



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 19

Commissioner: Honourable Justice Leo Barry

Wednesday

8 February 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry opened.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Good morning. It feels like it's a little bit warmer.

So Corporal, you won't have to go through any more of the moderate form of torture you had yesterday.

CPL BURKE: That's fine.

THE COMMISSIONER: Okay, continue when you're ready.

MS. O'BRIEN: Thank you.

Good morning, Commissioner.

Before we begin this morning I have two exhibits to seek to have entered: Exhibit P-0511 and Exhibit P-0513. Could I have an order please to have those entered?

THE COMMISSIONER: So ordered.

MS. O'BRIEN: Thank you.

Good morning, Corporal –

MR. KENNEDY: Excuse me, Mr. Commissioner, I should make just one note. In relation to these documents, I think you made some comment the other day, the text messages. Obviously, the messages, the inquiry counsel and Commissioner is entitled to consider whatever is relevant in terms of making a determination. I am, though, a little bit concerned that we don't get these until – at this point, as a result, but for whatever reason. I know it's nothing anyone can do about it.

THE COMMISSIONER: This was, this one was one – I don't think it's happened very often. This one was just created, I'm going to say, on this morning because counsel –

MR. KENNEDY: I'm not talking about counsel. I'm talking about the fact that it wasn't found. That it's – it was only found last week, I understand.

THE COMMISSIONER: Well, that's a function of the disclosure process. And I'm not sure – actually, I haven't seen that exhibit myself to know what it is. So if I could see it, just to see –

MS. O'BRIEN: Yes –

THE COMMISSIONER: I'd be able to follow what Mr. Kennedy is saying.

Go ahead, Ms. O'Brien.

MS. O'BRIEN: Yes, Commissioner, I'll give you a copy of the exhibit. But what it is, it is just an extract of some of the BBM messages, Blackberry Messenger messages –

THE COMMISSIONER: Right.

MS. O'BRIEN: – that we received just recently from the RCMP that had not been included in the original disclosure.

THE COMMISSIONER: Right. That's what I, that's what I understood. There's not much we can do about it Mr. Kennedy. We don't even know about them if they're not –

MR. KENNEDY: No.

THE COMMISSIONER: – disclosed to us. And we do have questions I think still unanswered as to why there was a delay with respect to certain disclosure from the RCMP. I mentioned it to Ms. Rasmussen several days ago I guess, and there's been I think some documents found since then, and I understand that we think that we have all the documents that are out there by now.

But, Mr. Kennedy, as I say again, it's – we make the order for disclosure and the normal process kicks in and sometimes human error means that things are missed or sometimes it might be a technical glitch because of software, which I believe was the answer given to us with respect to certain documents. That because the request was made for documents from the 1st of April, 2015, onward and because there was a day or so glitch in the date shown, because of the software, that they missed certain relevant documents.

Am I correct there Ms. Chaytor, or Ms. O'Brien?

MS. O'BRIEN: Oh, sorry. Yes.

MS. RASMUSSEN: Yes, Mr. Commissioner.

And Corporal Luther, a tech crime analyst who extracted the information from the phone, will be testifying later as to what exactly happen. So he's still looking into the software issues and why that may have occurred but what you said is basically, in a nutshell, what transpired.

THE COMMISSIONER: (Inaudible) oh, sorry, my mic is not on for some reason. I'm only getting this second or third hand after the information is passed on to me from counsel.

Mr. Simmonds.

MR. SIMMONDS: Yes, Mr. Commissioner.

And Ms. O'Brien and Ms. Chaytor can back this up. I understand that Ms. Breen picked this up because she went through something to do with Officer Noel's, Doug Noel's notes, and as a result of that – so it wasn't a case of the RCMP going back and finding it or having another look and realizing they'd made a mistake.

THE COMMISSIONER: No, I understand that Ms. Breen alerted Commission counsel that there seemed to be certain emails missing. We went back, Commission counsel went back –

MR. SIMMONDS: They did.

THE COMMISSIONER: – and pointed this out and I think there were certain documents supplied, but even after that I believe there were other documents that came. Was there two lots of documents?

MS. O'BRIEN: Yes, I think what originally happened was in preparing for Doug Noel, Ms. Chaytor noted that some messages that were in an email were not in Constable Smyth's phone records. So that led to one inquiry which returned some information from the RCMP, and then Ms. Breen noted that that information seemed to be incomplete which led to a further inquiry to the RCMP and then further messages came forward. That's more or less how it happened.

THE COMMISSIONER: Okay. All right.

So there it is Mr. Kennedy. I don't know if you have anything further to add on that.

MR. KENNEDY: No, other than, Mr. Commissioner, it does cause some difficulty, but the basic principle is that the inquiry and the Commissioner is entitled to consider whatever relevant evidence is there. So I'm not complaining that –

THE COMMISSIONER: Yeah, but we also have a principle of fairness to the parties and we try and be fair in terms of giving the – and the principle that parties are entitled to a proper hearing, a fair hearing, which means that you're entitled to whatever notice, whatever reasonable notice we can give you with respect to the documents, but we can only give you notice of documents that we ourselves know about.

MR. KENNEDY: Yeah.

THE COMMISSIONER: Okay. All right.

So let's continue now Ms. O'Brien, you're are putting a question of Corporal Burke.

MS. O'BRIEN: Yes. Thank you, Commissioner.

And I believe the document that we've all just been referring to should be found at tab 77 of your binder –

THE COMMISSIONER: Tab 77. Thank you.

MS. O'BRIEN: – if you want to review the document itself.

Good morning, Corporal Burke. I'm going to start today with going over some of the physical exhibits seized at the scene. And so I understand that the way that this works is that the FIS team decides what documentation initially to make of a scene. In other words, they go to the scene and they do the photography and video, and take measurements of the scene and they initially do that with very little input from the lead investigator. They get a brief statement of what happened and they go in and do their initial processing. Is that how you understand the process works?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And then before they finish with a scene, in some cases they may then go back to the command triangle or the lead investigator, or primary investigator and have some further discussion of what – if there's any areas there they may need to focus on or other aspects of scene processing that is recommended.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. All right.

Now, ultimately in terms of deciding what exhibits to seize from the scene, I understand that that's a decision that FIS or the ident team makes in consultation with the primary investigator. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: And then ultimately it is you in this case as the primary investigator who's responsible for ensuring that all relevant exhibits get seized.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

MR. SIMMONDS: Could the officer speak up a little tiny bit?

THE COMMISSIONER: Yes, Corporal. The way the system works, you have to be fairly close to the mic, apparently. We found out in the first couple of days, in order to be picked up. I make the same mistake.

MS. O'BRIEN: In this case, Corporal Burke, did the FIS team get any information following Constable Smyth's statement? That they – you know, any information that came out of that statement that they were able to use in assessing or processing the scene?

CPL BURKE: Not to my knowledge. I can't remember. I think I might have discussed scene processing with Sergeant Saunders at some point. Whether that was before or after Constable Smyth's statement, I just can't remember.

MS. O'BRIEN: Okay.

Do you recall giving him specifically any information that came out of Smyth's statement to assist him with the scene processing?

CPL BURKE: I don't remember that, no.

MS. O'BRIEN: Now, we have couple of areas at the scene and I wonder whether information from Smyth's statement might have made a difference. For example, the pen; in Smyth's statement, he talks about when the incident happens that he was writing notes at the time when he saw Mr. Dunphy's gun. Was that pen ever recovered from the scene?

CPL BURKE: Not to my knowledge. No.

MS. O'BRIEN: Okay.

And would that likely have been because the ident team were not aware that Smyth had talked about writing at the time?

CPL BURKE: Possibly.

MS. O'BRIEN: And another example of the scene processing, you know, was the chair that Mr. Dunphy was sitting in and particularly the right-hand side of the chair. Was there any analysis done by the ident team of that area? I know we're gonna hear from them to the extent that they noted a void in the garbage on the floor that they had noted.

CPL BURKE: Yeah.

MS. O'BRIEN: But in terms of the measurements taken of the chair, did the ident team take any measurements of the height of the chair?

CPL BURKE: As far as I know, they did.

MS. O'BRIEN: Okay.

What about the, you know, analysis of how high up the chair was off the floor, so to ascertain whether the gun could fit under the chair, for example?

CPL BURKE: I don't know.

MS. O'BRIEN: Okay.

Was the ident team aware, to your knowledge, that Constable Smyth had reported that the rifle had come from the right-hand side of the chair he was sitting in?

CPL BURKE: Not to my knowledge.

MS. O'BRIEN: Who is responsible for determining what forensic testing of exhibits needs to be done?

CPL BURKE: It would – in this case, it would have been tasked out to an investigator. And in this particular case, it was Constable Nippard and he would do that in consultation with the forensic strategists at the RCMP lab.

MS. O'BRIEN: Okay.

So in this case you would have, you're saying that you tasked Constable Nippard to determine what type of testing should be done and to consult then with the forensic strategists at the lab?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

I'm just gonna go over the testing that was done here and the reasons why that testing was done to the extent that you know them. We know that the rifle was tested for fingerprints, the .22?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And I understand that was actually not done by the forensic lab. That was done by the local ident team and, in particular, Corporal Kelly; is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So what was the purpose of getting the .22 tested for fingerprints?

CPL BURKE: I guess it was to determine, you know, whose fingerprints were on that gun.

MS. O'BRIEN: Was any other fingerprinting done, any other fingerprint testing done?

CPL BURKE: Not to my knowledge.

MS. O'BRIEN: Okay.

Do you know whether any consideration was given to doing fingerprint, you know, testing on the stick or the bat for example?

CPL BURKE: No.

MS. O'BRIEN: What about the bullet that was found in the rifle? Was there any consideration, to your knowledge, of testing that for fingerprints?

CPL BURKE: I thought that might have been tested for fingerprints, but I can't be sure.

MS. O'BRIEN: And I think we will hear from Corporal Lee on that and she'll give some evidence about the size of the bullet and the ability to test.

I'm going to ask, Madam Clerk, to bring up Exhibit P-0320.

So this document, Corporal Burke, is essentially the results of the lab testing that came back from the Forensic Science and Identification Services laboratory. So this is the results of the testing that was sent off by your team to that lab.

So I'm going to just go over – so this report would have come back, I take it, and you would have reviewed it when it was received.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So at – I'm just going to go over the conclusions of the results and conclusions of this report with you, Corporal Burke. So here in this Exhibits Examined, we see the various exhibit numbers of the exhibits that would have been forwarded to the lab. Is that correct?

CPL BURKE: Yes.

MS. O'BRIEN: And they talk a bit about the analysis that they did, but this is the results section. So I understand that they're saying here that during the testing Exhibit P-E4, which was the rifle, "discharged conventional ammunition designed to obtain a velocity exceeding 152.4 m per second and an energy exceeding 5.7 Joules."

They note that the rifle was not serial numbered. Then they tested the pistol, which would be Constable Smyth's pistol, and it also discharged ammunition at that velocity. Then they just did a recognition of P-E1, and these are the expended cartridge cases that were found in the room with Constable Smyth's pistol. They tested some metal fragments. They did an analysis of Mr. Dunphy's two shirts that he was wearing, is that right, at PE-21 and PE-23 analysis of the clothes?

CPL BURKE: Yes.

MS. O'BRIEN: And also looked at the cartridge PE-2, which was the bullet found in the gun – that's what PE-2 was – and did some further analysis of bullets for the – from Constable Smyth's pistol.

So that seems to be the testing they did. The conclusions here in the report, can you just review for us what the conclusions came from the lab? Can you – or I can review them for you. I just

want to get a sense of the conclusion – you sent off this lab. You got this lab report to assist you with your investigation, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So, ultimately, did these conclusions factor into your ultimate conclusion on the file?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So that's why I want to review them, for the purpose of that. So I want to go through them and maybe I can help you by going through it a bit. But I understand that the rifle PE-4, that was – Mr. Dunphy's gun was a rifle within the meaning of the *Criminal Code* definition, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And they noted it was not serial numbered. They also noted that Constable Smyth's pistol functioned normally and discharged ammunition. They were able to determine that three of the four expended cartridge cases from – were fired from Constable Smyth's pistol and the other one was, at least, cycled through the action of that pistol.

CPL BURKE: Yes.

MS. O'BRIEN: All right? Okay.

They found some metal fragments that were found to contain lead and they were able to determine that the four expended shell casings had in fact been fired from Constable Smyth's pistol. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

The shirts that were examined, Mr. Dunphy's shirts, they each had damage to the upper-left chest area that was consistent to having been caused by the passage of a bullet or other projectile.

And this is a finding of note, I think: the distant range; they were able to determine that the distance from which the gun was fired had to be more than 76 centimetres. Is that your understanding of the result?

CPL BURKE: Yes.

MS. O'BRIEN: And they did that by looking at the residue pattern analysis on the clothes.

CPL BURKE: Yes.

MS. O'BRIEN: And they were able to determine that the cartridge PE-2, which was the bullet found in the gun, was ammunition within the meaning of the *Criminal Code* and that it was a cartridge containing a projectile designed to be discharged from a firearm – in other words it was an actual bullet – and also determined that the cartridges of PE-37 were functioning ammunition.

Okay. Looking at those, does that summarize – that and the fingerprints, does that summarize the total of the testing that was done here, the forensic testing that was done on exhibits seized at the scene?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Was the, was the rifle, the .22 rifle, was that ever tested for DNA?

CPL BURKE: No, it wasn't.

MS. O'BRIEN: Okay.

And I'm going to bring up exhibit P-0321, please.

This is an email, Corporal Burke, that starts off – an email from you to Greg Williams, who's a forensic specialist in the Firearms and Toolmarks Section of the RCMP. And I think – I understand that you wrote this email on September 23, 2015, and that would have been just after you received the lab report that we reviewed. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: So you wrote Mr. Williams saying: I just reviewed the following report. Is it too late – but did you mean late there?

CPL BURKE: Late, yeah.

MS. O'BRIEN: Yeah – too late to have DNA testing performed on the rifle? Thanks, Steve.

So and then his answer's up here. First I'd like to ask did you – why were you making that, posing that question to Greg Williams at that time?

CPL BURKE: I thought DNA testing was going to be performed on the rifle.

MS. O'BRIEN: Okay. Are you saying that you had thought that that had initially been requested?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And why did you think that?

CPL BURKE: It's, it's pretty standard. It's like if you do an analysis of an item, I thought DNA testing would be included in that.

MR. KENNEDY: Excuse me, Commissioner, is there anyone going to be testifying as to touch DNA and how that works? Or is it – are we hearing from this officer, because that's a fairly complicated area of law – or of science from what I understand.

MS. O'BRIEN: Yes –

THE COMMISSIONER: Well, just again, Ms. O'Brien, may have information to bear here but –

MR. KENNEDY: I'm not questioning whether or not the step was taken but the actual testing that is requested is a type of DNA testing called touch DNA testing, which I understand is fairly complex.

THE COMMISSIONER: Yeah, I can understand why he'd want it if it was going in, but apparently it was never done, was it? There was no test –

MR. KENNEDY: They did –

THE COMMISSIONER: Okay. Go ahead.

MS. O'BRIEN: That's correct. There was no test.

MR. KENNEDY: But they did check into it, I understand.

THE COMMISSIONER: Pardon?

MR. KENNEDY: They did check into it, didn't they?

MS. O'BRIEN: I am about to review with this witness –

MR. KENNEDY: Okay, sorry.

THE COMMISSIONER: Yeah.

MS. O'BRIEN: – what steps were taken.

Okay. So, sorry, Corporal Burke, your microphone needs to be turned on, I just noticed so. Okay.

No, but it had been on earlier, you just turned it off at that moment, did you?

CPL BURKE: I didn't think so.

MS. O'BRIEN: Oh, okay (inaudible).

THE COMMISSIONER: Maybe. It has a mind of its own sometimes.

MS. O'BRIEN: Sorry.

Okay. Sorry, if you could go back. You were explaining you had thought it had been done. So if you could just explain to the Commissioner, you know, what led you to think that?

CPL BURKE: Basically, well, Constable Nippard spoke with the forensic strategist in Ottawa and they would decide on what testing, what would appropriate testing be on the items that we had listed. I would have assumed or I – you know, I ignorantly assumed that DNA testing would be performed, but after speaking with the RCMP lab, that wasn't a test that was planned to be analyzed at the RCMP lab. I can go on and I know –

MS. O'BRIEN: Well, you could –

CPL BURKE: – where you're going with this, I can probably give an explanation.

MS. O'BRIEN: Yes. And maybe, we can maybe go through because there's a few correspondence that might help as you're going through so that was what led you to ask that question to Mr. Williams.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And when you were referring to a forensic strategist, he's listed here on his signature line as a forensic specialist. Is that the same thing?

CPL BURKE: For Greg Williams, he's the Firearms section, and DNA would have been Biology section. So I think he – it goes on to say that he checked with his counterparts in the Biology section and determined when and if DNA testing was possible.

MS. O'BRIEN: Okay. And so what was his response to you then?

CPL BURKE: His response was that they handled the firearm, manipulated and fired the firearm so it was highly unlikely that DNA tests would find any useful result. And so then I learned that the DNA testing should have been done locally with our FIS section by Corporal Kelly Lee during the fingerprints assessment.

MS. O'BRIEN: Okay, so if I'm understanding correctly, that you found out after it should have been done, essentially before the rifle – while the rifle was still here in Newfoundland being analyzed for fingerprints –

CPL BURKE: Yes.

MS. O'BRIEN: – by Corporal Kelly Lee and the local ident team. That's when the DNA should have been done. When it gets sent off to the lab in Ottawa for all this testing it gets – I mean they've just said how they – do they try – they fired it and whatnot. So they've handled it at that point so much that it wouldn't be useful testing.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

MR. DROVER: Can I get a little clarification on that, Mr. Commissioner?

THE COMMISSIONER: What's that?

MR. DROVER: Was it, was it that you would do the DNA testing locally or you should have taken the swab –

CPL BURKE: The swabs, yes, before.

MR. DROVER: Okay.

CPL BURKE: And sent the swabs to the RCMP lab in Ottawa.

THE COMMISSIONER: So you should have taken the swabs before they got at it in Ottawa and basically would have contaminated the rifle?

CPL BURKE: Basically once the Firearms section gets the firearm, they would manipulate the firearm and it would be handled beyond, you know – it would contaminate the firearm basically.

THE COMMISSIONER: Okay.

MS. O'BRIEN: So, Corporal Burke, was that just an oversight then by the local ident team or did you look into that, why it hadn't, why the swabbing hadn't been done locally?

CPL BURKE: I did. DNA swabs – and I'm going to speak as a primary investigator, not as a forensic expert or anything like that. DNA swabs are taken when there's something visible or apparent on the item. Like a drop of blood or what appears to be blood or something that we could analyze or have suspect idea of what this may contain. It may contain substances that's the same consistency with blood, colour and whatnot.

The firearm didn't have any visible markings for possible DNA swabbing.

THE COMMISSIONER: So if you had specifically asked that the test be done anyhow, would they have complied?

CPL BURKE: Yes.

THE COMMISSIONER: You assume that it would done, but you had to specifically ask for it, is that –

CPL BURKE: It was my, it was my understanding that when the firearm was analyzed for fingerprinting, it would be analyzed for DNA swabbing as well. So that was – if I had asked for it, it would have. It would have been my fault that it wasn't done. I'll take responsibility for that.

MS. O'BRIEN: Okay.

But are we to take from what you've just said that, you know – was there any visible blood or that kind of matter on the rifle to your knowledge?

CPL BURKE: No, no.

MS. O'BRIEN: Okay. And had it been, had it been done – I mean, you were thinking like the DNA testing, you know, you had been thinking it would be done. What were you hoping to establish or rule out with the DNA testing?

CPL BURKE: From what I've learned since, if the DNA swabbing was completed, it would show a person that handled the gun multiple times or over a period of time, which would suggest to me that it would show the owner of the firearm. And it would not show DNA evidence of someone picking up the firearm, moving the firearm or handling the firearm once or twice.

MS. O'BRIEN: Okay. And your understanding there, where did you, where did that come from? How did you get that information?

CPL BURKE: I contacted the RCMP lab in Ottawa.

MS. O'BRIEN: Do you recall who you spoke to?

CPL BURKE: I think it was Sergeant Mike Merritt.

MS. O'BRIEN: Okay. I do have a note from your daily report of a conversation there, so that might be what you're referring to, so I'll take you to that.

Can I see, Madam Clerk, please, P-0323. Corporal Burke, you just might want to take a moment and read that note there and just confirm that that's the conversation you just referred to.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So that's when – so you had this conversation with Sergeant Merritt on September 24, 2015 and you asked if DNA testing was a test that should have been included and this is when he says, swabbing is normally completed by local FIS before it is shipped. Is this what you're referring to here in your statement: "Lab does not accept DNA swabs for touch DNA to eliminate a party"?

CPL BURKE: Yes, basically.

MS. O'BRIEN: Okay.

CPL BURKE: He goes on to say that, you know, DNA testing would prove ownership and will not provide if someone handled the firearm once or twice.

MS. O'BRIEN: Okay.

And the other information you got from down below is that touch DNA may prove ownership but cannot time-stamp when a person handled a firearm.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: Also when I discussed the analysis with Corporal Lee, she advised that as with the fingerprint testing, the condition and the dirt and condition of the gun being rusty, being able to obtain DNA of any type would have been difficult.

MS. O'BRIEN: Okay.

All right and we'll hear from Corporal –

THE COMMISSIONER: Sorry, what was that exhibit where Corporal Burke spoke with Sergeant Merritt?

MS. O'BRIEN: Yes, that's P-0323.

THE COMMISSIONER: Okay.

MS. O'BRIEN: And I understand that we will hear from Corporal Lee but I understand the reason you just gave for the DNA was the reason she'll tell us why she was unable to get fingerprints from the rifle.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Ultimately, I think later, the question had also been posed by ASIRT, had it not, that ASIRT asked you as they were doing their review, whether or not DNA had been tested for on the rifle?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And you provided them with an explanation similar to what you've given us here.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Now, I understand that it took some time to get these lab results back from the lab.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And, you know, towards the end of today we'll talk a bit about the length of time this investigation took and the reasons for that, but I understand that this might have been one of the reasons. Is that correct?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And I just want to point you to Exhibit P-0359, please, Madam Clerk. And I understand, Corporal Burke, this exhibit is going to show that you were making efforts with the forensic lab to see if it could be expedited.

So if you just – this is a – okay, that is not the – that's not the – oh, yes, you could go to page 340 of that exhibit. Sorry, in some cases we have the daily log entered as specific exhibits.

So, Corporal Burke, if you could just review your note there; this is one of your notes from May 12, 2015. So can you just explain what's going on there, what you're describing there in your notes?

CPL BURKE: I'm basically asking the lab to expedite the DNA testing because of, you know, the high-profile case that we have. But the lab – so then I go on and ask about the DNA testing, the analysis of the firearm basically.

MS. O'BRIEN: Okay.

CPL BURKE: Yeah.

MS. O'BRIEN: So you asked if they could expedite it.

CPL BURKE: Yes. Yes.

MS. O'BRIEN: What was the response ultimately?

CPL BURKE: The response that they would try to expedite it but given there was no urgency for public safety, I think is what – a gauge that the lab would use. There's no urgency or public safety in this matter. There wasn't a person that was on the loose or, you know, involved in serial criminal offences. So their priority list was different than ours, I guess.

MS. O'BRIEN: Okay. So that – so those cases would take higher priority for them. I just want to point you to your note here. You do say: Also, local government officials are keen to find out investigational findings as there is pressure for a public inquiry.

Had you been contacted by anyone from the government or can you just explain where that note is – where you got the information underlying that note?

CPL BURKE: I think the RCMP were contacted. I wasn't contacted personally but the RCMP was having contact with government officials about the inquiry – or about the investigation.

MS. O'BRIEN: Okay. So that would have been handed on to you by one of your superiors?

CPL BURKE: Yes.

MS. O'BRIEN: Do you recall who it was?

CPL BURKE: Who the superior was? Any correspondence like that would come through either Assistant Commissioner Tracy Hardy, or Chief Superintendent Andrew Boland.

MS. O'BRIEN: Okay. So they would have handed on that message to you and you would have taken this action to see if you could speed things along.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

With respect to the ownership of the gun, as we were just speaking about the DNA, did you ever ask any of the witnesses who had given statements that they had previously seen a .22 rifle that had been owned by Mr. Donald Dunphy's father – so that would be, I think, Dick Dunphy, Richard Dunphy and Meghan Dunphy who testified that she'd seen a gun in the house. Did you ever ask either of those witnesses to look at the rifle or photograph of the rifle for the purpose of identifying it?

CPL BURKE: To do that would be, I guess, of some benefit but it might be more complicated than – we ask people open-ended questions about what they observed and what – you know, to give a person a description of a firearm or they're given a picture would influence what they would tell us. We would rather have him say, can you tell me about a firearm that might have been at Don Dunphy's? And they would tell us, without influence, if it was a .22, if it was a 12 gauge or if there was no firearm and give a description without having, you know, the benefit of having a picture in front of them or me provide a description saying: Did you see a .22 calibre rifle with a black barrel and a brown stock at your father's residence, or at Don Dunphy's residence? Which would be a leading question or would it – you know, it would put influence on what they would tell the police.

MS. O'BRIEN: Okay. After they'd given – no, so are you saying it wouldn't be usual if an investigator said – I mean after someone has given a description because I think they both were able to describe what they had previously seen. After they'd given that description, you know, putting a picture to them or putting the rifle to them, are you saying that it's not something that you would normally do as an investigator?

CPL BURKE: No, I have never done it but – no.

MS. O'BRIEN: Did you give any consideration of doing that at the time, in this case?

CPL BURKE: I have to say, no.

MS. O'BRIEN: Right.

In the daily log, I'm going to ask, there's a note – no, sorry, Madam Clerk, please keep up the daily log which is P-0359. There's one note here that you've made, Corporal Burke, that I wanted to ask you about. It's at page 146 of this document. And this is a statement that, a note that you made in your file. And this was, I believe, a note that you made on April 9 of 2015. And you can correct me, but I think you were making this note after you had reviewed Constable Smyth's statement – or, sorry, after you'd reviewed Constable Warren Sullivan's statement.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And so you'd made a note in your report of that statement and a quote. It said: Task reviewed. Member noted a comment to Sullivan. Smyth later made a comment to the effect of I'm mad at him now. If I could only shake him alive and say what the eff are you doing? What did you do this for?

And then you have underneath it CH, which I take it is conclude here, from what you told us yesterday. Why did you extract this portion of Constable Sullivan's statement and add it to the daily log of your typed notes?

CPL BURKE: I found it was a strange thing to say, or something that I noted. Constable Smyth said he was mad at Don Dunphy, and I – it was to me a – Constable Smyth was mad at Don Dunphy for pulling a, or presenting a firearm.

MS. O'BRIEN: So you thought it was of – you said you found it was strange and you thought it was noteworthy of putting into your report. Did you do anything else with that information after, or did you just sort of note there and leave it at that?

CPL BURKE: I can't say for sure, but I thought in conversation with Constable Smyth or in his statement he said something like that.

MS. O'BRIEN: Sorry, okay –

CPL BURKE: He kind of clarified what that meant, I guess.

MS. O'BRIEN: In speaking with you, in his statement with you?

CPL BURKE: I can't remember where it came from but he explained that he was mad at Don Dunphy because he presented a firearm and he had to take action, I guess.

MS. O'BRIEN: Okay. So your memory now is that after you had noted this that you got some statement from Constable Smyth that –

CPL BURKE: No, no. I didn't get a statement for him – from him regarding that statement.

MS. O'BRIEN: Oh, okay.

CPL BURKE: But I thought he might have made reference to it in his initial statement –

MS. O'BRIEN: Okay.

CPL BURKE: – or at the re-enactment.

MS. O'BRIEN: But you're not sure.

CPL BURKE: I don't know.

MS. O'BRIEN: Okay.

Ultimately, did this cause you any concern in terms of your investigation? You know, did this affect your investigation in any way or the outcome of your investigation in any way, this note?

CPL BURKE: No.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Am I wrong, or was that possibly an interview with one of the RNC people who had been there? Where that –

MS. O'BRIEN: That's right.

THE COMMISSIONER: (Inaudible.)

MS. O'BRIEN: Constable Warren Sullivan, it was in his note. And I think this note here, that you have here, Corporal Burke, and the reason why I brought you to it, I think, is this might have gotten picked up by Judge Riche later on, or was one of the things that he noted later on.

CPL BURKE: Yeah, and maybe Constable Sullivan kind of puts context around that statement.

MS. O'BRIEN: And Constable Sullivan has given us evidence –

CPL BURKE: Yes.

MS. O'BRIEN: – about that. Okay.

Now, when you came in this morning you probably heard some discussion between counsel and the Commissioner regarding some Blackberry Messenger messages that have lately been uncovered by the RCMP. So I think you might have heard me say that they came to light when – I'll just ask the Madam Clerk, can you bring up Exhibit P-0297.

So, Exhibit P-0297 was in the initial disclosure from the RCMP, and it's an email chain that you're not on. It goes to Kent Osmond. It's between Doug Noel and Kent Osmond, but it would have been in the file. And, essentially, what Corporal Noel had done here is on the day of the incident, on April 5, he had – whether he cut and paste it, or how he did. He had emailed on to Kent Osmond some messages that he'd had that day with Constable Joe Smyth.

Can you recall seeing that document previously, Corporal Burke?

CPL BURKE: I don't recall, but –

MS. O'BRIEN: Okay.

So the way that this unfolded was that on review by Commission counsel and preparing for Corporal Doug Noel's testimony, it was noticed that these messages back and forth between the two of them didn't appear in the phone record extract that we'd had from Constable Smyth's phone.

So that led to a series of further inquiries, going back and forth, and also involving Ms. Erin Breen as you might have heard earlier. And, ultimately, some further Blackberry messages were disclosed to the Commission very recently.

Have you had an opportunity to review those Blackberry messages?

CPL BURKE: No, I have not.

MS. O'BRIEN: Okay. Are you aware that they had recently been found?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So I'm just going to bring you to them, notwithstanding the fact that you haven't seen them before. And I'm interested to know, Corporal Burke, just on a couple of examples whether or not – had you seen them at the time when you were doing your investigation, whether they would have in any way affected your ultimate conclusions or the steps that you took in the course of your investigation. Okay?

CPL BURKE: Yes.

MS. O'BRIEN: Whether they would have had any influence on you.

So I'm going to ask that Exhibit P-0513 be brought up. So what we have here, Corporal Burke, is some BlackBerry messages that are taking place on April 4 – so the date before the incident – between Constable Smyth and a friend of his. And Constable Smyth – and this is taking place at UTC time 4 p.m. in the afternoon, so it would have been 2½ hours before that, so around 1:30 p.m.

Got to go deal with some lunatic threatening the premier, et cetera. And his friend writes back: Cool, we'll have beer waiting for you. And Constable Smyth writes: If I have to arrest him, then I'll be late. And then Constable Smyth says: Too much paperwork. And his friend writes back: Give him a warning or – again, this is the friend – or bring him for a psych assessment. And Constable Smyth writes back: Not a bad idea.

So that's one section. And I'm going to bring you to another section that's sort of on the same topic before I pose the question to you, Corporal Burke.

And this is now – this is later on the same day, so it's 7 p.m. UTC time. So, again, we have to – that's around 4:30 in the afternoon, the same day, on April 4. Constable Smyth again messages his friend: Got delayed with work at home – that's Constable Smyth. And then his friend messages: Did you arrest buddy – he's corrected himself, he didn't – he said busy at first – but did you arrest buddy? And Constable Smyth says: Nope, tomorrow. Got all the background, et cetera, done.

So this is being written on the day before he went to Mitchells Brook. And I think the day before he had certainly done some of his background checks with the Communications Centre and contacting the RCMP and whatnot.

You were not aware of those messages at the time you did your investigation, is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Had you been aware, would they have affected the steps you took in any way?

CPL BURKE: I would have to say no.

MS. O'BRIEN: Okay. Can you just explain that for the Commissioner, why?

CPL BURKE: Well, I'm taking some time to assess it, but he – there's no indication about the actual event that happened. No information about the actual event that happened. His analysis of what he was going into, I guess, was a little different.

MS. O'BRIEN: And what do you mean by that his –

CPL BURKE: He refers to the person he was going to visit as a lunatic. You can take that literally or you can take it as a figure of speech. I don't know. I can't speak to that. And I guess if he had grounds for an arrest he was – it seems like he was going to determine that upon his visit.

MS. O'BRIEN: So sorry, in these messages, Constable Smyth is talking about arrest?

CPL BURKE: Yes.

MS. O'BRIEN: Had he ever said in any of his statements to you that he had planned an arrest?

CPL BURKE: No.

MS. O'BRIEN: Okay. So the difference there that he hadn't said it to you and he's at least talking in these BlackBerry messages with a friend of his of arrest, would that have made any difference to you in your analysis of the case?

CPL BURKE: It may have made some difference. I don't know if it would make a difference to the outcome of my conclusions.

MS. O'BRIEN: Okay. So when you – can you maybe explain that a little more 'cause you said you don't, it may have, I don't know – so just explain – if there are uncertainties, and I understand you haven't seen these previously –

CPL BURKE: Yeah.

MS. O'BRIEN: But I think we would be interested to know obviously what effect they might have had. So to the best you can answer that question, it would be helpful to the Commissioner.

CPL BURKE: To my knowledge, we had the information that Constable Smyth had upon arriving at Mr. Dunphy's. You know, what information he had on Don Dunphy and what his plans were. He said his plans were to go and talk and to find out, gather more information from Mr. Dunphy. I don't know if he – it doesn't seem like to me that he had enough information to arrest Mr. Dunphy, but he would make that assessment I guess when he got there.

I don't want to take what he's saying – you know, I don't know how to take those words that he used "arrest and lunatic." And if it's just casual conversation with a buddy, I have no idea.

MS. O'BRIEN: Okay.

Had you been aware – is that something that you would have had some follow-up questions for Constable Smyth on?

CPL BURKE: Maybe.

MS. O'BRIEN: Okay.

The other section that I want to bring you to is at page 5 of this exhibit, so it's just the next page. And this is taking place on April 6. So this is taking place prior to Constable Smyth going in to give his interview with the RCMP. It's that morning and it's between him and Sergeant Tim Buckle of the RNC.

And I'm going to go through them here but just to explain what we believe is, is – from reading these messages, what appears to be happening here is that Constable Smyth is working on his notes. And those would be the notes that he brought to his interview and later provided to you on April 7, those notes that we spoke about yesterday. And it appears that he is getting at least some input from Sergeant Buckle into those notes. So I'll just review the chain.

Sergeant Buckle writes him: Looks good. Should you be more specific and say I perceived a threat of imminent death or – gracious is what's written here but I'm – I would feel it's grievous which he corrects on the next line – grievous bodily harm to quote the use-of-force policy. And then he corrects the grievous.

And Smyth says: Okay. And then Smyth says: "But a gun pointed at me is pretty straightforward." And then Sergeant Buckle – and then, sorry, Smyth writes again: "Using policy line in the circumstances feels a bit manufactured." And Sergeant Buckle writes: It's reflective of the training and articulation. I think it's important to say that. And Constable Smyth says: Okay.

And Constable Smyth says again: "Read the change." And Sergeant Buckle comes back and says: "Yup, that's better." And Constable Smyth says: Thanks. Sergeant Buckle says: "A word was misspelled before 'MHA.'" Smyth says: Okay, fix and email it back to me, would you, I'm – I think driving is what he's indicating here. Sergeant Buckle says: Kk.

And then Sergeant Buckle messages again: "U must have fixed it ... can't find it now." And Constable Smyth says: "Send it anyway would you." And that's the end of that chain.

So yesterday when I had put the question to you whether or not you had asked Constable Smyth whether or not anyone had given him any input or assistance with his notes, you – I think your answer was, I'm going to paraphrase you now, but to the effect of, no, I didn't ask but I wouldn't have to; a police officer knows not to have anyone assist them with their notes.

Have I summarized you correctly, Corporal Burke?

CPL BURKE: That's right.

MS. O'BRIEN: Okay.

So looking at that now, which indicates – and we have not yet had Constable Smyth speak to this, but looking at that now it looks like he was getting some input certainly from Sergeant Tim Buckle. Would that – had that come to your attention at the time, would it have, in any way, affected the steps you took in this investigation or your ultimate conclusion?

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

MS. O'BRIEN: Okay.

MR. KENNEDY: Commissioner, if I could just interject for one second; this is for information more than anything. The SIU; one of the issues that went on with the special investigative unit in Ontario was the police officers came together with counsel and putting their notes together. The SIU took that all the way to the Supreme Court of Canada. There's a case call Wood v. Schaeffer

which deals with the interaction or involvement of police officers in terms of preparing their notes.

I can't remember off the top of my head, Commissioner, if there's anything there that may be of relevance but I'll certainly look at it. It's around 2012, 2013.

THE COMMISSIONER: Thank you, Mr. Kennedy.

MS. O'BRIEN: Sorry. Now, Corporal Burke, I'm just going to get you to give a little more explanation of the answer you just gave. So your reasonings behind that answer to assist the Commissioner, please.

CPL BURKE: It's just that as I'm reading through it with you I don't see anything there that would change the evidence that we obtained. They're talking – you know, I can't say that I agree with that form of note taking or note composition but they were just talking about wording, they're not talking about changing any of the events. So I can only go by what I believe were the events or the evidence that say what the events were.

MS. O'BRIEN: Okay. Thank you.

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

Corporal Burke, I understand that on or about June 11 of 2015, Meghan Dunphy contacted you through her legal counsel because she had found an unspent .22 bullet in the living room of her father's house. Do you recall that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

The first question would be would this have been an oversight of the ident team in doing their assessment of the room? Should that bullet have been found and seized in the first instance?

CPL BURKE: An oversight – I don't think I would call an oversight. The room was fairly messy and to find a .22 calibre bullet, you know, I could see that not being found basically. And it was unspent, meaning that it wasn't fired.

MS. O'BRIEN: Okay.

When I put that question to you, Corporal Burke, on December 1 in your pre-hearing interview – and I'm at page 425 of the transcript – I asked – we were talking about that bullet and I asked: Why wasn't that seized initially from the scene? Was that an oversight? And your answer was: It was an oversight at that time.

And then you did go on to say a lot of things – there was a lot of things in the living room and, you know, it could have been missed. If it was found they would have seized it, basically, but it was on the opposite side of the room where the chair was, I guess, and it wasn't found.

So I asked: Okay, if it had been found at the time it would have been seized as relevant evidence, for whatever relevance it would have had, I guess, but it would have been seized as evidence? And you responded yes. So at that time on December 1 you seemed to indicate that you felt that it was an oversight of – at least to some degree an oversight.

CPL BURKE: Which is what I said that time. Like, call it an oversight or not an oversight, trying to explain why the bullet wasn't seized and it wasn't a –

THE COMMISSIONER: It wasn't an oversight in the sense of seeing it and not taking it; it was arguably an oversight in being missed in the survey of the room but you gave an explanation why that might happen.

CPL BURKE: Yes, I guess so.

THE COMMISSIONER: Would that be fair?

CPL BURKE: Yes.

MS. O'BRIEN: On that bullet having been found by Ms. Dunphy, you ultimately went to seize it.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Can you ex – why did you go seize it? Did you feel it might have evidentiary value or what was your reason for seizing it?

CPL BURKE: I think I told Ms. Dunphy and Ms. Breen at the time that I wouldn't seize the bullet, it was of no evidentiary value, but I would take it and dispose of it.

MS. O'BRIEN: And just explain, just briefly, why you felt at that time it was of no evidentiary value.

CPL BURKE: At that it was – like I said, it was an unspent bullet. It – we didn't have continuity of that piece of evidence. It was three months after we released the scene, so I couldn't use that as evidence even if I wanted to. And I understood the inside of the residence and I could see why it wasn't seized and I didn't – it didn't hold any value to my investigation.

MS. O'BRIEN: When you went to seize – so you did go to, I'm using – probably misusing the word "seize" then. When you went to collect the bullet –

CPL BURKE: Yes.

MS. O'BRIEN: – because you say you just disposed of it, is that what happened?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So when you went to collect the bullet where did you – did you go to the house to meet Ms. Dunphy?

CPL BURKE: Yes.

MS. O'BRIEN: And was her legal counsel there at the time?

CPL BURKE: Yes.

MS. O'BRIEN: And did Judge Riche accompany you on that visit?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And why did Judge Riche accompany you?

CPL BURKE: Going from memory now, I think he wanted to go back to the scene and ask Ms. Dunphy some questions.

MS. O'BRIEN: So he specifically wanted to speak to Meghan Dunphy?

CPL BURKE: Yes.

MS. O'BRIEN: And you brought him there to facilitate that?

CPL BURKE: I facilitated the meeting between Ms. Dunphy and Justice Riche.

MS. O'BRIEN: And in terms of Judge Riche meeting with other witnesses or people involved in the case, I understand you also facilitated a meeting between him and the chief medical examiner; is that right?

CPL BURKE: Yes, that's correct.

MS. O'BRIEN: Any other meetings that took place between Judge Riche and other witnesses on the file that you can recall? Those are the ones I'm aware of, I can say that.

CPL BURKE: Yes. You know, we had a meeting with – he wanted to speak with our Forensic Identification Section. We had a meeting with Sergeant Saunders in the fall, I think.

MS. O'BRIEN: Okay.

Yesterday when we were talking about Judge Riche, you had raised the issue that he might have been becoming more of an investigator as opposed to an observer.

CPL BURKE: Yes.

MS. O'BRIEN: At the time, when you were bringing him to, say, to meet with Meghan Dunphy to ask her questions, and similar to meetings with Sergeant Saunders or Dr. Avis, the chief medical examiner –

CPL BURKE: Yes.

MS. O'BRIEN: – did you have concern at that time by facilitating his questioning of witnesses that that may have, in some way, contributed to his taking on the role that you have described as more of an investigator than an observer?

CPL BURKE: I had some concerns, I guess, but I wanted to provide Justice Riche with all the information that he required to make an assessment on our investigation, I guess. And I didn't want to be seen as prohibiting him from any access to any evidence that he may have wanted.

THE COMMISSIONER: Damned if you do, and damned if you don't.

MS. O'BRIEN: Corporal Burke, I understand that one of the other investigative steps that you took in this case is that you requested Wanda Richards, who is criminal analyst with the RCMP, to prepare a timeline. Is that right?

CPL BURKE: Yes, correct.

MS. O'BRIEN: Okay.

So her report – which she'll be called as a witness before the inquiry and she'll be able to speak to her report. But I do want to ask you some questions about it because at, Madam Clerk, at P-0003, which is your report, you take her graphical representation of that timeline and use it in your report. So I do want to ask you some questions about that.

And Madam Clerk, it's page 5 of Exhibit P-0003. I'll get you to make it a little bigger, Madam Clerk, just because it's really difficult to read.

Sandy, can you operate the scroll as we're going through? That would be really helpful. Okay.

So, Corporal Burke, prior to this timeline being finalized, did Wanda Richards send you any drafts for your review?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So you'd had a chance to review it and before it appeared in final form. Is that right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

All right, so a couple of questions about this because –

MR. KENNEDY: Excuse me one second, Commissioner. Ms. O'Brien is that contained in the RCMP report?

MS. O'BRIEN: It is.

MR. KENNEDY: And do –

MS. O'BRIEN: That's why we're looking at it.

MR. KENNEDY: What –

MS. O'BRIEN: It's at page 5.

MR. KENNEDY: Okay, sorry. Thank you.

MS. O'BRIEN: And just to be clear this – Corporal Burke, so everyone is clear on what we're doing here, this timeline that we're looking at, at page 5 of your report, that was created by Wanda Richards.

CPL BURKE: Yeah.

MS. O'BRIEN: It first appears in her report to you which –

CPL BURKE: Yes.

MS. O'BRIEN: And she has more details in report about what she'd done and her analysis and whatever, but you just – you essentially cut and paste the graphical representation of the timeline and put it in – used it in your final report, right?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MS. O'BRIEN: Yes. Sorry, yes, page 5 of the exhibit.

All right, so a few questions arising from this timeline. And if we just go to the entry there which is in the second line where it shows that at approximately 1:30 p.m. Smyth attends at the neighbour's/brother's residence.

Okay? And maybe it can't be made any bigger.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible) can't be made bigger.

MS. O'BRIEN: Okay. So, Corporal Burke, are you able to see there what we're pointing at? I know it's probably difficult for you.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And she has that taking place here on the timeline for about 20 minutes. Now, there has been – we've had some varying evidence on the amount of time that Constable Smyth and the Dunphys report that he was at that residence, but I understand that Constable Smyth's evidence is generally that he was there for approximately 20 minutes. Okay, is that consistent with your understanding?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And I understand this is when he attends, and she has listed the time at 1:30. Before, say, 20 minutes has elapsed, though, she has another entry on the timeline, which is a more fixed time; it's at 1:39:39 p.m. And it's Smyth calls Colin Dinn, friend of Dunphy. And it says Smyth makes several outgoing calls to Colin Dinn who is a friend of Dunphy; last call made at 1:39 p.m.

When you – did this cause you any surprise when you saw this on the timeline? I mean, to be more explicit, had you been aware of any evidence that indicated that Constable Smyth had called Colin Dinn?

CPL BURKE: No. This is the evidence that I would have presented with. When I review a timeline or the work of criminal analysis I look for – I don't look for accurate content; I look for

the way it's presented and the type of information I would like to see in a timeline or their analysis.

MS. O'BRIEN: Okay.

So you would not have taken her timeline and gone back to the phone records to cross-reference and check?

CPL BURKE: No, no, no.

MS. O'BRIEN: Okay.

So you would have taken this and – so when you're reviewing it, what are reviewing? When she's sending you drafts, what's the purpose of her doing that?

CPL BURKE: The type of information that's contained with the timeline, like certain information, and the way the timeline is set up if there are too many synopses of statements or too much information, it makes the timeline too long and really ineffective as a timeline.

So I would look at it and say, you know, take this stuff out because it doesn't mean anything and it makes it complicated to view. So that's the kind of things I look for in a timeline.

MS. O'BRIEN: Okay. All right.

So at the time, I mean, were you aware at the time that there was nothing in either Richard Dunphy's statement, Debbie Dunphy's statement or Constable Smyth's statement to indicate that he had made any phone calls while he was at their residence; is that right?

CPL BURKE: That's right.

MS. O'BRIEN: Okay.

And there was nothing in Constable Smyth's statement or Colin Dinn's statement to indicate that there had been any communication between them on that day?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And there was nothing there in the statements to indicate that they even knew each other existed at that time?

CPL BURKE: That's right.

MS. O'BRIEN: Okay. All right.

So this was obviously an error on the timeline, was it?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So ultimately – can you just explain the mistake that's there, please?

CPL BURKE: The outbound calls that Smyth makes are to the number associated with Donald Dunphy.

MS. O'BRIEN: Okay. Yeah.

And when did you realize that those calls had that – when did you realize that Constable Smyth had attempted to make calls to Donald Dunphy on that day?

CPL BURKE: When it came up in the interview.

MS. O'BRIEN: With the interview with Commission counsel?

CPL BURKE: Yeah. But when I got the cellphone analysis initially – it comes to me and then I gave it to Ms. Richards to analyze it basically – I did notice the, you know, the call history surrounding the event time, and in particular Mr. Dunphy's cellphone records. And I didn't see any, you know, incoming calls, only the one from Colin Dinn and it was a text message.

MS. O'BRIEN: Are you saying that you had done that prior to our interview on December 1 of 2016?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. You did not say that in the interview on that date.

CPL BURKE: No.

MS. O'BRIEN: In fact on that date you seem very surprised that those calls were there and –

CPL BURKE: Yeah – no, I analyzed – well, you know, I looked at the phone calls from that time period back when I received them. I didn't make a whole lot of sense out of them because they were just numbers. So, but when I looked at Mr. Dunphy's phone records, there was nothing incoming, you know, that gave me any concern. The calls that Joe Smyth made on his, they were numbers so I didn't know who owned those at the time.

MS. O'BRIEN: So you're saying when you looked at Constable Smyth's phone records initially, well before your interview with Commission counsel –

CPL BURKE: Yes.

MS. O'BRIEN: – you had noted that Constable Smyth made calls during this period.

CPL BURKE: Yes. Yes.

MS. O'BRIEN: Are you saying you didn't know to whom the calls were made?

CPL BURKE: Not at that time, no.

MS. O'BRIEN: Okay. So you didn't look at what numbers he had called to say, gee, do I know what name is associated with that number.

CPL BURKE: Yeah, I didn't get that – you know, I just made a cursory look at it and didn't get that far into the details of the phone calls which I left up to crim analysis.

THE COMMISSIONER: So that's Constable Smyth's calls you're talking about.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: So when he makes calls to us – when he made calls to Donald Dunphy, when you told me I was surprised by that, yes.

MS. O'BRIEN: Yes.

Yeah, you were very surprised at the time but that's because you had accepted – are you saying now that that's because you had accepted that those calls were made to Colin Dinn?

CPL BURKE: No, no.

MS. O'BRIEN: Okay. So just explain that. So you looked at it, you saw calls being made by Constable Smyth.

CPL BURKE: Yes.

MS. O'BRIEN: You, you're saying you left that for Wanda Richards to figure out.

CPL BURKE: Yes.

MS. O'BRIEN: She figures out, she comes back with a report and she says that it's Colin Dinn.

CPL BURKE: Yes, but the only – you know, I look at Constable Smyth's phone records and then I look at Don Dunphy's phone records and the calls that Constable Smyth made did not show up on Mr. Dunphy's phone records. So that's really as far as I went with it.

You know, I didn't know where these calls went but I knew they didn't go to Mr. Dunphy's or I – you know, they didn't marry up, basically. The outgoing calls from Constable Smyth and the incoming calls to Mr. Dunphy were not, not the same.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Were not what?

CPL BURKE: Were not the same.

THE COMMISSIONER: Okay.

CPL BURKE: When he makes a – when Constable Smyth made a call at a certain time, a certain number, those calls don't show up on Mr. Dunphy's phone records.

MS. O'BRIEN: And to do that, did you go to Mr. Dunphy's original phone extraction or did you – I know in Wanda Richards's report, in her appendix, she had appended excerpts from both Constable Smyth's phone and Mr. Dunphy's phone.

CPL BURKE: When I did it that it was the original phone extractions.

MS. O'BRIEN: Okay.

CPL BURKE: Because I didn't have her report then.

MS. O'BRIEN: Okay.

So you didn't see any – you looked at the original extractions you're saying, and you hadn't seen that, any incoming calls on Mr. Dunphy's phone.

CPL BURKE: Right.

MS. O'BRIEN: Okay. And you didn't know – you didn't know who the numbers that Constable Smyth was calling, who they were associated with.

CPL BURKE: Yes.

MS. O'BRIEN: You left that for Wanda Richards.

CPL BURKE: Yes.

MS. O'BRIEN: But she had attributed them to Colin Dinn.

CPL BURKE: Yes.

MS. O'BRIEN: And did – you had just accepted that that was the case when you got her report, is that what you're saying?

CPL BURKE: Yes, I accepted the timeline as it was. The contents, you know, I accepted as they were.

MS. O'BRIEN: Okay.

CPL BURKE: Yeah.

MS. O'BRIEN: So you didn't give any consideration to the fact that Colin Dinn hadn't mentioned it or Joe Smyth hadn't mentioned it?

CPL BURKE: No.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Am I understanding it correctly that there were two errors here with regards to the 1:39:39 call; one has to do with whether in fact it was that time or the other one, the reference to Colin Dinn.

The, if we take, if we start from the 1:30 call and if the evidence is that Mr. Smyth, Constable Smyth, was at the residence of Richard Dunphy for approximately 20 minutes, that would bring it to approximately 1:50.

MS. O'BRIEN: Yes.

THE COMMISSIONER: Whereas there's an indication there of a call at 1:39:39 which would be only nine minutes.

MS. O'BRIEN: Yes.

THE COMMISSIONER: – was left for Constable Smyth to be speaking with Debbie and Dick Dunphy; is that correct?

MS. O'BRIEN: Yes, so that's one of the points, Commissioner, on this part of the timeline. When you look at this part of the timeline, you know, I'm putting to Constable Burke that this part of the timeline seems to have been inconsistent with the other information that Corporal Burke had at the time. Because the other information he had was that Constable Smyth had been at the Dunphys' for approximately 20 minutes and he did not have any information from either Constable Smyth or the Dunphys that he had been placing phone calls during that time but I think –

THE COMMISSIONER: So that means that it would not have been – that 1:39:39 call or calls would not, several calls, would not have been from Constable Smyth?

MS. O'BRIEN: Those calls were from Constable Smyth, but it does cast doubt about whether the timeline is correct in placing Constable Smyth at Richard and Debbie Dunphy's house at that time, because the calls were from Constable Smyth's phone.

THE COMMISSIONER: Okay, so we don't have the – okay, so the phone record would be the guide here. The phone record of 1:39:39, that's the certainty that we have. Is that correct?

MS. O'BRIEN: Yes.

THE COMMISSIONER: And so it's the approximately 1:30 which is where the leeway is in terms of – okay.

MS. O'BRIEN: So my question to Corporal Burke is –

MR. KENNEDY: Commissioner, I wonder if I could clarify this. Because I think this is a fairly important point. The evidence given – of course, it's up to you how you determine. But the evidence given by Constable Smyth was that he went to Mr. Dunphy's home –

THE COMMISSIONER: Right.

MR. KENNEDY: – then he went down the road and made a number of phone calls.

THE COMMISSIONER: Right.

MR. KENNEDY: The last call is at 1:39:39, he's on the road for a couple of more minutes, then he goes to Richard and Debbie Dunphy's.

MS. O'BRIEN: And that's the point I'm about to make. Actually, I'm about to go there Mr. Kennedy with Corporal Burke.

THE COMMISSIONER: Okay, all right.

MS. O'BRIEN: Because when, Corporal Burke, you got this timeline from what I understand – and I'm pointing to you that there seems to be an inconsistency in it between what was presented to you by Wanda Richards and the other information that you had. And I'm asking did you go back and make any further inquiries to explain or to figure out why this inconsistency is appearing in the timeline? And I understand your answer is you didn't.

CPL BURKE: No.

MS. O'BRIEN: You didn't do anything further, you just accepted the timeline as it was; is that correct?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And as Mr. Kennedy has pointed out we have had – I understand that you never really, you never questioned Constable Smyth about the fact that his vehicle had been seen in front of Rochelle Nolan's house, for example.

CPL BURKE: No.

MS. O'BRIEN: And you never, so you never questioned him about who he was calling in those minutes, that half hour or less before he attended at Mr. Donald Dunphy's home. You never asked him that question.

CPL BURKE: No.

MS. O'BRIEN: Okay.

And I think what – by asking those questions or having Constable Smyth answer those questions, I think it has been established or is certainly accepted by some of the witnesses that there is an error in the timeline in that Mr. Dunphy made those calls to Colin Dinn here prior to him attending at the residence of Dick and Debbie Dunphy. That's certainly Constable Smyth's –

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

UNIDENTIFIED FEMALE SPEAKER: (Inaudible) Smyth's.

MS. O'BRIEN: – Smyth's evidence.

THE COMMISSIONER: But 1:39:39 was before Constable Smyth would have visited Dick and Debbie Dunphy. And if he was there approximately 20 minutes, that would have taken it up to 1:66 or 6 minutes after 3. Is that correct? Am I –

MS. O'BRIEN: No, it would have been, it would have been shortly before –

THE COMMISSIONER: Am I correct there? No? Go ahead.

MS. O'BRIEN: Yes, so it would have been he made these calls to Colin Dinn. And I think his testimony is that he sat in the car for at least some period of time after he made those calls.

MR. KENNEDY: Calls to Mr. Dunphy –

MS. O'BRIEN: Sorry, calls to Mr. Dunphy, yes.

THE COMMISSIONER: Right.

MS. O'BRIEN: Oh, I said Dinn. Sorry, the calls to Mr. Dunphy. He made those calls; he sat in the vehicle for a period of time after he made the last of those calls and he does not have an exact estimate of that.

THE COMMISSIONER: Right.

MS. O'BRIEN: Then he attended at the residence of Dick and Debbie Dunphy.

THE COMMISSIONER: And that time – oh, I see from 1:39 add 20 – yeah, we got 1:59, so that’s about –

MS. O’BRIEN: Sometime shortly after –

THE COMMISSIONER: – 2 o’clock, close to 2 o’clock.

MS. O’BRIEN: – 2 o’clock or shortly after 2 o’clock.

THE COMMISSIONER: Yeah.

MS. O’BRIEN: And then after finishing with Dick and Debbie Dunphy, that’s when he noted Mr. Donald Dunphy’s vehicle back in his driveway and then he attended at Mr. Donald Dunphy’s house.

THE COMMISSIONER: Uh-huh.

MS. O’BRIEN: And so, Corporal Burke, those – that – those adjustments to the timeline that we’ve just spoken about, they didn’t come to your attention when you were doing your investigation on the file.

CPL BURKE: No.

MS. O’BRIEN: Okay.

MR. SIMMONDS: Excuse me, but as part of that timeline we also have the call or the message that Mr. Dunphy sent to Colin Dinn which gives us – yeah, which gives us another –

THE COMMISSIONER: Right, that’s 1:46:34.

MR. SIMMONDS: Yeah, gives us another parameter to where because he couldn’t have been – he must have just been home at that point in time.

THE COMMISSIONER: If he was calling while home and not from –

MR. SIMMONDS: Not from the car.

THE COMMISSIONER: – not from the car.

MS. O’BRIEN: Yes, I – Colin Dinn gave testimony on that and he recalls seeing Mr. Dunphy drive by, and then very shortly after receiving the text –

MR. SIMMONDS: Call, exactly.

MS. O’BRIEN: – I think is his testimony on that.

Okay. One other item here with respect to this timeline that I’d like to review with you, Corporal Burke, is that according to this timeline the amount of time between the – and Ms. Chaytor can bring us to this spot – but the, the time in which, according to the timeline, approximately that Mr. Dunphy fired the shots – sorry, Mr. – Constable Smyth fired the shots was – can you read the time here?

MS. CHAYTOR: (Inaudible.)

MS. O'BRIEN: I think it, I think it's, it's about – it's 2:13:46, it's around 2 –

THE COMMISSIONER: 2:13:47 is when he's got that he exits the living room.

MS. O'BRIEN: Yeah, so I think his time of firing the shots is about – it's very hard to read, but 2:13:46, okay.

And then the time on this timeline where he makes the first call to the RCMP Communications Centre to report the incident is shown at 2:26 –

MS. CHAYTOR: 2:27.

MS. O'BRIEN: 2:27. Okay. So about – showing about 14 minutes passing.

When you reviewed the timeline, did that amount of time between Constable Smyth firing the shots and calling the call in to the RCMP, which is reported here as approximately 14 minutes, did that to you seem consistent with the statement that Constable Smyth had given to you reporting what had happened after the incident?

CPL BURKE: The amount of time, I don't know if it was consistent or not. I took the timeline, or those times to be approximate. The time that the call was made was a definite time.

MS. O'BRIEN: Yes.

CPL BURKE: And if memory serves me correctly, Constable Smyth cleared the house or searched the house and assessed Mr. Dunphy and then called the RCMP.

MS. O'BRIEN: Did you ever go back to ask Constable Smyth any questions as to what he might have been doing during that 14 approximate minutes that was being shown on Wanda Richards's timeline?

CPL BURKE: No, I didn't. I didn't take the 14 minutes as a definite amount of time. It could have been five minutes; it could have been 20 minutes. I didn't know, I didn't, I didn't have enough information to believe that or question the amount of time it would've taken to clear the house or assess Mr. Dunphy.

MS. O'BRIEN: Okay. And was that – whether you're saying you took it as approximately, it could have been five, it could have been 14. Would that have made any difference to your investigation, whether it was 15 or whether it was two minutes?

CPL BURKE: If the times were definite, it might have made some difference. But, like I took them as approximates and I took the times for what they are worth, and I didn't put a whole lot of weight into the actual times.

MS. O'BRIEN: Okay. And just to clarify for the record, Commissioner, that Constable Smyth's testimony has certainly been to the effect that this is an incorrect estimate of times on the timeline, and he has placed that time between when he fired the shots and when he made the first call to the RCMP Communications Centre to be on the order of a couple of minutes, or on that order.

THE COMMISSIONER: Sorry, say again the – the time between when the shooting stopped and when he made the call?

MS. O'BRIEN: He has estimated that as, you know, on the order of a couple of minutes, and I think his testimony has been quite clear that he does not feel it was anywhere near 14 minutes.

The interviews with the first medical responders, Corporal Burke, these would be Nancy Linehan and Kevin Bishop. You would have reviewed their transcripts of their interviews which you have as part of your view of the file?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. When you did that, did you notice any discrepancy between how Ms. Linehan and Mr. Bishop were in their statements reporting that they had seen the rifle on their entry into the room and how the rifle was appearing in the photographs that were captured by FIS sometime later?

And did you notice any discrepancy in how they were describing they had seen Mr. Dunphy's body when they had entered the room and then ultimately how his body had been captured on the photographs that were taken by FIS sometime later?

CPL BURKE: No, I didn't. They were audio statements and I could only piece together, you know, what they're describing as the scene and photos were photos that you couldn't actually see. So any discrepancies I would have attributed them to not being able to see what they're describing, basically.

MS. O'BRIEN: Okay. And when you say they were audio statements, they did get transcribed.

CPL BURKE: Yes.

MS. O'BRIEN: So you could read them –

CPL BURKE: Yes.

MS. O'BRIEN: – but there was no video taken of those statements is what you mean.

CPL BURKE: Yes.

MS. O'BRIEN: You couldn't see how they might have been gesturing or whatnot –

CPL BURKE: Yes.

MS. O'BRIEN: – as they were giving their statements. Okay.

When – we have had both those individuals give testimony before the Commission and they have been very – both very adamant that the way they saw Mr. Dunphy's left arm, in particular, is different from how it was captured in the scene photos. And also the way they recall seeing the gun is different from how it was captured in the FIS scene photos.

You're saying you didn't note that discrepancy. In part could that have been because that when – in their initial interviews by the RCMP they weren't questioned on those items in adequate detail so that someone listening to the audio or reading a transcript would be able to ascertain exactly how it was they did see the scene, particularly those two very important items.

CPL BURKE: I guess the – it was inadequate. I don't know, it could have been videotaped, I guess. If they were using gestures or, you know, words like it was this way or that way, you

know, someone reviewing that wouldn't be able to say with any certainty what they are describing.

So that's all I can really say about it. I don't know.

MS. O'BRIEN: Okay. So a video might have helped in that regard is what you're saying.

CPL BURKE: Yes.

MS. O'BRIEN: Yeah, a video might have helped. And their statements were – I think Nancy Linehan's was about 24 minutes and Mr. Bishop's was only about 14 minutes. So they were fairly short statements, would you agree with that?

CPL BURKE: I – appropriate to the witnesses, I assume.

MS. O'BRIEN: So you felt that they were appropriate – you felt they were appropriately detailed.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Yesterday, I was asking you a question and I put it aside because Mr. Kennedy had asked me to have the exact note on the transcript of what I was referring to. And this is in Officer Smyth's second re-enactment, which is the one that was videotaped and we ultimately have a transcript of – he had – and you attended for that, you were there on April 10 when he did that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

He – in that re-enactment he described where he had and how he had seen the rifle upon re-entering the room after shooting Mr. Dunphy.

CPL BURKE: Yes.

MS. O'BRIEN: And it's at the transcript of the second re-enactment, Mr. Kennedy, which at page 14 of 27. And he said: The firearm is leaned up against – I'm guessing it's this green case. Albeit I can't – if it was a box, if it was a Tupperware container, if it was something else, ice cream bucket, it was leaned up against something in that region. It was not on top of the coffee table and it wasn't laid on the floor. But that green bucket for some reason doesn't completely resonate with me. But the gun was there. I saw it.

CPL BURKE: Yes.

MS. O'BRIEN: And then he later on – and it's page 22, Mr. Kennedy, of that transcript. If this hasn't moved and I'm thinking these, the butt and it was the gun was on the floor and I'm pretty certain that the barrel was pointed up. Do you recall that in his second re-enactment?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And that's not how the gun was found was it?

CPL BURKE: No.

MS. O'BRIEN: Okay. So what's the difference there?

CPL BURKE: The way that the gun was found. The stock of the gun was pointing up and the barrel was pointing towards the floor.

MS. O'BRIEN: Okay. And so there's that discrepancy there between what Constable Smyth has said in that statement and how the scene was photographed. And also in his first statement to you, the one that was recorded on April 6, and I think it's also consistent with his typewritten notes that he ultimately provided you. But it's page 15 of his first statement, Mr. Kennedy, he describes the gun as being on the floor. Those were the words he used. Would you have seen his description as on the floor to be inconsistent with how the gun was found?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Did you note these inconsistencies?

CPL BURKE: Yes, I did.

MS. O'BRIEN: Okay. What – when you say you noted them, did you note them in the file?

CPL BURKE: I'm not sure.

MS. O'BRIEN: Okay.

CPL BURKE: Not sure.

MS. O'BRIEN: Did you make anything of them? What did you do with that information?

CPL BURKE: As with any information, and there's a lot of information in any file, you have to take all the information together and make a, I guess, a reasonable belief as to what was being presented.

MS. O'BRIEN: Okay. So can you just go through that process and explain what you did with this information; what you ultimately concluded and why?

CPL BURKE: You know, I can only say that after reviewing the scene photos and reviewing the statements, there are some inconsistencies of the way the rifle was placed and I can only go with what is most consistent or what is, you know, what I – there's errors in, you know, people's perception or people's, what they witnessed. So I have to take that as, you know, what I have reason to believe what happened or the way the gun was placed.

MS. O'BRIEN: Okay. So to be, to be clear, you're – just to, so that I can be clear about what it is you're saying. You're saying that you just took this to be frailties in memory of Constable Smyth or – is that what you're saying to the Commissioner?

CPL BURKE: I was just saying that I – you know, when I looked at the scene and I looked at the pictures after, I saw differences. Do you know what I mean? Like when you view something, it's not always 100 per cent accurate in placement of the firearm, or something like that.

MS. O'BRIEN: Okay.

CPL BURKE: And I, I just take that as a piece of information that I have to bear in mind.

MS. O'BRIEN: Okay. Okay. Ultimately, though, it had no impact on your final investigative result? Is that what you're saying?

CPL BURKE: You know – no.

MS. O'BRIEN: And when you noted that inconsistency, did you make any comparison to what Constable Smyth was saying how he saw the gun initially in his, in his initial statements and what the paramedics, the EMR and the paramedic Linehan and Bishop had said? Did you compare those and consider whether or not they were consistent or inconsistent?

CPL BURKE: I compared the, those statements and I compared the statement of Corporal O'Keefe, or notes of Corporal O'Keefe and Constable Cox. They described the, you know –

THE COMMISSIONER: Sorry. Corporal –

CPL BURKE: O'Keefe. Trevor O'Keefe.

THE COMMISSIONER: O'Keefe, and who else?

CPL BURKE: And Adrian Cox.

THE COMMISSIONER: Cox, yeah.

CPL BURKE: They described the gun in a manner, you know, that's consistent with the photos, I guess, but everyone has their own take on or memory of how the gun was placed.

MS. O'BRIEN: Okay. And I think just for accuracy, I think Corporal O'Keefe, his words used, I think, were on the floor, but I – and we'll hear from Cox later on. But so to summarize here, you're saying you had different people saying different things, you noted that, but ultimately you did not – it didn't lead you to conclude that the gun had been moved. Is that what you're saying?

CPL BURKE: No, exactly.

MS. O'BRIEN: Okay.

CPL BURKE: I just took that people's memories are different or the way people perceive things are different and I took a, I guess, a summary of that and decided that it wasn't, it didn't lead me to believe that the gun had been moved, no.

MS. O'BRIEN: Okay. So that was your ultimately conclusion. This wasn't evidence of movement of the gun. You were thinking this is people remembering incorrectly.

CPL BURKE: Exactly. Whatever they remember, I guess.

MS. O'BRIEN: Okay.

THE COMMISSIONER: You may pick a place to stop, Ms. O'Brien, when you're ready.

MS. O'BRIEN: Yes. Thank you, Commissioner. That is a good place to stop.

And I do believe that we will be able to conclude the direct examination of Corporal Burke before lunch.

THE COMMISSIONER: A bit ahead of schedule, eh?

Okay – oh, before I leave there’s one bit of housekeeping. When we heard the argument on the proposed experiment with the chair some counsel were not present. So I just wanted to check and see.

Mr. Flaherty, did you – are you taking a position – your client is taking a position in support or against Mr. Simmonds?

MR. FLAHERTY: In support.

THE COMMISSIONER: In support? Yeah, I figured that.

And who else was not there? Mr. Williams, you’re taking a position on it or not?

MR. WILLIAMS: Well, I don’t think it’s really relevant to the evidence for my client. Obviously we have a position on it that, you know, for the information of the Commission, I don’t think we are in favour of it. If you wonder about our opinion but the relevancy –

THE COMMISSIONER: That’s what I am. You would be on the other side, you would not be agreeing with the –

MR. WILLIAMS: No, we would not be in favour.

THE COMMISSIONER: – with the submission.

MR. WILLIAMS: Don’t see the point.

THE COMMISSIONER: I think everybody else was present, were they not?

MR. AVIS: I wasn’t present but I had discussed in advance –

THE COMMISSIONER: But you had some notes made that –

MR. AVIS: Yes.

THE COMMISSIONER: – that appeared to be not in favour.

MR. AVIS: Yes, appeared to be, absolutely.

THE COMMISSIONER: Okay.

MR. DROVER: Mr. Commissioner, I wasn’t present on Friday but we had discussed that –

THE COMMISSIONER: You had presented material earlier.

MR. DROVER: – a few weeks ago. I had presented quite a bit of case law on the topic and had made a very brief submission. So we’ll stand by that.

THE COMMISSIONER: Right. Okay.

And the position of Ms. Rasmussen, the RCMP – I’ve forgotten now whether you were – you were here, were you? You were.

MS. RASMUSSEN: I was here briefly, yes.

THE COMMISSIONER: Yeah, that's right. Sorry, you were –

MS. RASMUSSEN: So we had expressed our position.

THE COMMISSIONER: Now that I think of it, you made a brief but – a submission that I've noted. You were a couple of points different from other counsel I think.

Okay. So that's just for the purpose of my drafting my reasons.

We'll adjourn now for 15 minutes.

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.

MR. SIMMONDS: Mr. Flaherty will be back in a minute. He's just –

THE COMMISSIONER: (Inaudible.)

MS. O'BRIEN: Commissioner, your microphone.

Thank you.

Commissioner, before we begin, two further exhibits to enter please: Exhibit P-0527 and P-0528.

THE COMMISSIONER: (Inaudible) 0257 and 0258?

MS. O'BRIEN: Yes, thank you.

Corporal Burke, during the course of this investigation did you have any communication with anyone from the premier's office, other than – and I know that two members – we know that Donna Ivey and Steve Kent, who are both – one from premier's office and one obviously an MHA at the time, were both interviewed by the RCMP. But other than that, did you have any communications from anyone from the premier's office?

CPL BURKE: No.

MS. O'BRIEN: Okay, and what about anyone else from government generally?

CPL BURKE: No.

MS. O'BRIEN: Okay.

And we're going to hear from some others officers with the RCMP with respect to their contact with, you know, members of the RNC. But were you ever contacted directly by senior members of the RNC with respect to the investigation?

CPL BURKE: The only contact I had with senior officers with the RNC was Inspector Superintendent Jason Sheppard.

MS. O'BRIEN: And briefly, what was your interaction with Superintendent Jason Sheppard.

CPL BURKE: Superintendent Sheppard was my contact for obtaining training records and use-of-force reports. Anything, you know, that I requested from the RNC, he was the point of contact.

MS. O'BRIEN: Did you have any interaction with anyone else at the RNC other than individuals that would have been part of an investigation?

CPL BURKE: Briefly with, I think, it's an RNC lawyer, Wendy Zdebiak.

MS. O'BRIEN: (Inaudible.)

CPL BURKE: I'm thinking, yes.

MS. O'BRIEN: All right, thank you.

And we're going to hear from Superintendent Jason Sheppard and understand that his interactions with you was what you just said, providing records and whatnot to you (inaudible).

CPL BURKE: Yes.

UNIDENTIFIED MALE SPEAKER: Mr. Commissioner, not sure – I know the mic is on, but I'm not sure it's actually working because I don't hear anything being amplified. Your mic –

MS. O'BRIEN: Oh.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

UNIDENTIFIED MALE SPEAKER: I can see that it's on but –

MS. O'BRIEN: I am hearing – I'm hearing my own voice quite loudly.

UNIDENTIFIED MALE SPEAKER: Yeah, okay. Okay.

MS. O'BRIEN: And when, in terms of your review of Constable Smyth's use-of-force report, did you get copy – can you explain to the Commissioner, did you get copies of all his reports from the RNC?

CPL BURKE: To the best of my knowledge.

MS. O'BRIEN: Okay.

Did you attend at the RNC ever to review records of his?

CPL BURKE: Yes.

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

CPL BURKE: I think it was the, well, I think it's called a personnel file, which is any records that would be on his personnel file I guess. So I went to the RNC and reviewed those records.

MS. O'BRIEN: Okay. Did you take copies of them for you file?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. So you would have seen whatever was presented to you by the RNC at that time in his personnel file

CPL BURKE: Yes.

MS. O'BRIEN: But you – when we get the RCMP disclosure, because you didn't have copies of those records, wouldn't necessarily be in our disclosure. Is that right?

CPL BURKE: No, I just took notes on what I read.

MS. O'BRIEN: Okay.

And do you recall that there were use-of-force reports in that personnel file?

CPL BURKE: No, I can't remember seeing any use-of-force reports.

MS. O'BRIEN: Okay. So that would have been related to his training and –

CPL BURKE: Yes.

MS. O'BRIEN: – and also any discipline he'd received. Those records would have been in there.

CPL BURKE: The – yes.

MS. O'BRIEN: Okay.

I think in the RCMP disclosure we have one use-of-force report, and that's the one that he completed for this particular incident. Did you – do you have any recollection of ever doing any review of his other use-of-force reports in previous incidents in his policing career?

CPL BURKE: I didn't – I wasn't provided with any use-of-force reports.

MS. O'BRIEN: Okay.

CPL BURKE: Other than the one for the actual incident on December – April 5.

MS. O'BRIEN: Okay. And did you seek – you're saying you weren't provided, did you ask for them?

CPL BURKE: Yes.

MS. O'BRIEN: You asked for them and they didn't provide them? Is that what you're saying?

CPL BURKE: I asked for them and I assume they gave me what they had.

MS. O'BRIEN: Okay.

And that request would have been made to Jason Sheppard?

CPL BURKE: It would have been requested from Inspector Pat Cahill at the time to Superintendent Sheppard.

MS. O'BRIEN: Okay.

From time to time we understand that Constable Smyth contacted you for an update. And you would have provided updates to Constable Smyth periodically through email.

CPL BURKE: Yes.

MS. O'BRIEN: Did you also speak to him by phone to give him updates?

CPL BURKE: Yes.

MS. O'BRIEN: All right.

And we're going to look at some of those in particular. Generally, is that something you would normally do? In other investigations that you have done, have you provided updates to the subject of the investigation as to where you are and how things have progressed as the investigation's been ongoing?

CPL BURKE: No, it's not something that I normally do.

MS. O'BRIEN: Okay.

And when you were contacting Constable Smyth by phone, did he have your cellphone number?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And did you provide him to – provide that to him?

CPL BURKE: Yes.

MS. O'BRIEN: In any other case that you've been involved with, have you provided your cellphone number to the subject of an investigation?

CPL BURKE: No, it's a business phone. It wasn't – it's not a personal cellphone so I didn't consider that as a, you know, anything other than providing a point of contact. And I also, when – I don't make a whole lot of contact or I don't have a whole lot of involvement with people that are not charged or arrested from my experience as a Major Crime investigator.

You know, so it's a special circumstance because this – Constable Smyth in this case was not charged with any offence. So usually that would mean that there's no contact with other people. We don't usually have much contact with subjects of complaints in homicide investigations so

MS. O'BRIEN: Okay. So to understand what you're saying here is that – and this, you're saying that although you don't normally provide updates to a subject of a criminal investigation, in fact is that something you've ever done before, given regular updates to a subject of an investigation?

CPL BURKE: No.

MS. O'BRIEN: Okay. So this was your first time ever doing it. And you're, I think you're articulating the difference, why, what would be in this case that you've done it and not in other cases.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And you're saying that it's because, the difference being that here there was no, no charge had been laid. If you could just explain that again and make your answer a little more clear for the Commissioner.

CPL BURKE: It's just that if the person is not charged, we don't have any contact with them, basically.

MS. O'BRIEN: Okay. And, but in this case you did.

CPL BURKE: Yes.

MS. O'BRIEN: Would the difference here have been because or had anything to do with the fact that Constable Smyth was a police officer?

CPL BURKE: I don't know about that. It's just that there was no reasonable grounds to believe he committed a criminal offence at that time. So he was a subject, I guess, that we were dealing with, not a, a person that had committed a criminal offence, basically.

MS. O'BRIEN: But you were still conducting your investigation –

CPL BURKE: Yes.

MS. O'BRIEN: – to determine whether or not –

CPL BURKE: Yes.

MS. O'BRIEN: – there are criminal charges.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. That must happen somewhat frequently where you do an investigation before you conclude that there's criminal charges to be laid?

CPL BURKE: Yes.

MS. O'BRIEN: That would be something that you do fairly often?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Can I please bring up Exhibit P-0197 please, Madam Clerk?

So this is one example of your communication with, with Constable Smyth. And this is, takes places on June 9 of 2015. And Constable Smyth writes: Hey Steve, I'm wondering if you can share a copy of my interview with you? Whether it be the audio, video or transcript. Thanks, Joe.

And then you reply: “Sorry Joe, the interview forms part of an ongoing investigation and cannot be released. Hope you understand. Thanks, Steve.”

So in this case we have Constable Smyth asking for his, a copy of his interview. Why did you not give it to him?

CPL BURKE: We don’t – it’s part of our investigative file and we don’t provide that information to anybody.

MS. O’BRIEN: Okay. And would that be consistent with how you do it in other cases? In any ongoing investigation, would you ever provide the subject of an investigation with a copy of their, of their interview or statement?

CPL BURKE: No.

MS. O’BRIEN: Can I please see Exhibit P-0199, Madam Clerk?

I’m just going to go to the bottom of this email chain and this one takes place in July, July 28, 2015 and it’s again from Constable Smyth to you. “Hey Steve, wondering if you’ve heard any update from the lab. Still looking at mid August? Thanks, J.” So I take it he’s looking here for the lab report that we reviewed earlier this morning, whether you’ve had any update on that item. You responded: “The lab dd” – is that diary date?

CPL BURKE: Yes.

MS. O’BRIEN: Okay. “... has been extended until Sept 15th. Steve.” He writes back then: “Thanks Steve; In light of the fact that the lab analysis will evidently continue to be delayed as long as higher- priority investigations are submitted, is there any reason your findings to date cannot be discussed with the Chief of Police? I continue to exist in a state of professional limbo, and it will be very much appreciated to have some sense of a definitive conclusion. Thanks, Joey.”

When he wrote here, the chief of police, who did you understand that to be?

CPL BURKE: Chief of police of the RNC.

MS. O’BRIEN: Of the RNC, okay.

So your response back is, again July 28: “Hey Joe; I appreciate your desire to have this matter resolved. Until the lab analysis is completed along with other investigative steps, it would be inappropriate for me to discuss an on-going investigation or make any sort of tentative conclusions. I hope you understand and rest assured that this investigation remains priority. Steve.”

And then he writes back: “Thanks, should I assume it is moot to ask what ‘other investigative steps’ is referring to? Forgive my queries, this is new territory for me, and I honestly do not know what my status is. I know what I would be telling the subject of an investigation, but I don’t know if that is what I am classified as.”

So you don’t respond to that or I don’t see any record of a response to that and then the next is a further email from Constable Smyth. “Cpl Burke, I would sincerely appreciate an update on your investigation. There have been times when the RCMP have referred to me as ‘another victim’ in this case and investigation; if that is the situation, then I would like to think I should be privy to

some semblance of an update, or perhaps explanation of what ‘other investigative steps’ refers to, given that we are now four months out from the incident.”

And then he goes on to say he knows explicitly what happened and goes on and concludes with: “Of course, if my status is not what I believe it to be, then I naturally know you cannot update me in any way. If this is the case, you will not hear from me again before disclosure. Thanks again for your time. Joe.”

What I want to talk to you about in this chain, Corporal Burke, very specifically, is this note that Constable Smyth makes to you that he has been referred to by the RCMP as a – as another victim. Had you heard that from RCMP members?

CPL BURKE: Yes.

MS. O’BRIEN: Okay. So can you explain that, please?

CPL BURKE: I think it stems from the original PROS file and the original complaint, which was pointing a firearm. And the pointing a firearm was allegedly pointed at Constable Smyth, and he was a complainant and a victim in that scenario or in that incident.

MS. O’BRIEN: Okay.

You’re saying as we discussed yesterday that Constable Smyth had been classified or carded in the PROS system as a complainant, but the issue here I think that Constable Smyth is saying is that he’s been referred to as another victim. Are you equating the term victim and complainant?

CPL BURKE: Victim – well, equated to the pointing a firearm complaint or incident or occurrence.

MS. O’BRIEN: Okay. So you –

CPL BURKE: So he’s alleging that the firearm was pointed at him, so that in pointing a firearm he would be a victim.

MS. O’BRIEN: So you had heard members of the RCMP refer to him as a victim?

CPL BURKE: Yes.

MS. O’BRIEN: Okay.

Do you recall specifically who that was?

CPL BURKE: No.

MS. O’BRIEN: Okay.

When Constable Smyth gave testimony at this inquiry on January 27, he testified that he recalled it was one of the investigators who had said that.

CPL BURKE: Yeah.

MS. O’BRIEN: And I think his words were it was probably you. Or in response to a question whether it was you, I think he said probably, yes, or words to that effect. Was that you who did that?

CPL BURKE: I don't remember doing that, no.

MS. O'BRIEN: Okay.

Is it possible that you might have been the one who referred to Constable Smyth direct – to him as the victim?

CPL BURKE: I don't have an answer to that.

MS. O'BRIEN: Okay.

And when you say you don't have an answer, is that you're saying I don't recall whether I did that or not?

CPL BURKE: You asked me if it was possible. I guess it's possible. I can't say with any reasonable consistency or belief that it was me that said that.

MS. O'BRIEN: Okay, because you don't remember doing that.

CPL BURKE: No.

MS. O'BRIEN: Okay.

When we talked about this issue on your pre-hearing interview I asked you, put the question to you whether you had made any inquiries to find out who within the RCMP might have referred to Constable Smyth directly as a victim. Your answer at that time was, no, that you didn't make any inquiries.

Today, you're saying that you do recall, though, some RCMP officers using that terminology. Is that right?

CPL BURKE: It, it's not – I guess it's not – it doesn't surprise me that members would refer to him as a victim.

MS. O'BRIEN: Okay.

This email that you've received here from Constable Smyth, we have a series of them, and particularly the last one, there seems to be a bit of a change of tone in that, in that email. It's probably illustrating his growing frustration. When you received that email did you respond to it?

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

MS. O'BRIEN: Okay.

I didn't see an (inaudible) response.

CPL BURKE: I responded before and gave him an update and, I guess, as far as I went with it.

MS. O'BRIEN: Okay.

So it don't – certainly don't seem to file any response to this last email in the chain of the one that's sent on the 29th here. Why would you not have responded? Is there a reason?

CPL BURKE: I thought I had sufficiently responded in the previous email.

MS. O'BRIEN: Okay.

With respect – we've heard some evidence about the glasses. On April 14, Erin Breen wrote Sergeant Kent Osmond specifically with respect to the glasses that Meghan Dunphy had found in the house that had not been seized as part of the initial investigation. And that – I think the initial email and the resulting email chain had been entered as Exhibit P-0042, Commissioner, for your information, but I don't need to go through that in detail now.

But the result of that email chain, Corporal Burke, is that you advised that you would take a look at the glasses as they existed in the scene photos and that the police officers would seize the glasses that Meghan Dunphy found with her consent. Do you recall that generally, her communications?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So as a result of that did you look at the glasses in the scene photos?

CPL BURKE: Yes, I did.

MS. O'BRIEN: Okay.

I'm going to bring up a photograph that might be one of the ones that you looked at. Can we see in Exhibit P-0010, Photo 100, please?

Corporal Burke, do you recognize this as one of the photographs that you would have looked at on that day?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And I can also bring up, if you just want to keep that one in your mind for a moment – I'm going to bring up one of the photographs that Meghan Dunphy took of the glasses when she found them in the home.

Can we also see Exhibit P-0062? And so this is the photograph that was provided by Meghan Dunphy.

Corporal Burke, having – when you looked at the photographs what was your conclusion having done that?

CPL BURKE: That the glasses were of no evidentiary value.

MS. O'BRIEN: Okay.

And so can you just explain that, please, in a little more detail for the Commissioner. Why did you consider them not to be of evidentiary value?

CPL BURKE: First of all, the scene was released at that time. We did not have any continuity of any items that were in that residence.

I took the information provided to me by Ms. Breen and Ms. Dunphy, and they asked me – or, you know, they asked why the glasses weren't seized. I didn't feel the glasses, either way, were of any evidentiary value to seize initially at the scene.

Once I reviewed the RCMP photos of the glasses of what I could find of the glasses at the scene, I determined that the glasses were in rough shape, but of wearable condition.

MS. O'BRIEN: So that would have been like, in Photograph 100 that we just looked at a few minutes ago. That's what you're referring to there?

CPL BURKE: Yeah, there's other – there's a series of photographs that I looked at other than that one.

MS. O'BRIEN: Okay. And so you concluded that they were in rough shape but wearable condition. Is that what you just said?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And what about – how would you compare that to the glasses in the photograph; for example, this photograph, 062, that we're seeing that was taken on or about April 14?

CPL BURKE: Obviously, the glasses were still in rough shape but I think they were in worse shape than they were when I viewed them in the RCMP photos.

MS. O'BRIEN: Did you consider that they were in wearable condition on April 14?

CPL BURKE: No, I think they were in a little rougher shape, basically.

MS. O'BRIEN: Okay.

So you looked at the photographs, you determined they were of no evidentiary value. Did you take any other steps with respect to the glasses?

CPL BURKE: And I wanted to just highlight that, you know, the glasses were obviously moved from when they were photographed by the RCMP and when this photograph was taken.

MS. O'BRIEN: So you're pointing out, then, photograph 100 we just looked at and P-0062; the glasses are in a different location.

CPL BURKE: Yeah. And the items on the table are in different locations as well, so.

MS. O'BRIEN: Okay.

CPL BURKE: And I also know from the scene that Mr. Dunphy was sitting directly in front of that table. So that table would have been moved at some point and items dislodged or moved as well.

MS. O'BRIEN: You mean when Mr. Dunphy's body was being removed from the room?

CPL BURKE: Yes.

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

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: So I made my assessment on the glasses and didn't see any evidentiary value to move our investigation forward. That was my assessment and, you know, I also had to bear in mind the fact that I couldn't legally, or with any great influence use these glasses as evidence as we had no continuity of the glasses. So it was kind of a two-fold thing, there was no continuity and I didn't feel in the RCMP photos that – you know, they were obviously in poor condition, but in wear – you, know, what I would consider as a wearable condition.

MS. O'BRIEN: Go ahead.

CPL BURKE: And obviously they were repaired at some point at home and the, when I went to look at the rest of the photos I did find evidence of the tape that was used on the glasses in the residence. Or what appeared to me as the same tape, I guess.

MS. O'BRIEN: You were able to see that in some of the photographs –

CPL BURKE: Yes.

MS. O'BRIEN: – that were taken in the house, okay.

CPL BURKE: And I think in reviewing it again, I think Colin Dinn mentioned giving Mr. Dunphy some tape to – surgical tape, I call it – to, I think he got scratched by cats or something and to dress a wound I guess. So that's fine. So I made an assessment that the glasses were no evidentiary value. I think Ms. Breen suggested that there may have been a struggle in the residence and the glasses did not provide any evidence of that.

MS. O'BRIEN: To – in your consideration, you're saying.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. But you went – you did task someone to go seize the glasses, right?

CPL BURKE: Yes, I did.

MS. O'BRIEN: Okay. So you were, you tasked, I think it was Constable Galway –

CPL BURKE: Yes.

MS. O'BRIEN: – who went to seize the glasses. Why would you have sent him to go seize the glasses if at that time you'd already concluded they were of no evidentiary value?

CPL BURKE: I didn't want to be seen as dismissing this piece of evidence that was, or potential piece of evidence that was brought to our attention by Ms. Breen and Ms. Dunphy. I didn't want to, you know, say that they're of no evidentiary value and we're not doing anything with them. So in order to, I guess, appear transparent or independent or, you know, as thorough as we could be, we seized the glasses and did a, I guess side investigation on the glasses as, you know, some investigation on the state of the glasses, the condition of the glasses before the incident on April 5.

MS. O'BRIEN: And that those – that side investigation you just referred to, that would have included going and re-interviewing Colin Dinn –

CPL BURKE: Yes.

MS. O'BRIEN: – and also maybe Thomas Hearn.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And the waitress who had worked at the Woodstock restaurant that day –

CPL BURKE: Yes.

MS. O'BRIEN: – that Mr. Dunphy had been in for brunch. And other investigative steps you took at that time would have also included getting surveillance video –

CPL BURKE: Yes.

MS. O'BRIEN: – from the Circle K store that –

CPL BURKE: Yes.

MS. O'BRIEN: – and the Shoppers Drug Mart –

CPL BURKE: Yes.

MS. O'BRIEN: – that Mr. Dunphy had attended. And I believe you also tried to get it, as we looked at yesterday, from the Royal Bank of Canada.

CPL BURKE: Yes.

MS. O'BRIEN: All right.

So all those extra steps you took with regards to a piece of evidence that you didn't feel had any evidentiary value even before you took those steps.

CPL BURKE: Yes, you know, it was, I guess, a exercise to, you know, present to Ms. Dunphy and Ms. Breen that we were doing everything we could and tracking down any information that we could and to remain as independent and thorough as we could.

MS. O'BRIEN: Okay.

Did you consider that the communications that you were receiving from Meghan Dunphy through her legal counsel were having an influence on how you were conducting the investigation?

CPL BURKE: Well, it led us to do the glasses investigation. So I'd say, yes.

MS. O'BRIEN: Okay.

I'm just going to – when I asked you that same question on December 1 of 2016 you answered differently than you just did then. I'll just read you this part of the transcript, page 418: Do you consider that those – the communications from Meghan Dunphy's counsel ever influenced the investigation or how you handled the investigation? And your answer at that time was no.

So can you just explain to the Commissioner why the difference in your answer on December 1 and your answer here today.

CPL BURKE: I guess having an opportunity to assess that question or, you know, explain the incident with the glasses, it was obvious that there was an influence.

MS. O'BRIEN: Can we please bring up Exhibit P-0426, please, Madam Clerk.

Corporal Burke, this is an email that you were copied on, one of a number of people copied on but it's from Kent Osmond and it is just, during this period, just following the time period after the glasses had in fact been seized.

And he writes that: "Yesterday afternoon I was served with a strongly worded letter from Erin BREEN, legal counsel for Ms Meghan DUNPHY, which was also addressed to C/Supt BOLAND and Justice Minister Darin KING. The letter calls for a cessation of RCMP involvement and the immediate assignment of an out-of-province police agency to perform the investigation.

"Her reasons cite 'tunnel vision' on the part of the MCU, FIS and Holyrood members, stating that we may have overlooked or intentionally dismissed a critical piece of evidence at the scene that didn't fit with our current theories. She states our investigation isn't being completed in a thorough or unbiased manner.

"She feels that way due to our not seizing a set of eyeglasses that were worn by Mr. DUNPHY on the day in question.

"Obviously, any decision on such matters will occur at RCMP Management/Governmental levels and we will continue to investigate until told otherwise.

"MCU has been very accommodating of Ms DUNPHY's needs and questions and have involved Ms BREEN extensively.

"Moving forward, when dealing with the family or Ms. Breen, please direct them to Cpl BURKE or myself. If they have questions, note the questions and forward same to us. Any interactions are to be well documented. Kent"

Do you recall receiving this email from Sergeant Osmond?

CPL BURKE: Yes.

MR. KENNEDY: Sorry, could you just go back to actually the date, Ms. O'Brien?

MS. O'BRIEN: Yes, it's April 17.

MR. KENNEDY: Thank you.

MS. O'BRIEN: Did you have any discussions with Sergeant Osmond prior to him sending out this email? Is that something that you had consulted on in the Command Triangle before he sent it out to the larger group?

CPL BURKE: We were discussing it.

MS. O'BRIEN: You would have discussed it with him, yes, okay.

All right. Now, I understand when we had talked about the position of family liaison yesterday that the family liaison had initially been Constable John Galway and that at a certain point it had transitioned to become you; you became essentially the family liaison.

Would this email have marked that change from going from Constable John Galway to you?

CPL BURKE: (Inaudible.)

MS. O'BRIEN: It's showing it's on, but –

CPL BURKE: Yes, it would have (inaudible).

MS. O'BRIEN: Yes, so maybe Mr. Drover just suggested you hit it on and off to see if that makes a difference.

CPL BURKE: It would have – from reading that email (inaudible).

MS. O'BRIEN: If we could get Kathy to confirm that she's able to hear.

THE COMMISSIONER: Just give us a test there.

CPL BURKE: Test.

THE COMMISSIONER: It doesn't seem to be.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible) off and turn it on again.

CPL BURKE: Test.

THE COMMISSIONER: All clear.

Okay.

MS. O'BRIEN: Okay.

CPL BURKE: From reviewing that email it would have been yes, to the point where I began family liaison duties, I guess. Or myself or Sergeant Osmond.

MS. O'BRIEN: Okay. (Inaudible) John Galway is no longer the family liaison either.

CPL BURKE: I don't know if it was a formal communication, but I spoke with Ms. Dunphy from that point, I guess.

MS. SHEEHAN: Excuse me, Counsel, I think we have to take a break; the techs want to reset the mics.

MS. O'BRIEN: Okay. Thank you.

THE COMMISSIONER: Pardon?

MS. SHEEHAN: We have to take a break, Commissioner, (inaudible) problem with the mics.

THE COMMISSIONER: We're going to recess for a minutes.

Okay. We have to recess to adjust the mics. We'll take a five-minute break, hopefully, roughly.

Recess

MS. SHEEHAN: The Commission of Inquiry is now in session.

Please be seated.

THE COMMISSIONER: Thank you.

Go ahead when you're ready, Ms. O'Brien.

MS. O'BRIEN: Thank you.

Corporal Burke, did you know that Constable – I believe he's now perhaps corporal – Lee Lush's, who's a member of the RCMP, that his business card was found in Mr. Dunphy's wallet.

CPL BURKE: I can't remember.

MS. O'BRIEN: Constable Galway, who testified to having found the wallet – I think he went looking for it at Meghan Dunphy's request – said that he and Staff Sergeant Tiller were there. He quickly looked in the wallet; he hadn't seen that business card and that he'd returned the wallet over to Meghan Dunphy.

But we heard from Corporal Lush also. He also provided some evidence to us. And he testified to running into you at – sometime at headquarters, RCMP headquarters in White Hills at some point during the investigation, he didn't have a specific time. And he said that he in that conver – he had run into you and there'd been a brief conversation and you had told him about his wallet being found in Mr. Dunphy's – his business card being found in Mr. Dunphy's wallet. Does that, you know, does that refresh your memory at all?

CPL BURKE: No, it doesn't actually.

MS. O'BRIEN: Okay.

All right, so you – no explanation for how –

CPL BURKE: No. Corporal Lush's, you know, I guess involvement in this investigation was that there was a PROS investigation RCMP file in 2012. And that's the contact I would have, you know, I can only assume I would have discussed that with Corporal Lee – Corporal Lush, sorry.

MS. O'BRIEN: Okay. Was Corporal Lush ever – did you ever interview or task someone to interview Corporal Lush as part of this investigation?

CPL BURKE: No, I reviewed the PROS file and it was pretty detailed as to what happened, so I didn't feel it was necessary to interview him on that.

MS. O'BRIEN: Okay. And to the best of your knowledge, you were never aware of that card being in the possession of Mr. Dunphy.

CPL BURKE: No, I can't say. No.

MS. O'BRIEN: Okay.

Okay. Just a couple of questions with respect to the subject matter experts that you used on this file. We, I understand that a 3-D reconstruction was considered at some point and that ultimately Darryl Barr was retained to do an analysis of the shooting evidence that had – from the scene.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. Did you have any involvement in the retainment or selection of Darryl Barr?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay. So I – that was Kent Osmond, was it? Sergeant Kent Osmond –

CPL BURKE: Yes.

MS. O'BRIEN: – who did that particular piece of work. Okay. Did you receive and review Darryl Barr's report?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And we are going to hear from Darryl Barr, who will give his evidence to the Commission, but just for the purposes of you giving us some information as to your investigative steps, do you recall what his conclusion was?

CPL BURKE: I go by memory, but his conclusion was that the, the information he found at the scene, or the information he gleaned from the scene and his 3-D reconstruction were consistent with the statements and re-enactments provided by Constable Smyth.

MS. O'BRIEN: Okay. And I think – and we will hear from him directly. And in his report he says it a little bit differently but it's along the – he didn't find any inconsistencies between the shooting evidence and Constable Smyth's statement. And he'll explain why he phrases it that way when he gives his evidence.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So you also engaged another subject matter expert and that would be in the area of use of force.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And Corporal Wayne Knapman provided you with a report?

CPL BURKE: Yes.

MS. O'BRIEN: On that matter. And Corporal Knapman will come to the inquiry to speak to his report, but right now, for the purposes of your involvement in the investigation, what was – can you advise the Commissioner what the conclusion that you received from Corporal Wayne Knapman?

CPL BURKE: Something – and I'm just going to go by memory and probably paraphrase, but his conclusions were that the amount of force used by Constable Smyth, given the conditions or what he was presented with, was consistent and not excessive.

MS. O'BRIEN: Yes. And again, we'll hear from him, but the words I think, in his report he uses was reasonable and necessary in the totality of the circumstances that the force was.

Okay. I'm going to bring you to your general report, which is at P-0312 please, Madam Clerk, and I'm going to bring you to a couple of specific areas of that. I understand this report generally is the culmination of all of the notes that you took, your typed notes that you took while working on this file. Is that correct?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And it's a 25-page document and I do not intend to go through all of it, but there's some sections I have questions on. And the first one would be at page 13, please, Madam Clerk.

I can see that it's not responding; Madam Clerk is typing in the number. That's fine, if we could just – if you could scroll quickly down to page 13 might be as fast.

What I'm going to take you to first is your notes of a conversation with Dr. Simon Avis, the chief medical examiner.

Okay. Thank you. Yeah, that's – oh no. Okay, that's good. Thank you. I'm going to come down here a little bit.

Okay. I'm going to read this note out and then get you to explain it, please, Corporal Burke. And this is taking place on April 30.

This is your note of April 30: "Member received a return call from Dr. AVIS, who is the Dr. in charge of the DUNPHY shooting. Member asked Dr. AVIS about the hand position of the deceased as noted in the scene photos. Dr. AVIS said the hand position of the deceased does not mean that ... his hand position ..." – that "does not mean that was his hand position before he was shot. Dr. AVIS added that it would be possible to move the body for a certain time post mortem. Member explained the reason for questions on this about whether the police officer involved moved the body in any way, also if there may have been any sort of struggle or altercation. Dr. AVIS said that the scene evidence indicated that DUNPHY was indeed in seated in the chair when he was shot due to trajectory and the fact there was brain matter on the back of the chair. He also advised that as part of his autopsy report he will speak to any other injuries besides the bullet wounds. Dr. AVIS mentioned the fact that the police officer entered the residence believing that there was no firearms present and then one was presented. (This was contradict any theory that the police officer would have placed any firearm at the scene, not knowing there was a firearm there and the last location of one would have been behind the couch (Meghan DUNPHY statement)."

So the first question to put you on this entry, Corporal Burke, is can you explain for us the reasons why you were putting to Dr. Avis questions about the position of the hands, of Mr. Dunphy's hands?

CPL BURKE: I wanted to know how much weight I could put on that piece of evidence. When Mr. Dunphy was discovered, his hands were positioned in such a way that would lead one to believe that he was holding a long piece of a long item; one, I think it was his left hand was facing up and his right hand was facing down on his lap.

MS. O'BRIEN: Okay. And we've seen pictures and one arm is slightly ahead of the other arm. Okay, so that's the reason you were asked – one of the reasons you were asking. And what did you understand the answer to be?

CPL BURKE: I understood the answer to be that it could be moved, like his hands could be moved post-mortem.

MS. O'BRIEN: Okay.

You note here that you were – one of the reasons was about whether the police officer involved moved the body in any way. So were you trying to explore the possibility of whether Constable Smyth had placed Mr. Dunphy's hands in a position to look as if he was holding a rifle? Is that what you were getting at?

CPL BURKE: I was exploring the possibility if – if I could, the possibility that if – you know, if it was possible for that scenario to take place basically.

MS. O'BRIEN: Okay. And the scenario I just described there and what you learned from Dr. Avis that it would have been possible for some – it would have been possible for someone to move the body.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

In the next you mention that item. You also mention also if there may have been any sort of struggle or altercation. That was one of the other reasons for asking questions. Can you explain that? What specifically were you asking? What specific idea were you – question were you trying to answer there?

CPL BURKE: That's someone that Ms. Breen brought up, that there may have been a struggle between, at the Dunphy residence obviously. And I was trying to obtain any information I could to either support that statement or not support it basically.

MS. O'BRIEN: Okay. And the response from Dr. Avis, in the response you got from him, did you find that there was information there that assisted you with that line of questioning?

CPL BURKE: Yes. He – basically he's stating that the way that we found the body was consistent with the bullet – bullets and other, you know, his injuries, but that was more or less our assumptions or what we've gleaned from the evidence. He was talking more like a police officer than a forensic pathologist at that time I thought.

THE COMMISSIONER: I'm sorry; I missed your first part. You said Dr. Avis stated that the way the body was found, you say was consistent with –

CPL BURKE: With the, where the bullets were found in the damage to the chair and things like that.

THE COMMISSIONER: Okay.

MS. O'BRIEN: And he also reported to you, you note here at least that he reported to you that if there was other injuries on the body he would report that –

CPL BURKE: Yes.

MS. O'BRIEN: – as part of his autopsy.

CPL BURKE: Yes.

MS. O'BRIEN: Now you just made a statement that you felt that Dr. Avis talking more like a – if I heard you correctly, more like a police officer than, I guess, a chief medical examiner was what you were saying. Can you just explain that?

CPL BURKE: Well, these are things that we would consider in our evidence basically. I'm not saying that it was wrong for him to talk like that, it's just that being a forensic pathologist, I guess, he takes those things into consideration as well.

MS. O'BRIEN: Okay.

And are you there specifically saying with the evidence of where the head was, where Mr. Dunphy's head was at the time of the shooting? Or are you referring to this – the last part of the paragraph.

CPL BURKE: Yes, the last part basically.

MS. O'BRIEN: Okay.

CPL BURKE: Yeah.

MS. O'BRIEN: Because I did have a specific question on that and that is Dr. Avis mentioned the fact that the police officer entered the residence believing there was no firearm present and then one was presented.

CPL BURKE: Yes.

MS. O'BRIEN: Now, I will say that we have not yet heard from Dr. Avis at the inquiry but he has been examined by Commission counsel or interviewed by Commission counsel in advance. And Dr. Avis has no memory of saying this and questions whether, you know – I think questioned whether he ever would have said anything like that, just to summarize his statement.

Can you tell us what do you – reading it; it's 100 per cent clear to most of us what's going on here. Can you tell us what you recall of the conversation with Dr. Avis?

CPL BURKE: What I recall of the conversation with Dr. Avis is what I have in my notes.

MS. O'BRIEN: Okay, that Dr. Avis mentioned the fact that the police officer entered the residence believing there was no firearm present and then one was presented. So you're saying Dr. Avis was making statements about what Constable Smyth believed when he entered the home?

CPL BURKE: That's what I have in my notes. That's all I can speak to.

MS. O'BRIEN: Okay. Do you have any memory of that conversation otherwise?

CPL BURKE: No, I don't.

MS. O'BRIEN: Okay. And this would, this, I think – would that mean this would contradict any theory that the police officer would have placed any firearm at the scene not knowing that there was a firearm there?

Is that – what you have there in brackets, is that your statement that this would contradict any theory of the police officer, or is that something else that you noted that Dr. Avis had said?

CPL BURKE: I think I might have put that in there. I am not sure.

MS. O'BRIEN: Okay. Can you explain what you meant by it?

CPL BURKE: I guess – I don't know how other way to say it.

MS. O'BRIEN: Okay.

What would contradict that theory? I mean, you are saying that this would contradict the theory that Constable Smyth placed the gun at the scene that that's not where the gun was –

CPL BURKE: Yes.

MS. O'BRIEN: – after whatever happened, he put it there. What are you pointing out that contradicts that theory?

CPL BURKE: I guess the fact that there was no firearms present.

MS. O'BRIEN: Pardon?

CPL BURKE: There is no firearms present in the residence or it was believed there were no firearms present.

MS. O'BRIEN: The fact that he believed that there was no firearms present would contradict the theory that he placed it where it was found by the police officers who arrived at the scene; is that what you are saying?

CPL BURKE: Just say that again, sorry.

MS. O'BRIEN: I'm trying to get – you know, what are you saying contradicted the theory that the police officer, that Constable Smyth essentially staged the scene with the gun –

CPL BURKE: Uh-huh.

MS. O'BRIEN: – that's what you're getting at here, is it?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. So you're saying something contradicts the theory that he staged the scene by placing the gun –

CPL BURKE: That he believed there was no firearms present.

MS. O'BRIEN: Okay. So can you explain for the Commissioner what's the contradiction there?

CPL BURKE: That if you believe there are no firearms present and one is, one is, you know, you go behind a couch and see stuff, or grab a firearm, how would you know where to look or even to look for a firearm, basically?

MS. O'BRIEN: Okay. All right.

So you're thinking – so I think I understand your point now. So you're saying that based on what Dr. Avis had said to you, you felt that the fact the if Constable Smyth had gone in there not knowing or believing there was any gun in the residence –

CPL BURKE: Yes.

MS. O'BRIEN: – how would he know to go –

CPL BURKE: Yes.

MS. O'BRIEN: – look for a gun behind the couch and then stage a scene with it?

CPL BURKE: Yes.

MS. O'BRIEN: Is that the idea that you were capturing in that note?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Did you discuss the theory of Constable Smyth staging the scene with Dr. Avis?

CPL BURKE: Not to my recollection.

MS. O'BRIEN: Okay.

All right. I'm going to take you to your report, your final report which is in at P-0003 and ask Madam Clerk to go to page 18 of that report.

MR. KENNEDY: So what page, Ms. O'Brien?

MS. O'BRIEN: Page 18.

MR. KENNEDY: (Inaudible.)

MS. O'BRIEN: No, this is his final report.

Thank you. There is a footnote here – this is your final report that you submitted sometime after the ASIRT report was completed, Corporal Burke. It says a footnote nine, and it relates to a sentence here in the report, this is about the blood flow from the injury in Mr. Dunphy's temple, and you note – and the section of your report that you're dealing with here, just to help you, it's the section dealing with Forensic Identification Section Examination.

And you note that the blood flow from this injury in this temple was not flowing straight down with gravity, as is expected, but it was flowing on an angle toward the back. This appears inconsistent with the present position of the deceased.

And then you put a footnote to that, and you said: Corporal Burke reviewed all statements/notes of those who entered the Dunphy residence before FIS arrived and there is no evidence that the body was removed – was moved; my apologies.

Did you ever have – you're noting here, obviously, that the line of blood that was trickling down Mr. Dunphy's head was not perpendicular with the floor, not straight down with gravity; did you have any discussion about that point with Dr. Avis or any other medical or forensic specialist who may have shed some light on that issue?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay.

So what was your ultimate conclusion on that piece of evidence that was recorded in the photos?

CPL BURKE: I didn't have any information to believe that the body was moved.

MS. O'BRIEN: Okay. So are you saying that you noted this as an inconsistency, you reviewed the statements of people who were there and nobody said they moved the body?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And so you just concluded that nobody had moved the body.

CPL BURKE: I didn't have any evidence to believe that they moved the body.

MS. O'BRIEN: Okay.

Did you ever satisfy yourself as to a possible explanation for the way that the blood had trickled?

CPL BURKE: No.

MS. O'BRIEN: Okay.

I just want to go back –

THE COMMISSIONER: Are you moving from that point? I had a question.

MS. O'BRIEN: Yes. Please, Commissioner, go ahead.

THE COMMISSIONER: Again, I think I mentioned that a few days ago. Did I not see somewhere some reference to the possibility of the body possibly having slumped further as – you know, in the hour or hours after the shooting?

MS. O'BRIEN: We will have some testimony from Dr. Avis on that regard, on that point, Commissioner, about –

THE COMMISSIONER: Is that mentioned in his report?

MS. O'BRIEN: It's not mentioned in his report but I believe it was – Ms. Chaytor, when she questioned Dr. Avis, did explore that with him. So it might be in his pre-hearing interview that you're recalling from.

THE COMMISSIONER: Okay. I seem to have seen it somewhere.

All right.

MS. O'BRIEN: Okay.

But I think the testimony from Corporal Burke is he never discussed that with Dr. Avis. And what I understand is you noted it as something that was inconsistent but you never resolved it with an answer in your mind, fair to say?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Okay. You can add to the possibility of – from the body possibly sinking lower in the chair. That may be affecting the line or angle at which the blood flowed.

CPL BURKE: I can't add anything to that, no.

THE COMMISSIONER: You haven't run into that?

CPL BURKE: No.

THE COMMISSIONER: Okay.

CPL BURKE: No.

MS. O'BRIEN: One of the points I was just discussing with Ms. Chaytor there, with respect to the – having no evidence that the body was moved, in the statements that you reviewed and coming to that conclusion that we see there in footnote 9, did you consider – review and consider the transcripts of the interviews with the first responders, the first medical responders being the paramedic and the EMR attendant?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And in their statements did you note anything there that might have been suggestive of the body having been moved?

CPL BURKE: No. I think they were asked specifically if they moved the body or, you know, disturbed the scene in any way and they said no.

MS. O'BRIEN: Okay. Do you recall them giving in their statements, discussing the way that Mr. Dunphy's left arm was when they saw him there?

CPL BURKE: I don't recall that, no.

MS. O'BRIEN: Okay.

Just for one question I should go back to you on, on Exhibit P-0312, Madam Clerk, if you could just go back. This has to do with an area of questioning. We'd already covered Corporal Burke about any communications from the premier's office. It's on page 13, please, Madam Clerk.

The note just below the one that we were dealing with a few minutes ago with regard to Dr. Avis on May 4, 2015; there's a note here that you had received a call from Veronica Hayden of Premier Paul Davis's office where she was stating that she received an ATIPP request and she was asking you for some explanation on the April 3 message. And ultimately, you said you advised that she should consult with the RNC to see if it would interfere with their investigation into the contents of the email.

This is an example of the communication you did have from the premier's office. Is that right?

CPL BURKE: Yes

MS. O'BRIEN: Okay. Do you recall any others?

CPL BURKE: I'm just going by memory.

MS. O'BRIEN: Okay.

CPL BURKE: Any communication I had with the premier's office or anyone else would be in my notes.

MS. O'BRIEN: Okay.

CPL BURKE: That's all I can say.

MS. O'BRIEN: All right, thank you.

The last significant area that I would like to speak to you about is your review of Judge Riche's report. And, Madam Clerk, can you please bring up Exhibit P-0437.

THE COMMISSIONER: It's 12:30, so we probably should leave that –

MS. O'BRIEN: Yes, I didn't realize the time.

THE COMMISSIONER: – or, that's the only item you have left for after lunch is it?

MS. O'BRIEN: It is. There are a few other smaller questions but that is the last major area of questioning and a few questions with respect to the ASIRT report as well.

THE COMMISSIONER: Okay. I guess it's – Mr. Simmonds, you're going to be a bit of time, I take it, probably in the cross-examination are you?

MR. SIMMONDS: I believe so, yes.

THE COMMISSIONER: Yeah, and anybody else believe there'll be extensive time on the examination, just for scheduling purposes.

MR. KENNEDY: I expect to be a while, a good –

THE COMMISSIONER: Yeah. I'm just trying to get a feel for whenever we're likely to finish this afternoon, not that we have to but – Mr. Flaherty is shaking his head, no, he doesn't think so.

All right. Well, we have – it may be that we'll have some free time tomorrow. That's the only reason I'm reviewing this and we'll all have other things to do I'm sure if any time is made available or opens up.

So we'll be starting then at 1:30.

MS. SHEEHAN: This Commission of Inquiry is now recessed.

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.

Before we get to Judge Riche's report, I'm going to ask Madam – Commissioner, to bring up exhibit P-0191, please. Sorry, it's P-0194 is the better exhibit to bring up. Sorry, Madam Clerk, P-0194.

Thank you.

Corporal Burke, what's here in evidence and on the screen before you, starts with an email that Constable Smyth wrote to all staff Royal Newfoundland Constabulary on April 10, 2015. Are you aware of that email?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And at the top of the email here we see that he sent the initial email at 7:32 a.m., that Friday morning. And then at 8:49 a.m. he forwarded the same email on to you, here we see it, and also to Corporal Doug Noel, now Sergeant Doug Noel. And the message that he sent to you and now-Sergeant Noel: "I forwarded the below message this morning to my RNC co-workers. It however has inherent application to my RCMP counterparts. The officers that have been involved in this investigation have been nothing but profoundly professional, and for that I am grateful. Joe."

Do you recall receiving that email?

CPL BURKE: Yes, I do.

MS. O'BRIEN: Okay. Did you feel it was an appropriate email for Constable Smyth to send you?

CPL BURKE: No.

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

CPL BURKE: You know, having me involved in that email didn't really – I didn't have any interest in the email or it wasn't part of what I should know. I don't know how to answer that, really.

MS. O'BRIEN: Okay. But you saying, you said you didn't feel it was appropriate for him to have forwarded it on to you.

CPL BURKE: Yes, yes.

MS. O'BRIEN: So can you just explain to the Commissioner why you didn't feel that, that was an appropriate thing for him to do?

CPL BURKE: Well, it's addressed to friends and colleagues, for one thing. And he, he makes a, I guess, some sort of a speech about what he, what he felt about the incident happened. I know when I received it I notified my supervisor, team commander, I guess, that I received it. I didn't really know how to feel about it, I guess.

MS. O'BRIEN: Okay. But is your, is your feeling that it was inappropriate, does that have to do with you being the investigator, the primary investigator, who was, at that time, investigating Constable Smyth?

CPL BURKE: Yes.

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

CPL BURKE: Yes, yeah.

MS. O'BRIEN: Okay.

CPL BURKE: I was, I got sent the email and I didn't really feel good about receiving the email, basically, and I guess that's why.

MS. O'BRIEN: Okay. Did this email in any way impact how you conducted your investigation?

CPL BURKE: No, it didn't.

MS. O'BRIEN: Okay. So you reported it to Sergeant Osmond. Did you ever reply to this email?

CPL BURKE: No, I didn't.

MS. O'BRIEN: Okay.

Thank you.

Madam Clerk, can we now see, please, exhibit P-0037. Sorry, P-0437. I don't know if I just might have misspoken, P-0437. Yes, thank you.

Corporal Burke, this is a letter from Inspector Pat Cahill to Superintendent Stephanie Sachsse. I know you're not the author of this letter, but attached to this letter is a summary, it's a summary of findings that reviews, essentially, Judge Riche's report. I understand that while you're not the author of the letter, you are the author of the attachment?

CPL BURKE: Yes.

MS. O'BRIEN: Is that right?

CPL BURKE: Looks like it, yeah.

MS. O'BRIEN: Okay. So the attachment, we'll go through it in a bit of detail, but it's a number of points that have been raised with respect to Judge Riche's report.

Can you explain to the Commissioner how did you come to prepare this document?

CPL BURKE: I guess when I received Justice Riche's report I – as a primary investigator – I noticed some inconsistencies or issues that I, you know, wanted to make a comment on. It was written so I could kind of detail in my mind or have a sense of – when I was reading it I made notes regarding what I saw were concerning for me, I guess. And that's how this document was written, I guess.

MS. O'BRIEN: Okay. So you did this of your own, on your own accord. You weren't specifically asked to do this but you got the report and this was your record, your recording of your response or reaction to Judge Riche's report?

CPL BURKE: Yes.

MS. O'BRIEN: Is that right? Okay.

And then ultimately you did provide it to Pat Cahill. How did Pat Cahill come to get it to provide it to Stephanie Sachsse?

CPL BURKE: Yes, I provided it to Superintendent Cahill.

MS. O'BRIEN: Okay. So I'm gonna just get you to review your summary of findings and I'll have some specific questions along the way.

So you're, what you state you're doing here is you're doing a written summary of findings that reviews the compliance with the role of independent observer that was outlined in the terms of reference that was provided to retired Justice David Riche.

And then you state that: "Justice David RICHE was requested by the RCMP 'B' Division to provide independent observation of a criminal investigation being conducted by the RCMP. Justice RICHE had unfettered access to all aspects of the criminal investigation. Justice RICHE was asked to complete a written report regarding his observations of the independence and thoroughness of the investigation."

And, Corporal Burke, here when you said he had unfettered access to all aspects of the criminal investigation, I know yesterday you said he was provided with seven or eight very thick binders worth or material?

CPL BURKE: Yes, or more.

MS. O'BRIEN: Or more.

CPL BURKE: Yeah.

MS. O'BRIEN: And I know you've also discussed some other access that he was given in terms of Meghan Dunphy, getting to speak to Meghan Dunphy and Dr. Avis and so forth.

At any time when you – I know when you were providing all the written documentary disclosure to Judge Riche you said it was contained in binders.

CPL BURKE: Yes.

MS. O'BRIEN: At any time did you ever specifically draw his attention to any one piece or a part of that disclosure that you thought might be of particular interest to him? Or did you just, sort of, provided all binders for him to go through and find what he might be relevant – what might be relevant to him?

CPL BURKE: We provided – we brought everything to him that we had in our disclosure, or in our police file.

I don't necessarily think that we drew his attention to anything in particular, but I do remember drawing his attention to major reports we might have received, be it the lab reports or the 3-D imaging report or the use-of-force report, things like that. Things we were waiting on, basically. And I advised him that, when we get the report, you will receive it as well.

MS. O'BRIEN: Okay.

CPL BURKE: And that would probably be outside his usual disclosure.

MS. O'BRIEN: Okay. I see.

But other than that, with other things like emails; for example, an email from Constable Smyth, you wouldn't have specifically pointed that to him, or specific other communication or anything in the file.

CPL BURKE: No, I think that particular email that you just showed, I think he mentioned that to me, actually, because it was in the media soon after.

MS. O'BRIEN: Okay.

Judge Riche –

CPL BURKE: Yes.

MS. O'BRIEN: – mentioned that to you.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Okay, so, then you go on to say that “The following in this report is not meant to summarize comments by Justice RICHE where the RCMP disagree with his findings but the contrast of how police investigators perceive the evidence and base conclusions of the facts presented.”

So the first part is: “1. Justice RICHE stated that his job as an independent observer requires him to review the evidence and to make his conclusions and his interpretations of what was presented.” And that's you – they're quoting from Judge Riche's report, in that sentence, I believe, yes?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

“This is clearly outside his mandate of completing a written report regarding his observations of the independence and thoroughness of the investigation.”

The second point you make is: “Justice RICHE when discussing the meeting between Cst. SMYTH and Donald DUNPHY in the DUNPHY residence, said that Cst. SMYTH said in his statement that he got mad at DUNPHY. This statement by Cst. SMYTH must be put into context. Cst. SMYTH refers to being mad at DUNPHY because DUNPHY produced a rifle causing Cst. SMYTH to react with lethal force. It was after the fact.”

Can you explain what you're referring to here in point number two, please?

CPL BURKE: When I read Justice Riche's report, it seemed to me like Constable Smyth, you know, went to the house and was mad at Dunphy. And, you know, they – two angry men comes in there as well. I took the statement that Constable Smyth was being – was mad at Dunphy as him – he was mad at Dunphy because he produced a firearm.

MS. O'BRIEN: Okay.

And, here, are you referring to the excerpt from the statement of Constable Sullivan that we talked about earlier today, that you had put in your daily log?

CPL BURKE: I would expect.

MS. O'BRIEN: Okay.

Is there anything else in the file that you might have been referring to here?

CPL BURKE: No, we had no indication that Joe Smyth was angry at Mr. Dunphy prior to his arrival or while at the residence.

MS. O'BRIEN: Okay, sorry, and when you said – what I was specifically saying here, where you referred to it being after the fact, was it that after the fact statement that we talked about earlier –

CPL BURKE: Yes.

MS. O'BRIEN: – with Constable Smyth?

Okay.

And then the third point is also on a similar topic: “Justice RICHE believes that there were two angry men in DUNPHY’s house the day of the shooting. Justice RICHE cannot believe that Cst. SMYTH did not become upset at DUNPHY and said he does not believe it was in SMYTH’s character to lay back and just take this stuff on the chin without reaction. This belief of Justice RICHE is not supported by evidence,” is your comment there.

Your statement, “This belief by Justice RICHE is not supported by evidence,” one of the items, having done an interview with Justice Riche, that he might be referring to here is at this point he might be referring to the incident that was recorded for Constable Smyth in Constable Smyth’s personnel record regarding the incident that had taken place in the Caribbean.

Do you recall that incident?

CPL BURKE: I recall the incident, yeah.

MS. O'BRIEN: Okay.

I think in speaking with Judge Riche that that might be at least one of the elements that he’s referring to here on the making his “two angry men” statement.

Did you see that evidence of Constable Smyth’s past behaviour on that incident that we’ve had testimony on here as being evidence of Constable Smyth’s character, the idea that he might not be the type to just lay back and take it on the chin?

CPL BURKE: I considered that, but I couldn’t equate that to the incident that happened at Mr. Dunphy’s residence.

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

CPL BURKE: The incident that happened in – that you’re referring to in the British Virgin Islands happened in 2005. You know, the circumstances – that incident did not lead me to believe that what Justice Riche said that he would just lay back and take it on the chin. I didn’t feel that that was sufficient evidence to make that assumption.

MS. O'BRIEN: Okay, thank you.

The next point, point number four. This is a statement here – and I don't think I have any particular question to ask you on that one. I think we've already had that one addressed in the testimony, and this is the statement with – Corporal O'Keefe's statement that her father was found on the floor. So I don't have any question for you on that one.

And likewise with point five, I think that one is self-explanatory.

Number six: "Justice RICHE comments that it was be extremely unlikely that a person who is shot with a fatal shot would have kept holding the rifle after two shots were fired. He added that if the gun was being held by DUNPHY when he was shot, the gun would have likely fell out of his hands and fell to the floor. The only evidence we have with regards to the position of the gun is where the gun was when police entered the scene and we have no evidence of the gun being moved prior to scene examination."

Can you explain for the Commissioner what you were referring to in that paragraph?

CPL BURKE: Basically, it's very difficult to assume or to make a guess at how a gun would fall when a person is shot. I couldn't make that determination and I was unsure of how Justice Riche could make that determination.

MS. O'BRIEN: Okay.

Had you and the RCMP ever engaged any expert or sought out any advice of anyone who did offer an opinion as to how a gun would fall after someone had been shot?

CPL BURKE: No.

MS. O'BRIEN: Okay.

Number seven is: Judge "RICHE said that we know from Dr. AVIS (OCME)" – which I take it is Office of the Chief Medical Examiner – "that the shot to the body of DUNPHY was the one that killed him. Dr. AVIS said that either shot that hit DUNPHY (three in total) could have been the fatal shot."

And I take it you're getting that from the autopsy report, is where you got that information?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Were you there when – Judge Riche met with Dr. Avis.

CPL BURKE: Yes.

MS. O'BRIEN: Were you there at that time?

CPL BURKE: Yes, yes.

MS. O'BRIEN: So, Judge Riche – I think we'll say that he interpreted Dr. Avis to be saying that it was the shot to the body, which would be the one in the chest area of Mr. Dunphy, that killed him. Did you hear Dr. Avis say that during that meeting?

CPL BURKE: The way I interpreted the meeting was that either of the shots could have been a fatal shot.

MS. O'BRIEN: Okay.

Paragraph 8: "Justice RICHE said that the RCMP Use of Force expert does not deal with the rifle being on the floor which Justice RICHE believes fell from DUNPHY's hands after the first two shots. No evidence to support this belief."

Can you explain to the Commissioner what you mean in that paragraph?

I don't know if you – are you just reading it or –

CPL BURKE: Yeah, I'm trying to figure out what –

MS. O'BRIEN: Okay. Yeah.

CPL BURKE: Yeah.

MS. O'BRIEN: That's fine.

CPL BURKE: I think it's the – he's saying that it would have fell from his hands within the first two shots and there is no evidence to support that or, you know, there's no evidence to know which – when the gun was dropped basically.

MS. O'BRIEN: Okay. All right.

Okay, so that's what you're referring to. You're not referring to what the use-of-force expert dealt with in that statement because you talk – Justice Riche said the use-of-force expert does not deal with the rifle being on the floor.

Was that accurate? Did the use of force – when I read the paragraph initially, I couldn't – I didn't understand if you were saying no evidence to support this belief referred to what the use of expert – expert had said, or whether it had been where the gun fell or when the gun fell. And I take it you're saying it was the second part of the sentence when the gun fell from Mr. Dunphy's hand?

CPL BURKE: Yeah, I think the use-of-force expert doesn't deal with the fact that the rifle was on the floor, or it would have been where it was after the first two shots.

MS. O'BRIEN: Okay.

I think paragraph number 9 is self-explanatory because it's dealing with the notes in the folder and we've already addressed it.

Paragraph 10 says: "Justice RICHE says he was not provided with any information of how Cst. SMYTH was feeling or his demeanour during the incident. Justice RICHE was present for two re-enactments by Cst. SMYTH and reviewed his statement where Cst. SMYTH is quite animated and emotional while retelling the events of that day. It appears that Justice RICHE is just reviewing the transcript of the statement. Justice RICHE was present for both re-enactments but did not since review any video."

How is it that you were aware that Justice Riche did not review any video?

CPL BURKE: He didn't review any audio or video that would have been electronic basically.

MS. O'BRIEN: Okay. So he did not – he was given paper disclosure, he wasn't given the audio statements or the video statements.

CPL BURKE: I think he was given the audio and video statements but he didn't review them. He relied on transcripts.

MS. O'BRIEN: Okay.

Did you know that from Judge Riche?

CPL BURKE: Yes.

MS. O'BRIEN: Is that where you got that information from?

CPL BURKE: Yes.

MS. O'BRIEN: He told you that he hadn't reviewed video?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And I think paragraph 11 is self-explanatory and we've already covered that – your statements on that.

With respect to paragraph 12: "Justice RICHE said he would have liked to have had Cst. SMYTH submit to a Polygraph examination. S/Sgt. TOWNSEND NCO i/c Truth Verification Section was consulted if a Polygraph examination was a reasonable investigative step in this case. S/Sgt. TOWNSEND noted that a polygraph would not be appropriate in this case because there is no suitable issue to test. The proposed issue would be whether or not the firearm was pointed at the officer. TOWNSEND noted that this is 'interpretive' and not a suitable question. It is similar to a consent question with a sexual assault which is also not typically suited to a polygraph examination."

We haven't discussed the issue of the polygraph previously. Corporal Burke, can you explain to the Commissioner what you're referring to in this paragraph?

CPL BURKE: The polygraph examination task was, you know, issued by me. I'm nowhere near – I can't speak to whether a polygraph examination would be suitable in any case so I left that to a person that I would consider an expert in that field. And this is basically the information that I was told. Or I think that was his actual notes that he made.

MS. O'BRIEN: Okay.

Had you – prior to Judge Riche asking you if Constable Smyth, you know, should be taking a polygraph or was it possible for him take a polygraph, was that an investigative step you had considered?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So you had already considered it and had – prior to Judge Riche raising the issue with you, had you already reached out to Staff Sergeant Townsend to see if it would be a suitable topic to use a polygraph on?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And we are going to hear briefly from Staff Sergeant Townsend here but – and he'll explain what he means here. But the short answer was you reached out to him and asked and he said this is not a suitable case to test with polygraph.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Paragraph 13: Justice Riche concluded that the last shot was fired by Constable Smyth – “that the last shot was fired by Cst. SMYTH indicated that he intended to fatally injure DUNPHY. This is not supported by the evidence.”

Can you please explain to the Commissioner what you mean in that paragraph?

CPL BURKE: We had no evidence to support the fact that Constable Smyth intended to fatally injure Mr. Dunphy or the last shot for – to be more specific.

MS. O'BRIEN: The –

THE COMMISSIONER: This gives rise to the common misperception out in the community that police officers are able to pick their spot and hit it in an emergency; rather than using lethal force, shoot the firearm out of the person's or the suspect's hands, for example. Do you have any comment on what your training indicates there?

CPL BURKE: Our training in the RCMP is that if we're faced with a threat of death or grievous bodily harm that we would shoot to stop the threat and –

THE COMMISSIONER: You would what?

CPL BURKE: Shoot to stop the threat or to, you know, eliminate the threat, I guess.

THE COMMISSIONER: Right.

CPL BURKE: And we're trained to aim or shoot centre of mass, which would be the biggest portion of the threat that you see, and to continue your use of force until the threat has stopped.

MS. O'BRIEN: And I think the point following from that, I understand – and Judge Riche will be able to speak to his report here at the inquiry. But I understood from Judge Riche that because, you know, Mr. Dunphy was essentially, had already been fatally wounded at that time, that he was getting at the idea that this fourth shot to Mr. Dunphy's head was an overkill type shot, that it wasn't a necessary shot to take.

Can you make any comment on that idea, that the fourth shot might not have been a necessary shot?

CPL BURKE: I can't comment on that because I – you know, I don't know. I can't comment if the fourth shot was necessary or not.

MS. O'BRIEN: Okay.

CPL BURKE: I don't have any evidence to say it wasn't necessary.

MS. O'BRIEN: Okay.

Number 14 here: "Justice RICHE talked about section 25 of the Criminal Code and how police are not justified in using excessive force. Justice RICHE noted that Cst. SMYTH was equipped with OC Spray and that may be used to incapacitate a subject so they can be controlled with minimal physical contact. Cst. SMYTH was faced with a rifle/grievous bodily harm or death and responded to the threat with lethal force. He fired 4 shots, 3 that struck DUNPHY while exiting the room. RCMP SME Use of Force concluded that the response by Cst. SMYTH was appropriate and not excessive."

And I take it here what you're responding to here is Justice Riche making note that Constable Smyth – or suggesting perhaps that Constable Smyth might have used his OC spray, which is his pepper spray, to incapacitate Mr. Dunphy. Is that correct?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And what you're saying here is based on the SMU Use of Force conclusion, that pepper spray would not have been a reasonable response?

CPL BURKE: Yes. And police training is that our use-of-force model, if I'm faced with something that would cause – could cause me death or grievous bodily harm, then appropriate force would be, you know, lethal force. If I used OC spray in a situation where lethal force was presented, in a training scenario I would fail.

MS. O'BRIEN: Okay.

Paragraph 15: "Justice RICHE said that Cst. SMYTH was not questioned in detail about what he was doing the 30 to 40 minutes after the shooting before police arrived. Cst. SMYTH gave a detailed account of what he was doing after the shooting that included clearing the house (ensuring safety) and advising RCMP and RNC of incident."

At this point, and I guess we have discussed this to some extent already, Corporal Burke, did you feel you had enough information from Constable Smyth to account for his time following the shooting until the RCMP first responders arrived?

CPL BURKE: Yes, at the time I did.

MS. O'BRIEN: So paragraph 16: "Justice RICHE makes a conclusion that the 22 rifle was behind the couch up to the time the shooting took place between Cst. SMYTH and DUNPHY. At the scene police found the rifle in front of DUNPHY, Cst. SMYTH said the rifle came from the right side of the chair and there was a void in the garbage on the floor that is consider consistent with the dimensions of the rifle found. Justice RICHE then says there is no way for anyone to determine where the 22 rifle was located on Easter Sunday. Justice RICHE said that another circumstance took place, where the gun was moved, following what he would refer to as an argument between DUNPHY and SMYTH. There is no evidence to support this statement by Justice RICHE."

Can you explain what you're saying in this paragraph, please?

CPL BURKE: Well, Justice Riche makes a comment that the rifle was moved, you know, at the result of some argument between Mr. Dunphy and Constable Smyth. We didn't have any evidence to support that.

MS. O'BRIEN: Okay.

Number 17, we've talked about it already and it's self-explanatory.

18 says: "Justice RICHE describes another scenario where Cst. SMYTH and DUNPHY got into an argument and added, 'which I am sure they did ...' Then DUNPHY ordered him out of the house and if Cst. SMYTH refused, DUNPHY could have gone behind the couch and took the 22 rifle to threaten Cst. SMYTH. Justice RICHE said that this could have probably been done while Cst. SMYTH was looking around the house, checking things out down the hallway. The scenario is in contradiction of all evidence available."

Can you explain what you mean by that paragraph, please?

CPL BURKE: Justice Riche is providing a, I guess, a theory of what happened and what he says is not supported by evidence or is it consistent with the evidence that we do have.

MS. O'BRIEN: Okay. And that would include the, his statement that Constable Smyth was checking things out down the hallway. I take it there. There was no evidence of that in your investigation?

CPL BURKE: No.

MS. O'BRIEN: Okay.

19: "Justice RICHE does not agree with Cpl. KNAPMAN, RCMP SME Use of Force of where the gun should have landed when DUNPHY was shot. This would be impossible to verify and we have to depend on the evidence presented and if it would be reasonable for the gun to land where it was found."

You've already addressed that here today, Corporal Burke, but the last sentence of this bullet or numbered item: "Justice RICHE then goes on" – I think, to "discredit Cpl. KNAPMAN as an expert in use of force. Cpl. KNAPMAN is a Use of Force SME and provides a lengthy CV qualifying his expertise."

Can you explain what you're discussing here in the later part of that paragraph, please?

CPL BURKE: Corporal Knapman is considered a, I guess, defined as a subject matter expert in use of force and he provided a lengthy CV qualifying his expertise. That's all I can say.

MS. O'BRIEN: Okay.

Paragraph 20: "Justice RICHE notes an example by Cpl. KNAPMAN where an unarmed 90 year old woman threatens to slap a police officer. The police officer response could be a punch or kick or physical control hard. Justice RICHE misinterprets this example. Cpl. KNAPMAN is talking about officer perception and tactical considerations and how police can" respond "differently from what they perceive as a threat. (a 90 year old female opposed to a 30 year old fit 250 pound male, your response to that threat would be different.) Cpl. Steve Burke provided Justice Riche with what he thought was clarity on this example used by the SME in his report."

Can you explain to the Commissioner, please, what you're referring to in that paragraph?

CPL BURKE: I noted the comment by Justice Riche and I reviewed the subject matter expert report and I think that he misinterpreted the example provided by Corporal Knapman. And as I go on to say, that Corporal Knapman is talking about a perceived threat by a police officer and goes on to say that a 90-year-old female, you may – while the threat may be the same threat of physical assault or force, you would react differently in those situations.

MS. O'BRIEN: The explanation that you gave to Justice Riche, did you give him that explanation before or after he wrote his report?

CPL BURKE: That would have been before he wrote his report.

MS. O'BRIEN: So did he raise that with you as an issue or a question he was having with Corporal Knapman –

CPL BURKE: Yes.

MS. O'BRIEN: – with Corporal Knapman's report?

CPL BURKE: Yes.

MS. O'BRIEN: Okay. And when you provided him with the explanation at that time, did you think he understood what you were saying at that time?

CPL BURKE: I don't know.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Was that before he finished his report?

CPL BURKE: Yes, it was.

MS. O'BRIEN: "Justice RICHE talks about a series of mistakes because he believes that this killing should have never happened: DUNPHY should have been arrested by Cst. SMYTH for Uttering Threats. The investigation did not reveal that Cst. SMYTH had reasonable grounds to arrest DUNPHY."

So just looking at that one bullet, can you explain to the Commissioner what you mean by that one?

CPL BURKE: If upon arriving at the residence of – Constable Smyth arriving at the residence of Donald Dunphy, there was no information to believe that Mr. Dunphy was 'arrestable' at that time for any criminal offence, I guess.

MS. O'BRIEN: Okay. And that is based on – are you stating that based on your review of the tweet that Constable Smyth was going there to speak to Mr. Dunphy about?

CPL BURKE: Yeah, based on my review of the file basically.

MS. O'BRIEN: Okay. So you didn't see grounds there for arrest when you had reviewed the file.

CPL BURKE: From the information I had, no.

MS. O'BRIEN: From the information that you had, that you understood Constable Smyth to have. Okay.

The next bullet: "The RCMP could have asked DUNPHY to drop into RCMP detachment to explain what he meant by raising or sending the items on Twitter. Cst. SMYTH was unable to assess the risk without speaking to DUNPHY. What if he refused to come in. What if something were to happen if DUNPHY decided take action?"

What are you referring to there, Corporal Burke?

CPL BURKE: Just looking at the scenario where Constable Smyth visits Mr. Dunphy's residence, sure, I guess you could have asked Mr. Dunphy to attend the RCMP detachment, but that was, you know – there's inherent risks for that as well.

MS. O'BRIEN: So what's the inherent risks for that? I mean, was that not one option that Constable Smyth could have used?

CPL BURKE: It is, but without speaking with Mr. Dunphy, he was unable to establish if there was any sort of risk or threat to any government official, I guess.

MS. O'BRIEN: Okay. But I, I think Judge Riche's point in that part of his report was that he could have had that conversation with Mr. Dunphy, but he could have had that at the detachment as opposed to visiting Mr. Dunphy at his house. That he could have, I guess, contacted him and asked him to come to the RCMP detachment to speak to him.

CPL BURKE: Yes.

MS. O'BRIEN: So I don't – are you, when you're, that's the point that Mr., or that Judge Riche is making, and you're saying that Constable Smyth was unable to assess the risk without speaking to Dunphy. So can you explain, you know, what are you saying here, why wouldn't that be – why is Judge Riche wrong in his statement that that was a possibility that that was a path that Constable Smyth could have taken?

CPL BURKE: I don't think I said he was wrong. Just offering some comment on what other steps could have been taken or why they weren't taken.

MS. O'BRIEN: Okay. What did you mean specifically by what if something were to happen if Dunphy decided to take action? What does that ...?

CPL BURKE: Basically it says that if, you know, the tweets or some – if Mr. Dunphy, you know, was threatening or without knowing what he meant by his commentary, you know, you would be risk, there may be a risk there for Mr. Dunphy to take action on a threat or anything until you know exactly what he meant by what he was saying on Twitter, basically.

MS. O'BRIEN: Okay.

The last bullet here: "Cst. SMYTH could have stopped to see Meghan DUNPHY en route to DUNPHY'S residence. The value of the visit at this time would have been considered low." I take it the first sentence here is what Justice Riche was asserting, and the second sentence here is your own opinion of the matter. What did you mean by the value of the visit to Meghan Dunphy at that time would have been considered low?

CPL BURKE: There was no – you know, at that time, Ms. Dunphy didn't have any information considering the, when you look at the tweets. Or the information that Constable Smyth was going to investigate.

MS. O'BRIEN: But if Constable Smyth was going to get information about Mr., Mr. Dunphy and what his, what his situation was, wouldn't Meghan Dunphy have had relevant information that she could have potentially given Constable Smyth?

CPL BURKE: In what way?

MS. O'BRIEN: Well, she would have – I think Constable Smyth has testified that one of his reasons for going to see Mr. Dunphy was to find out a little bit more about Mr. Dunphy's situation, what his grievance was with Workers' Compensation, and, you know, the likelihood of that grievance being ultimately resolved. I mean, Meghan Dunphy could well have had information about her father and his grievance with Workers' Compensation that might have been of assistance to Constable Smyth, could she not have?

CPL BURKE: I don't see it that way. I think Mr. Dunphy himself would have been the best person to go speak to about what his situation was and what his grievances were, or what he meant with his commentary on Twitter.

MS. O'BRIEN: Okay.

Do police officers – in your experience, do police officers, ever, before going to visit the subject of their investigation, speak to other family members of that subject to get a little bit more information before making contact with the person directly?

CPL BURKE: It's a case-by-case scenario.

MS. O'BRIEN: But it does happen, does it?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

And perhaps Meghan Dunphy might have been able to give him, you know, I don't know, information that might have been helpful to him in his risk assessment. Like he could have asked Meghan Dunphy, for example, does your father own any weapons – I mean, that could have been a question he could have posed to her, could it not have been?

CPL BURKE: Yes, in hindsight, it could have been for Constable Smyth, but with the information he had he was going to the source of the, of the, of the tweets. That's all I can say about that.

MS. O'BRIEN: Okay.

I think the last point there is, I think, self-explanatory. You just state that Justice Riche makes the comment that Dunphy was only trying to get Smyth out of the house; he was not trying to hurt him. No evidence to support this statement. And I take it you're just saying there's no evidence to support that Mr. Dunphy was just trying to get Constable Smyth to leave.

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Corporal Burke, before we leave that, do you have any further comment with respect to Justice Riche's report?

CPL BURKE: No.

MS. O'BRIEN: Okay.

The last area of, significant area of questioning I have is with respect to the ASIRT report, which is entered as exhibit P-0004.

Some of the, some of the issues raised by the ASIRT report we've already discussed in the course of your evidence, so there's no need to go over them again. But there's a few items that we have not talked about and so I want to give you an opportunity to comment on those. One was that ASIRT commented on the failure to have monitor notes for the first re-enactment. Do you recall that?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So can you just explain what that criticism or critique was from ASIRT, and tell me, do you agree with it?

CPL BURKE: Yes, I do.

MS. O'BRIEN: Okay. So essentially it was that when the first, when the first re-enactment was taking place and it was being videoed, there was not back up video recorder, I understand?

CPL BURKE: No.

MS. O'BRIEN: And there was no one who was tasked with sort of taking notes as to what was happening while the re-enactment was taking place?

CPL BURKE: No.

MS. O'BRIEN: Okay.

And so the idea being, when the video was lost, ultimately, that you hadn't no back-up video or even notes to go on. Okay. All right.

One of the other critiques raised by ASIRT was a failure to photograph the side arm and the ammunition and do a bullet count, and this would be for Constable Smyth's, Constable Smyth's weapon. Do you agree that that was a deficiency in the investigation?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

Was Constable Smyth ever questioned as to whether he used a top-up round in his gun?

CPL BURKE: No.

MS. O'BRIEN: Can you just explain – I know it's covered in the ASIRT report and they mention that it's a question that should have been asked. Can you just explain for us what does that mean, a top-up round?

CPL BURKE: A top-up round – I never heard that expression before. It's not something that I use or heard used, but I can assume what it is.

MS. O'BRIEN: All right.

CPL BURKE: A top-up round is that you would load your magazine to capacity, and in this case it was 12 with Constable Smyth, and you would rack the action and then –

MS. O'BRIEN: And by "rack the action," just explain what you mean by that?

CPL BURKE: Just cycle a round into the chamber.

MS. O'BRIEN: Okay.

CPL BURKE: And then you release the magazine again and put another round in there, and that would give you 13 rounds.

MS. O'BRIEN: Okay.

So the issue here was without questioning him about whether or not he used a top-up round, there's no way to know if all the bullets that were there that day were ultimately accounted for; is that right?

CPL BURKE: Yes, but there's some, there's a statement in Constable Smyth's statement to the RCMP that he was doing a bullet count during the incident and he counted 12.

MS. O'BRIEN: Okay.

CPL BURKE: So

MS. O'BRIEN: That's when he was considering whether or not to switch out his magazine – after firing the shots, you're referring to when he was standing in the hallway, whether he was deciding whether or not to put in –

CPL BURKE: A tactile reload.

MS. O'BRIEN: – a tactile reload. Okay.

All right, and I think the other issues that we have that the ASIRT report raised we have already discussed in the course of our examination here today and yesterday.

We talked about it early at the beginning of your testimony that an anonymous letter was received. It came to us, I think, through counsel for Meghan Dunphy; came to the Commission of Inquiry and the Commission then passed that anonymous letter over to the RCMP. Can you just briefly describe the further investigative steps you took as a result of that and what your conclusion was?

CPL BURKE: We received the letter from Mr. Bob Simmonds. The letter was addressed to Ms. Breen at their old office. There is another business there now. That business forwarded the letter to Ms. Breen's office. We were notified by Ms. Breen or Mr. Simmonds that the letter did exist.

So we attended the – I went and met with Mr. Simmonds and he provided the letter to me. I took a statement from Mr. Simmonds to ascertain how he came in contact with the letter.

MS. O'BRIEN: And, sorry, Corporal Burke, I don't need a whole lot of detail here because I know your ultimate – you've already said your ultimate conclusion is it didn't affect the outcome of your investigation.

CPL BURKE: Yeah.

MS. O'BRIEN: So if you could just – you know, I don't need to know every person you interviewed or anything like that, but just a short summary of the actions you took.

CPL BURKE: So we obtained the letter and we found out there was no likelihood of any forensic evidence that could get obtained from the letter because it was handled by several people. We went to the post office in Mitchells Brook, the post office in Port aux Basques. The letter was postmarked from Port aux Basques.

We spoke to employees at Canada Post. We interviewed people in Mitchells Brook; Colin Dinn; Thomas Hearn; Mr. Richard Dunphy and Debbie Dunphy about the contents of the letter and how they, you know – if it was feasible for and if they knew a person that had visited Mr. Dunphy on a regular basis and by boat, the letter said.

MS. O'BRIEN: The letter had mentioned someone had visited by boat?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

CPL BURKE: And the letter is – the anonymous letter says that this person was a witness to the event. He gave some specific details about the event but the details were discovered in the media. We considered, you know, if we deemed it was appropriate, there would be DNA testing done on the letter – on the stamp which, you know, is – you know, has kind of a low value because a lot of stamps are self-adhesive now so, but we – and we didn't have any DNA to compare that letter to.

I'm just trying to think. The letter mentions that the person knew Constable Smyth, so we interviewed Constable Smyth to see if he had any knowledge of this person. Anyway, the conclusion of the letter investigation, I guess you'd call it, was that this – we also received a subsequent letter from another anonymous person that kind of says that the person that wrote the letter – we couldn't say for sure but we believe it to be the same person and that they didn't mean to send the letter and they're sorry for sending it and, you know, they weren't a witness to the event.

That's all I can remember.

MS. O'BRIEN: Okay.

And ultimately – so what I understand, you're saying the first letter; there was details in that first – the first letter. Someone was claiming to have been an eyewitness to events and they put in some details. But you're saying that having reviewed all the media reports around the incident, around the shooting of Mr. Dunphy, that the detail that had been included in that letter was all information that was out in the media –

CPL BURKE: Yes.

MS. O'BRIEN: – and had been released. This was information that had been released by the RCMP previously in its statements or its press releases. Is that right?

CPL BURKE: No, it wasn't released by the RCMP. It was released by other means.

MS. O'BRIEN: Okay. Specifically what piece of information would that be then?

CPL BURKE: The number of rounds, I think, that were involved; four rounds. That wasn't released by the RCMP. And I did some searching in the media and it was released by Justice Riche.

MS. O'BRIEN: Okay.

And then ultimately a second letter came and although you didn't – you weren't able to positively confirm that the authors of the two letters were the same, the author of the second letter claimed to be the author of the first letter and essentially retracted the first letter. Is that right?

CPL BURKE: Yes. We basically put a plea out to the general public asking for any information with regards to the author of the letter. And I guess subsequent to that we received the other anonymous letter.

MS. O'BRIEN: Okay. So that second letter came after the RCMP sort of had made a request to the public for information –

CPL BURKE: Yes.

MS. O'BRIEN: – to assist them with the investigation.

CPL BURKE: Yes.

MS. O'BRIEN: All right.

And I think you said yesterday that ultimately you closed off that section of the investigation. It didn't change your ultimate result in this case.

CPL BURKE: No.

MS. O'BRIEN: Okay.

Corporal Burke, this was a long investigation obviously. From the time the incident happened to when you gave your final report was approximately 17 months.

CPL BURKE: Yes.

MS. O'BRIEN: We've accounted for some of that time and certainly we spoke today about how the lab – getting that lab report back had taken some time. What other – what were the other significant contributors to the amount of time here?

CPL BURKE: I think the lab report was the first one, use-of-force report was a second one, the 3-D imaging was a third one and the review by ASIRT would have been another one.

THE COMMISSIONER: Review by?

CPL BURKE: ASIRT.

MS. O'BRIEN: Okay.

And the 3-D imaging, so that would be Darryl Barr's report. It took some time to get that one back.

CPL BURKE: Yes.

MS. O'BRIEN: And then finally, when everything was done, the whole thing went off to ASIRT and got ASIRT to do a review. And that took some time.

CPL BURKE: Yes.

MS. O'BRIEN: Okay. All right.

Corporal Burke, those are the questions I have for you. Other counsel will have questions and, ultimately, the Commissioner may have some more as well.

Thank you.

THE COMMISSIONER: Mr. Simmonds, you're going first.

MR. SIMMONDS: Officer Burke, I'm Bob Simmonds and I'm counsel for – one of the counsels for Meghan Dunphy.

Officer Burke, this was a very unique situation, was it not? You had a homicide. You had one person dead. The only other witness was the shooter. It happened in the dead – the deceased's home and the shooter was a police officer.

Have you ever had to deal with anything like that before?

CPL BURKE: No, I didn't.

MR. SIMMONDS: So this was a one-of-firsts stuff for you?

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

Would you agree that in this situation, because of the uniqueness, that the scene is absolutely crucial to making a determination as to what likely happened?

CPL BURKE: It is part of the investigation, yes.

MR. SIMMONDS: No, not part of the investigation. Would you agree it's absolutely crucial? A proper examination of the scene is absolutely crucial to make a correct determination to what happened.

CPL BURKE: Yes.

MR. SIMMONDS: Number one, the identification of the evidence taken from the scene would be important, the forensic examination of the items seized would be important, and if indeed the

scene is released prematurely, any other evidence that comes up after that has a very diminished value, if any. Would you agree with that?

CPL BURKE: Yes.

MR. SIMMONDS: So you want to get as much information as possible when you have the appropriate professional people in there, equipped with all the necessary information, so you'll get all the possible evidence that can possibly be achieved or received from that scene. Do you agree with that?

CPL BURKE: Yes.

MR. SIMMONDS: Officer Burke, you were accused, or it's been said that the RCMP were guilty of tunnel vision. And the definition of tunnel vision that I have is: the single-minded and overly-narrow focus on a particular investigative or prosecutorial theory so as to unreasonably colour the evaluation of information received in ones conduct in response to that information. This can lead investigators to overlook evidence that does not fit their theory of events.

Do you agree that that's – do you accept that definition of tunnel vision?

CPL BURKE: Yes.

MR. SIMMONDS: Do you think you, or the investigation that took place here, were in any ways guilty of that tunnel vision?

CPL BURKE: No.

MR. SIMMONDS: Well, we've heard from Officer Galway who was – and you correct me if I say it wrong – he was the exhibit custodian as well as the family liaison. Am I correct?

CPL BURKE: Yes.

MR. SIMMONDS: Okay. And he writes a letter; it's Exhibit 0511. I'm just looking for the date on that.

MS. BREEN: Seventeenth.

MR. SIMMONDS: What is it?

MS. BREEN: Seventeenth.

MR. SIMMONDS: I think it's – my partner tells me it's April 17, if we have that there. And that's some time – the event took place on April 5. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: Okay. He writes this on the 17th, and at that point in time, and you've had – what's being investigated is not Officer Smyth's version of events, but what's being investigated, and this is not a determination by your Comm Centre. This is a determination by an officer significantly involved.

If you go to the second page of that exhibit, page two: First offence, pointing a firearm; second offence, unsafe storage of a firearm. So what you – there was no investigation or no concentration that any other story could be correct. You're accepting this here, when he puts this

forward. These are the two offences that he says he's reviewing. And that's on the 17th, that's some time after. Because I thought you said the reason it was probably categorized like that was because the Comms people did that when it came in. Is that correct?

CPL BURKE: What correct?

MR. SIMMONDS: You did say that the heading on this file, when it was pointed out to you previously about pointing a firearm, that that was probably done by the communications people when the information was first called in. Did you not say that?

CPL BURKE: Yes.

MR. SIMMONDS: Okay. And we see here on the 17th that an officer involved with the investigation, significantly involved, is still categorizing it as pointing a firearm and unsafe storage of a firearm.

CPL BURKE: Yes, we didn't have any other – you know, I can't speak for Constable Galway and, you know, I didn't author those –

MR. SIMMONDS: No, but –

CPL BURKE: – that report itself, but we didn't have any other information of a criminal offence or any other evidence of a criminal offence at that time.

MR. SIMMONDS: But you're the guy driving the bus here. You're the primary investigator. You're the guy that's setting out – yes, you do have superiors, but you're the guy setting out how this investigation is going to go. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: Officer Galway writes, while he's under your command, this on the – and he's still referring to it as pointing a firearm and unsafe storage of a firearm. Does that not cause a problem? Cause you an issue?

CPL BURKE: I can, I can't speak for Constable Galway, but –

MR. SIMMONDS: I'm not asking you to.

CPL BURKE: – and the only offence or I guess the offence that we had established or had reasonable grounds to believe that happened was pointing a firearm. We didn't have any other offence, grounds for any other offence at that time.

MR. SIMMONDS: Isn't it true, that right from the beginning the RCMP accepted Officer Smyth's version of what took place and really didn't look significantly outside of that. Is that not correct?

CPL BURKE: No, that's not correct.

MR. SIMMONDS: We have this notation by the officer is pointing a firearm. We have the notation that was brought to your attention yesterday when the officer, I think it was Officer Nippard, writes the RBC and says this is not a criminal investigation. These are both officers under your command that seem to believe that they're not investigating a homicide. Does that not show that there's misdirection here?

CPL BURKE: I provided an explanation for Constable Nippard as well, and the glasses and the reason for the footage that we were seeking from RBC was not part, was not criminal.

MR. SIMMONDS: Corporal Burke, as Ms. O'Brien pointed out to you yesterday, this was one investigation. There may have – this may have been a different branch of the investigation but going and getting the information from RBC, Shoppers Drug Mart or the Woodstock was all part of the investigation with respect to this event that happened on the 5th of April. Correct?

CPL BURKE: No, it was really more in respect to the glasses.

MR. SIMMONDS: And what significant – the glasses are significant because they were at the scene of the event that happened on the 5th of April. Correct?

CPL BURKE: I didn't think they're significant.

MR. SIMMONDS: They were significant enough for you to send people to RBC, Shoppers, the Woodstock. They were significant enough for you to do that. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: Okay. And that's only significant because it's related to the events that happened on April 5. Correct?

CPL BURKE: No, that's not correct.

MR. SIMMONDS: You bring in a forensic investigator, or identification unit comes in, is it not clear at that point in time when they come in, that what they're doing is accepting Officer Smyth's version of what he says took place?

CPL BURKE: I don't think they had a version at that time. They knew what – they were looking at an officer-involved shooting, but Constable Smyth didn't give any, he gave some indication of what happened but he didn't provide a statement at that time.

MR. SIMMONDS: And isn't it true that your focus was really, from the beginning, on the mental state of Don Dunphy as opposed to a precise examination of what happened in that room? Isn't it true that the focus was on whether Don Dunphy had some kind of mental illness or a mental condition that made him do this?

CPL BURKE: Focus by the forensics people or focus by –?

MR. SIMMONDS: By the whole investigation.

CPL BURKE: Pardon me?

MR. SIMMONDS: By your whole investigative team.

CPL BURKE: There were some concerns about Mr. Dunphy's mental state. What we observed at the scene, some of the comments he was making on Twitter. Those are items that we wanted to kind of seek some answers to.

MR. SIMMONDS: And the main issue that the investigator seemed to seize on was to try and determine whether or not Mr. Dunphy was ready for or prepared for Officer Smyth when he arrived there that day. Was he somehow tipped off? Was there some information that was given to him? Is that correct?

CPL BURKE: I don't understand what you just said. You're saying the main investigator, which is me. I wasn't, you know – the tipped off part came up, but it wasn't a focus of mine in the beginning.

MR. SIMMONDS: Well, if we accept that Mr. Dunphy pulled a gun from the right side of the couch – chair – which is generally what has been accepted, correct?

CPL BURKE: Yes.

MR. SIMMONDS: It would have meant he would have had to get the gun. He would have had to come back from the Woodstock. He would have text his buddy to tell him to come down for a toke. He would have then had to go and get the gun, a gun that's never in use, hasn't been seen out around the back of a couch, no one seems to know very much about it. In fact, when it's seen, you're not even sure if it's operable. Put a bullet in that gun, put the gun down by the side of his couch and wait for Officer Smyth to arrive.

Doesn't that seem a significant stretch for a man that just came back from a meal and is expecting his friend to drop up shortly? Doesn't that cause you some kind of pause?

CPL BURKE: We had no indication that the gun was moved that day.

MR. SIMMONDS: You had no indication that the –

CPL BURKE: The gun was moved that day.

MR. SIMMONDS: The last place anyone saw it was behind the couch. If he indeed brought the gun up from the right side of the couch, he must have moved it, put it on the right side of the couch, put a bullet in it –

THE COMMISSIONER: The couch or chair?

MR. SIMMONDS: Chair, I will say. I apologize, Mr. Commissioner.

Chair, put a bullet in it and had it in grasping distance for when Officer Smyth came in. There was nothing that day that gave any indication that he had that mindset. Did you find anything?

CPL BURKE: No.

MR. SIMMONDS: Does that detail, does that stark contrast, not cause you a problem?

CPL BURKE: I didn't equate the gun with being moved on that particular day.

MR. SIMMONDS: No.

CPL BURKE: You know what I mean? I didn't think that Mr. Dunphy that day took the gun from behind the couch and put it on the right side of his chair.

MR. SIMMONDS: Had you any evidence from anybody that the gun was ever seen anywhere near his chair previously?

CPL BURKE: No.

MR. SIMMONDS: The only – go ahead, I don't mean to gut you off. You were going to say something.

CPL BURKE: It didn't cause me grave concern in particular because of the – I could see how a person would not see that gun on that side of the chair beforehand.

MR. SIMMONDS: Officer – Corporal Burke, I'll go with you and say, okay, down on the side of the chair, there's garbage there. Maybe if you didn't have the view from a particular point in the room maybe you wouldn't see it, but that's not what I'm talking about when I say we are asked to believe – or we're not, the Commissioner is asked to believe and I guess the public is asked to believe, that this man who had never before displayed any violence, this man, who – events leading up to that day – appeared that he was in good humour. He was going to get some more money.

This man was invited out by his daughter and her boyfriend, who just came back from vacation, for Easter dinner. This man had gone out for Easter dinner, stopped at a couple of places on the way back, and then decides to go home, passes his buddy who he sees, sends him a text to come up for a toke, puts on his pyjamas, sits in his chair and loads a rifle that he's never used before, puts it down by the side of his chair waiting for Officer Smyth to come.

Doesn't that cause you some concern that, gee, there's something here that just doesn't seem logical?

CPL BURKE: I didn't consider those events happening that way. I didn't consider the gun being moved on when he came home or that day, Easter Sunday. My opinion was that the gun was there for some time or definitely before Easter Sunday.

MR. SIMMONDS: Now, you visited the scene on April 5?

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

And you went in with Corporal Henstridge and Sergeant Conohan, who came down because Sergeant Conohan is the resident expert with respect to marijuana grows?

CPL BURKE: Yes.

MR. SIMMONDS: Were you or Officer – Corporal Henstridge wearing any kind of protective, and I don't mean – well, perhaps for both purposes. Protective gear so as not to contaminate the scene, I'm mainly concerned about.

CPL BURKE: No.

MR. SIMMONDS: Proper booties, a suite, anything like that?

CPL BURKE: No.

MR. SIMMONDS: In your notes – and I believe it's exhibit 0312 at page 2, but in your notes you've indicated you didn't go past the porch.

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

If I might pull up that diagram.

This is the front – this is the steps coming up with the tires, the deck. Right here is the front porch area.

CPL BURKE: Yes.

MR. SIMMONDS: You didn't go much past that, you say?

CPL BURKE: Yes, the entrance to the living room, which –

MR. SIMMONDS: Right here?

CPL BURKE: Yes.

MR. SIMMONDS: Because if that's the case, where you say you didn't go past the porch, there's a wall there so you would have had to go past the wall. Because you indicate you saw Mr. Dunphy's body in the chair. You saw the rifle, the stick and the yellow file folder?

CPL BURKE: Yes.

MR. SIMMONDS: So you would have had to go some distance into the room. You saw the small table, which was in front of Mr. Dunphy's knees. Did you see these things?

CPL BURKE: Yes, I did. I consider the porch to be that front portion with the archway and the living room.

MR. SIMMONDS: So you maintain that you can see those things from where you were to?

CPL BURKE: Yes.

MR. SIMMONDS: You also saw the couch next to the coffee table, and I mean couch. You saw the heater in the room. You'll have to (inaudible).

CPL BURKE: You're asking – pardon me?

MR. SIMMONDS: There was a heater in there. You saw that?

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

You saw Mr. Dunphy in his pyjama pants?

CPL BURKE: Yes.

MR. SIMMONDS: You saw the garbage?

CPL BURKE: Yes.

MR. SIMMONDS: Did you see the void in the garbage?

CPL BURKE: Not at that time, no.

MR. SIMMONDS: But you did see the state of disrepair and the general condition of the house?

CPL BURKE: Yes.

MR. SIMMONDS: Did that affect your opinion on what you were looking at, Corporal Burke?

CPL BURKE: In what way?

MR. SIMMONDS: Did it lend credence to your belief that I'm dealing with an unbalanced man here, the deceased?

CPL BURKE: I could say it was not normal for a house to be in that state or – you know.

MR. SIMMONDS: So this is another thing that you believe backed up your theory, that you were believing with someone, that had some illness, some condition, that would cause him to pull that rifle on the officer?

CPL BURKE: I just thought that the person that owned the house may have had some issues that needed to be explored.

MR. SIMMONDS: Had some issues that needed to be explored.

When you go – you do take statements on April 5 from Dick and Debbie Dunphy. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: Okay. What was the focus of those statements?

CPL BURKE: The focus of those statements was that we had information to believe that Constable Smyth visited Richard and Debbie Dunphy prior to attending Mr. Dunphy's residence. And we never really had a focus for those statements; we wanted to obtain witness statements that evening.

MR. SIMMONDS: If I said to you that I would think from reading those statements you'd get the focus that the issue was on Don Dunphy, not officer Smyth, about the guns, falling out with the neighbours and falling out with his relatives – and you were looking for an explanation or a theory as to what happened there today, thinking that it was based on the mental illness or the condition of Don Dunphy – would you say that was, that's a fair focus, fair statement of the focus of those statements?

CPL BURKE: Part of the statements that were provided by the Dunphys, that's where those statements led. That's what they wanted to talk about.

MR. SIMMONDS: But –

CPL BURKE: Also, we explored if there was any mental issues with Mr. Dunphy.

MR. SIMMONDS: Now, you're keeping an open mind. You've just – a man came back from Easter dinner with a gun and then shortly after shot a police officer who came into his house on Sunday unannounced. Okay? You go next door to talk to the relatives and you know that that very police officer had gone over and spoke to those people before going into that house. You knew that, right?

CPL BURKE: Yes.

MR. SIMMONDS: Wouldn't the thrust of your investigation at that point been: What was the interaction between you and that police officer? What did he say? What did he inquire about? What did he do? Wouldn't that be the reasonable focus? Because this is the guy that left them and went over and minutes later, shoots and kills the man sitting in his living room. Wouldn't that be the focus of your investigation at that time?

CPL BURKE: We wanted to obtain pure version statements from the Dunphys.

MR. SIMMONDS: Pure –

CPL BURKE: Pure version, meaning we didn't want to influence what they said. And this is the information that they provided to us.

MR. SIMMONDS: And why wouldn't you, at the end of those, go through a continuum of questions, which is the way I've seen most of these statements over the years I've been doing criminal law. That you let them speak at the start but then you shortly follow up with a whole host of questions.

CPL BURKE: Yes.

MR. SIMMONDS: That wasn't done here though.

CPL BURKE: Clarifying their pure version portion, I guess.

MR. SIMMONDS: Okay.

Now they tell you – because you see, the perception, rightly or wrongly, I believe is that – or the perception, certainly, from the Dunphy's point is that you had a theory, the RCMP had a theory. The theory was based on solely on what Officer Smyth said happened and ye really didn't step outside of that theory to determine what else could have happened.

You don't agree with that. Do you agree with that statement?

CPL BURKE: No.

MR. SIMMONDS: Do you think that it's a fair assessment for people to view it and believe that you didn't step outside of that theory?

CPL BURKE: Yes.

MR. SIMMONDS: You speak to Dick and Debbie Dunphy and their information at best is 10 years old.

CPL BURKE: Yes.

MR. SIMMONDS: But you then find out that Mr. Dunphy had a daughter, Meghan.

CPL BURKE: Yes.

MR. SIMMONDS: You found out she grew up in the house, so you determined that that night you're going to meet with her. Yes?

CPL BURKE: Yes.

MR. SIMMONDS: There was no consideration given to the fact that she may be significantly traumatized at this point in time having been down to the scene three or four times, not being able to get information, not being able to see her deceased father. That did not stop you proceeding to go and get a statement from her that night.

CPL BURKE: We attended Ms. Dunphy's residence and asked her if she wanted to provide a statement. And she provided a statement.

MR. SIMMONDS: That's not the question I'm asking. I'm asking in common sense, as an empathetic human being and a professional police officer, would you not have possibly thought, you know, she just – her father was just killed by another police officer, she's been down here trying to get information. She's traumatized, upset, understandably; maybe we'll leave it for a day. Just give her a call and tell her we're going to want to talk to her, when she's up to it let her give us a call.

That wasn't done. Ye went right down there. You and Officer Henstridge went down there –

CPL BURKE: Yes.

MR. SIMMONDS: – to get a statement that night.

CPL BURKE: Yes.

MR. SIMMONDS: That's a contrast, a little bit, to the way you treated Officer Smyth.

CPL BURKE: In what way?

MR. SIMMONDS: In what way?

CPL BURKE: Yes.

MR. SIMMONDS: He was at the detachment, said he didn't want to give a statement that night. Talked to his buddies from the RNC and said, that's fine, you go on. You didn't push it any farther than that.

CPL BURKE: We asked Ms. Dunphy if she wanted to give a statement and she agreed to give a statement.

MR. SIMMONDS: And the issues you covered with her: last contact with her father, how was he, any issues; his behaviour, his attitude; were there any firearms; tell us about was he ever depressed; tell us about his marijuana use; ask if there was any other people that knew him; asked about the video cameras; and asked about the falling out with Dick and Debbie Dunphy.

Is that pretty much what was covered?

CPL BURKE: Yes.

MR. SIMMONDS: Would you agree that she's probably your best source of information with respect to her father; what would upset him, what would not upset him, what happened in that house, the layout of that house, the way things were found, if certain things weren't found, if certain other things were found that weren't there before. Is she not your best source of that information?

CPL BURKE: We didn't know what value her information was at that time.

MR. SIMMONDS: And when she asked about it, Officer Henstridge said: There will come a time when we'll come back and sit down with you and kind of give you an assessment of what's happening – when she asked about what happened. Do you recall him saying that? Like, because that's a quote.

CPL BURKE: Okay. Yeah.

THE COMMISSIONER: Pick an appropriate place to break. I don't mean to interrupt you but –

MR. SIMMONDS: No, that's fine.

THE COMMISSIONER: – it's time for a break.

MR. SIMMONDS: That's fine.

THE COMMISSIONER: All right, good.

We'll recess for 15 minutes.

MS. SHEEHAN: All rise.

This Commission of Inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Sorry we're a little late coming back; I had some work to do behind the scenes.

Go ahead, Ms. O'Brien.

MS. O'BRIEN: Thank you. Sorry, Mr. Simmonds, to interrupt, but there's two new exhibits to be added. Commissioner, I ask for an order to add Exhibit P-0545 –

THE COMMISSIONER: Just one second now – exhibit ...?

MS. O'BRIEN: P-0545 and P-0546.

THE COMMISSIONER: 0545 and 0546. Okay, thank you.

Go ahead, Mr. Simmonds.

MR. SIMMONDS: (Inaudible), Mr. Commissioner.

THE COMMISSIONER: So ordered on the exhibit.

MR. SIMMONDS: Corporal Burke, you and Officer Henstridge took that statement from Ms. Dunphy that night, on the fifth. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: And I went through the things that you asked her about. Was there anything in hindsight that if you had your time back again, you might have inquired, looking back on it?

CPL BURKE: I never thought of that question, or

MR. SIMMONDS: Okay. So you're trying to get as much information to understand the scene where the shooting took place, and try and measure up Constable Smyth's version of what took place, so you're trying to gather as much information as you possibly can to help you in that assessment, correct?

CPL BURKE: Correct.

MR. SIMMONDS: Do you think it might have been helpful if you inquired of Ms. Dunphy whether her father was right- or left-handed?

CPL BURKE: Not at that time.

MR. SIMMONDS: Why?

CPL BURKE: We had limited information on – it didn't come up.

MR. SIMMONDS: No, I agree it didn't come up, and I agree you had limited information. But I'm asking you why it didn't come up. Why you as a seasoned investigator in the place of a shooting where a gun is supposed to have been pointed, why you didn't at the outset ask whether the person was left or right-handed. Wouldn't that be a logical, sensible question to ask?

CPL BURKE: It wasn't a question that came up at the time.

MR. SIMMONDS: No, I'm not going to leave it there. I understand it wasn't a question that didn't come up at the time. I'm asking you is it not a question you should have asked?

CPL BURKE: I don't know how to answer that question. It's a question – you're asking me if I should've asked that question. I didn't consider that question, so I don't know if I should've asked it or not.

THE COMMISSIONER: Well, put it another way. Would it not have affected your view of how Mr. Dunphy might have acted or reacted, in terms of whether he goes down to the right side of his chair or the left side of his chair, if he pointing a gun, whether he lifted with the right hand or the left hand, or ...?

CPL BURKE: Yes.

MR. SIMMONDS: So the answer is yes?

CPL BURKE: Yes.

MR. SIMMONDS: It should have been asked. Okay.

Would it have helped your investigation, furthered the investigation, if you had asked Ms. Dunphy what her knowledge was of the stick with the tape that was found? What was it used for? Where does it normally – where was it normally kept to? Wouldn't that have been – it

appears to be out of place. It's out right in the walkway. It's a stick with tape on it. Wouldn't it have been of assistance to find out where her father normally kept that stick?

CPL BURKE: We're provided with that information in a subsequent interview with Ms. Dunphy.

MR. SIMMONDS: That night, you saw it, you saw the thing, you went and interviewed her. Would that not have been an appropriate question to ask her that night to get the maximum information?

CPL BURKE: Our, I guess, our agenda that night was not to get the maximum information. We were going with what we had at the time.

MR. SIMMONDS: I put it to you your agenda that night was to back up Constable Smyth's version of events, with the greatest of respect, and your agenda that night in talking to her was to see how much information you could get with respect to the fact that her father had mental issues. Now that was your agenda, I believe, when you went to the house that night.

What I'm asking you is why you didn't ask whether he was right or left-handed, which would be important to how a gun came up, or any other weapon. Number two, when a weapon is seen there, a stick with tape on it, wouldn't it have been an appropriate question to inquire of her where her father normally kept it?

CPL BURKE: We didn't have all the questions when we visited Ms. Dunphy.

MR. SIMMONDS: Pardon me?

CPL BURKE: We didn't have all the questions. We were going by our initial view of the scene, and I can't expect, or I couldn't expect to ask every question that was appropriate at that time.

MR. SIMMONDS: No. But you find a stick at the scene with tape on it that could clearly be used as a weapon. Officer Smyth didn't bring it with him, so it was there before. Wouldn't it have been appropriate to ask how – did she have any information how it might have come out in the doorway? Where was it normally to? That's not a stretch. I don't think that that's something that's unforeseen. Would you agree you should have asked that that night?

CPL BURKE: I – you know, our statement from Ms. Dunphy, we asked questions, we obtained what we could from Ms. Dunphy as a pure version, as a witness statement.

MR. SIMMONDS: With the great of respect, you didn't obtain what you could. Ms. Dunphy agreed to this interview. You came up, you didn't cut her the slack to wait till a couple of days later, you came up that night to interview her, she said she would be interviewed, and you choose either you didn't think of asking these questions or you chose not to ask these questions, either of which go to the fact that this is not a comprehensive investigation. This is information that you needed.

Is that not correct, Officer?

CPL BURKE: I didn't have any preconceived notions of what I needed when I took that statement or –

MR. SIMMONDS: Then why wouldn't you ask about an obvious weapon that was there?

CPL BURKE: We were just trying to obtain a statement from Ms. Dunphy and it didn't come up.

MR. SIMMONDS: Did you ask her anything about – so I don't make the mistake a couch and chair again – anything about the chair, the chair that Mr. Dunphy was found in? That is a therapeutic La-Z-Boy. Did you ask her any questions about that?

CPL BURKE: I don't know.

MR. SIMMONDS: You don't know? You're there.

CPL BURKE: I can't remember everything we asked in the statement.

MR. SIMMONDS: Okay. It's – (inaudible).

Oh, shoot! Mine has come undone. Bear with me for one second, Officer. My photos came undone.

I want to go to Photo 044, which is a confidential exhibit. I don't think that can be viewed by anybody now, but I've got my monitor switched.

Is that photo up –?

UNIDENTIFIED FEMALE SPEAKER: No. It is Scene 044 or –?

MR. SIMMONDS: It's C-0001, 044.

UNIDENTIFIED FEMALE SPEAKER: Photo 44 (inaudible). Are they confidential?

MR. SIMMONDS: Yes, they are. Yes.

Now, you've had a look at the scene. You go to – you go to Meghan Dunphy's to get information. You understand that the deceased is sitting in a chair when he is shot. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: You understand that the firearm that supposedly he pointed at Officer Smyth came from the right-hand side of the chair. Correct?

CPL BURKE: I don't know if we had that information at the time.

MR. SIMMONDS: You don't know if you had – that information wasn't passed along? Officer Smyth had told this to other officers there that evening. You'd given then a brief rendition of it. You didn't know where the rifle supposedly came from at that point in time?

CPL BURKE: I don't know if I knew that information at that time.

MR. SIMMONDS: You knew a rifle had been brought up. You did know that?

CPL BURKE: Yes.

MR. SIMMONDS: That a rifle had supposedly been brought up –

CPL BURKE: Yes.

MR. SIMMONDS: – and pointed.

CPL BURKE: Yes.

MR. SIMMONDS: And you knew he was sitting in this chair when it happened.

CPL BURKE: Yes.

MR. SIMMONDS: Did you think to ask her any questions about that chair? Did it have an obvious hiding place? Was it electronic? Did it lift up? Could a gun been hid underneath it? Did you think to ask her any questions about that chair, which clearly is relevant?

CPL BURKE: Any issues or any observations or any evidence gleaned from the scene, I would have expected to get from our FIS examination.

MR. SIMMONDS: I'm asking you if you asked Meghan Dunphy, who is the daughter of the deceased, any questions about the chair? How her father utilized it? Whether he had it up? Whether he had it back? What was his normal use of the chair? Anything that would lead to a hiding – hiding of a firearm in it, did you ask any questions? And if we want to, we can go back to Meghan Dunphy's statement which I think is exhibit 0036.

CPL BURKE: Yeah

MR. SIMMONDS: If you can't remember, I mean – can we bring up exhibit 0036, if there's any parts you want to review on this.

CPL BURKE: I'm just saying, I had limited information at that time when we spoke to Meghan Dunphy and I didn't want to get into the specifics of the scene or anything that would –

MR. SIMMONDS: You didn't want to get into the specifics of a scene. You're going there to question her. Her father has been shot. You have a very brief summary from Officer Smyth. You've had a look at the scene. You know he's been shot in a chair, the hiding of a weapon. Because Officer Smyth said when he looked up from the file folder the barrel was pointed at him and followed him across the room. You didn't think to ask any questions about that chair even though it's clearly one of the predominant pieces in this scene where someone was killed.

CPL BURKE: I feel those questions would have been premature at that time.

MR. SIMMONDS: The questions would have been premature at that time.

CPL BURKE: Yes.

MR. SIMMONDS: When would they have not been premature?

CPL BURKE: After the scene had been examined; after we learned more about the scene itself.

MR. SIMMONDS: Did you ever of your own volition go back to Ms. Dunphy and say I'd like to get another statement? I put it to you, you did not.

CPL BURKE: No, she came and provided an additional statement.

MR. SIMMONDS: She came and she had Ms. Breen contact, and an arrangement was set up for a second statement. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: Do you know in that statement whether or not she was ever asked about the chair? Whether she was ever asked whether her father was left or right handed?

CPL BURKE: No, I don't.

MR. SIMMONDS: You don't?

CPL BURKE: No.

MR. SIMMONDS: Well, you certainly had time to assess it. Now she's coming back for a second – why wouldn't you ask those questions?

CPL BURKE: No reason.

MR. SIMMONDS: Would you agree that that shows a flaw in your investigation? Shows a shortcoming of the investigation?

CPL BURKE: What part are you saying is a shortcoming?

MR. SIMMONDS: The fact that you didn't ask relevant questions: Which hand does he normally use? Is he right or left? How does the chair work? Could a gun been hid underneath it? You've now had time – you certainly by now have had the statement from Officer Smyth. Don't you agree that those questions were still very relevant, should have been asked before the scene was released? You didn't ask them and that's a shortfall in your investigation. Would you not agree?

CPL BURKE: No, I don't agree.

MR. SIMMONDS: Would you agree they're relevant information? They could be relevant information?

CPL BURKE: They could be.

MR. SIMMONDS: Okay. They could be, and you couldn't weigh it unless you had the answers to it to determine whether they would be. So if they could be, don't you agree those are questions that should have been asked?

CPL BURKE: I don't feel those questions are – have major impact on the investigation or would have had a major impact.

MR. SIMMONDS: You don't feel that it could have had a major impact on the investigation where a 38½ inch long gun could have been hidden or disguised so that it surprises a professional, well-trained police officer to the point that he has no alternative, no course, no other course, but take his firearm and shoot the person seated in the chair?

CPL BURKE: I don't think that question is appropriate because it's a leading question. It kind of gives the person an option to where the firearm could have been stored. It doesn't – it didn't seem an appropriate question to me, and it still doesn't when you say it.

MR. SIMMONDS: You know by then that Officer Smyth is saying the gun came up over the right-hand side of the chair or somewhere on the right hand, over the right arm side of the chair. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: Not to question her as to where she might believe the rifle would have been situated on that right-hand side is an inappropriate or leading question?

CPL BURKE: She believed that the rifle was behind the couch, if you're referring to Ms. Dunphy. That's the last place she saw it.

MR. SIMMONDS: That's the last place she saw it.

CPL BURKE: Yes.

MR. SIMMONDS: Did you ask her had he ever had it underneath the chair? Did he ever have it over by the chair? Have you ever seen it there? Did you ask any of those questions?

CPL BURKE: She gave us her recollection about the firearm and I felt that was adequate.

MR. SIMMONDS: That was adequate. But, yet we still have unanswered, to this day, where exactly that firearm was located that it could have been brought up in a manner that Officer Smyth didn't see, until the barrel was pointed at him. That's not a relevant question. That's what I'm hearing you say.

CPL BURKE: To ask Ms. Dunphy, I don't think it's a relevant question.

MR. SIMMONDS: Outside of Ms. Dunphy, we have the deceased and we have Officer Smyth. The deceased cannot speak. Officer Smyth has spoken. So the only one left to inquire about the location of that rifle which has been a real issue, you didn't feel it was an appropriate question to ask her.

CPL BURKE: Ms. Dunphy gave her evidence on where she believed the rifle was located. We asked Mr. Colin Dinn where – if he saw a rifle or where it was located. We asked Tom Hearn if he knew of a rifle or where it was located. We've asked other witnesses.

MR. SIMMONDS: You didn't ask Ms. Dunphy to come up and look at the chair and show you – tell you whether the gun had ever been stored or hidden underneath the chair. You went through no such procedure, unless you can take me to it, that I'm aware of.

CPL BURKE: I'm just saying that we – Ms. Dunphy gave her version of where the gun was located the last time she saw it or –

MR. SIMMONDS: (Inaudible.)

CPL BURKE: – her history of viewing the gun. And I didn't want to influence that by asking her could it have been by the chair or could it have been under the chair. So I was – I accepted Ms. Dunphy's statement in her detailing where she saw the gun.

MR. SIMMONDS: Okay.

The last place she saw the gun was behind the couch. She said that was some months before when she was cleaning up when her father was in hospital. You did know that.

CPL BURKE: Yes.

MR. SIMMONDS: You never asked her since that, and you never asked her whether she ever had seen it in relation to the chair in a question about the chair. Has it ever been hidden underneath or put underneath the chair; you did not ask that.

CPL BURKE: Like I said, that would have been what I would refer to as a leading question.

MR. SIMMONDS: Yeah.

CPL BURKE: Suggesting the answer, basically.

MR. SIMMONDS: Would it have been a leading question to ask her what was the level of her father's disability? How did his disability affect his mobility, his ability to move his arms, his ability to get in and out of chairs, go up and down steps? Did you ask anything like that in either one of the statements?

CPL BURKE: No.

MR. SIMMONDS: Do you agree that that's a relevant question?

CPL BURKE: I think it's a relevant question for a doctor or someone –

MR. SIMMONDS: This is his daughter who has personal knowledge of him, who sees him more than anybody else, who would be able to speak specifically of what his disabilities were. Was that not a reasonable, appropriate and relevant question to ask her? And it was not asked.

CPL BURKE: If we were to use that piece of – that question, and the answer as evidence, I think the best evidence would come from a medical professional.

MR. SIMMONDS: Officer Burke, indeed it may be appropriate to call a medical professional to get information on it, but would it not be part of any competent investigation that the issue of the man's disability, in this situation where he is supposed to have pointed a firearm – taken it out from a hidden position and pointed a firearm – be a relevant piece of information that you would want to have part of the file?

CPL BURKE: Yes. And we sought that out, actually.

MR. SIMMONDS: You never asked her.

CPL BURKE: No. I didn't feel it was appropriate to ask her.

MR. SIMMONDS: You didn't feel it was appropriate to ask her. Why isn't it appropriate to ask her?

CPL BURKE: If you're talking about Mr. Dunphy's disabilities or level of motion, I think it was best – and I still think it was best – to ask Mr. Dunphy's family doctor or any doctor that had given Mr. Dunphy any medical treatment.

MR. SIMMONDS: Corporal Burke, maybe it's my inexperience but in the cases where I've seen police officers doing investigation in relation to serious crime, they often ask the same questions to multiple witnesses. They get different answers but they – sometimes, they ask the professional witnesses, they ask it to other witnesses. It may not even be information they can use in court but sometimes it's still relevant and leads them to another piece of information.

MR. AVIS: Commissioner, I think there's a point where Mr. Simmonds has to ask questions and not actually give evidence. You know, I –

THE COMMISSIONER: That's a question. He's putting the question out that isn't it a fact that police officers ask the same questions to various witnesses.

MR. SIMMONDS: Multiple witnesses.

THE COMMISSIONER: Continue.

MR. SIMMONDS: Would you agree, Officer Burke?

CPL BURKE: Certain questions are posed to certain people, certain witnesses.

MR. SIMMONDS: You didn't ask her.

CPL BURKE: No.

MR. SIMMONDS: You don't feel that's a flaw in your investigation?

CPL BURKE: No, I don't feel that's a flaw in our investigation.

MR. SIMMONDS: Okay.

Did you ask her whether or not her father had the glasses on all that day? What was his normal habit with respect to the glasses, what kind of condition the glasses were in: did you ask that during the first interview?

CPL BURKE: No.

MR. SIMMONDS: Glasses were found at the scene on the table in whatever condition they were which, again, is shown in that picture that I – you had up a minute ago, the confidential picture.

CPL BURKE: Yes.

MR. SIMMONDS: Didn't you feel it was relevant to ask, well, does he have them on all the time? Because they weren't on when this took place, we found them on the – and we found them in some state of disrepair. And, in fact, if you look at them closely one of the nosepieces is off.

Is that consistent with your dad's use, is that consistent with how they were? Didn't you – don't you agree that that's another relevant question that you should have asked in that situation?

CPL BURKE: I didn't see the glasses that night.

MR. SIMMONDS: You didn't see –

CPL BURKE: (Inaudible.)

MR. SIMMONDS: – the glasses that night?

CPL BURKE: No.

MR. SIMMONDS: Did you at any time before the scene was released see the glasses?

CPL BURKE: No.

MR. SIMMONDS: Did you ensure as to whether or not before the scene was released, that the forensic unit was sure they had checked everything that might be relevant?

CPL BURKE: Yes.

MR. SIMMONDS: Did you speak to them about that?

CPL BURKE: Yes.

MR. SIMMONDS: And they didn't feel the glasses were relevant? Did you specifically address that with them?

CPL BURKE: The glasses? No.

MR. SIMMONDS: You didn't.

But the glasses do become relevant at the end of it because you carry on a separate – you say – investigation. You sent people out to get information with respect to them. And it appears somewhere along the line they got damaged, but in this photo we see that the nosepiece was off when they were – they were on the table. Again, a relevant piece of information, is it not?

CPL BURKE: I don't think so.

MR. SIMMONDS: You didn't ask Meghan Dunphy to determine whether or not it was relevant, did you? You never asked her about it that first interview, to see if indeed these glasses did have any relevance.

CPL BURKE: I had no idea that the glasses existed for the first interview.

MR. SIMMONDS: So any of those – I think it's five questions I put to you – you agree that the left or right hand might be relevant, but the rest of them you don't think are relevant to the proper investigation of this matter.

CPL BURKE: I don't want to – I don't want to say – I don't know what questions you're referring to.

MR. SIMMONDS: The ones I just asked you: where the stick was kept, whether he's right- or left-handed, how was the – did you ask her about the chair, did you ask about his level of disability, did you ask them about the condition the glasses: any of those. Do you agree that certainly as a group they are potentially relevant questions that could provide relevant information to your investigation?

CPL BURKE: Yes, and most of those were asked. Regarding the chair, the –

MR. SIMMONDS: Did you ask her?

CPL BURKE: No.

MR. SIMMONDS: Right. And she's, she was the person that knew him best.

CPL BURKE: I don't see the relevance in those questions and Ms. Dunphy's first statement.

MR. SIMMONDS: Okay.

You had the Forensic Identification unit at the scene on the 5th and 6th. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: And I understand that that's Corporal Lee or Constable – or no, Corporal Lee, and Officer Saunders. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: And I understand that Corporal Lee says on the morning of the 6th she met with the Major Crime Unit, but there was no new info to share so she left headquarters and returned to the scene.

CPL BURKE: Yes.

MR. SIMMONDS: Did you ever provide her with a full copy of Officer Smyth's statement?

CPL BURKE: I don't think we had it at that time.

MR. SIMMONDS: When you did get it, because you got it on the 6th.

CPL BURKE: Right.

MR. SIMMONDS: And, in fact, there were some notes. Did you ever, before the scene is released, go back and say: Now, look, here's the statement we got, do you – have another look in there and make sure that there's nothing missed?

Did you do that, Officer?

CPL BURKE: I don't remember doing that.

MR. SIMMONDS: Well, you don't remember doing that. Okay.

Okay. We've got a dead person who can't speak and the officer who can speak was giving a statement. The forensic unit, as good as they might be, would clearly depend upon some guidance from the Major Crime Unit as to what supposedly may have taken place in there.

You get a detailed statement from Officer Smyth and you don't provide that to the two officers who were in at the scene to determine whether this says, hey, here's other things we should check out in light of that statement.

CPL BURKE: I believe that they were informed of a synopsis of that statement, nothing detailed but –

MR. SIMMONDS: Nothing detailed?

CPL BURKE: Right.

MR. SIMMONDS: Where do you think they were informed to? Were they given – is it in one of your notes? Is it somewhere in the forms here, the continuation reports, I'll call them, the narratives?

CPL BURKE: I don't know.

MR. SIMMONDS: You don't know.

You've got the only witness to the event, you've got your two forensic people who came from Clarendville and Grand Falls, I believe –

CPL BURKE: Yes.

MR. SIMMONDS: – to go in and review this on the 6th, Officer Lee, Corporal Lee was at headquarters, no new information; you knew you were getting a statement that day –

CPL BURKE: Right.

MR. SIMMONDS: – because they wouldn't do the autopsy until you got the statement. The chief medical examiner said: Hold on; we're not going ahead until we see if there's anything. Shouldn't that have been a clue that, you know, when we get this, maybe we should give it to our forensic people?

CPL BURKE: I think –

MR. SIMMONDS: He's the only witness.

CPL BURKE: From my recollection, I think there was an update to FIS.

MR. SIMMONDS: I'm sorry. I didn't get that answer.

From your – there was enough –

CPL BURKE: To my recollection, we provided FIS with an update.

MR. SIMMONDS: I believe her note set out on the morning of the 6th at 9:30, but there was no new information to share so she left headquarters and returned to the scene.

Okay, if there's no new information to share, you knew that statement was coming that day, that would be new information to share, don't you agree?

CPL BURKE: Yes.

MR. SIMMONDS: Okay. It wasn't shared with her. Don't you agree?

CPL BURKE: No, I don't – I don't know.

MR. SIMMONDS: She was not provided with a copy of the statement.

CPL BURKE: No.

MR. SIMMONDS: Okay. Her and the other officer were the ones examining the scene.

CPL BURKE: Yes.

MR. SIMMONDS: The only person alive that was there when the event took place was Officer Smyth who had now given a statement. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: Would that statement not be relevant to how they conducted their examination of the scene, potentially relevant?

CPL BURKE: There are some issues with that or some risk, I guess.

MR. SIMMONDS: Some risk, you guess?

CPL BURKE: Yes. The risk would be they did a separate scene examination without too much influence from, you know, any witnesses. So I felt that was adequate.

MR. SIMMONDS: When you investigate a crime scene, I'm told, from officers from previous cases, that what you want to do is attempt to ensure that you try and explain any changes in the scene from what they originally were to what you find.

Is that a fair statement? Because any changes are a result of the actions that took place, do you agree?

CPL BURKE: Changes in what?

MR. SIMMONDS: Scene looks like this – after the event, the scene looks different. Those –

CPL BURKE: Yes.

MR. SIMMONDS: – changes are a result of the activity that took place at the scene. Correct?

CPL BURKE: Sure. Yes.

MR. SIMMONDS: The activity that took place at this scene was: Mr. Dunphy was shot three times, because he supposedly pulled a rifle on Officer Smyth.

Officer Smyth then gives a statement. I think it's 138 pages, but I don't have it right here in front of me. That's not turned over to either one of the forensic examiners that you have in at the scene. In fact, she's told there's no new evidence.

CPL BURKE: She's told there's no new evidence before Constable Smyth's statement.

MR. SIMMONDS: You knew Constable Smyth was giving a statement because the autopsy was held up on behalf of it. Henstridge makes that comment in the statement, in fact, and we can take you to that statement if you want to check it.

CPL BURKE: Yes, I know that.

MR. SIMMONDS: So you knew the statement was coming down that day; this is the same day they were at the scene, do you not agree that it was absolutely negligent not to have given them that statement while they were at the scene, before they closed, the scene was turned over before they left?

CPL BURKE: No, I don't agree with that.

MR. SIMMONDS: Do you agree it's a shortcoming in your investigation?

CPL BURKE: No, I don't agree with that.

MR. SIMMONDS: So you're saying Officer Smyth's statement had no relevance to the Forensic Identification unit.

CPL BURKE: Relevance – and they knew the statement was coming, and they had an update on what the statement entailed. It wasn't – the statement itself wasn't provided to FIS. But an update of any additional things we should consider –

MR. SIMMONDS: Who made that decision of any additional things you should consider? Their specialty is to determine what things they should consider based upon gathering all the information. You didn't give them all the information, so how would they make that decision appropriately and competently?

How could they do that, Officer Burke?

CPL BURKE: I don't know it would have been – did you want us to provide Constable Smyth's full statement to FIS while they are processing the scene?

MR. SIMMONDS: I don't know; I'm not the investigating police force. I'm asking you that they are in there – I understand he's the only witness and they're in there trying to determine why these things are as they are. Don't you agree that that's important information to equip them with?

CPL BURKE: No, it's not something we considered and it's not something that my experience, I've done in the past.

MR. SIMMONDS: Do you have anywhere in your notes which sets out when you reviewed the photos that were taken at the scene?

CPL BURKE: No.

MR. SIMMONDS: Okay.

CPL BURKE: I don't know, I don't think so. I don't know.

MR. SIMMONDS: My understanding is that, first, we have you reviewing the statements, the photos taken at the scene was when the issue of the glasses arose, and that was somewhere around April 14. In fact, according to Officer Saunders there was a typically downloading the photos from her camera, so the first look had to be through her camera as opposed to a hard copy. Is that correct?

CPL BURKE: I don't know. I know that Sergeant Saunders gave me a CD that was, that had a watermark on it.

MR. SIMMONDS: Yeah, she took the camera back to I believe Clarendville and burned off a CD; am I correct?

CPL BURKE: Sergeant Saunders would have provided me with the photos of the scene, Chris Saunders – he.

MR. SIMMONDS: Or he, pardon me.

CPL BURKE: Yeah. And he said these are not the copy we want to use, but they have a watermark and he was trying to fix the watermark, so I reviewed those photos.

MR. SIMMONDS: When did you review them?

CPL BURKE: When he provided them to me.

MR. SIMMONDS: Do you have any note to show that? Do you have any proof that you reviewed them on the 5th, 6th, 7th, 8th, 9th?

CPL BURKE: I don't know.

MR. SIMMONDS: You don't know? Those photos obviously set out how the scene supposedly was found immediately after the incident, correct?

CPL BURKE: Yes.

MR. SIMMONDS: Did you ask after reviewing the statement – or reviewing the photos – I put it to you; you didn't review them in time, the scene was released before you reviewed them and, in that case, it would be difficult if not impossible, to have the Forensic Identification unit go back for any meaningful purpose.

Do you have anywhere in your notes where it substantiates that you reviewed these photos?

CPL BURKE: I don't know.

MR. SIMMONDS: You don't know.

Would you not agree that for the prime investigator, in reviewing a scene where a death has taken place, that reviewing the photos would be a very important task before you release the scene and before you let the Forensic Identification unit go home?

CPL BURKE: All I can say is I reviewed the photos and had a discussion with FIS and it was –

MR. SIMMONDS: But when? I put to you that that was after they had left the scene and the scene had been released. And I put to you that you should have, as the prime investigator, done that before. And not doing it and documenting it is an important deficiency in the file and the investigation.

CPL BURKE: All I can say is that I had a discussion with FIS and the scene had been processed.

MR. SIMMONDS: You referred a little earlier, in fact, that you're sure they were given an overview. Officers Lee and Saunders were given an overview of what Smyth's statement says.

CPL BURKE: I think after the statement we had a conversation with FIS.

MR. SIMMONDS: I understand that your policy is clearly that any important conversations, any important events with respect to the file, should be clearly documented in the file. Please take me to where that is documented that that conversation took place and show me where it sets out what information you provided in that overview.

CPL BURKE: I don't know if I could do that.

MR. SIMMONDS: But you're the – you're the primary investigator. Isn't it your job to do this? There was already issues about officers not taking notes. You, as the primary investigator,

certainly would be taking notes of important events. That's an important event, what information you gave the Forensic Identification unit.

Do you have that noted anywhere and do you have succinctly put what information was provided to them?

CPL BURKE: I don't think so.

MR. SIMMONDS: Do you agree that that's a significant deficiency in the investigation?

CPL BURKE: What.

MR. SIMMONDS: That we are unsure what, if any, information was given to the Forensic Identification unit. There's no documentation to prove anything was ever given to them. And number one, it should have been, so if it wasn't, that's one deficiency; number two, the fact that the prime investigator hasn't got it recorded is another deficiency.

Would you agree, Corporal Burke?

CPL BURKE: All I can say is that we were – we were consulted and we were in agreement that the scene was to be released.

MR. SIMMONDS: Okay. I was going to get to that in a little while but you brought it up, we'll deal with it now. The scene was going to be released. Who released the scene?

CPL BURKE: Uh –

MR. SIMMONDS: Now think carefully about this, please. Who – and releasing a scene where a sudden death has taken place by another police officer in a home, I would think, is something that would require documentation. Where is the proof of the date, time and information that was conveyed to release the scene?

CPL BURKE: I wouldn't be able to point you to that.

MR. SIMMONDS: The releasing of the scene – because we do agree, once the scene is released it's pretty well gone after that. There's no continuity, things can change, particularly if anybody goes in there, there's contamination. So the value, the forensic value, the evidentiary value, the legal value of anything obtained after the fact, greatly, greatly diminishes. Do you agree?

CPL BURKE: Yes.

MR. SIMMONDS: That was your point with respect to the glasses. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: So the date that the scene is going to be released and the assurance that everything that needs to be done has been done before that should be something that would be well documented. Do you have it documented anywhere when the scene was released?

CPL BURKE: I don't know.

MR. SIMMONDS: Do you know exactly who gave the order, you or Sergeant Smyth – or Sergeant Osmond? Pardon me.

CPL BURKE: The scene would have been released after the autopsy was completed.

MR. SIMMONDS: You don't have that recorded?

CPL BURKE: I don't know.

MR. SIMMONDS: Would you agree that these are things you should know? Would you agree with me on that at least?

CPL BURKE: I – you know, if it's in my notes. I don't know if it's in my notes or not.

MR. SIMMONDS: I haven't seen the policy and procedures for note taking in some period of time. But I did years ago see a copy of what the RCMP sets out with respect to the taking of notes and I think it leads off by something that notes are invaluable. If there's any changes you should put a line through it and initial it; they should be made contemporaneously. Do you agree that that's generally the thought behind notes?

CPL BURKE: Yes.

MR. SIMMONDS: Okay. Would you agree that the releasing of the scene is an important event?

CPL BURKE: Yes.

MR. SIMMONDS: Would you agree that in conjunction with what your notes say and this important event, the same should be recorded in the file?

CPL BURKE: Yes.

MR. SIMMONDS: Did you record it?

CPL BURKE: I don't know.

MR. SIMMONDS: Do you know for sure who released it: You, Officer Osmond – Sergeant Osmond?

CPL BURKE: No –

MR. SIMMONDS: Someone else?

CPL BURKE: I don't know.

MR. SIMMONDS: You don't know.

THE COMMISSIONER: You don't recall, is it?

CPL BURKE: I don't recall, no.

MR. SIMMONDS: You went to the scene. Officer Smyth's four-wheel drive, his Yukon I think it was, was still there.

CPL BURKE: Yes.

MR. SIMMONDS: Tape was run out around the vehicle so that it was part of the scene area, the vehicle was considered to be.

CPL BURKE: Yes. It was inside the police tape if that's what you're asking?

MR. SIMMONDS: Yes.

CPL BURKE: Yes.

MR. SIMMONDS: You didn't search Officer Smyth's vehicle.

CPL BURKE: No.

MR. SIMMONDS: I believe Ms. O'Brien touched on that. Why didn't you search it?

CPL BURKE: We didn't believe the vehicle held any evidentiary value.

MR. SIMMONDS: You didn't believe the vehicle held any evidentiary value but you didn't search it. So how could you know it didn't hold any evidentiary value if you didn't search it?

CPL BURKE: The scene where the incident took place, to the best of our knowledge, occurred in the living room of the Dunphy residence.

MR. SIMMONDS: Do you agree items might be found in the vehicle that could have relevance to what had happened in the living room?

CPL BURKE: No, I didn't.

MR. SIMMONDS: No, you don't or there couldn't be? There couldn't be anything in that vehicle that would be possibly important, i.e. proof of ingestion of alcohol – just throw that one out there, that seems to be an obvious one – but any number of things.

CPL BURKE: The ingestion of alcohol had nothing to do with the event as far as I was concerned.

MR. SIMMONDS: You don't know that. He wasn't – there was never a blood test. There was never any testing done to determine whether alcohol was an issue in this or not. Am I correct?

CPL BURKE: It is also not part of the elements of the offence that we were investigating.

MR. SIMMONDS: If indeed – and I'm not saying this is the case. If indeed it was shown that earlier that day Officer Smyth consumed a significant amount of alcohol before he went to Mr. Dunphy's, that would be relevant information for your investigation. Please don't tell me that would not be relevant information.

CPL BURKE: We had no information to believe that occurred.

MR. SIMMONDS: I know you had no information, but you didn't check the truck to see if that could lead anything, or if there was anything else in the truck that might lead to valuable information.

CPL BURKE: We had no information to believe that the truck or the Yukon had any evidentiary value.

MR. SIMMONDS: Officer Smyth said that he was writing on the file folder – correct?

CPL BURKE: Correct.

MR. SIMMONDS: The file folder, you thought, was relevant enough to seize from the scene – correct?

CPL BURKE: Correct.

MR. SIMMONDS: The file folder, you thought, was relevant enough not only to seize, but then to conduct some kind of testing to see if it was dropped, would it possibly land in the manner that it was found, i.e. on the table – correct?

CPL BURKE: Correct.

MR. SIMMONDS: And ye did that a number of times and I think, understandably, the result was that it is fairly inconclusive; didn't prove anything.

CPL BURKE: Yes.

MR. SIMMONDS: For Officer Smyth to have written in that file folder, two things would be required: the file folder and a pen – agreed?

CPL BURKE: Agreed.

MR. SIMMONDS: Did you ever determine whether his pen was found? Did you question him about the pen? Did you see if anything that was found at the scene matched up with the ink that was on the folder? Was anything checked of that nature?

CPL BURKE: What was the last part?

MR. SIMMONDS: Did you check and see if there was any pen found at the scene that would be consistent with the ink that was on the file folder?

CPL BURKE: No.

MR. SIMMONDS: Do you not agree that if writing in the file folder was an important enough piece of information to conduct these tests that determining the location, if indeed there was a pen there and if indeed the pen, if there was one found there, matched up, which wouldn't need to terribly scientific perhaps, matched up with the ink that's on the file folder – that would not seem to be a difficult or bizarre request, would you agree, Officer Burke?

CPL BURKE: It's not something we considered during our investigation.

MR. SIMMONDS: You considered the file folder, but why wouldn't you consider the pen?

CPL BURKE: The file folder was on the coffee table and it appeared to be out of place or the FIS checked the file folder and it appeared –

MR. SIMMONDS: They checked the file folder and there was writing in it and there was some papers in it. Correct?

CPL BURKE: Yes. Yes.

MR. SIMMONDS: Which a file folder – and the writing was on the inside of the file folder, so the file folder would have had to be open to try and write in it – correct?

CPL BURKE: I would assume.

MR. SIMMONDS: You would assume. Well – and for him to have written in it while it was open, he would have needed some kind of writing instrument. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: He dropped the file folder once the incident arose, is what he tells us – correct?

CPL BURKE: Correct.

MR. SIMMONDS: Would it not have been equally as important to locate the supposed pen to see if that corroborated his story in any manner?

CPL BURKE: It was not an investigative step that we considered at the time.

MR. SIMMONDS: It was not an investigative step that you considered at the time. Should it have been an investigative step that you considered at the time? You don't think locating the pen was an important enough – is important enough for evidentiary value?

CPL BURKE: I can only speak to my investigation at that time or my mindset at that time. It didn't come up.

MR. SIMMONDS: No, no. No, you can speak to more than that, with the greatest of respect. You're the lead investigator on this. The information goes through that triangle. We only have one witness and we're trying to corroborate that witness's rendition of what took place.

Would you agree that would be material evidence, that that pen could possibly be material evidence in this matter?

CPL BURKE: Now, yes. At the time, it didn't come into our investigation.

MR. SIMMONDS: And I take it at no point in time did you, as the prime investigator, ask Officers Saunders and Lee to return to the scene to do a further investigation resulting from something you had seen either in the photos or thought of. They were never asked to come back – correct?

CPL BURKE: Correct.

MR. SIMMONDS: If you had your time back, would you agree that perhaps they should have been asked to come back, that they should have been given a copy of the statement, that they should have gone looking for the pen, they should have determined whether it was a matchup between the pen and the ink on the file folder? Would you agree that those are relevant, appropriate, potentially evidence-bearing inquiries that could have assisted in this matter?

CPL BURKE: At the time, those weren't steps that we considered. And looking back at it now, I don't feel they would have dramatically affected the outcome of the investigation.

MR. SIMMONDS: Would you agree they might have affected the outcome of the investigation?

CPL BURKE: I can't see where they would affect the outcome of the investigation.

MR. SIMMONDS: Did you ever ask Officer Smyth about the pen?

CPL BURKE: No.

MR. SIMMONDS: If we could bring up – just for the purposes if we have to refer to it, Madam Clerk – Officer Smyth's statement; it's P-0119.

Did you inquire – I put it to you, in fact, you did inquire of Officer Smyth where the firearm came through, came from, in that statement. Did Officer Henstridge inquire?

CPL BURKE: I don't know if he inquired or it was offered by Constable Smyth.

MR. SIMMONDS: And am I correct to say that he said it came from the right-hand side of the chair?

CPL BURKE: I think so.

MR. SIMMONDS: Did you inquire any further of him what he meant by the right-hand side of the chair?

CPL BURKE: I'm not sure.

MR. SIMMONDS: You're not sure? Would you agree that this 38½ inch rifle is one of the central pieces of evidence in this matter?

CPL BURKE: Yes.

MR. SIMMONDS: Would you agree how it came from, wherever it was hidden, to be in Don Dunphy's hands, is a very important piece of information?

CPL BURKE: Yes.

MR. SIMMONDS: Would you agree that the only one that could likely provide that information would be Officer Smyth?

CPL BURKE: Yes.

MR. SIMMONDS: Why, then, was he not extensively questioned on where that rifle came from, how he felt it came up, outside of that it came over the right-hand side?

CPL BURKE: From my recollection of the statement, Constable Smyth provided a detailed statement, I guess a recollection of where he thought the firearm came from, and I didn't think there was anything else that we could have asked him that he didn't already present to us in the statement.

MR. SIMMONDS: Do you know to this day from your investigation where the rifle came from?

CPL BURKE: Reasonable grounds to believe it came from right side of the chair.

MR. SIMMONDS: Okay.

If that's the case, don't you feel, that being a very relevant piece of evidence, significant inquiry should have been done with respect to the rifle, the ability to hide it by the chair, the

determination as to whether it would have fitted underneath the chair, a determination if it was leaning up against the wall, would you be able to see it? Would you agree that each and every one of those options, in this situation, which is the only reason – the only grounds for Officer Smyth being able to shoot Mr. Dunphy, would you agree that that information is crucial to this investigation?

CPL BURKE: I don't know if we could have determined if it was leaning up against a wall or – we could only make a, I guess, educated assumption or a belief of where the firearm came from, and I believe we established that.

MR. SIMMONDS: Now, Officer, I'm not gonna go into – do you agree that – well, Officer Osmond, Sergeant Osmond, did speak to you about the lack of – I'll use the lack of it being formal. It appeared to be very informal; it appeared to be by a buddy-buddy type of interview. Officer Osmond, as soon as you came out, had a concern about that. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: You agree that that was a mistake, to conduct the interview that way?

CPL BURKE: I don't know if it was a mistake, but it was probably inappropriate.

MR. SIMMONDS: And would you agree that the comment, "The general public doesn't understand the kind of pressure that we're under, I don't think – and they never will," and the further comment, "But I mean the most important person in this whole picture now is you for sure," that these are not appropriate comments for the interrogating officers to be making to the subject who's being questioned? Would you agree with that?

CPL BURKE: Yes.

MR. SIMMONDS: But you didn't feel at the time it was appropriate for you to interject and say, no, we're not going to add – we're not going to mention anything like that? Didn't do it.

CPL BURKE: I didn't do it, no.

MR. SIMMONDS: Do you feel that Officer Smyth was treated different than another person would have been, a common citizen, the average citizen, in the same situation?

CPL BURKE: In what regard?

MR. SIMMONDS: In that regard, is one.

CPL BURKE: The statement?

MR. SIMMONDS: Yes.

CPL BURKE: I would have to say yes, but I'd also have to say that, you know, it was a person in that chair that was, you know – I guess our – when we obtain statements from anybody, we want to appear like we're their best friends. And that's how we obtain the most information from a person.

MR. SIMMONDS: I understand that that can indeed be an investigative technique. If it is going to be the technique utilized, it's supposed to be well documented before you go in there. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: It wasn't well documented.

CPL BURKE: No.

MR. SIMMONDS: And I put to you the reason this was buddy-buddy was because it was another police officer and you had some empathy for him. Am I not correct?

CPL BURKE: I had empathy for the person in the chair. Whether it's a police officer or not, I can't answer that.

MR. SIMMONDS: And you leave him with the impression – that Officer Smyth sends a text message on the 7th of April: “they were complimentary of the process and tactics. They expect a short investigation.” That's the impression you left with him. Would you agree that that's not an appropriate impression to leave with a person who's being questioned and investigated in relation to the shooting of someone?

CPL BURKE: I can't speak to any text messages that Constable Smyth has sent.

MR. SIMMONDS: You can speak certainly to the things that you did and said in that room that would leave him with that impression, two of which were – I just took you to a moment ago – when Corporal Henstridge said these things to him.

CPL BURKE: Yes.

MR. SIMMONDS: Would you agree that leaving someone with that impression is indeed an error?

CPL BURKE: I don't know if it was an error or if it had any effect on the investigation.

MR. SIMMONDS: Where would Officer Smyth have got the idea that it was going to be a short investigation?

CPL BURKE: I don't know.

MR. SIMMONDS: Well, you were there. You were there. The statement was transcribed. Was there something said to him that's not there, that we're not seeing? Where did he get that impression?

CPL BURKE: I don't know.

MR. SIMMONDS: You don't think Officer Smyth was treated different than your average citizen?

CPL BURKE: I would have to say, yes, he was treated different than your average citizen.

MR. SIMMONDS: You do?

CPL BURKE: Yes.

MR. SIMMONDS: And, in fact, in the case of Mr. Dunphy, you seize the cellphone and you got a consent from his daughter down the road to search it. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: Because you were searching it in the hope that there would be information revealed on it which would, in some way, corroborate Officer Smyth's story. Correct?

CPL BURKE: That's not why we seized the cellphone. We thought it would have investigative value of his contacts that day and anything – and Constable Smyth does give some times and, so, yes, but it is not to complement his story.

MR. SIMMONDS: But you didn't seize Officer Smyth's cellphone that day.

CPL BURKE: Mr. Dunphy's cellphone was on the table at the scene.

MR. SIMMONDS: But you didn't seize Officer Smyth's cellphone that day.

CPL BURKE: No, we didn't.

MR. SIMMONDS: You seized his weapon, his magazine, seized his clothes, but you didn't seize the cellphone, you say.

CPL BURKE: Yes.

MR. SIMMONDS: In fact, he went to Florida, came back and it was after he came back that you contacted him and asked for the cellphone.

CPL BURKE: Yes.

MR. SIMMONDS: Would you agree that Officer Smyth's cellphone could likely reveal relevant evidence in this matter?

CPL BURKE: Yes, that's why we seized it.

MR. SIMMONDS: Almost – over two weeks later. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: Doesn't the same logic apply to that cellphone that applied to the scene: that once it's out of your control, there becomes issue with the value that it has?

CPL BURKE: We didn't have any control of Constable Smyth's cellphone.

MR. SIMMONDS: You could have had control. You could have asked for it on the night of the event. You could have asked for it when he came in the next day to give a statement. You did not. You subsequently did it some weeks later, and when you got it back significant parts of it were deleted. Am I not correct?

CPL BURKE: I don't know if significant parts were deleted or not.

MR. SIMMONDS: Parts of it were deleted. Correct?

CPL BURKE: There's – from what I reviewed there are some portions that had the term, deleted, on it.

MR. SIMMONDS: When you did get it back, when you did seize it, why did it take so long, because we only got some of it within the last few days? Would not a thorough investigation be getting the printout that you could get from it, try and matching that up against any other records

or information you had? You told us on the rec that you didn't do that. You glanced at it, I think, or you used some phrase like that.

CPL BURKE: I left the analysis of the cellphone to our criminal analysts.

MR. SIMMONDS: Well, when you get it back, you get the analysis back, would you not check it yourself to make sure you're fully aware of any evidence that might be revealed by it?

CPL BURKE: There was maybe a thousand pages of cellphone records in that incident, and I, you know, I wanted to leave that –

MR. SIMMONDS: There's a man dead.

CPL BURKE: There's criminal analyst that is trained to analyze such things as cellphones, and I left it to the experts.

MR. SIMMONDS: But you didn't check any of it yourself, you left it to them?

CPL BURKE: Like I said, I glanced at it.

MR. SIMMONDS: You glanced at it.

It's been my experience in criminal matters that one of the first things the police seize is the cellphones of anybody that's a person of interest, under suspicion, being investigated, if they can. Do you agree?

CPL BURKE: It all depends on the investigation.

MR. SIMMONDS: Would you agree that in this situation, the seizing of the cellphone has resulted in information that has come before this Commission, which this Commission will make a determination on as to whether it's relevant or not. So it's potentially relevant information. Would you agree, Officer?

CPL BURKE: Yes.

MR. SIMMONDS: Then, can I ask, why would you seize Don Dunphy's because it was on the table? And why would you not seize Officer Smyth's in the same time frame?

CPL BURKE: The relevancy investigation was unknown at that time, and we were dealing with a shooting scene. If we're doing a drug investigation or a conspiracy to commit, cellphone records may be more of a priority. But for the scene that we had, it wasn't, I guess, top priority.

MR. SIMMONDS: If you would've had the cellphone records and they analyzed them properly you would've picked up, in all likelihood, the mistake made by Wanda Richards, who was your analyst. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: You didn't pick up on that mistake, and it appeared the calls were made to a different person. And you operated under that mistake for a significant period of time. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: And when it turns out we do get the correct information, it turns out that Officer Smyth stopped on the side of the road. And I believe it was either five or six calls he made to Don Dunphy through all the numbers that he had, which you didn't even know about. Correct?

CPL BURKE: I knew the numbers that he called and I knew the numbers that were received by Don Dunphy. And they didn't match up.

MR. SIMMONDS: But, indeed, it turns out when the proper investigation is done on the phone, that Officer Smyth says he stopped on the side of the road and did call Don Dunphy five or six times, from I believe two, if not three different numbers. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: So that was information, that had it been properly analyzed at the outset would have come to light. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: And the fact that Mr. Smyth, Officer Smyth stopped on the side of the road has become a real issue because it then determines how long he might have been in the house. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: And how long he might have been in the house and what he did after the event, after the shooting, how long he was there, who he called, what he did is also relevant information to this investigation. Correct?

CPL BURKE: Yes, but the information I don't feel impacted the outcome of the investigation.

MR. SIMMONDS: You don't feel impacted. That's ultimately the decision for the Commissioner here.

What we know is the chart that Wanda Richards did is basically useless because of this mistake. And this mistake wasn't picked up by you, the prime investigator, until it was raised in here in your interviews. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: And that time is crucial to our determination of how long Officer Smyth was in that house after he shot Mr. Dunphy. Correct?

CPL BURKE: I determined the time that Constable Smyth was in the residence as being approximate.

MR. SIMMONDS: The time he was there may be approximate but the time he was in the house after he shot Mr. Dunphy, that passage of time is an issue before this Commission and is important. Correct?

CPL BURKE: I don't know if it's an issue for the Commission.

MR. SIMMONDS: Would you agree it's important information, Officer Burke?

CPL BURKE: It's important information.

MR. SIMMONDS: Okay.

What's more, when you interviewed Officer Smyth on the sixth, there was talk of him trying numbers but he did not volunteer that he had parked on the side of the road and called Mr. Dunphy a number of times. And if you want, we can bring up the statement and you can go through it. I put to you it is not there. He did not tell you that. Am I correct?

CPL BURKE: I can't disagree with that.

MR. SIMMONDS: You can't disagree with it. So I'll take that as a yes.

And the fact that that information, while you're talking about telephone numbers, while you're talking about what he did down there and going to Dick and Debbie's and then going back to the house, there was no mention of parking on the side of the road until this information came to light. Correct?

CPL BURKE: The information that he was parked on the side of the road came from our neighbourhood inquires, as far I know.

THE COMMISSIONER: From where?

CPL BURKE: Our neighbourhood inquires.

MR. SIMMONDS: Subsequently, a neighbour backed up, that he was parked on the side of the road but you were unaware of that in that statement with him on the sixth or the fifth – the sixth pardon me – and the issue of telephone calls and what numbers he had, because he said he had a number of numbers for Don Dunphy, that information was not volunteered by Officer Smyth. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: Do you feel if you had of had his cellphone at that time, if you had of questioned him about it, that that may have been valuable information?

CPL BURKE: I don't know where that information would have taken us or if it would have taken us down a different path or not.

MR. SIMMONDS: If indeed there is an issue with Officer Smyth's rendition of what happened, and if indeed it turns out that he's not in the house after the event, two minutes, but he's in there 12 to 14 minutes, would you agree that could be very relevant information to any decision, to your decision on the file, but certainly to the Commissioner's decision on the file?

CPL BURKE: As I testified earlier in the (inaudible) it wasn't under you, of course – the time that Constable Smyth was in the residence, I felt, was approximate and I didn't know it – I took into account that it could have been two minutes or it could have been 14 minutes –

MR. SIMMONDS: So you're the lead investigator. You hire – a poor choice of terms – you retain, or task an analyst, Wanda Richards, to do it. It turns out because of this mistake, her chart is basically useless. You don't review the records yourself to pick up on it and it doesn't come to light until December of 2016. Am I correct?

CPL BURKE: What part?

MR. SIMMONDS: Number one, Wanda Richards's chart is of very little use because of the mistakes she made in it.

CPL BURKE: Yes.

MR. SIMMONDS: Number two, that this was information that was available before that, but you didn't check it. Correct? You didn't check it; you glanced at it.

CPL BURKE: What?

MR. SIMMONDS: The records, the phone records, you glanced at it.

CPL BURKE: Yes, but I also – I looked at the phone records that Constable Smyth had presented. They had the numbers there. I didn't know who the numbers were for. Then I looked at Mr. Dunphy's phone records and he didn't receive any calls from those numbers.

MR. SIMMONDS: Excuse me for one second.

There were a number of numbers there, but you did not check those numbers to see who those numbers were to.

CPL BURKE: Not at that time, no.

MR. SIMMONDS: Because you don't need a search warrant for that, do you?

CPL BURKE: For what?

MR. SIMMONDS: To check the numbers. You simply call them. You could have seen who the numbers were to by simply calling them – correct? Don't need any fancy, investigative technique, don't need a court order; you simply call the numbers and identify yourself and say why you're calling. Most people would co-operate with you. Isn't that correct?

CPL BURKE: Yes.

MR. SIMMONDS: And you, as the leader investigator, don't find that out until you come in to have your meeting with Ms. – Madams O'Brien and Chaytor. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: Constable Smyth never told you in any of the interviews that he was sending BBMs to people who were witnesses: Donna Ivey, Doug Noel. You didn't know that, did you?

CPL BURKE: Not from the interview, no.

MR. SIMMONDS: You never saw those in his cellphone records, correct?

CPL BURKE: Um.

MR. SIMMONDS: Even your analyst didn't find them. Correct?

CPL BURKE: The ones who, the ones I saw this morning to –

MR. SIMMONDS: Yes. Those are some of them.

CPL BURKE: I don't know which ones you're referring to; it's hard for me to make a comment. I don't know.

MR. SIMMONDS: Let's, let's go with the ones we found this morning. Your previous investigation, your review by your analyst Ms. Richards, did not reveal these BBM. Correct?

CPL BURKE: The BBMs we saw this morning, I did not see those before.

MR. SIMMONDS: Officer Smyth did not tell us about these, when he was on the stand. You had no knowledge of them, previous to today.

CPL BURKE: No.

MR. SIMMONDS: Would you agree that those could be relevant pieces of information in this investigation?

CPL BURKE: Yes.

MR. SIMMONDS: So explain to me again, why Don Dunphy, the deceased's cellphone is seized and why Officer Smyth's is not.

CPL BURKE: Don Dunphy's cellphone was part of a scene that we investigated. Constable Smyth's phone was not.

MR. SIMMONDS: And the end result is, in February 2017, some two years later almost, we get BBMs that may indeed be relevant to this inquiry.

CPL BURKE: Yes, but not relevant to the outcome of the investigation.

MR. SIMMONDS: I don't know that you can say that, Officer Burke.

CPL BURKE: The –

MR. SIMMONDS: Would you – please, I don't mean to cut you off.

CPL BURKE: The information I saw this morning didn't speak to the actual event itself, and that was the focus of my investigation.

MR. SIMMONDS: The information you saw this morning would not possibly go to the demeanor of Officer Smyth when he was intending to travel down to Mitchells Brook? His statements would not possibly go to set out his demeanor, his intentions, what process he was going to put in place when he got down there? That wouldn't be relevant to your investigation: I'm going to arrest the guy?

CPL BURKE: Um.

MR. SIMMONDS: Yeah, it would be.

CPL BURKE: He says he's going to arrest the guy. I didn't see evidence that he had reasonable grounds to arrest somebody. I don't –

MR. SIMMONDS: Would you agree police officers sometimes arrest citizens without reasonable grounds? It has happened. It's not unheard of, is it?

CPL BURKE: It's not something that I –

MR. AVIS: Commissioner, if I have to arrest him, I don't see where he says he's going to arrest him.

MR. SIMMONDS: Mr. Avis –

THE COMMISSIONER: You know something? I think it might be an appropriate time to recess. It's been a long day, for some reason. I don't mean to interrupt in the middle of something. If you are able to wind it up in a few minutes but – how are you doing by the way, just overall?

MR. SIMMONDS: I'm probably a half an hour or so from the close, but I do appreciate your comment.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: And I say again, and I don't say this in any disrespectful sense, if there's an area that I'm covering that you have a concern, you don't believe is relevant, then advise me and I –

THE COMMISSIONER: No, no, don't get the impression that because I'm suggesting we break that early, about 20 minutes or so –

MR. SIMMONDS: I'm getting the impression that you don't think that this is (inaudible) –

THE COMMISSIONER: No, no there is no reason for you to get that impression at all. That's not intended. I'm actually taking notes and it's a significant area for questioning and I'm not implying that at all. It's just that we've had –

MR. SIMMONDS: I'll finish in half – the officer is going to have to come back tomorrow anyhow, so I'm not inconveniencing him.

THE COMMISSIONER: Oh yes – no, that's –

MR. SIMMONDS: He was going to have to come back anyway.

THE COMMISSIONER: That's right.

MR. SIMMONDS: I would think if we start at 9:30, by 10:30 I should be finished and you can take a judgement from there.

THE COMMISSIONER: Okay, I think we'll go on that basis. And I may be pushing Commission counsel into a new adjusted schedule for that. I apologize, but we'll adjourn now until 9:30 tomorrow morning.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now closed.