, I don't.

MS. O'BRIEN: Okay. If I told you they were about 16, 17 minutes each, does that sound about right –

CPL BURKE: Yeah.

MS. O'BRIEN: – with some interruptions in there I think.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Meghan –

THE COMMISSIONER: I should, I should just say, I guess, just to complete the record, Mr. Kennedy. I just remembered there was some evidence about Constable Smyth having what he put as a modest amount of alcohol the night before. So it's not that there was no reference to alcohol at all but there was nothing to indicate that he was under the influence on the 5th of April at the time of the incident.

Go ahead, Ms. O'Brien.

MS. O'BRIEN: Thank you.

Corporal Burke, Meghan Dunphy was also interviewed the evening of April 5. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Who made the decision to conduct the interview that night?

CPL BURKE: I would say it was mine.

MS. O'BRIEN: Okay.

Did you have a plan in place for the information that you wanted to cover with Meghan Dunphy in that interview?

CPL BURKE: No, not really. No formal plan, no.

MS. O'BRIEN: Okay.

Did you give any consideration – at this point you knew that Constable Smyth had asked for some more time because of the two – before giving his statement.

CPL BURKE: Yes.

MS. O'BRIEN: Did you give any consideration to allowing Meghan Dunphy some time before seeking to interview her after the death of her father?

CPL BURKE: No.

MS. O'BRIEN: Now, we know that Meghan Dunphy, through her legal counsel, proactively contacted the RCMP to give a further statement a couple of days later on April 8. Do you recall that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And do you understand that was because Ms. Dunphy did not think that important information had been canvassed with her on her first interview.

CPL BURKE: Correct.

MS. O'BRIEN: Okay.

Had you – by the time the second interview which did take place on April 8, had you had an opportunity to review her first statement? I know you'd been there but had you – so you'd heard it initially but had you an opportunity to go back and look at it?

CPL BURKE: I don't remember.

MS. O'BRIEN: Okay.

Did you feel your first statement from – that you took from Meghan Dunphy on April 5, did you feel it was adequate?

CPL BURKE: For our investigation at that time, yes. She gives an account of her interaction with her father that day.

MS. O'BRIEN: Okay.

So when I asked – you just, I think you just – I heard you just say you thought it was adequate. When I asked – I heard you right, did I? Yes?

CPL BURKE: Yes, at that time, yes.

MS. O'BRIEN: Okay. All right.

I asked you that question on December 1, at page 416 of the transcript. I'd asked, and we're talking about – I asked you, had you thought it was adequate at the time, referring to your first statement, and you answered: Yeah, we were still assessing what we had basically and no, it wasn't adequate. But she came forward with new information before we had a chance to assess her statement, her initial statement.

So at that time when you answered the question in December, you had determined that you did not think her first interview was adequate and, today, I understand you saying at the time you thought it was. Which is the correct answer?

CPL BURKE: I am saying almost the same thing, aren't I?

MS. O'BRIEN: Oh, I may have misunderstood. I understood back then, you were saying no, you had said it was adequate.

CPL BURKE: I said it was adequate, and then I said, well, we got further information from Meghan a couple of days later. So it's kind of, I guess, a play on words. You know, at that time, it was an adequate interview. We didn't know what to expect from what Meghan was going to tell us and so from what we had that night, we wouldn't know what else to ask her, really.

MS. O'BRIEN: Okay.

In a letter that – I don't need to bring up on the screen but if you need to refer to it, you just say so. It's been entered into evidence as Exhibit P-0094 and it's a letter from Erin Breen, legal counsel for Meghan Dunphy to assistant – not assistant, Commissioner, but it's Tracy Hardy and then minister of Justice and Public Safety, Darin King, on April 25 of 2015. So that was a letter Ms. Breen wrote then.

MR. KENNEDY: What was the exhibit, sorry?

MS. O'BRIEN: Sorry, it's P-0094.

In that letter, Ms. Breen states that a police officer told Meghan Dunphy that her first interview was an intake interview. Do you have any knowledge of this?

CPL BURKE: No, I don't.

MS. O'BRIEN: Okay. Have you ever heard of an intake interview?

CPL BURKE: No, I haven't.

MS. O'BRIEN: Okay. Now, I understand that the first, the first responses of the RCMP to this incident, like right when the call came in, those had taken place prior to your appointment as primary investigator.

CPL BURKE: Yeah.

MS. O'BRIEN: But the document that recorded those first responses would have been included in the documentation that was ultimately entered into the PROS system and then in our system. Would that documentation have been available to you as you were carrying out your investigation?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And would you have reviewed that as part of your investigation?

CPL BURKE: Yes.

MS. O'BRIEN: All right.

When you, I had asked you earlier whether there was anything in there that caused you any concern that any of the first responders did not understand that this was a criminal investigation or a criminal investigation was being launched and I think I asked you more for any RCMP member, but do you think that's the same for the first responders? Did you have any concerns that any of them might have been not fully understanding that they were involved in a criminal investigation?

CPL BURKE: I don't remember being concerned at the time.

MS. O'BRIEN: Okay. What about since?

CPL BURKE: No.

MS. O'BRIEN: Okay. And any concern that any of the first responders treated Constable Smyth differently or preferentially because he was a police officer?

CPL BURKE: I wasn't concerned about it, no.

MS. O'BRIEN: And what about since?

CPL BURKE: No.

MS. O'BRIEN: Okay. The call that Constable Smyth first made, after Mr. Dunphy had been shot, was to the RCMP Communications Centre; is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay, and I understand Communications Centre phone lines are answered by civilian members of the RCMP; is that right?

CPL BURKE: Yes.

MS. O'BRIEN: And that's who would have opened the initial file, is it, the Communications Centre would have opened the initial file in PROS?

CPL BURKE: Yes. Yeah..

MS. O'BRIEN: Okay. I'm going to bring up your General Report, which is P-0312, please Madam Clerk.

Okay. So this is your General Report, and at the top here it says that the Occurrence, and then what I understand to be the file number, 2015376186 Pointing a firearm, 87(2) Criminal Code, and it says FIP @ 2015/04/05 at 14:28. So I understand that last bit is a date and a time.

Can you explain why we're seeing here that the charge is pointing a firearm, 87(2)?

CPL BURKE: I guess the occurrence is pointing a firearm.

MS. O'BRIEN: Okay? Sorry yes, I misspoke then, I apologize.

CPL BURKE: Not necessarily the charge.

MS. O'BRIEN: Yes.

CPL BURKE: And I can only, I guess, surmise of what happened there. Joe Smyth calls the RCMP telecoms, and complains, or he's the complainant of what happened, and the applicable charge at that time, according to telecoms, is pointing a firearm.

MS. O'BRIEN: Okay. So Constable Smyth would have called in and complained, and the complaint would have been that Mr. Donald Dunphy pointed a firearm at him, Constable Smyth.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And that's how the telecom centre would have opened the file, is that –

CPL BURKE: I, I assume yes.

MS. O'BRIEN: Okay. And this same notation occurs not only on your General Report but on every supplemental report that we have in this file –

CPL BURKE: Yeah.

MS. O'BRIEN: So on, you know, many, many, many, many documents that we have –

CPL BURKE: That stays the same, though.

MS. O'BRIEN: It stays the –

CPL BURKE: The top part? Unless you change it.

MS. O'BRIEN: Okay.

What does FIP mean?

CPL BURKE: I don't know.

MS. O'BRIEN: Okay.

Does Firearms Interest Police mean anything to you?

CPL BURKE: It means something to me, but I don't know if that's what that means.

MS. O'BRIEN: Okay, so I can speak to somebody else about that.

So do you know who was identified – you just said Constable Smyth would have been the complainant. Do you know for certain he was identified as the complainant in PROS on this file, was he not? On the RCMP software?

CPL BURKE: Yes, yes.

MS. O'BRIEN: He was. So this is for an investigation, though, not into Mr. Dunphy for pointing a firearm – right?

CPL BURKE: Yes.

MS. O'BRIEN: You weren't investigating Mr. Dunphy. You were investigating Constable Smyth – right?

CPL BURKE: We were investigating the occurrence.

MS. O'BRIEN: You were investigation the occurrence, okay.

Was that an error that Constable Smyth was identified as the complainant? Was that how it should have been recorded I guess is the right way to say it?

CPL BURKE: I guess so, yeah. Yes.

MS. O'BRIEN: So it was an error? Okay.

CPL BURKE: No, no, not an error. If he called in, he was automatically carded or scored as the complainant.

MS. O'BRIEN: Okay. Is that the accurate way to describe him in this investigation as the complainant?

CPL BURKE: No, I guess not.

MS. O'BRIEN: Okay. So was that an error, a misdescription of Constable Smyth's?

CPL BURKE: I didn't see it as a – it's not something that I looked at really, that first screen in PROS whether he was carded as a complainant, a victim, a subject of complaint. It wasn't really something that I was – I really picked up on.

MS. O'BRIEN: Okay.

CPL BURKE: It was a check box that you would do in PROS. That's all I can say about it.

MS. O'BRIEN: Okay. As the primary investigator, you could have gone in to change that at any time; could you not have?

CPL BURKE: Yes. Yep.

MS. O'BRIEN: Okay.

But you didn't. Any concern here that the Communications Centre, the people at the telecom centre who initially took this call and took the file, do you consider that this might be an indication that they didn't fully understand that it is Constable Smyth who would be the subject of the investigation?

CPL BURKE: I don't know.

MS. O'BRIEN: Okay.

I'll ask to bring up Exhibit P-0311. So this is what's called I believe a form, a C-237; can you just very briefly explain to us what the C-237 is?

CPL BURKE: A C-237 is an investigational update completed by the team commander to give updates to RCMP senior management.

MS. O'BRIEN: Okay. So who created this document? Is that you?

CPL BURKE: No, this one in particular –

MS. O'BRIEN: And I'll bring you down –

CPL BURKE: Okay.

MS. O'BRIEN: – because I did understand it was you but –

CPL BURKE: Yep.

MS. O'BRIEN: Okay. So there it says there prepared by Corporal Steven Burke, so that's you.

CPL BURKE: Yeah.

MS. O'BRIEN: Okay. So you prepared this document?

CPL BURKE: Yep.

MS. O'BRIEN: So here, and this was prepared by you and let's – I think it was – this was prepared on September 29 of 2015.

CPL BURKE: Yes.

MS. O'BRIEN: So some fair time later.

Again, Constable Smyth is here listed as the complainant here. Would you have typed that in or is it something that – how would that have come to pass that his status would have still in September of 2015 been given as complainant?

CPL BURKE: I would have typed that in.

MS. O'BRIEN: You would have typed that in?

CPL BURKE: Yeah.

MS. O'BRIEN: Corporal Burke, why in September of 2015 would you have still considered Constable Smyth as the complainant?

CPL BURKE: That's the way he was in PROS and that's the way – he called in the complaint. No reason.

MS. O'BRIEN: Okay.

The recordings from the telecoms centre, the RCMP telecom centre, they were recorded. They were included in the documentation we received from the RCMP. So I understand any calls that come into your RCMP telecom centre get recorded, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So the first call that had been placed by Constable Smyth to report the shootings, that would have been recorded and all the calls back and forth with telecom subsequent to that?

CPL BURKE: Yes.

MS. O'BRIEN: Would you have reviewed those as part of your, as part of your work as the primary investigator?

CPL BURKE: Yes.

MS. O'BRIEN: All right.

I ask to bring up Exhibit P-0126. So this is a transcript of those calls. So here we see this is the, this is – I don't have – it starts actually with a contact with the Comm Centre speaking to Constable Smyth, but the one I want to bring you to is actually at page 8. Sorry, my fingers are not working well. Can you bring me to page 8 please, Madam Clerk? Thank you.

So I'm just going to bring this, you through this. So what we have is: this is the Comm Centre: "Holyrood, does anyone have an ETA of the closest unit there. I've got Gibbons' Ambulance on the line. They're got another emergency that they were dispatched to first, and they're trying to prioritize there. I know that this one is very dire. I'm just trying to advise him how long before a member is there."

And then some unknown member of the RCMP responds: "You can tell him there's an RNC officer on the scene, there is police on the scene. I'm going to be probably ten, maybe a little more getting there. I just crossed the Trans Canada."

And then we have a female RCMP. I guess when they don't say if it's male or female, we just default to male. "Yeah, I just came by Holyrood Access."

And if we just go down to the next page, because they are in portions. So the Comm Centre comes back and says: "Hello." And she's back on the line with Gibbons' Ambulance Service. "Yes?"

"Yeah, there is an RNC Officer already on the scene there."

"Okay, so are they in the house or outside?" Answer: "Well, they were in the house. They're just waiting for backup to get there."

And the ambulance service says: "Yes, okay."

"Okay." Ambulance service: "So there's no danger or nothing?" And the Comm Centre says: "There's no danger to the ambulance attendants, no."

So here we see, I think this is a, this is the ambulance service – you know, there's been a shooting. They want to make sure that it's safe to send their ambulance attendants to the scene. And what we see from this is the Comm Centre is basically saying: no, no concern, no danger. There's an RNC officer there on site.

Okay. Is that how you would have understood that, too?

CPL BURKE: Yeah, I guess so.

MS. O'BRIEN: Okay.

Do you see any concern here that maybe the Communications Centre was just immediately thinking: Look, there's an RNC officer there. He's – he can't have done anything wrong. There can't be any issue there with him. That's all right. Let's send in the ambulance service.

CPL BURKE: I didn't read that into it, nor did I take much interest in it or put much weight into that conversation.

MS. O'BRIEN: Okay.

Let me put it to you this way. If it had been a civilian calling in to the RCMP Communications Centre to say: Look, I've just killed a man in self-defence, can you please call – you know, send

out your members as soon as possible. Do you think that the telecom centre would have given the same message to the ambulance operator?

CPL BURKE: I have no idea.

MS. O'BRIEN: Okay. Does it cause any concern for you to today that the Communication Centre here is right from the beginning, treating Constable Smyth differently because he is a police officer?

CPL BURKE: No concern for me as the investigator, no.

MS. O'BRIEN: What does that mean, no concern for you as the investigator?

CPL BURKE: What the telecoms operator observed or thought or presumed didn't have an effect on me.

MS. O'BRIEN: Okay.

Do you see that it might be different than how Constable Smyth would have been treated had he not been a police officer, though?

CPL BURKE: I have no idea.

MS. O'BRIEN: Okay.

Looking at scene security, who is responsible for securing the scene?

CPL BURKE: It would be the first responders or first person on the scene.

MS. O'BRIEN: So first police officers –

CPL BURKE: Yes.

MS. O'BRIEN: – responding to the scene. Okay.

Were you aware that the first responders did not surround the scene with police tape?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. You were aware of that?

CPL BURKE: When I got there, there was security there obviously. I didn't know the – I didn't know how the scene was secured before I got there.

MS. O'BRIEN: Okay. And when you got there, were you aware that – did you understand that the tape had not gone all the way around the scene?

CPL BURKE: Yes. To my recollection, yes.

MS. O'BRIEN: Okay.

When I put that question to you on December 1, I questioned: How did they secure the scene? You said: With police tape. And I said: Did it go around the perimeter of the? And you said: Yes. I said: It went around the entire perimeter of the house? And you said: As far as I know, yeah.

CPL BURKE: Yeah. I was just going by memory, and still am today I guess.

MS. O'BRIEN: Okay. So is it fair to say your memory is to where the police tape went around the house is not that great?

CPL BURKE: Sure.

MS. O'BRIEN: Okay.

Were you aware – because I think photographs will show that police tape was not put all the way around the house. I mean that – were you aware that the first responders had not posted anyone to the rear of the house?

CPL BURKE: I am now, yes.

MS. O'BRIEN: Okay. Were you aware –

CPL BURKE: From my review of the file, yes.

MS. O'BRIEN: From your review of the file. Did that cause you any concern?

CPL BURKE: No, 'cause when I got there, there was actually a member inside the house. So, you know, at that time I didn't know what time he got there. But when I was at the scene there was a member inside the house. So I wasn't concerned about scene security because there was a member inside.

MS. O'BRIEN: Inside. Okay. But for the period of time between when the first responders arrived and initially cleared the house and Corporal Foote, who is the member who was inside the house, there was, you know, a fair period time there where there was no RCMP officer inside the house. Does it concern you that the first responders had not thought to put a guard on the back of the house to watch those – 'cause there were two doors on the back of this house, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Any –

CPL BURKE: You know, looking back at that and looking back at the scene, it's a small community, rural community. The property, Mr. Dunphy's property was, you know, was on the road, but the back of the house backs onto a wooded area, you know, no concern with foot traffic or anyone, you know, as it wasn't a walkway or another business or another house behind Mr. Dunphy's house. So I think the scene was secured as best as we could, given the risk of it being contaminated, so

MS. O'BRIEN: Well, couldn't you have – couldn't they have posted someone on the back of the house?

CPL BURKE: I guess they could have posted someone on the back of the house but, you know, it was an initial scene, there a lot, I guess, a lot going on. To post a person back there, I didn't foresee or, you know – I wasn't there, but I could see that it was not a high-risk area for intrusion or scene contamination.

MS. O'BRIEN: Okay. Is it best practice to post a guard at any possible entrances to the house that you are attempting to secure as a crime scene?

CPL BURKE: Best practice, I guess, best-case scenario, but it doesn't always happen.

MS. O'BRIEN: So you're saying it would be the best practice, but it wasn't followed here. Is that what you're saying?

CPL BURKE: I can't say that, no.

MS. O'BRIEN: Were you aware that the officers who cleared the house did not enter all rooms of the house?

CPL BURKE: No, I wasn't.

MS. O'BRIEN: Okay. When did you learn – have you learned that information since?

CPL BURKE: Yes, I guess so. I read that members went in and cleared the house basically before the paramedics went inside.

MS. O'BRIEN: Okay, so you weren't aware that they hadn't gone into the addition of the house which has an exterior door and they hadn't gone into the cat room – you weren't aware of that at the time?

CPL BURKE: No, I don't think so.

MS. O'BRIEN: Okay. Knowing that now, would you, do you think that the scene was properly cleared and secured?

CPL BURKE: I can only say to properly secure that scene you'd go into every room as humanly possible, I guess, or if the doors were able to open, stuff like that so – you should go in every room, yes, to clear a house.

MS. O'BRIEN: Okay. Is it a concern, yes, it wasn't properly cleared?

CPL BURKE: In what way? Concern for what?

MS. O'BRIEN: Does this concern you as the primary investigator on the file that it shows a lack of thoroughness of the work done on the file not to have properly cleared the house?

CPL BURKE: I would be concern for safety in that situation, basically.

MS. O'BRIEN: Concern would be for safety?

CPL BURKE: Yes.

MS. O'BRIEN: For anyone else coming in afterwards?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Now, Constable Cox arrived at, at the scene, we understand, and he was the first officer on the scene at around 2:55 that afternoon – so 5 to 3. And we know that Constable X left the scene with Constable Smyth at approximately 10 past 4. So Constable Smyth was on the scene for about 75 minutes after the RCMP's first response to the scene.

Would that be a usual or unusual time to leave the subject of the investigation at the scene?

CPL BURKE: Yes and no, I guess. All depends on what was going on and circumstances that were involved. I can't say it was usual or unusual, really.

MS. O'BRIEN: Okay.

CPL BURKE: It was a long time, but I can't say it was unusual, I don't know.

MS. O'BRIEN: Okay. Do you know why the decision was made to keep him there for so long?

CPL BURKE: No, I don't.

MS. O'BRIEN: Whose responsibility was it to make the decision to remove him from the scene?

CPL BURKE: I guess it would have been the person in charge of the scene at the time.

MS. O'BRIEN: Okay, and who was that?

CPL BURKE: From my understanding it was Corporal O'Keefe.

MS. O'BRIEN: Okay.

Were you or anyone else from MCU in touch with Corporal O'Keefe?

CPL BURKE: I wasn't.

MS. O'BRIEN: Okay, do you know if Sergeant Osmond was?

CPL BURKE: No, I don't.

MS. O'BRIEN: Okay.

For that period that he was on the scene, should Constable Smyth have been asked or requested to sit in a police unit while he was there?

CPL BURKE: I guess. What do you mean?

MS. O'BRIEN: Well, there's some evidence that for some period of this time he was kind of just, you know, walking around, or he was just sort of left to go wherever he wanted to go –

CPL BURKE: Right.

MS. O'BRIEN: – and there is evidence that at some time he was asked to sit in, in a, in a police unit.

CPL BURKE: Yes.

MS. O'BRIEN: So I'm wondering, you know, should he have been asked to sit in the police unit throughout that period of time?

CPL BURKE: Yes.

MS. O'BRIEN: Constable X who drove – transported Constable Smyth from the scene stated that, that he had quickly diverted conversation with Constable Smyth from the topic of the day's events, like the incident –

CPL BURKE: Yes.

MS. O'BRIEN: – when he had Constable Smyth in the vehicle with him – and you're aware of that, are you?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Now, that was recorded in Constable X's –

CPL BURKE: Yes.

MS. O'BRIEN: – typed notes, okay.

I understood that police officers are trained to carefully record any spontaneous utterances a potential suspect or subject might make after an incident, particularly during transport. Is that, is that correct?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And I guess the reason for that is that although if someone is under detention, the police won't ask them questions to get information because there might be a concern of breaching their charter rights in doing that –

CPL BURKE: Yes.

MS. O'BRIEN: – if they're, in fact, detained. But if someone makes a spontaneous utterance or just says something without being prompted by a question, that's a fair game statement, that may ultimately be used against them; is that fair to say?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

The notes, sort of Constable X's notes seem to suggest that he might have been even actively trying to prevent statements from being made and that he used the words he quickly diverted, talked about quickly diverting the conversation.

Do Constable X's actions here raise any concern with you that he was treating Constable Smyth differently than he would have another subject of the criminal investigation, a civilian subject, because Constable Smyth was a police officer?

CPL BURKE: No, and I had a chance, I guess, to think over that question or that scenario and I can't really speak for Constable X, but I can speak for members in general. And if they're aware that MCU is going to take over an investigation, members are kind of conditioned to avoid getting involved and waiting for MCU to arrive. So I can offer that explanation without knowing Constable X's intentions or how he handled that situation.

MS. O'BRIEN: So that's different than your answer that you gave me in your interview on December 1, 2016 –

CPL BURKE: Yes, it is.

MS. O'BRIEN: – and I'll review that with you. But before I do, have you had an opportunity to discuss this topic with anybody else between the time that I interviewed you on December 1 and today?

CPL BURKE: No. I knew of the question and wanted to – you know, my answer to that question I'm just trying to search for – but I know members don't like to get involved in MCU investigations and I remember that when I was a constable.

MS. O'BRIEN: Okay. So here's how – just for the record, here is how the questioning went on December 1. I asked you: Normally, wouldn't a police officer who's in the investigative force be trying to capture and record those kinds of spontaneous utterances? To which you answered: Yes. So I said: Okay. I mean, do you think that Constable X would – had Constable Smyth not been a police officer that Constable X would have been trying to divert the conversation to prevent that from being recorded? And you answered: I have no idea. I said: Okay, does it raise some concern with you that that might be the case? And you answered: Yes. And I asked: Was it ever addressed with Constable X? And you said: No.

So that was your answer then, but you're giving us a different answer today. You're saying upon further reflection?

CPL BURKE: Yeah. My answer is not that different. I just put it in more, I guess, more context around it and offering an explanation that I can't really offer as speaking for Constable X.

MS. O'BRIEN: Okay.

Now, the Alberta Serious Incident Response Team, or ASIRT – we will talk about it a bit towards the end of your evidence, but they did a review, as I think most people are now aware. They did a review of the RCMP investigation in this matter and they issued a report. And one of the concerns that they raised was that some of the first respondents did not take note, or did not take sufficient notes to capture – particularly their early interaction with Smyth, capture his statements, his demeanour in the immediate aftermath of the shooting.

Did you agree with that criticism?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Had you noted that yourself when you were reviewing the file?

CPL BURKE: There was some, you know, there's always some effort that we have to make to get all members notes, notebook notes and general reports and everything. So it wasn't a surprise to me that they made that comment.

MS. O'BRIEN: Okay. No, but my question was, had you, in your review of the file, noticed that, that the first responders notes were inadequate?

CPL BURKE: The notes themselves? No, no.

MS. O'BRIEN: So you hadn't noticed that?

CPL BURKE: No. The notes that I did get, you know, they were what they were. You know, if I got three or four lines of notes, then I assume that's all the member had to say about it.

MS. O'BRIEN: Okay. But that's not the view that ASIRT took, right?

CPL BURKE: Yes, of course.

MS. O'BRIEN: ASIRT said these notes are respectfully inadequate, and as a result of the ASIRT report the – at least two of the first responders were actually interviewed by the RCMP, right?

CPL BURKE: Yes.

MS. O'BRIEN: But you were saying ASIRT noticed that as an issue, like, the inadequacy of the notes –

CPL BURKE: Yes.

MS. O'BRIEN: – but you hadn't. You were just happy to get some notes from these gentlemen. Is that what you're saying?

CPL BURKE: Well, I made a, you know, an effort to get all notes and I assumed that the notes I had were the police officers full notes.

MS. O'BRIEN: Okay. But in reviewing them could you not – you didn't note that they looked very sparse?

CPL BURKE: I didn't note it at the time, right. I can't say that.

MS. O'BRIEN: Okay. All right.

When these officers were interviewed, and that was some, approximately 17 months later, was it you who – after they got the ASIRT report – tasked someone to go now interview those officers to see if they recalled anymore?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So 17 months later, did they recall, did they have much in the way of additional information to give?

CPL BURKE: I can't remember.

MS. O'BRIEN: Okay.

Was it ever explained to them why they were being interviewed?

CPL BURKE: Yes. They're – some parts of their notes that were unexplained, I guess, or felt that they were inadequate.

MS. O'BRIEN: Okay. Were they told that ASIRT had raised a concern about their work?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Do you know that directly? Or how do you know that because it's not what the officers had testified to. They just –

CPL BURKE: What –

MS. O'BRIEN: Like Corporal O'Keefe testified he didn't understand at the time why he was being re-interviewed or being interviewed by the RCMP.

CPL BURKE: Oh, yeah. I don't know. I tasked those statements out and it was because of the ASIRT report that we were getting the additional statements.

MS. O'BRIEN: And it was Constable Fudge who you tasked that task to, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Would you have told Constable Fudge, please tell these officers why we're having to interview them now?

CPL BURKE: I don't know.

MS. O'BRIEN: Okay.

Commissioner, we're about to enter into a fairly lengthy segment about Constable Smyth's interview and so perhaps now would be a good time for the afternoon break.

THE COMMISSIONER: All right, we'll break for 15 minutes.

MS. O'BRIEN: Thank you.

MS. SHEEHAN: All rise.

The Commission of Inquiry is recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

MS. O'BRIEN: Thank you, Commissioner.

Before we begin, we'd ask to have one further exhibit entered into evidence and that's Exhibit P-0511.

Could we just get an order for it?

THE COMMISSIONER: Oh, so ordered.

MS. O'BRIEN: Thank you.

THE COMMISSIONER: Sorry about that.

MS. O'BRIEN: Okay.

Prior to you and Corporal Henstridge interviewing Constable Smyth on April 6, what preparation did you do for the interview?

CPL BURKE: I know we had a discussion about that interview, Sergeant Osmond, Corporal Henstridge and I.

MS. O'BRIEN: Okay. So what did you discuss? I mean what – did you come up with a plan or a strategy for the interview?

CPL BURKE: Yeah. First it was a – whether the statement would be cautioned or not.

MS. O'BRIEN: Okay.

CPL BURKE: When I say cautioned, it would be a police caution, which entails advising Constable Smyth of his right, I guess, not to provide a statement, and the statement that he does give can be used as evidence in court.

MS. O'BRIEN: Okay. And so you discussed whether or not to make it a cautioned statement. And what was the outcome of that discussion? What did you decide to do?

CPL BURKE: Our outcome was that the statement would not be cautioned.

MS. O'BRIEN: Okay. And did you do any other planning for this statement, any other discussions of what kind of information you wanted to get from Constable Smyth? What type of plan, you know.

CPL BURKE: The statement was tasked to Corporal Henstridge, and I don't know what plans or what strategies he came up with. But from our discussion, the statement wouldn't be cautioned and we're fearful that he would not give a statement if we provided him with a caution.

MS. O'BRIEN: Okay. So that was your reason for not cautioning him?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: And at that time he was a witness, and we didn't want to influence his recount of the event in any way. So the plan was to obtain a pure version statement from Constable Smyth.

MS. O'BRIEN: Okay. And again, was it your intention after getting his pure version statement to then ask him some questions and fill in – to get more information or detail that you felt you needed?

CPL BURKE: Yes, and I think those questions, and which they usually do, come from his pure version. We, you know, the questions would be some clarifying issues or anything that came out of the pure version portion of the statement that we wanted to ask questions on.

MS. O'BRIEN: Okay. So did you have any plan about the kind of details or information you wanted to get from Constable Smyth?

CPL BURKE: Not to my recollection.

MS. O'BRIEN: Okay.

And at that time, was your intention at the time or plan at the time, only to do one interview with Constable Smyth?

CPL BURKE: I would say, yes.

MS. O'BRIEN: Okay. And you did say yes, actually, when I asked you that question on our interview. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Did you consult with anyone else? I mean, you said you consulted with Sergeant Osmond and Corporal Henstridge as to about the issue of the caution. Did you consult with them at all? Was there any consultation between the three of you as to the strategy?

CPL BURKE: Not – no more than a pure version.

MS. O'BRIEN: Okay, no more than a pure version.

CPL BURKE: Yeah.

MS. O'BRIEN: All right. So this was one of the critiques by ASIRT, was it not?

CPL BURKE: Yes it was.

MS. O'BRIEN: Okay.

So I'm going to bring that up, P-0004, which is the ASIRT report; and Madam Clerk, if you take me to page 4 of that document, please. So at the ASIRT report, Sue Hughson, who's the author of this report, writes, "At a minimum, careful consideration should be given to the approach to the interview of the subject officer in advance and any tactics or strategies should be documented along with principled reasons why those tactics or strategies were selected. In this case, the interviews observed were very informal in the context of a homicide investigation. This may well have been an intentional approach, however, this would best be documented to demonstrate a recognition that while it might be perceived a certain way, the approach was carefully considered and determined to be the most advantageous to the investigation."

So is that, is that a fair criticism from ASIRT?

CPL BURKE: Yes it is.

MS. O'BRIEN: Had you interviewed the subjects of homicide investigations previously?

CPL BURKE: Yes. But, I'm not usually tasked with those interviews.

MS. O'BRIEN: Okay. In this case, the interview took just over an hour and a half. How would that compare to interviews with subjects of investigations on other, you know, serious events like this that you've experienced in the past?

CPL BURKE: It all depends on the interview.

MS. O'BRIEN: Okay.

CPL BURKE: I know we did a – we've done interviews that lasted four hours, but the subject didn't say anything.

MS. O'BRIEN: Okay.

CPL BURKE: You know what I mean? Like –

MS. O'BRIEN: Sure. So that – an hour and a half is, you're not finding anything unusual about that in comparison to your other investigations.

CPL BURKE: No.

MS. O'BRIEN: Okay.

Now, Constable Smyth arrived at his interview with notes. Is that correct?

CPL BURKE: Yes, correct.

MS. O'BRIEN: Okay. And the, he – you did not get a copy from him that day. Is that right?

CPL BURKE: Yes, we simply forgot to obtain them after the interview.

MS. O'BRIEN: Okay. But then he emailed them to you the next evening, I think, April 7, at around 20 to 10 p.m. Does that sound right?

CPL BURKE: Sure.

MS. O'BRIEN: Okay. All right.

Was Constable Smyth permitted to refer to those notes during his interview?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Did you ask him if he had any assistance or input from anybody else in writing those notes?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. Should you had asked him that question?

CPL BURKE: I shouldn't have to ask that question.

MS. O'BRIEN: What do you mean by that, you shouldn't have to ask that question?

CPL BURKE: Police officers, the notes that you make are your own notes and they shouldn't be influenced by anybody else.

MS. O'BRIEN: Okay. And you're saying that Constable Smyth should have known that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And I think I asked this question earlier but just to confirm, you did not ask him whether or not he had spoken to anybody else or who he had spoken to about the incident prior to giving his interview with you; is that right?

CPL BURKE: No, but I knew he spoke with a lawyer, his lawyer I guess at the time.

MS. O'BRIEN: Okay. But you didn't ask him about anyone else? I know everyone is entitled to legal advice and that's confidential advice.

CPL BURKE: Sure.

MS O'BRIEN: But did you ask him if he had spoken to anybody else?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay.

Should you have asked him that question?

CPL BURKE: No.

MS. O'BRIEN: Okay.

That's not the answer you gave me on our interview, Corporal Burke. I'm just gonna bring you to that, on December 1, when I asked you that question, and it's on page 287 of the transcript. Question: Did you ask him when he came into the interview whether he had spoken about the incident with anybody else? Answer: No, I didn't. Question: Okay. Would that not have been a good question to ask him? Answer: Yes.

So you're giving a different answer today than you did in our interview.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So which is the correct answer?

CPL BURKE: It's a judgement call. I'm not saying it was wrong not to ask him if he spoke to anyone else about the incident. I don't disagree with asking him and I don't disagree with not asking him. Like, it's a judgement call. That's all I can say about it.

MS. O'BRIEN: Okay.

And you just talked a few minutes ago about why you had decided not to give Constable Smyth a caution – and this too was one of another one of the criticisms that was raised by ASIRT, is that not right, that Smyth should have been cautioned so that he was aware that this was a homicide investigation and that he could have some potential jeopardy here?

CPL BURKE: Yes.

MS. O'BRIEN: Do you recall that? Do you agree with ASIRT on this point?

CPL BURKE: Yes, I agree with ASIRT on that point. They also go on to say that every investigation is different, every interview is different and judgement calls are made on caution or

no caution, and it could go either way. We decided not to caution him. Looking back at it, I don't think we would have cautioned him. You know, looking back at the investigation with hindsight, I wouldn't have cautioned him now, basically.

MS. O'BRIEN: So when you look at hindsight now, you still think you should not have cautioned him?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: Although you know the caution –

MS. O'BRIEN: I'm just going to just stop you there for a moment because I want to, before you leave that point – so when I asked you that question, you know, to look back at the interview, on your interview on December 1, I understood your answer to be different than you just gave then a moment ago. So I'll take you to that and you can just comment on it.

CPL BURKE: Yes.

MS. O'BRIEN: I'm at page 302 and page 303 of your transcript of the December 1 interview. Question: Having read the ASIRT report, do you still – you know, have you changed your mind on whether or not you should have cautioned him or not? Answer: Yeah, like it was a decision at the time. If we had the same scenario and we had the same discussion, we might have come up with the alternate decision to caution him. So I don't disagree with that. In looking at it, yes, a caution would have been appropriate.

So on December 1, you were saying, kind of looking back in hindsight, a caution would have been appropriate and then when I asked you the same question today, I understand your answer to be that looking back at it, you still maintain that a caution was not appropriate.

CPL BURKE: You know, the answers that I provided in your interview and the answers I'm providing today are very similar. I'm still – you know, there's still a judgement call on the caution or not. Looking back at it, maybe I would give the caution, but it's not – I don't see it as being a mistake that we made. I see it as a judgment call we made at the time and, you know, looking back at it, it would still be a judgement call and it may be caution, it may not be.

I still think in hindsight even, after reviewing it all again, if we would have provided a caution to Joe Smyth that day, I don't think we would have obtained a statement from him.

MS. O'BRIEN: Okay. But you're saying that your answers during the interview and your answers today are very similar, and maybe I'm misunderstanding because that's not how I understand them to be. I understood your answer to be that today when I put the question to you, looking back in hindsight, that you still think that not cautioning Constable Smyth was the right decision –

CPL BURKE: Yes.

MS. O'BRIEN: – and on December 1, I understand your answer to be, looking back at the investigation on December 1, that you felt that a caution would have been appropriate. So I actually see those answers as contradictory.

CPL BURKE: I don't. I explained in the interview and I explained today that it's a judgement call and, on any day, the answer could be different.

MS. O'BRIEN: So if I asked you tomorrow what would the answer be, a different answer?

CPL BURKE: It would be a judgement call then. But after the interview and before my testimony, I had a chance to review the file again and that's the answer I came up with. I can't help that.

MS. O'BRIEN: Okay.

Now ASIRT also – sorry, I should follow up on that one point – you're saying now that you really feel that if Constable Smyth had been cautioned, he would not have given the statement. Is that what you just said?

CPL BURKE: Yeah, it's an opinion.

MS. O'BRIEN: Okay. Based on what?

CPL BURKE: Based on my review of the file.

MS. O'BRIEN: Okay. But what in the file did you see, because everything we're seeing, or everything I'm aware of to date is that Constable Smyth was, you know, incredibly co-operative with the RCMP.

CPL BURKE: Yes.

MS. O'BRIEN: Like I have not seen, you know, other than he asked to have his statement delayed, but that's the only – I've seen him be very responsive –

CPL BURKE: Uh-huh.

MS. O'BRIEN: – from the evidence that we've had come out here now. So what in the file is making you say now that you feel that if had you actually cautioned him, he would have declined to speak with the RCMP?

CPL BURKE: I just think it's, you know, and it was something we discussed at the time – police officers know our techniques, and one of our techniques in interviewing is to obtain something from the subject of interest, whether that be a statement that's totally fabricated or a statement that's all truth. If they say something, we can use it. So Joe Smyth would have known that. And our experience when anybody speaks to counsel, their lawyer, their lawyer would say don't give a statement. So we took that into consideration as well.

MS. O'BRIEN: Corporal Burke, is that a fair statement to make? Have you not taken interviews from people who have been represented by counsel and who have sought advice from their counsel and still offered to give a statement to the RCMP?

CPL BURKE: Yes and no. I guess there's oftentimes that we would have a person in the interview room and once they speak to counsel, they don't talk to us anymore.

MS. O'BRIEN: Right. But I think my point was that's not always the case, is it?

CPL BURKE: I don't know what point you're trying to make.

MS. O'BRIEN: Well, your suggestion, I thought, was that if Constable Smyth had spoken to a lawyer, the inevitable result would be that he wouldn't give a statement.

CPL BURKE: It was a consideration that we took into account.

MS. O'BRIEN: Now, ASIRT also raised a concern about the RCMP having revealed information to Constable Smyth during the interview. And the example that they gave in their report is that you and Corporal Henstridge informed Constable Smyth that there was a round in Mr. Dunphy's rifle. Do you recall that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And do you recall that happening in the interview?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And is it fair to say that good practice, good investigative practice is that you don't provide information to the subject of your interview or any results of the investigation to the subject unless there's an investigative purpose for it. So you don't give them any information unless you've got a reason for doing so and that reason being one that would further your investigation.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

In this case you gave Constable Smyth a number of pieces of information during his interview. Is that not right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And were these pieces of information given for any investigative purpose?

CPL BURKE: No.

MS. O'BRIEN: No. Okay.

Do you think that Constable Smyth's being a fellow police officer influenced your judgment in giving him information during the interview that wasn't for an investigative purpose?

CPL BURKE: I don't think so.

MS. O'BRIEN: Okay. So I mean that would – would you be fair to say it was an error or a mistake on your part to give him that kind of information without advancing the, advancing your investigation?

CPL BURKE: You know, when I was asked this question, you know, when we got the ASIRT report, I went back to the interview and looked at, you know, the portions of the interview they were talking about and didn't really see a whole lot. And then you brought it up in my interview before the testimony and I went back and I kind of – I didn't notice it because the information that was provided I felt were minor or it wouldn't affect our investigation.

MS. O'BRIEN: Okay. Well, we'll review some of those but this is the day after the shooting. It's very early in your investigation at this time, is it not?

CPL BURKE: Yes.

MS. O'BRIEN: Yeah. This was an investigation that didn't conclude until this past September and we're talking about April 6 the next day. So I mean how can you know that early in the investigation whether or not a piece of information is relevant or could be relevant or might ultimately affect the investigation by sharing it with the subject? I mean there's no way really for you to know that early on, is there?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Now with respect giving Constable Smyth the information about the bullet, ASIRT actually in their report noted positively that prior to giving Constable Smyth the information about the bullet, that you and Henstridge actually left the interview room, you left Constable Smyth there and you went and consulted with Sergeant Osmond before giving him the information.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And I understand that during the course of this interview, Sergeant Osmond was monitoring the interview in another room, right?

CPL BURKE: Yes.

MS. O'BRIEN: So he was watching you over a video feed live, as you were doing the interview. Okay.

And – now, is it fair to say that you had not consulted about this in advance but when Constable Smyth during the interview raised the issue of whether or not there was one in the gun, that you thought at that point, well, here's good – what we should do before we do that is go out and consult.

CPL BURKE: Yeah.

MS. O'BRIEN: Okay. And then you consulted together and you, the three of you determined that it would not negatively impact your investigation to give him that information –

CPL BURKE: Yes.

MS. O'BRIEN: – and then you came back in the room and gave Constable Smyth that information.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And I understand you did that to help put his mind at ease. Is that –?

CPL BURKE: Yes.

MS. O'BRIEN: Yeah, okay.

Now, for the other pieces of the information that you gave Constable Smyth, is it fair to say that you did not do any consultation on those?

CPL BURKE: No.

MS. O'BRIEN: Okay. And I just note, I think what ASIRT's comment here was that it was good you consulted and considered and documented in the file that was an appropriate thing to do, but you'd only done that appropriate consultation and documentation for the information about the bullet, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Can you recall any other investigation in which you gave the subject this type of information at such an early stage in the investigation?

CPL BURKE: I can't recall, no.

MS. O'BRIEN: Okay. So is it fair to say this would be the first time?

CPL BURKE: Every investigation, every interview is different.

MS. O'BRIEN: Okay. So this was –

CPL BURKE: It's hard to compare them.

MS. O'BRIEN: Right. So this was the first time like this, hey?

CPL BURKE: I'll have to say, yes.

MS. O'BRIEN: Okay.

All right. I'm going to take you to a few examples of where you gave some information to Constable Smyth. And I'm going to ask Madam Clerk to bring up Exhibit P-0119. And I ask Madam Clerk to go to Page 61.

MR. KENNEDY: Would that be in the first statements, Ms. O'Brien?

MS. O'BRIEN: Yes, it is.

Okay. So this is you to Constable Smyth. You say, "Ah, you know, we're doing, you know, a thorough investigation of what went on and, of course you know, a major part of that is talking to you. You're the only witness, you know what I mean." He says: "Yeah."

"So, ah ..." And then Constable Smyth says: "And nothing in those cameras, eh? Had no..." And you say: "No." He says: "No."

And Henstridge go on, just says: I don't know if they'd probably, would, would, they'd be probably of much help anyway.

So here you are, Constable Smyth was aware there was video – security cameras, right? He had already been aware.

CPL BURKE: Yes.

MS. O'BRIEN: He'd mentioned that the day before to Corporal Henstridge that –

CPL BURKE: Yeah.

MS. O'BRIEN: – he'd seen cameras, but he didn't know whether they were operational or not.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So here in his interview you're telling him that they weren't operational and so they, they didn't capture any of the incident, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Was that an error for you and Corporal Henstridge to give that information to Constable Smyth?

CPL BURKE: Looking back on it, yes.

MS. O'BRIEN: Okay.

CPL BURKE: However, the consequences of giving him that information, I didn't think was severe. I also, I was kind of giving information that appeared obvious to me. I don't know if it appeared obvious to Constable Smyth or not, but the fact that the cameras weren't working was pretty obvious when I went there that night, even in the dark. And the – I thought it was obvious that he was the only witness.

MS. O'BRIEN: Okay. But it had not been obvious to him because he had specifically said the night before to Henstridge he didn't know whether the cameras were working or not. So he didn't have that information.

CPL BURKE: Exactly. Well, that's where my mindset was I guess.

MS. O'BRIEN: Okay. Do you think you would've had the same mindset if Constable Smyth had not been a police officer? Do you think you would have shared that information with him had he been a civilian?

CPL BURKE: I can't really answer that. I don't think it would have been any different.

MS. O'BRIEN: Okay.

Go to page 63 of this document please, Madam Clerk.

So this is Constable Smyth asking you some questions. Constable Smyth asks: "Do you know where that firearm came from?" And you answer: Well there were firearms – there's one firearm un – unaccounted for in that family. And I don't know if his brother knew where it was or, without giving too much detail, his father passed away years ago and had three firearms. His brother had two of them. That one you spoke to before you went to Donald Dunphy's. And there was one outstanding, so – and here you're giving Constable Smyth, you know, some information about where the firearm came from. Was that appropriate to give him?

CPL BURKE: No.

MS. O'BRIEN: No. Okay.

CPL BURKE: I don't think I was giving him a whole lot of information by the looks of that.

MS. O'BRIEN: Okay.

Page 64, please, Madam Clerk. And this is Corporal Henstridge. So this is Corporal Henstridge talking about the, telling Constable Smyth some more information about Mr. Dunphy. My

understanding, just curious, that's why the camera was up there, though – and I think that had to do with the marijuana licence. Apparently that had something to do with the licensing. He had to have it in order to get a licence, but yeah, he was, he smoked a lot of pot. That, we do know. He wasn't a drinker.

And Smyth says: I'm just wondering if his licence were for, if he had a lot more than what his licence was for. Was he in fear of prosecution by me being there? And Henstridge says: He's been busted before, you know, for that kind of stuff, so maybe. And then Smyth says: Maybe; who knows? And you add in: Again, and he would have had the drug paraphernalia on that table in front of him, right? And Smyth says: Yeah.

Was there any reason that, for you and Corporal Henstridge to tell Constable Smyth that Mr. Dunphy smoked a lot of pot, that he'd been busted before, that there was drug paraphernalia in the room – was there any investigative purpose for that?

CPL BURKE: I can't speak to what Corporal Henstridge said, and the drug paraphernalia was in the room.

MS. O'BRIEN: Okay, but had Constable Smyth already mentioned that in his pure version statement?

CPL BURKE: What's that?

MS. O'BRIEN: About the drug paraphernalia.

CPL BURKE: It was in the room.

MS. O'BRIEN: Okay.

CPL BURKE: That's what I said.

MS. O'BRIEN: That's what you said, that's what you said. Okay.

Do you think you would have given this type of information to the subject of an investigation about the victim or the person who is now deceased because of the interaction – do you think you would have given that kind of information to Constable Smyth had he not been a police officer?

CPL BURKE: The only thing I can say is that I said drug paraphernalia on the table and that part of the information I can't say if I would have gave that to a civilian or not.

MS. O'BRIEN: Okay, well, what about Corporal Monty Henstridge? You're sitting there, you're the primary investigator, did it raise any concern to you that he was giving that kind of information to Constable Smyth?

CPL BURKE: Looking back at it, it raises a concern, but I wasn't concerned at the time. And like I said, I can't speak for Corporal Henstridge.

MS. O'BRIEN: Okay. So what you're saying now looking back at it, it does raise concern for you but at the time you had not noted it as a concern; is that right?

CPL BURKE: I guess so. Yes.

MS. O'BRIEN: Is that yes? That's what you just said.

CPL BURKE: Yes.

MS. O'BRIEN: Yes, okay.

ASIRT also raised a concern about you and Corporal Henstridge using comforting language with Smyth during his interview. Do you recall that in ASIRT's critique?

CPL BURKE: Yes.

MS. O'BRIEN: And I understand that Sergeant Osmond had raised this with you on that day; can you tell the Commissioner about that?

CPL BURKE: After the interview, Sergeant Osmond had a chat with myself and Corporal Henstridge that, you know, we may have appeared too friendly.

THE COMMISSIONER: May have what?

CPL BURKE: May have appeared too friendly with Constable Smyth.

MS. O'BRIEN: Okay.

And he did that immediately after, so after he'd observed it.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And did he make any comment to you about laughing or joking or that kind of stuff?

CPL BURKE: I can't remember.

MS. O'BRIEN: You can't, okay.

This discussion that was had between you and Sergeant Osmond, was Corporal Henstridge there as well?

CPL BURKE: Yes.

MS. O'BRIEN: Was that recorded anywhere in the RCMP file?

CPL BURKE: I don't know.

MS. O'BRIEN: Have you ever seen it in the file?

CPL BURKE: Not to my recollection.

MS. O'BRIEN: Okay.

Is that the type of thing that should be recorded in the file?

CPL BURKE: Yes.

MS. O'BRIEN: Do you think the interview would have had the same tone had Constable Smyth not been a police officer?

CPL BURKE: I can't answer that.

MS. O'BRIEN: Pardon?

CPL BURKE: I can't answer that.

MS. O'BRIEN: Okay.

I'm going to take you to a few examples of this type of comforting language. I ask Madam Clerk in the same document to go to page 56.

Okay. So Constable Smyth here asks you a question: And what about my firearm? Was it four rounds missing from that? You answer: And the scene is still being processed as well, and the firearm stuff has –

MR. KENNEDY: Excuse, Ms. O'Brien, what page is that?

MS. O'BRIEN: Oh, I apologize; 56.

And the firearm stuff hasn't been processed yet so – he says: Okay. And Henstridge says to him: I will say trust your memory. And Smyth says: Yeah. He says: Yeah, that's fair to say. And then you say: And, you know, your account of what you gave us and what we know is pretty accurate.

Was that appropriate?

CPL BURKE: No.

MS. O'BRIEN: Okay.

I'm going to page 59 now. I apologize; I'm just having trouble finding my cite, it's on – my note is on page 59. Thank you.

So this is Smyth, saying: I don't – and he is talking about knowing whether there is a bullet in the gun. He says: I don't know if I want to know. Because I feel like if the answer is no, then I don't know what he was doing, you know. Did he want to die, or did – or was he just trying to intimidate me? Did he even know I was carrying a firearm? You know, he is old school – thinking RNC; they don't carry firearms. I'm giving him the effing shock of his life. And I don't know if it was loaded; then I walk out of here feeling like I have saved my life. And Corporal Henstridge says to Constable Smyth: You saved your life.

Was that appropriate?

CPL BURKE: Corporal Henstridge said it. I can – looking at it; maybe not appropriate.

MS. O'BRIEN: Okay.

Any concern here that someone reading this may interpret that statement from Corporal Henstridge on April 6 – that Corporal Henstridge on that day had concluded that Constable Smyth had acted in self-defence. It sort of seems like jumping to the ultimate issue. Do you see that as a concern?

CPL BURKE: I can't say what Corporal Henstridge was assuming or concluding.

MS. O'BRIEN: Can you see that concern that someone looking at this and trying to, you know, look at the investigation to see whether there are any signs there of early tunnel vision, or early, you know, narrowing in on a ultimate answer, prior to the investigation might be completed – can you see how someone may have concerns about Corporal Henstridge saying to Constable Smyth on April 6: You saved your life.

CPL BURKE: I don't know how to answer that. I can only assume what – when Corporal Henstridge said you saved your life, what he was talking about, I don't know. And I think it's whether the firearm was loaded or not.

MS. O'BRIEN: Okay.

CPL BURKE: So I don't know if that goes towards any conclusions or not, it's just, I think he was referring to a round in the chamber.

MS. O'BRIEN: Okay.

You're the lead investigator on the file. Did you speak to Corporal Henstridge about this statement and the other statements that you said have been of some concern following the interview?

CPL BURKE: We discussed it since.

MS. O'BRIEN: Okay.

CPL BURKE: Briefly. I don't know if we ever –

MS. O'BRIEN: Okay. What would have been your discussions since?

CPL BURKE: You know, I guess what was said in the interview.

MS. O'BRIEN: So what do you mean, you just – did you discuss the appropriateness of these comments?

CPL BURKE: No, nope.

MS. O'BRIEN: Okay.

Page 60 that I can go through; it's just the next page. So this is Corporal Henstridge saying to Constable Smyth: And like I told you before, his brother and sister have said nothing, nothing but support for you. They feel bad for what you're going through, and so – so you don't need to think about that, either.

Smyth says: What about his daughter? His daughter's got a lot of questions. Some of her questions are relevant and some of them are not really relevant at all. She just wants answers as to what happened and no one, by their account, was aware that there was a firearm in the house, really. But, yeah, there's a lot of questions from her, but not much you can answer. So that's where we're at. But you gave an amazing account and, like, it was incredible. I'm glad we waited, to be honest, because – yeah, me to-.

So again, is that an appropriate thing for an interviewer to be saying to the subject of an investigation that they gave an amazing account?

CPL BURKE: I don't know what Corporal Henstridge meant by that.

MS. O'BRIEN: But I'm looking for your opinion, Corporal Burke, as the lead investigator on this file.

CPL BURKE: I don't know the appropriateness of it, because I don't know what he meant by that. You'd have to ask Corporal Henstridge.

MS. O'BRIEN: Okay, well, we certainly will get an opportunity to do that.

If I could go, Madam Clerk, to page 67.

Again, you may have the same answer that you're not sure that you can answer any questions on this, but I will bring it to you anyway. This is Corporal Henstridge to Constable Smyth: We certainly appreciate your coming down, because your account is, it's pretty powerful, I think that's fair to say. And you say, yeah – so you're agreeing with him this time, Corporal Henstridge.

And then you say: You know, from what we do know, it's – and Henstridge says: And I will say that I don't think you need to second-guess anything that happened in that room. I don't know if I'm supposed to say that or not, Steve, but I think you can leave the room – and you're talking, I think, to Smyth – I think you can leave the room if you're feeling that way. And you say: Yeah, and that's my assessment anyway. And Smyth says: I appreciate that.

So I think in this case you are agreeing with Corporal Henstridge's statements to Constable Smyth, are you not?

CPL BURKE: Yes.

MS. O'BRIEN: Okay, and were those appropriate statements to make or appropriate statements to agree with?

CPL BURKE: No.

MS. O'BRIEN: Okay.

During this interview, did you question Constable Smyth on his training, on his use-of-force training?

CPL BURKE: No.

MS. O'BRIEN: Training, anything to do with his de-escalation tactics?

CPL BURKE: No.

MS. O'BRIEN: Okay. Would that not have been relevant to the investigation?

CPL BURKE: Not at that time, no.

MS. O'BRIEN: Why wouldn't it have been relevant at that time?

CPL BURKE: If we're looking at a homicide investigation, his training as an RNC member or his de-escalation tactics doesn't really come into our investigation. It's not part of the elements of the offence. So those are not things that we initially were planning on asking Constable Smyth.

MS. O'BRIEN: Isn't his – wouldn't his use-of-force training be relevant to an analysis of section 25 of the *Criminal Code*, whether he acted –

CPL BURKE: Only to the point where – as long – you know, he was a member of the RNC and authorized by law to carry a firearm. His policies and training, unless he wasn't allowed to carry a firearm because he couldn't pass the course of fire or something, that may come into it, but the fact that he was a peace officer in Canada and authorized to carry a firearm, that satisfied section 25.

MS. O'BRIEN: Okay.

As part of your investigation you engaged Knapman, Wayne Knapman – I think it's Corporal Wayne Knapman, I believe, or maybe it's –

CPL BURKE: Yes.

MS. O'BRIEN: It's Corporal Wayne Knapman as a use-of-force expert to provide you with an opinion on Constable Smyth's use of force. Right?

CPL BURKE: Yes.

MS. O'BRIEN: Was that something that – an investigative step you felt you needed to do in order to come to your ultimate conclusion about this file?

CPL BURKE: Yes, because section 25 does talk about appropriate force for a situation.

MS. O'BRIEN: Right.

CPL BURKE: And, you know, we're all trained in use of force as members, but we're not all experts, and I identified a use-of-force expert to look at the information and to assess whether the actions taken by Constable Smyth were appropriate uses of force in this scenario.

MS. O'BRIEN: Okay.

So that was ultimately information that you did need to get from Constable Smyth, about information about his use-of-force training and how he used force.

CPL BURKE: Yes.

MS. O'BRIEN: But you didn't do it on that day?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Did you question Constable Smyth about his work experience, for example, how long he's been with the force or what areas he'd worked in?

CPL BURKE: Not at that interview, no.

MS. O'BRIEN: Okay.

Did you ask him if he was wearing glasses?

CPL BURKE: No.

MS. O'BRIEN: Did you ask him if he needed glasses?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Was he wearing glasses during the interview?

CPL BURKE: I'd have to – I don't know, I don't know.

MS. O'BRIEN: Did you ask him if he'd ever drawn or fired his weapon before?

CPL BURKE: Not in the interview, no, I don't think.

MS. O'BRIEN: Okay.

Did you ever ask him that?

CPL BURKE: We got the use of force – we asked for use of force or any use-of-force reports from the RNC.

MS. O'BRIEN: Right. So you looked at use-of-force reports from the RNC but you never asked Constable Smyth that question?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Did you ask him if he had ever been disciplined for inappropriate use of force?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Did you ask him if he had ever been involved in any altercations or fights or things that might not have been reflected in his personnel file with the RNC?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Would these types of questions have been relevant to the investigation?

CPL BURKE: The information would have been relevant to the investigation somewhat. Instead of asking Constable Smyth, we sought those records out from the RNC.

MS. O'BRIEN: Okay.

Did you ask Constable Smyth if he had any mental health issues?

CPL BURKE: No, we didn't.

MS. O'BRIEN: Okay.

Did you ever seek out any other information that might answer the question as to whether or not Constable Smyth had any mental health issues?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Did you ask Constable Smyth if he had any anger management issues?

CPL BURKE: No.

MS. O'BRIEN: Did you ask him if he had any substance abuse problems?

CPL BURKE: No.

MS. O'BRIEN: Did you ask him if he ever received treatment or if he'd ever been referred to treatment – to a counsellor, a psychologist, psychiatrist?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Did you ever do any, take any other investigative steps to determine the answers to any of those questions?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Did you ask him if he consumed any drugs or alcohol that morning?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Did you ask him if he consumed any drugs or alcohol the night before?

CPL BURKE: No.

MS. O'BRIEN: Would that have been a relevant question to ask?

CPL BURKE: Not at that time, no.

MS. O'BRIEN: Okay. Why would it have not been a relevant question at that time?

CPL BURKE: We were looking at the incident itself, the shooting incident and whether that incident itself was a criminal offence. He's a police officer in line with his duties; he was presented with a firearm and he took action. Now, whether that's as far as we go – you know, we wanted to maintain our investigation as a criminal investigation and we didn't want to go outside of that for an investigation or internal investigation into policies and things like that, so elements of a criminal offence is what we are focused on.

MS. O'BRIEN: I understand that but looking at section 25, which is when you look at whether an officer has – and I'm not quoting the section directly but you're looking at whether an officer has used appropriate force.

CPL BURKE: Right.

MS. O'BRIEN: Right.

CPL BURKE: Yes.

MS. O'BRIEN: So you're looking at the reasonableness of that officer's actions?

CPL BURKE: Yes.

MS. O'BRIEN: Would it not have been relevant to that query, those elements of the *Criminal Code* sections that you were investigating, whether or not Constable Smyth had any drugs or alcohol in his system that morning?

MR. KENNEDY: Excuse me –

CPL BURKE: (Inaudible.)

MR. KENNEDY: – Commissioner, I don't know if this is my place to object, since we are dealing the RCMP investigation, but we're also dealing with Constable Smyth. You know, what seems to be forgotten here is that the issue is whether or not a firearm was pointed at him and whether or not he acted in response to that. So there's suggestions being made here, again the implication being made that there are mental health issues, that there are other issues that have not come out. And there's no evidence of that before this inquiry.

THE COMMISSIONER: It, again, Mr. Kennedy, I think that's similar to the objection that was raised by Mr. Avis, and I think I'd have to give the same response. That the question is not put because there was any evidence of mental health issues or alcohol issues. Ms. O'Brien is testing whether the process that was followed was thorough or rigorous enough and appropriate in the situation. So it would seem to me that the questions are appropriate; she should be entitled to proceed with getting the answer now.

I'll hear your submissions on the effect of the responses, whether the fact that Corporal Burke didn't ask these questions that may or may not have any significance, but I think it's an appropriate way of exploring whether the investigation that was carried out was sufficiently thorough or if it wasn't because Constable Smyth was a police officer.

So I think she can continue with that line of questioning but I'll hear you on, at the end, your submissions as to what the effect of that is. Go ahead.

MR. KENNEDY: Yes, thank you, Commissioner, but – we have to know, one of the problems here is what are we gauging this against, what are we measuring it against. I understand that there has been a report commissioned by the, the –

THE COMMISSIONER: There will be three experts that will be questioned. One –

MR. KENNEDY: But we have not seen in terms of Mr. –

THE COMMISSIONER: No, they'll be – it's in the process of being finalized as I understand it, and we'll try and get it to you as soon as we can, but these things take time. You know, there

have been things that we've had to work on, and you have the names of the witnesses and you'll have your opportunity to question them and to see their reports beforehand.

MR. KENNEDY: One of the problems, Mr. Commissioner, I know that one of the areas being explored by Ms. O'Brien, she explored with ASIRT with Ms. Hughson at the, for example at the pre-inquiry interview, and there's relevant information in there on a number of different issues referred to by Corporal Burke today.

THE COMMISSIONER: Right.

MR. KENNEDY: But that's not being put to Corporal Burke. What's being put to Corporal Burke is simply have you done this, have you done that.

THE COMMISSIONER: Yeah, but if you – if there are any questions that are left unasked, you'll be entitled to put them –

MR. KENNEDY: Okay. Thank you.

THE COMMISSIONER: – to Corporal Burke at the end of Commission counsel's questioning.

MR. KENNEDY: Okay. That's fine.

THE COMMISSIONER: That's been true, that's been true for all the witnesses, you know, and we'll continue to do that.

MR. KENNEDY: So I will be able to put to this witness what Ms. Hughson said in her interview with Commission counsel?

THE COMMISSIONER: If it relates –

MR. KENNEDY: Yeah, okay. That is fair.

THE COMMISSIONER: – to the information that the inquiry should have, I don't – what sort of stuff are you talking about? I don't want to give you a blank cheque now. I got to –

MR. KENNEDY: Well, I can tell you right now in terms of this 24 to 72 hours that Corporal Burke talked about, Ms. Hughson clearly stated in her interview with Commission counsel that that is a standard procedure in investigating police officers. She went – she outlined her reasons there for –

THE COMMISSIONER: No, that's fine. I'm not sure there would be any contention about that but whether or not that's reconcilable with the way the ordinary civilian, the member of the public is treated, is something else.

MR. KENNEDY: Ms. Hughson goes on to say that as a former prosecutor she said it was counterintuitive – or whatever word she used – to me to even accept that when I became the director or executive director of ASIRT that police officers would be treated differently or police officers would be given time to give statements. That's certainly not the impression that's been left here today by Ms. O'Brien in terms of her questioning of this witness.

THE COMMISSIONER: Yeah, I'm not sure what you said that the report states in that regard

–

MR. KENNEDY: No, her interview with Commission counsel, it was explored as to whether or not, why are police officers treated differently.

THE COMMISSIONER: Right.

MR. KENNEDY: Is there a reason that they – are they given extra time in terms of before they give a statement.

THE COMMISSIONER: Right.

MR. KENNEDY: Ms. Hughson clearly stated there were reasons why that was the case. She then referred to that fact that as a former prosecutor, she had difficulty herself understanding why police officers were treated differently –

THE COMMISSIONER: Right.

MR. KENNEDY: But once she became the director of ASIRT and was involved in this investigation –

THE COMMISSIONER: She explained in her report, I can't recall now –

MR. KENNEDY: No, not in her report, in her interview with Commission counsel.

THE COMMISSIONER: In her interview with Commission counsel – I'm not sure if I've seen that, but go ahead, sorry.

MS. O'BRIEN: She will be – Sue Hughson from ASIRT will be giving testimony here and those questions will be explored with her.

THE COMMISSIONER: Yeah, and you will be able to question her too.

MR. KENNEDY: My point is, am I allowed, basically, to clear up some of the, what I would suggest is confusion – I'm allowed to put it to this witness what Ms. Hughson said –

THE COMMISSIONER: There's nothing wrong with you saying there will be evidence as I understand of such and such, do you agree or not agree, for example.

MR. KENNEDY: Okay, thank you.

MS. O'BRIEN: I'll move through this line of questioning quite quickly because this line of questioning is really to put to Constable Burke questions that were not posed to Constable Smyth during his interview.

Did you ask Constable Smyth whether he was feeling sick that day?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Did you ask him if he was taking any prescription medications or over-the-counter medications, such as cold remedies?

CPL BURKE: No.

MS. O'BRIEN: Did you ask him if he was taking any substances such as steroids or nutritional substances?

CPL BURKE: No.

MS. O'BRIEN: Okay.

He said in his interview he saw the tweets as ambiguous, do you recall that –

CPL BURKE: Yes.

MS. O'BRIEN: – in terms of the threatening level of them or he saw them –

CPL BURKE: Yes.

MS. O'BRIEN: But now Constable Cox and Corporal O'Keefe and others had reported in their notes and things that went to the files that Constable Smyth had told them that he was investigating a threat against the premier.

CPL BURKE: Yes.

MS. O'BRIEN: Did you note this discrepancy?

CPL BURKE: Yes.

MS. O'BRIEN: Did you ask Constable Smyth about it?

CPL BURKE: No.

MS. O'BRIEN: Did you report the discrepancy in your investigative report on this file?

CPL BURKE: No.

MS. O'BRIEN: Okay.

In Constable Smyth's interview he says that Richard and Debbie Dunphy told him that there was no gun. Do you recall that?

CPL BURKE: Yes.

MS. O'BRIEN: And you had already at that point interviewed Richard Dunphy and Debbie Dunphy, right?

CPL BURKE: Yes.

MS. O'BRIEN: Were you aware that – did you recall from those interviews that I think Dick Dunphy had said that he told Constable Smyth that he didn't know if Donald Dunphy had had a gun?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And Debbie Dunphy had said more or less the same thing in your interview to her.

CPL BURKE: Yes.

MS. O'BRIEN: Did you note this discrepancy between what you had heard from the Dunphys and what you heard from Constable Smyth?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Did you ask Constable Smyth about this?

CPL BURKE: No.

MS. O'BRIEN: Okay. Did you note this discrepancy in your report?

CPL BURKE: I think and, you know, it's, it's – what I based my decision on is that when we spoke to Richard and Debbie Dunphy, they felt bad that they didn't notify Constable Smyth that there may have been a firearm in the house. So I'm kind of – and an officer cannot make an absolute assessment of this, but I think they're feeling bad that they didn't notify him that there may be a firearm in the house. And when they were speaking to us, it's like, you know, they didn't want to say we told him there's no firearms in the house when actually there were. And I think they said I don't know, instead of no.

MS. O'BRIEN: So you think that – you believe what Constable Smyth was saying to you over what the Dunphys were saying to you. Is that –?

CPL BURKE: No, not like that. When we knew that we – we knew that Constable Smyth said that there's no firearms in the house. And I think the way he said that, I believe that when he said that, that's what the Dunphy's told him. And I think they said they didn't know because they felt bad about not telling Joe Smyth that there was a firearm in the house. That's all I can base my decision on.

MS. O'BRIEN: Okay.

CPL BURKE: Whether that's right or wrong, I don't know.

MS. O'BRIEN: Okay, but I understand – I'm just summarizing what I understand you're saying. You believe that you noted the discrepancy, but you believe Constable Smyth's statement to be the more accurate one. That's what I just understood you just said to me, that's why I'm just getting you to confirm that.

CPL BURKE: But the statement, what do you mean, the entire statement or that part about –

MS. O'BRIEN: No, no, on that one asked – just on that one asked.

CPL BURKE: Yeah, I didn't make a big deal of it.

MS. O'BRIEN: Okay. And you didn't make any notes to it in your investigative report?

CPL BURKE: No.

MS. O'BRIEN: Okay.

THE COMMISSIONER: And to be fair, I guess we should note that there was – it would have been 10 years previously. It could have been a case of not recalling –

CPL BURKE: Yes. No, exactly.

THE COMMISSIONER: – I think that was, Richard Dunphy’s testimony was that he thought about it and even went out for a drive to see if he could find Constable Smyth to tell him.

MS. O’BRIEN: Yes.

In Constable Smyth’s first statement to you I believe he says that the gun was on the floor. And I think in his second re-enactment – is the one that was recorded – he positioned the gun on the green tub. And I don’t think he exactly remembered the green tub but he said, you know, I remember it being up against something. And you know, he said he didn’t have any clear memory of the tub itself. But at that time in the second re-enactment –

MR. KENNEDY: Excuse me, could we have references to this? This is not according with my memory. Could we have references to when Ms. O’Brien is going to refer to this, Commissioner?

MS. O’BRIEN: Oh, Mr. Kennedy, certainly. And I’ll just put that one aside so I can come back and ask it when I have the specific reference.

Constable Smyth –

MS. CHAYTOR: (Inaudible.)

MS. O’BRIEN: Pardon?

MS. CHAYTOR: Yeah, the second interview.

MS. O’BRIEN: Yeah.

MS. CHAYTOR: (Inaudible.)

MS. O’BRIEN: Second re-enactment. It’s – I know it’s there; I’ll just get the reference for him.

Constable Smyth was not – you know, looking at his interview there, your first interview with him, he was not questioned in much detail on his timeline, you know, when things happened when. Would you agree that there was a fair amount of time sort of left unaccounted for in Constable Smyth’s statement?

CPL BURKE: Yes. And I guess I took that into consideration that it would be appropriate not to remember every time when a major event happens like that.

MS. O’BRIEN: Okay. Do you feel you posed enough questions to him in order to help, you know, help account for that time?

CPL BURKE: At the time, you know, looking back, maybe we could have asked more questions. I don’t know.

MS. O’BRIEN: Okay.

For one example, it would be that during your interview you didn’t uncover the fact that Constable Smyth had attempted to call Mr. Dunphy six times –

CPL BURKE: (Inaudible.)

MS. O'BRIEN: – that day prior to attending at Mr. Dunphy's home. And that was something that you actually didn't learn about, I don't think, until December 1 of 2016 when you were being interviewed by us as Commission counsel. Is that right?

CPL BURKE: Yeah, looking back I do remember seeing it, though.

MS. O'BRIEN: Okay.

And in your questioning of Constable Smyth, your first interview of him, you didn't uncover that Constable Smyth had sat in his vehicle for a period of time on the side of the road prior to attending Mr. Donald Dunphy's. Is that fair to say?

CPL BURKE: Yes, but other witnesses had seen him on the side of the road.

MS. O'BRIEN: Yeah. Rochelle Nolan gave you a statement where she said that she and her son had saw, saw, you know, what they believed to be Constable Smyth in the vehicle on the side of the road. After you got that information from Rochelle Nolan, why didn't you go back to Constable Smyth to question him on that?

CPL BURKE: No reason, we were just piecing it together, I guess.

MS. O'BRIEN: Okay. Constable Smyth told you he was taking notes at the time that he first noticed the barrel of the gun being pointed toward him. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Did you find the notes he said he took?

CPL BURKE: Yes, I believe they were in the yellow folder.

MS. O'BRIEN: Okay. Were they on the inside or the outside of the yellow folder?

CPL BURKE: They were on the inside.

MS. O'BRIEN: Okay. Did you ever speak to Constable Smyth or ask him about, about, specifically about the notes that you found on the folder?

CPL BURKE: No. He told us that he was making notes and the notes were basically to, I guess get him to stop looking around the residence and to de-escalate the situation. That's how I remember it, I think.

MS. O'BRIEN: Did you ask Constable Smyth whether his yellow folder was open or closed when he, when he drew his firearm when he saw Mr. Dunphy's – the barrel of his rifle?

CPL BURKE: No.

MS. O'BRIEN: Okay. Do you remember a folder drop re-enactment being conducted by members of the RCMP, and I think specifically Corporal Henstridge, as part of your investigation?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Was that, was that folder drop re-enactment, was done with an open or closed folder?

CPL BURKE: I think it was a closed folder.

MS. O'BRIEN: Okay. And the notes that you found on the folder, they were on the inside of the folder, is that right?

CPL BURKE: Yes, yes.

MS. O'BRIEN: ASIRT, that's one of the, the issues they raised. They questioned the value of the folder drop re-enactment.

CPL BURKE: Yes.

MS. O'BRIEN: Did you agree with, with their conclusion or statement on that?

CPL BURKE: Yes, and it's something that we identified.

MS. O'BRIEN: Okay.

CPL BURKE: There wasn't much value in it, but we had to try it.

MS. O'BRIEN: Okay. And I guess, you know, and again, just the folder was, the folder drop re-enactment was done with a closed folder too, so I guess it would have been less consistent with, even less consistent with Constable Smyth's –

CPL BURKE: Yes.

MS. O'BRIEN: – statement. Okay.

During the, during your interview with Constable Smyth, did you ask him at the conclusion to keep the information that you gave him confidential?

CPL BURKE: No.

MS. O'BRIEN: In the statement that Sergeant Kent Osmond took with Meghan Dunphy on April 8 of 2015, which has been entered into evidence as exhibit P-0037 – and I can bring you to the reference if you want – but in, in that statement he essentially asks Ms. Dunphy to keep the information that he's given to her confidential. What would be the difference here? Why would, why would, why would Meghan Dunphy be asked to keep information confidential and Constable Smyth not be asked to keep information confidential?

CPL BURKE: I don't know.

MS. O'BRIEN: Okay.

At this time, Commissioner, I'd like to ask to review a portion of Corporal Burke's interview with Constable Smyth. It's not going to be the full interview. As Corporal Burke has testified, the interview took place, the first part is what he called the pure version part where Constable Smyth recounted his, recounted events and I'm not going to play that portion. We've already had a fair bit of evidence from Constable Smyth on that, but I'd like to take you to the second part of the interview where we see some of the interaction between Corporal Burke, Corporal Henstridge and Constable Smyth.

Madam Clerk, if you could go to 15:49 on the time-stamp there on the interview.

THE COMMISSIONER: What is that exhibit number?

MS. O'BRIEN: Madam Clerk, do you have the exhibit number for that?

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. O'BRIEN: But this is being entered as an exhibit.

Commissioner, we do have an exhibit number and I'll get it for you. I'm just going to bring it to the – so we don't waste time, I'm just going to bring it to the –

THE COMMISSIONER: Yeah, okay. That's right.

Go ahead, we'll get that later.

MS. O'BRIEN: P-0237.

UNIDENTIFIED FEMALE SPEAKER: No, 327.

MS. O'BRIEN: Sorry, P-327.

Okay, I'll bring it up to the (inaudible). Yes.

(Video shown.)

CST. SMYTH: (Inaudible) tactical team.

CPL BURKE: Yeah.

CST. SMYTH: You know, I don't know.

CPL BURKE: Yeah.

CST. SMYTH: I can analyze – I feel like I can analyze the living hell out of that.

CPL BURKE: Uh-huh.

CST. SMYTH: Because part of me says, well, you should have took a uniform. Would that have prevented him doing that? I don't know.

CPL BURKE: I suppose.

CST. SMYTH: Conversely, would it have given him the opportunity to see the uniform and know that we were police –

CPL BURKE: Uh-huh.

CST. SMYTH: – and stand up and pick us off –

CPL BURKE: Right.

CST. SMYTH: – through the window.

CPL BURKE: Yeah.

CST. SMYTH: So I can go either side of it, right. So part of me says, well, maybe you should have took another member and, oh well, you did all the due diligence checks.

CPL BURKE: You're only second guessing.

CST. SMYTH: But it – the only thing I haven't – I didn't second guess was that –

CPL BURKE: Yeah. You did, it was instinctive. It really was. It was just second – it was never –

CPL HENSTRIDGE: Just a couple of questions. And, like, if you're okay with this, I was going to get you to draw a diagram just to kind of illustrate to us the best you can. Obviously a diagram is – is a diagram. But is there any way he could have had any notion that you were coming? Like, do you think that he might have been tipped off by anybody or anything like that? Were you aware of him having a phone in the house?

CST. SMYTH: He had a phone. I knew he had a phone. I had his phone numbers.

CPL HENSTRIDGE: Okay.

CST. SMYTH: I don't know. His brother could have called him but I don't think so. I didn't get that impression from them.

CPL HENSTRIDGE: Okay.

CST. SMYTH: Like I – you don't know –

CPL HENSTRIDGE: So he didn't seem to feel – like when you, when you – when you kind of approached him, he was legitimately surprised that you were there, I guess, would be my question.

CST. SMYTH: Yeah. He didn't seem surprised I was there but – he definitely wasn't surprised.

CPL HENSTRIDGE: Okay.

CST. SMYTH: But he wasn't – I think he was just – he was pretty calm demeanor.

CPL HENSTRIDGE: Okay.

CST. SMYTH: If someone showed up to your door I don't – you or I would probably have reacted no differently.

CPL HENSTRIDGE: Yeah. Right.

His head position, did it change at all like from the time – I think initially you said when you checked on him his head was in what position?

CST. SMYTH: I think it was like this.

CPL HENSTRIDGE: Okay. Was his head ever in a different position than that, or that you recall?

CST. SMYTH: Not that I recall, no. It was – I don't know how far back it was. It was almost just like –

CPL HENSTRIDGE: Okay.

CST. SMYTH: – you know right here.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: I know if it might have went back more or forward more. I don't know.

CPL HENSTRIDGE: Okay. And that's basically it with the exception of a diagram of the living room, if you're – if you'd be willing to –

CST. SMYTH: Yeah, I could.

CPL HENSTRIDGE: – draw something for us.

CST. SMYTH: Are you able to confirm how many times I did hit him or?

CPL BURKE: We're, well, it's – he hasn't had the autopsy yet.

CST. SMYTH: Yeah.

CPL HENSTRIDGE: And we haven't had a file –

CPL BURKE: You know, we don't want to –

CST. SMYTH: Yeah. No, I understand that.

CPL BURKE: We kind of have our suspicions but there's nothing that we can say that's concrete and that so.

CST. SMYTH: And what about my, my firearm? Was it four rounds missing from that?

CPL BURKE: And the scene is still being processed as well. And the firearm stuff hasn't been processed yet, so.

CST. SMYTH: Okay.

CPL HENSTRIDGE: I will say trust your memory.

CST. SMYTH: Yeah.

CPL HENSTRIDGE: Yeah. That's fair to say.

CPL BURKE: Yeah. And you know, your account of what you gave us and what we know is pretty accurate.

CPL HENSTRIDGE: Yeah. It's pretty consistent.

CPL BURKE: Yeah. And like I said, we don't know all –

CST. SMYTH: I want to ask you –

CPL BURKE: – the answers and we –

CST. SMYTH: I want to ask you if his firearm was loaded but, you know what, I don't know if I want to know the answer. Do you know what I mean?

CPL BURKE: Yeah.

CST. SMYTH: Because if – to me it changes the water on the beans a bit for how I'm going to feel.

CPL HENSTRIDGE: Of course it does.

CST. SMYTH: Well, if he knew it was loaded, you can – I can say with some degree of confidence what his intentions were. If it was unloaded, I can also say what, to some degree what his intentions were.

CPL HENSTRIDGE: Can you just give us one second? Can we start that whole – just come on out here for a second, and I'll be right back.

CST. SMYTH: And I don't know if I want to know the answer to that ever.

(Video paused.)

MS. O'BRIEN: Commissioner, I'm just going to move it forward now to this period where they're checking with Sergeant Osmond and Constable Smyth is drawing.

(Video resumed.)

CPL HENSTRIDGE: That's a pretty good diagram.

CST. SMYTH: So I got this here as the front door.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: This being the hallway when you come in. This being – I'm pretty sure that's a full wall. Right here, entrance into the living room. This is your walls, your front window. And there's a table there in front of him and I had – pretty sure it was some drug paraphernalia on it. A coffee table over here. I don't know what was on that, if anything; nothing of any consequence.

That was the chair he was seated in. It wasn't a ton of room down here between –

CPL HENSTRIDGE: Uh-huh.

CST. SMYTH: Probably a bit more than what I've got here to scale but it wasn't a lot of room. It was full of garbage. And there was like Boost containers is what I noticed a lot of and where a lot of food-related garbage. This was the chair that he was in for pretty much the duration.

CPL HENSTRIDGE: Okay.

CST. SMYTH: And I was stood – you know, I was back and forth here.

CPL HENSTRIDGE: Uh-huh.

CST. SMYTH: But this is the region I would have been in when I initially perceived that threat. I don't – I really don't know if I ran, came that way or that way. I'm thinking this way.

CPL HENSTRIDGE: Okay.

CST. SMYTH: And, you know, again this is just a rough –

CPL HENSTRIDGE: It's a loose estimate of where the rounds were fired from.

CST. SMYTH: I was on the move –

CPL HENSTRIDGE: Yeah.

CST. SMYTH: – as fast as I could fucking go.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: And that's it.

CPL HENSTRIDGE: (Inaudible.)

CST. SMYTH: And by the time I was out here with him – by the time it would have taken me to fire a fifth shot, I was not even in sight of him.

CPL HENSTRIDGE: Yeah. No, that's perfect. You asked, or you're about to ask a question. You're not sure if you want to ask if or not, about whether or not there was a round in the chamber. So I just wanted to check with Steve and the team commander on that just to see if it would be okay for us to answer that question.

If you want to know the answer to that question, we will tell you the answer to that question. You don't have to ask it now if you don't want to. If you want to call me two hours or two days from now, you can do it. But if you want to know the answer, we can tell you.

CST. SMYTH: I don't know if I want to know because I feel like if the answer is no, then I don't know what he was doing. You know, did he – did he want to die or did – or was he just trying to intimidate me? Did he even know I was carrying a firearm?

You know, is he old school thinking the RNC (inaudible) don't carry firearm. I'm giving him the fucking shock of his life. And I don't know if it's – if it was loaded, then I walk out of here feeling like I saved my life.

CPL HENSTRIDGE: You saved your life.

CST. SMYTH: If it's not loaded, I feel like I just fucking killed a guy.

CPL HENSTRIDGE: You saved your life. Okay.

CST. SMYTH: Okay. Yeah so –

CPL HENSTRIDGE: Because I don't want you leaving here dwelling on that.

CST. SMYTH: Do you understand that?

CPL HENSTRIDGE: Oh, absolutely. I'd be asking the same question if I was sitting where you are. But I'd also not want to know if it was empty. There was one in the chamber.

CST. SMYTH: Okay.

CPL HENSTRIDGE: Okay.

CST. SMYTH: All right. That's good to know.

CPL HENSTRIDGE: And like I told you before, his brother and sister had said nothing but support for you. They feel bad for what you're going through and so you don't need to think about that either.

CST. SMYTH: What about his daughter?

CPL HENSTRIDGE: His daughter has got a lot of questions. Some of her questions are relevant and some of them are not really relevant at all. She just wants answers as to what happened. No one, by their account, was aware that there was a firearm in the house really. But, yeah, there's a lot of questions from her but not much that you can answer. So that's where we're at.

But you gave an amazing account man, like that was incredible. I'm glad we waited, to be honest, because –

CST. SMYTH: Yeah. No, me too.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: I don't know if I would have, you know, fully been able to do that –

CPL HENSTRIDGE: Yeah.

CST. SMYTH: – yesterday, you know.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: Some of that stuff I remembered, probably some of it irrelevant –

CPL HENSTRIDGE: Yeah.

CST. SMYTH: – but, you know, just some of the pieces of the conversation –

CPL HENSTRIDGE: Yeah, for sure.

CST. SMYTH: Well, yeah, it probably would have been a lot more disjointed, I think, if we had done it last night.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: But anyway it's all –

CPL HENSTRIDGE: Do you have any questions for us, Joe, at this stage?

CST. SMYTH: I don't think so. What – you know, what do you need me to do? What happens from here?

CPL BURKE: You know, we're doing, you know, a thorough investigation of what went on and, of course, a major part is talking to you. You're the only witness, you know what I mean.

CST. SMYTH: Yeah.

CPL BURKE: So –

CST. SMYTH: And nothing in those cameras, eh? Can't get them –

CPL BURKE: No.

CST. SMYTH: No.

CPL HENSTRIDGE: I don't know if they would have been much help anyway. They were outside.

CST. SMYTH: Outside. I'm sure they wouldn't have been.

CPL HENSTRIDGE: Yeah.

CPL BURKE: So, you know, we're – you know, we're just trying to gain as much information as we can, as you know. We're going to talk to his – we spoke to some of his family members, we're going to talk to some others. You know, get the member's accounts that were at – initially at the scene.

CPL HENSTRIDGE: The biggest gist of the investigation now is to try to figure out what happened in his head. You know, what was he thinking and so on, right.

CST. SMYTH: But no notes or anything there? No –

CPL HENSTRIDGE: I don't know what's there because the boys were looking at the scene last night

CST. SMYTH: I just can't see –

CPL BURKE: (Inaudible) the house you mean.

CST. SMYTH: I can't see – I just can't see him planning it. He didn't know I was coming.

CPL HENSTRIDGE: No.

CST. SMYTH: If he knew I was coming it wouldn't been any more than a minute or two.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: So to plan something, I – no.

CPL BURKE: You know, and our initial findings is that he wasn't in a state that he was going out, you know, guns a blazing type situation. He was fairly – fairly level headed at that –

CST. SMYTH: Yeah.

CPL BURKE: – at that time in his life but –

CPL HENSTRIDGE: Relatively, yeah.

CPL BURKE: Yeah, you know what I mean.

CST. SMYTH: Yeah, within reason.

CPL BURKE: He had some issues but –

CST. SMYTH: Not that kind of –

CPL BURKE: Nothing that would say, you know, he was waiting for you to come down and this is the way he was going to go.

CST. SMYTH: Yeah.

CPL BURKE: Yeah, so

CST. SMYTH: And do you know where that firearm came from? Like – I mean, it's probably pointless. It probably doesn't matter but –

CPL BURKE: Well, there were firearms – there's one firearm unaccounted for in that family. And I don't know if his – his brother knew where it was or – you know, without giving too much detail, his father passed away years ago and had three firearms. His brother had two of them. That one you spoke to before you went to Donald Dunphy's. And there was one outstanding, so

CST. SMYTH: Can you say what kind of firearm it was?

CPL BURKE: We're not really sure yet.

CST. SMYTH: Okay. And do you know if it came from the couch or the floor? I mean, you'll probably never know.

CPL BURKE: There's – we don't know that either and we can only speculate.

CST. SMYTH: It wasn't like – it wasn't like a gun holster on the side of the –

CPL BURKE: Not –

CST. SMYTH: – chair or anything.

CPL BURKE: No. No.

CST. SMYTH: And what about – was there anything else found in the house? Any other weapons do you know or ...?

CPL BURKE: The scene is still being processed. Nothing else has come to light yet, basically.

CST. SMYTH: And, and I know he's got a licence to, to grow.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: Do you know what quantity? Like was his quantity – you don't know.

CPL BURKE: We don't have the licence yet, so –

CST. SMYTH: What's that? You –

CPL BURKE: We –

CST. SMYTH: – you haven't seen the licence.

CPL BURKE: No. No.

CPL HENSTRIDGE: My understanding – I'm just curious – that's why the camera was up there, though. Apparently that had something to do with the licensing. He had to have it in order to get a licence. But yeah, he was – he smoked a lot of pot. That, we do know. Wasn't a drinker.

CST. SMYTH: I'm just wondering if his licence was for – if he had a lot more than what his licence was for. Was he in fear of prosecution by me being there?

CPL HENSTRIDGE: He's been busted before, you know, for, for that kind for stuff, so

CST. SMYTH: Maybe. Who knows?

CPL BURKE: Again – and he would have had the drug paraphernalia on, on that table in front of him, right.

CST. SMYTH: Yeah.

CPL BURKE: (Inaudible) saw that there, yeah.

CPL HENSTRIDGE: So he might have – yeah, he might have been nervous over that. Who knows, right?

CST. SMYTH: Yeah.

CPL HENSTRIDGE: Hopefully we'll be able to answer a lot more questions. I suspect that once the investigation is complete that Steve will probably be able to sit down with you and kind of do a fairly thorough debriefing of what's, of what's happened.

CPL BURKE: Like we're not – I'm – we're not trying to withhold any information from you. It's just that –

CST. SMYTH: It's the system.

CPL BURKE: – you know, we don't have, you know, we're –

CST. SMYTH: And don't feel like I'd, I'd be bothered if you were.

CPL BURKE: No – (laughing).

CST. SMYTH: It's part of what you gotta do. I don't – that doesn't bother me for a second.

CPL BURKE: It's not, you know, it's – it's – you know, we don't know a lot of things –

CST. SMYTH: Yeah.

CPL BURKE: – yet and –

CST. SMYTH: No, I (inaudible).

CPL HENSTRIDGE: We (inaudible).

CST. SMYTH: You're in good company there. If –

CPL HENSTRIDGE: Yeah.

CST. SMYTH: – you got to withhold stuff don't

CPL HENSTRIDGE: Yeah. They wouldn't – they won't do the autopsy until we spoke with you too. They needed that information to be able to sort of assess what they were looking at. And, so that's why it was kind of important. And I didn't mean – I didn't really wanna call you today until you were ready to call me, but they can't do the autopsy until.

CST. SMYTH: Yeah.

CPL HENSTRIDGE: So there's a little bit of pressure on that front to, to see if you were okay to do it.

CST. SMYTH: Yeah. No, and I was, I was doing it today. I was –

CPL HENSTRIDGE: Yeah.

CST. SMYTH: The only delay actually was the association lawyer was in a, you know, a grievance hearing and he was getting the afternoon, he said he, he wasn't gonna be available. I'm like, well, I'm, I'm sorry I got –

CPL HENSTRIDGE: Yeah.

CST. SMYTH: I'm comfortable doing this.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: I appreciate your –

CPL HENSTRIDGE: Yeah.

CST. SMYTH: – you wanna be there or you wanna –

CPL HENSTRIDGE: Yeah.

CST. SMYTH: – go over it with me but this, to me, this is what it is.

CPL HENSTRIDGE: Yeah.

CST. SMYTH: And you being there or anyone else being there is not gonna change that, so unless you got some really good reason for me not to go down there by myself, I'm going down there.

CPL HENSTRIDGE: Okay.

CST. SMYTH: So ...

CPL HENSTRIDGE: We certainly appreciate you coming down because your account is, is – it's pretty powerful. I think that's fair to say.

CPL BURKE: Yeah.

CPL HENSTRIDGE: And –

CPL BURKE: From what we do know, you know, it's –

CPL HENSTRIDGE: And I will say that I don't think you need to second guess anything that happened in that room. I don't know if I'm supposed to say that or not, Steve, but I think you can leave the room feeling that way.

CPL BURKE: Yeah.

CPL HENSTRIDGE: That's my assessment anyway.

CST. SMYTH: I appreciate that. I, I do feel that way, yes.

CPL BURKE: Yeah. And you know like, we're – you know, we have your account and I know you have some time off and try to, you know –

CST. SMYTH: (Inaudible.)

CPL BURKE: And I know that it's a, it's a huge incident that we'd all wouldn't want to have but, you know, we don't foresee having to contact you and I'm sure if we did, you'd be open to that but –

CST. SMYTH: Call anytime.

CPL BURKE: – we're going to try to –

CST. SMYTH: You know, I want to be available to you, I want –

CPL BURKE: Yeah.

CST. SMYTH: Anything I can do. And if there's anything obviously I remember, you'll be the first to hear from me, but I don't have any problem talking about this.

CPL BURKE: No.

CST. SMYTH: From what I can gather –

CPL BURKE: Appreciate that.

CST. SMYTH: – it's important to talk about it and it's just, it's not in me to kind of keep things bottled up. I, I yabber, yabber and yabber. So don't, don't feel like you're bothering me at any time for anything.

CPL BURKE: Yeah.

CST. SMYTH: And it might sound crazy but if, if the family want –

(Video paused.)

THE COMMISSIONER: (Inaudible) I'm not following why we're watching so much of the video. Is there a question that you're putting forward for –

MS. O'BRIEN: No, there are some portions of the video, though, that I wanted to put into evidence, Commissioner, and that might be enough of it. I think it's covered, the parts I wanted to, but certainly I think some of the questions that I put to Corporal Burke about the tone of the interview was best shown –

THE COMMISSIONER: That's what I thought you were –

MS. O'BRIEN: Yes.

THE COMMISSIONER: – putting it forward for. But that's pretty well established I think, isn't it?

MS. O'BRIEN: It is, and the portions that I really wanted to focus on have gone in now and so we can continue with the questioning of Corporal Burke.

THE COMMISSIONER: Yeah, okay.

I think we're going to break a little early because people I know are uncomfortable with the temperature. Unfortunately, our additional heat didn't go very far.

I understand this had been the coldest day of the year and probably the coldest in many years, but I don't believe it was too bad a few days ago or yesterday. It wasn't yesterday, when we were here last. Yeah, yesterday. It was cool yesterday. So I don't know if we can experiment with letting some heat in overnight from out, from the other part of the building.

Anyway, we will take a look and see if we can improve things. All I can suggest otherwise is to bring your mittens and your coats and we'll try and get on with it. And it's not a form of enhanced interrogation, Corporal. We don't usually put our witnesses through this, so you're getting it – instead of getting it hot, you're getting it cold and a bit too cold we understand.

CPL BURKE: No, that's fine.

THE COMMISSIONER: We'll try and do better tomorrow. So anything before we break?

All right, let's adjourn now until 9:30 tomorrow morning.

MADAM CLERK: All rise.

The Commission of Inquiry is now closed.