



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 20

Commissioner: Honourable Justice Leo Barry

Thursday

9 February 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry opened.

Commissioner Leo Barry presiding

Please be seated.

THE COMMISSIONER: Good morning.

Go ahead, Mr. Simmonds –

MR. SIMMONDS: Thank you.

THE COMMISSIONER: – when you're ready.

And I didn't really cut you off yesterday.

MR. SIMMONDS: No, no.

THE COMMISSIONER: Although I think you thought that.

I knew you had some work to do before you went home.

MR. SIMMONDS: No, No, that's fine. Thank you.

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: Good morning, Corporal Burke.

CPL BURKE: Morning.

MR. SIMMONDS: Corporal Burke, I took you briefly to – could we have Exhibit 0511 put up on the – can you see that?

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. SIMMONDS: Okay.

You may recall I referenced that briefly yesterday. That was the report – the Assistance Request done up by Officer Galway.

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

And, you know, you had stated I believe in your direct – and you correct me if I say something wrong, but you had stated in your direct that the captioning of this as pointing a firearm was probably done by the Communications personnel when it came in and it just stayed that way. There was – you thought no particular significance to it.

CPL BURKE: No.

MR. SIMMONDS: No, you agree with me or no –

CPL BURKE: No particular significance.

MR. SIMMONDS: No particular significance.

And when we see this report, which is a number of days later, it indicates the two on the – when you go to the second page, it indicates that there's actually two offences: one is pointing a firearm and the other is unsafe storage of a firearm.

So this is some days later but it's – that caption is still kept there. And it's what Officer Galway uses when he attempts to get the assistance – forensic assistance, correct, on the phone?

CPL BURKE: Yes, those are the only offences that we had identified at that time.

MR. SIMMONDS: But this was still a criminal investigation.

CPL BURKE: Yes.

MR. SIMMONDS: With Mr. Dunphy deceased and Officer Smyth is a person of interest.

CPL BURKE: Yes.

MR. SIMMONDS: Okay. But your documentation doesn't change to reflect that.

CPL BURKE: I think those captions that Constable Galway has referred to requires an offence.

MR. SIMMONDS: Uh-huh.

CPL BURKE: And those are the only offences that we had established at that time.

MR. SIMMONDS: Okay.

CPL BURKE: Or –

MR. SIMMONDS: That was your reasoning.

CPL BURKE: – information to believe.

MR. SIMMONDS: That, you're saying, was your reasoning for this – these captions; even though you agree they're inappropriate captions.

CPL BURKE: I don't agree they're inappropriate captions. No.

MR. SIMMONDS: Okay.

Well, this form was then sent off but what was the purpose of this form? It was to get a forensic review of Don Dunphy's cellphone. Correct?

CPL BURKE: I don't know.

MR. SIMMONDS: But you're –

CPL BURKE: I don't – I only see Primary Offences, Exhibits Submitted. I don't know what the form actually is for. So it's an Assistance Request to Technological Crime.

MR. SIMMONDS: Okay.

Do I understand – and I’m not being facetious here. Do I understand it correctly, this is a triangle where Osmond is at the top, you’re on one corner and the exhibit personnel is on the other corner, I think.

CPL BURKE: No, that’s not correct.

MR. SIMMONDS: Okay. You tell me what’s correct then.

CPL BURKE: Sergeant Osmond, the team commander, is on the top, I’m on one corner as the primary investigator and on the other corner is Corporal – or Sergeant Dion Foote –

MR. SIMMONDS: Yeah.

CPL BURKE: – who is the file coordinator.

MR. SIMMONDS: The file coordinator. And he assigns the tasks and things like that, on that nature.

CPL BURKE: Yes.

MR. SIMMONDS: So all the information that’s ongoing – because Galway is operating under that umbrella, all the information that’s ongoing you should be appraised of.

CPL BURKE: Yes.

MR. SIMMONDS: And he says in this document – it’s not like there was a whole of them. He says in Exhibit P-0511 at the bottom of the page: “It is suspected that this will be the only forensic analysis request required to be made in this investigation.”

So it’s not like you had 15 or 20 to go through but you don’t recall this one; the very last line on the first page.

CPL BURKE: Yes.

MR. SIMMONDS: But you don’t recall this one.

CPL BURKE: I don’t know what to say about that only that he made the statement that the phone itself – this would be the request for the phone, that particular phone.

MR. SIMMONDS: Am I being unfair if I say to you your lack of knowledge here on some of the questions yesterday and today appear to show that you did not have the grasp of this file that you should have had?

CPL BURKE: I had the grasp of this file I should have had.

MR. SIMMONDS: But yet you didn’t know this.

CPL BURKE: Didn’t know what?

MR. SIMMONDS: You didn’t know about this request and you don’t know the background on it.

CPL BURKE: Yes, I do.

MR. SIMMONDS: Oh, okay. Well, tell us about it then. I didn't think you did know.

CPL BURKE: I'm only – I'm seeing this form – I saw it probably two years ago. The thing is, is that it's a tech crime request form for a cellphone analysis.

MR. SIMMONDS: And what was the real purpose – the real purpose – behind this tech phone analysis?

CPL BURKE: We wanted to obtain all the information that we could in order to make any decisions on this file. And cellphone analysis would be included in that.

MR. SIMMONDS: But what was – well, we contrast that with Officer Smyth, whose cellphone you didn't get it for some time. But what was the knowledge you hoped might come from this cellphone analysis?

CPL BURKE: We had no idea what we would get from the cellphone analysis.

MR. SIMMONDS: Well, that seems to run counter to what Galway says on the second page in the paragraph: "The cell phone, which Mr. DUNPHY used, was seized at the scene. His daughter, Meghan DUNPHY, has told police that she owns the phone, and it is on her account, which she pays for. Ms. DUNPHY has signed a Consent form for the phone to be searched. The phone needs to be searched, in hopes of finding any evidence that would shed some light on any communication that Mr. DUNPHY had with the RNC, prior to this incident."

So he seems to have a very specific purpose with this request. And you're just saying a minute ago we just wanted to make sure, general knowledge type of thing.

CPL BURKE: We wanted to make sure we had all the information and a tech crime request would obtain all the information on a cellphone.

MR. SIMMONDS: And, in fact, really what you were looking for here was to see if there was any way of finding out if Don Dunphy was tipped off that Officer Smyth was going to come there. Correct?

CPL BURKE: No, it's not correct.

MR. SIMMONDS: Well, what does the line mean: "The phone needs to be searched, in hopes of finding any evidence that would shed some light on any communication that Mr. DUNPHY had with the RNC, prior to the incident"? What is your interpretation that you want to give the Commission as to what that purpose is?

CPL BURKE: As with anything, that would be part of the information we're hoping to obtain.

MR. SIMMONDS: I know it would, but what is the purpose of it? What are you hoping to find in those communications, Officer Burke?

CPL BURKE: Any previous history between Constable Smyth and Mr. Dunphy or anyone else for that matter.

MR. SIMMONDS: I put it to you that it was to find out if he was tipped off.

CPL BURKE: No, it wasn't.

MR. SIMMONDS: So you search that on Don Dunphy – so you’ve had Don – you get Don Dunphy’s and you go through it and you don’t find anything, it appears, of significance. Then you get Smyth’s phone and you go through it and you don’t appear to find anything of significance. And indeed it turns out when they check the records and they fix up the mistakes that were made, that indeed Officer Smyth called Mr. Dunphy on that very phone that very day. Correct?

CPL BURKE: Correct. But analysis of Mr. Dunphy’s phone shows that there was no connection made I guess. The cellphone service in Mitchells Brook is non-existent as far as –

MR. SIMMONDS: It doesn’t change the fact that indeed cross-referencing these two phones –

THE COMMISSIONER: You didn’t let the witness finish. I’d like to hear the end of it, sorry.

MR. SIMMONDS: Oh, I’m sorry. Go ahead.

CPL BURKE: When we were in Mitchells Brook – and I’m talking from experience. When we were in Mitchells Brook, the cellphone service is sparse at best and you have to go on a hill or something; I didn’t know really where to go to get cellphone service. So the calls that were made to – made by Constable Smyth, I didn’t know where they were made, but then I checked Mr. Dunphy’s phone and he didn’t receive those calls.

MR. SIMMONDS: But, you know, you’ll have to excuse me if I’m not real confident with the job the RCMP has done with reviewing phones here, particularly Officer Smyth’s. We have gone back and we have actually asked counsel to go back and review Mr. Dunphy’s to see if anything came up on his, which wasn’t discovered originally, that might show indeed that these calls did connect. We don’t know the answer to that yet. But we will.

But what I’m saying to you is, you did not check Officer Smyth’s phone. You had Dunphy’s; you checked that. You get Smyth’s; you check that. But you don’t realize that, in fact, Officer Smyth had made a number of calls, five or six, to Mr. Dunphy that day, even though you’ve got a requisition here for analysis of cellphones.

CPL BURKE: I saw – I saw that calls that Constable Smyth made on that day and I compared those to the calls received by Mr. Dunphy, and they did not – you know, there was no comparison.

MR. SIMMONDS: But you were operating under a mistake, when you looked at the documents that day.

CPL BURKE: The phone calls and the received calls from Mr. Dunphy, I don’t think were mistaken.

MR. SIMMONDS: Yeah, they were mistaken. And it would be interesting to see if we do get any other information from Mr. Dunphy’s phone.

CPL BURKE: I didn’t see a mistake when I –

MR. SIMMONDS: No.

CPL BURKE: – checked the phone records.

MR. SIMMONDS: You found, you found – the mistake was found when you came in here in December, came in and speak to Commission counsel, and we’ve gone through that yesterday,

and in fact the mistake is made by Wanda Richards which really renders her chart completely useless with respect to the timeline. And it was a timeline that you were operating on and information you were operating under, correct, which was incorrect information?

CPL BURKE: The weight I put into the timeline was minimal.

MR. SIMMONDS: The weight you put into the timeline was minimal. That doesn't change the fact that Wanda Richards put together this chart and the chart was significantly in error and ye operated for a period in time on the basis of that error till it was pointed out to ye. Correct?

CPL BURKE: Operating under that timeline, I didn't operate under that timeline.

MR. SIMMONDS: You didn't – basically what you're saying is you paid no attention to the chart she did.

CPL BURKE: Very little.

MR. SIMMONDS: Very little.

CPL BURKE: I looked at the timeline and the chart –

MR. SIMMONDS: That's interesting to know.

CPL BURKE: – to kind of see how it would look as a, as a product or as a display.

MR. SIMMONDS: That timeline she had, had she had it right, would have shown the calls and the times by Officer Smyth to Mr. Dunphy. Correct? If it had have been done right.

CPL BURKE: Yes.

MR. SIMMONDS: Yep.

CPL BURKE: And compare those with Mr. Dunphy's phone records, it would show that there was no connection made.

MR. SIMMONDS: To date – I emphasize to date – we have asked for that to be checked and we have seen that things done by the RCMP with respect to the phones before have been terribly deficient, and we found numerous pieces of information, some of which are again going to be introduced at this inquiry.

I'd ask you to go to Exhibit P-0527. Now, I asked you yesterday because I feel this is a very important piece of – the scene is everything in determining or in assisting a determination, a correct determination, as to what took place.

On April 5, Kent Osmond writes: "Before we release the scene please check with me or Cpl Burke ... we plan on interviewing the RNC member tomorrow and until we get his version, we should keep continuity just in case we need to go back for any reason."

You were aware of that email, text, call it what you will?

CPL BURKE: Yes.

MR. SIMMONDS: You were aware of it at the time?

CPL BURKE: I would assume.

MR. SIMMONDS: You would assume.

CPL BURKE: I don't see myself carbon copied on that email but –

MR. SIMMONDS: But don't they keep you – you're the Constable Burke – Corporal Burke he's referring to in here, correct?

CPL BURKE: Yes.

MR. SIMMONDS: You're the primary investigator, correct?

CPL BURKE: Yes.

MR. SIMMONDS: And it would be your – his duty to release the scene, correct?

CPL BURKE: Yes.

MR. SIMMONDS: And the continuity of the scene is vitally important for the investigation, correct?

CPL BURKE: Yes, correct.

MR. SIMMONDS: So he writes this, and the autopsy takes place on the 7th – correct?

CPL BURKE: Yes, I think so.

MR. SIMMONDS: It was going to take place on the 6th, he wanted to get the records, he didn't have – or the chief medical examiner wanted to get record or the statement first, holds off – they're making him hold off and then it takes place on the next day.

CPL BURKE: Correct.

MR. SIMMONDS: Correct?

You don't know if you ever released the scene.

CPL BURKE: Yes, I checked my notes last night and we released the scene.

MR. SIMMONDS: You checked your notes and we released the scene.

CPL BURKE: The scene was released, yes.

MR. SIMMONDS: Yes, the scene was released on April 8.

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

And I refer to Exhibit P-0312 at 9:05.

CPL BURKE: Yes. Is that my notes?

MR. SIMMONDS: It is your General Occurrence Report. So this is the 8th, at 9:05.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. SIMMONDS: It's on page 4 of 25, Madam Clerk.

I think maybe that was just it, there. Okay, here we go. That's it. Thank you very much.

9:05 on the 8th – so, it's my mistake. The scene was actually released on the 7th, the day before, after the autopsy was completed.

A member in conversation with Sergeant Osmond was advised that the scene was released once the autopsy was completed. Mr. Dunphy's daughter had requested the police tape the remaining residence, and give her consent for the police to attend the residence if required. Officer Galway has the keys.

So the scene gets released; you're not consulted. You hear about it the morning after it's released, correct?

CPL BURKE: Yes.

MR. SIMMONDS: How can that happen when the scene is the most vital piece of information you have now to make the determination. Burke – pardon me, Osmond is already after saying, don't release it till you check with me and Burke, because you want to retain continuity. Yet, unbeknownst to you, after the autopsy on the 7th, it gets released, and you find out about it morning of the 8th.

CPL BURKE: That's what I've noted, yes.

MR. SIMMONDS: That's what you've noted.

Do you agree that that's a significant problem for the primary investigator not to have a say in the releasing of the scene, be aware it's being released, in case he's had – he or she has had some thoughts, some review of the file and says, look, I've got to task people to do certain other things. I want the forensic unit to go back to do certain pictures, perhaps.

CPL BURKE: I was aware that the scene would be released once the autopsy was completed.

MR. SIMMONDS: Before we release the scene, please check with me or Corporal Burke.

CPL BURKE: That is – that email was written before the autopsy time –

MR. SIMMONDS: Correct.

CPL BURKE: – was changed.

MR. SIMMONDS: It was.

CPL BURKE: The circumstances have –

MR. SIMMONDS: But should you not have been checked with, seeing you're the lead guy?

CPL BURKE: It was my understanding that once the autopsy is completed the scene would be released, and I didn't have any issue with that.

MR. SIMMONDS: So you weren't even consulted with the release of a scene. You're the senior investigator there, the primary investigator, and at that point you agree, once it's released there's nothing you can do with respect to any continuity issues?

CPL BURKE: I was conformable with the fact that we obtained all the information that was relevant to our investigation before the scene was released.

MR. SIMMONDS: You were comfortable with the fact?

CPL BURKE: Yes.

MR. SIMMONDS: Even though, subsequently, an issue arose with respect to glasses, a round was found in there, a .22 round which fits the exact calibre of the rifle that was found in there. Those appear to be shortcomings. I think you've admitted those.

CPL BURKE: I did not admit those as shortcomings. I admitted those as not – evidence that's not specific to our investigation or it's evidence that we considered.

MR. SIMMONDS: With the greatest of respect, you went and did other investigations on the glasses.

CPL BURKE: We did other investigation on the glasses to – it wasn't for any evidentiary value. It was to appear and to remain open, transparent and unbiased or – in our investigation.

MR. SIMMONDS: See, the two of those don't live together, you know. I've never seen the – it must be a first. I've never seen the RCMP before to appease someone and that was the line in –

MR. AVIS: Commissioner, I, I'm not going to be making an application to cross-examine Mr. Simmonds. He's giving a lot of evidence and speeches this morning. You'll have to take exception to it.

THE COMMISSIONER: Well, leading, leading questions are permitted in cross-examination. I agree that the term appease, I think was used, is a characterization of the facts. So the more, the more you stick to reciting what the facts are instead of your own colour on them, Mr. Simmonds, the more useful it'll be to me in terms of –

MR. SIMMONDS: I understand.

THE COMMISSIONER: – following the evidence.

MR. SIMMONDS: I thank you, Mr. Commissioner.

THE COMMISSIONER: But I don't see anything highly improper with, with what's suggested there.

Go ahead.

MR. SIMMONDS: But the word appease was the one used by Officer Galway in his interview with Commission counsel and then when he gave his evidence here, he admitted he used that term and was, didn't want to use it here. So the word appease was used.

THE COMMISSIONER: I'll check the transcript.

MR. SIMMONDS: I can, I'll get it –

THE COMMISSIONER: I have the transcript, so you can check that, that's fine.

Carry on.

MR. SIMMONDS: I'll get it from the transcript, but it was definitely (inaudible).

THE COMMISSIONER: As I've said, I see nothing wrong with continuing with the line of questioning.

MR. SIMMONDS: Thank you very much, Mr. Commissioner.

I don't normally see – I don't ever see the RCMP waste valuable resources by doing something just to satisfy someone else. You did a number of things here which we've gone through ad nauseam about the glasses, to the Woodstock, to the RBC, to Shoppers Drug Mart. Those were all things you did which indeed you may call a separate investigation but are part of this investigation. Those were done after the fact with respect to glasses found at the scene.

CPL BURKE: Yes.

MR. SIMMONDS: And the glasses, you maintain had little value because the scene had been released. Correct?

CPL BURKE: The glasses had no value in our investigation.

MR. SIMMONDS: The glasses had no value after the fact. Because the scene had been released, there was no continuity. Correct?

CPL BURKE: That's one part of it, but upon examination of the glasses and analysis of the glasses, I felt they were of no evidentiary value in our investigation.

MR. SIMMONDS: Do you still maintain, because I think yesterday you did acknowledge that at least in part or earlier in your direct that Officer Smyth was receiving treatment or the manner in which he was being treated was in part because he was a police officer?

CPL BURKE: He was treated in the manner he was because he was a police officer because that's what it says in the Criminal Code under section 25.

MR. SIMMONDS: And one of the things you did on April 10 and – I believe it was April 10 – you did a, prior to that – there was two re-enactments done. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: Within a day of each other?

CPL BURKE: Maybe two days.

MR. SIMMONDS: Maybe two days of each other. And on the first re-enactment the information was lost. Correct?

CPL BURKE: Correct. The video was lost, the information we witnessed and we completed notes on our observations.

MR. SIMMONDS: But the video which was really the main part of the re-enactment was lost through some kind of technological problem that you were unaware of until after the fact.

CPL BURKE: Yes.

MR. SIMMONDS: That re-enactment was a significant piece of evidence in assisting, or would likely be in assisting the investigation into what happened there. Correct?

CPL BURKE: It's a step we use to – re-enactment is used to put on video or put in a video form essentially Constable Smyth's version of the events.

MR. SIMMONDS: Right. And it allows you to then see, here are the things that changed in the scene because of this event and here's what changed them. The movements of the two parties, he does his re-enactment, and you're able to get from that and see does that corroborate what he's told us. So it's a very important piece of evidence. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: The camera glitches for some reason, the recording does. And in your exhibit, or in your continuing general report, Exhibit P-0312, at page six of 25. It's at – the date is 15-04-10, so it's the 10th of April.

Okay. There it is. Thank you very much, Madam Clerk.

You write: "Member was present ..." – and this is you writing this, correct, Corporal Burke?

CPL BURKE: Yes, it is.

MR. SIMMONDS: "Member was present at the first re-enactment and made detailed notes from memory." So you weren't taking notes during the actual time that you were in there. These were notes that you made after the fact when you came out.

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

"Member is satisfied with the information gleaned from the re-enactment. Member from an investigational stand point is comfortable if another re-enactment was not completed however having video would a great benefit."

So you acknowledge yourself that the video is a great benefit.

CPL BURKE: Yes.

MR. SIMMONDS: Okay. But you were willing to tell Officer Smyth, you don't have to come back for another re-enactment. We're satisfied with the notes we got, we're just going to let it go.

CPL BURKE: That was my version of, you know, my thoughts and it had to go through the triangle before I could tell Constable Smyth anything.

MR. SIMMONDS: And indeed, was it not, either – I think it's Superintendent Boland or is it Inspector Boland? Do I have the rank wrong?

CPL BURKE: It was Chief Superintendent Boland.

MR. SIMMONDS: Chief Superintendent Boland who says, no, we are going to do another re-enactment. Correct?

CPL BURKE: I don't know. I was told by Sergeant Osmond that we were doing another re-enactment.

MR. SIMMONDS: You're the primary investigator –

CPL BURKE: And he's the team commander.

MR. SIMMONDS: He's the team commander and an order comes down from above. Because I believe Osmond's notes say the same thing, that he was satisfied. So the word came down from above, being Chief Superintendent Boland, that, no, you're not. You are going to do another re-enactment. And you weren't aware of where it came from.

CPL BURKE: I can only say that, and it's in my notes, that I was advised by Sergeant Osmond that a second re-enactment would take place.

MR. SIMMONDS: Do you think that's clearly an indication of Officer Smyth getting preferential treatment when you say, no, we're just going to go on the notes I made after the fact? And I'm not criticizing you for that; you probably couldn't make them during the re-enactment, but they're notes made from memory after the fact.

A video is invaluable, you say that yourself, but you're going to let him go on because it would be too traumatic for him to do a second re-enactment. That was your thought process, was it not, Corporal Burke?

CPL BURKE: No, it was not.

Constable Smyth was under no arrest or no obligation or no custody by the RCMP.

MR. SIMMONDS: Agreed.

CPL BURKE: And any statements or any re-enactments he provided was totally voluntary.

MR. SIMMONDS: Agreed.

And there was nothing – I don't see anywhere here where you went to Officer Smyth and he said, no, I got second thoughts, I'm not going to do it or anything of that nature. This was a decision you made. He did one re-enactment. The camera goes for a glitch for some reason and you say, no, we won't bother with another re-enactment even though it's of great value. And it takes an order from the chief superintendent to change that.

Does that not show preferential treatment? Does that not show the chief superintendent saying, no, not on my watch this is not happening, we're going to do a second re-enactment?

CPL BURKE: That was the notes that I made. And in a conversation with the team commander we decided, I don't know where – it came to me from Sergeant Osmond and that's all I can say.

MR. SIMMONDS: Do you agree that these are things you should know and be able to answer precisely to this inquiry: who gave the command; what was officer – or Chief Superintendent Boland's reasons; what were my reasons for not going or not saying we needed a second re-enactment?

Do you not agree, though, it should all have been documented in the file?

CPL BURKE: I don't agree how they relate really.

MR. SIMMONDS: This is a one-off. Correct?

This event is a one-off; a police officer going into a person's home in RCMP territory, ending up shooting him because he's confronted with a gun. In your time in the RCMP, this is the only one that you've ever dealt with.

CPL BURKE: From my time in Major Crime – yes, it's the only one I ever dealt with. Yes.

MR. SIMMONDS: It's a very complex situation because it's an RNC officer on RCMP territory. So there's a jurisdictional issue as to which force must investigate.

CPL BURKE: No, there wasn't.

MR. SIMMONDS: Explain.

CPL BURKE: The incident happened in Mitchells Brook which is RCMP territory.

MR. SIMMONDS: Uh-huh.

CPL BURKE: It was a sudden death and we attended the sudden death. The sudden death happened to involve a RNC member. There's no question about that.

MR. SIMMONDS: That's what I thought I said, that there was no question. It was a, it was – this was a complicated issue because it was an RNC officer –

CPL BURKE: It wasn't complicated because we knew exactly who should go to that complaint.

MR. SIMMONDS: And you went to the complaint.

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

You knew who should go to that complaint and the – who should go is the person jurisdictionally that says so or is set out to do so and that, that agency should go very well equipped to deal with a one-off situation. Would you agree?

CPL BURKE: I don't know what, what you mean by that.

MR. SIMMONDS: I mean that the force that's going in to investigate should be equipped with any and all tools, policy, procedures, information that they possibly – is available to determine how to do an investigation with these unique – I won't call it complex – these unique circumstances.

CPL BURKE: All I can say is that MCU was called to attend this investigation or called to attend this incident because it was a sudden death involving a police officer.

MR. SIMMONDS: Right. And it's a one-off; it's the first one you've had.

CPL BURKE: Yes.

MR. SIMMONDS: Okay. It's not something you do every day, like a break and enter or something of that nature that the RN– RCMP may deal with every day.

CPL BURKE: I don't do break and enters, I do homicides.

MR. SIMMONDS: Okay.

But it's still the first one you've done of this type of homicide. Correct?

CPL BURKE: It's a homicide.

MR. SIMMONDS: It's the first one you've done where an officer in the RNC on RCMP jurisdiction shot and killed somebody.

CPL BURKE: Yes.

MR. SIMMONDS: Police officer shootings are a rarity but they certainly are heard of, have been heard of and they've been written about. Did you ever attempt to see if there was any policies in the RCMP guidelines, if there was any policies in any other police forces or any other body that might assist you in doing this?

CPL BURKE: Yes.

MR. SIMMONDS: Make sure we don't miss any steps.

CPL BURKE: Yes.

MR. SIMMONDS: Okay. What did you do?

CPL BURKE: There was a task – I think it was assigned to Sergeant Osmond – to seek out any guidelines for police-involving shootings.

MR. SIMMONDS: I'd like to take you to Exhibit 0528, the bottom of page 1. So this was – he was tasked with going in and finding any information, Sergeant Osmond was.

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

CPL BURKE: If my memory serves me correctly.

MR. SIMMONDS: Pardon me?

CPL BURKE: Yes, I think so, if my memory serves me correctly.

MR. SIMMONDS: A little farther down, Madam Clerk. This is Officer Townsend, I believe, and it's: Hi Kent. As per our discussion – this is Monty Henstridge who had the discussion with Officer Townsend, or Staff Sergeant Townsend I believe he is.

CPL BURKE: Yes.

MR. SIMMONDS: As per our conversation, I was talking with Staff Sergeant Townsend "this morning in relation to the DUNPHY file. As an aside he mentioned it might be worthwhile to reach out to SERT in Halifax to determine if they have some form of Checklist when investigating Officer Involved Shooting. This might be a good Q/A process."

As an aside – it was a throwaway piece of information almost. Wouldn't getting a checklist, if one existed by one of the emergency response organizations, be one of the first things you went looking for? This is on the 9th. Do you agree that this seems to be a bit late? The scene has been released, autopsies done. Do you agree that this type of information should have been sought out immediately?

CPL BURKE: It didn't come in my mind at the time.

MR. SIMMONDS: It didn't come in your – surely it had come in your mind at the time.

CPL BURKE: I don't know.

MR. SIMMONDS: You don't know? A checklist done by an organization that is highly skilled, highly trained and deals with these type of unique situations exists and it doesn't come in your mind. This is the first one you've done and it doesn't come in your mind to check and see if there's such a checklist that may be of assistance to make sure we don't miss something.

CPL BURKE: I wasn't aware of any checklist when we began our investigation. And B Division doesn't have a checklist.

MR. SIMMONDS: You didn't go looking for one either.

CPL BURKE: Not at the time, no.

MR. SIMMONDS: If you had to do it over again, would you go looking for one now?

CPL BURKE: Of course.

MR. SIMMONDS: Did you ever get that checklist and review it?

CPL BURKE: We got some information regarding officer-involved incidents, but they weren't useful.

MR. SIMMONDS: They weren't useful.

CPL BURKE: Not for our particular investigation.

MR. SIMMONDS: Not for your particular – but they were, were they a checklist? Was it an actual checklist of things to do within this triangle that's widely accepted, this management triangle of major events?

CPL BURKE: No.

MR. SIMMONDS: Did you look anywhere else?

CPL BURKE: No.

MR. SIMMONDS: Do you agree that that would be a very helpful tool?

CPL BURKE: I didn't know what I was looking for, what it would provide me. I had no idea.

MR. SIMMONDS: Corporal Burke, I believe it's a fair statement to say to you that you and the other RCMP officers involved accepted at face value Constable Smyth's rendition of what happened in that house. Is that a fair statement? Do you agree?

CPL BURKE: It's the information that we had at the time and we then assessed that information in our investigation.

MR. SIMMONDS: Okay. It was the information you had from him.

CPL BURKE: Yes.

MR. SIMMONDS: And you had a couple of days control of the scene.

CPL BURKE: Yes.

MR. SIMMONDS: And you had the autopsy.

CPL BURKE: Yes.

MR. SIMMONDS: And then the scene is released and pretty well the major part of the investigation is over by that point in time. Would you agree?

CPL BURKE: No.

MR. SIMMONDS: The major part of what took place in that room that led to the shooting cannot be investigated any further after that point in time.

CPL BURKE: Forensically, no. But –

MR. SIMMONDS: Forensically no.

CPL BURKE: – the investigation went on to corroborate or disprove any statements or any evidence that we found.

MR. SIMMONDS: And did at any point in time, while you were going through this, did you sit back and reflect and say, okay, that's Officer, what Officer Smyth says, but, boy, looking at it from the other side, it's really odd, things that you can't understand?

Did you ever do that? Did you ever reflect on it, sit back in your office and reflect on the information you had and what Officer Smyth had said and think about the realities of what you were faced with, what you knew was hard-core facts – forget what Officer Smyth said – what you knew was hard-core facts, besides that, and try and reconcile the two?

CPL BURKE: I wouldn't say reconcile was what I was trying to do. It was trying to assess Constable Smyth's information with the other –

MR. SIMMONDS: Okay.

CPL BURKE: – information we had –

MR. SIMMONDS: I'll accept that.

CPL BURKE: – from the scene.

MR. SIMMONDS: You sat back and you did an assessment to match it up against Officer Smyth's version?

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

So we got a very small room; a short distance between the two people. We got at least a partially disabled man and we got Officer Smyth, a trained, dignitary security officer, with significant experience. That's the two participants we have.

CPL BURKE: Yes.

MR. SIMMONDS: You've got a rifle that's 38½ inches long found at the scene. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: A rifle that you know subsequently was, or very shortly after, was old, hadn't been used in many, many years and the last time it was seen was behind the couch. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: I don't believe you have any photos of where Officer Smyth says he was standing at the exact moment the shot was fired, the first shot was fired, what his view of Mr. Dunphy sitting in the chair would have been at the very first moment.

He's told us he moved along the mantelpiece. He told us he was up towards the round table, a bit back, somewhat back from it. The distance that they would have been is somewhere in the range to seven to nine feet maximum. You don't have a picture that shows here's where I was standing; here's the view I would have had. 'Cause if you do have a picture that he recognizes or you had taken to show that, please take me to it.

CPL BURKE: When the scene was processed, that view was not photographed, or maybe should have been. That was just a –

MR. SIMMONDS: Maybe should have been?

CPL BURKE: Maybe shouldn't have been. When – for Constable Smyth, he gave us a version of his events and where exactly he was standing. If we would have took information and took a picture from there, it would have been – would have been making an assumption of where it would have been; it would have been an estimate, at best.

MR. SIMMONDS: It's Officer Smyth's estimate. He's the only living witness. He tells us – what are we supposed to reject his testimony completely, any parts of it, because he says he moved along the mantelpiece, and that's an estimate? Those are the facts he's asked us to accept, asked the Commission to accept.

A picture that would show exactly where he was standing, what his view was in relation to the chair and Mr. Dunphy – I put to you – would be valuable information right now.

CPL BURKE: We didn't know exactly where Constable Smyth was standing at the time.

MR. SIMMONDS: His best estimate, that's what a re-enactment is all about. Wouldn't it have been an appropriate question to say: Where you standing when you first saw the barrel pointed at you and you unhasped your gun?

CPL BURKE: We asked that question and he provided the information.

MR. SIMMONDS: Did you take a picture of it so the rest of us can see it, as part of your investigation?

CPL BURKE: There was a video of the scene and photographs of the scene, and video and photographs of the re-enactment.

MR. SIMMONDS: You don't have either photograph where you got him to indicate this is where I was standing, this is where I fired the first shot, this is where – this is the view I would have of Mr. Dunphy. Correct?

CPL BURKE: I felt that we had –

MR. SIMMONDS: Do we have such a shot, Officer Burke?

CPL BURKE: I don't know.

MR. SIMMONDS: You don't know. Okay.

You never asked Officer Saunders or Lee to go back into the scene before it was released to take such a shot, did you?

CPL BURKE: No.

MR. SIMMONDS: Did you ever ask Officer Saunders to go back – or Officer Lee – to go back with the rifle and place it in various locations by the right side of the chair, number one, in the chair, because Officer Smyth said at one point it could have been tucked into the cushion; two, tucked into the pocket on the side of the chair; three, on the floor in the void of garbage that is seen there; or five – or four, pardon me, up leaning up against the wall.

Did you ask Officer Saunders to go back and do any of those and take pictures of it?

CPL BURKE: I don't see what value that would have had.

MR. SIMMONDS: I'm sorry, you don't see –

CPL BURKE: I don't see what value that would have held for our investigation.

MR. SIMMONDS: Corporal Burke, you were told that it came from right side. That's what he told you.

CPL BURKE: Yes.

MR. SIMMONDS: In his first statement – I think it's at page 62 or 63 of that statement, that's where he said the rifle came from, the right-hand side. There's only so many places on the right-hand side in that 13-by-14 room that it can be. And over the various statements, we learned in the cushion, on the floor, in the pocket or leaning against the wall.

Why would you not have got Officer Saunders to go back and photograph the rifle in all four of those positions? That would be very useful information for us today.

CPL BURKE: I didn't – I don't see, and I didn't see at the time, the evidentiary value of those pictures.

MR. SIMMONDS: Do you agree that if we knew – if indeed Officer Smyth’s version is true, if we knew exactly where the rifle came from, all 38 inches of it, if we knew where it came from that may go a long way to either rebutting or supporting his rendition of events? You can’t possibly say no to that. You can’t possibly tell me that knowing where that rifle was at would not be a relevant piece of information for you to have.

THE COMMISSIONER: That’s not a question now –

MR. SIMMONDS: No, it’s not a question. I apologize.

CPL BURKE: Exactly, but I don’t know how we could have said 100 per cent that that’s where the rifle came from.

MR. SIMMONDS: You do it a lot for –

CPL BURKE: We had to go with our, our evidence and based on our statements and make a best, reasonable conclusion of where the rifle came from. Putting the rifle back in various places in the room doesn’t tell me anything.

MR. SIMMONDS: Officer, with the greatest of respect, I think it tells you every bit as much information as the file drop.

CPL BURKE: Exactly, and that proved to be no valuable.

MR. SIMMONDS: But you did it. You did it.

CPL BURKE: Yes, we did it but it was no value.

MR. SIMMONDS: How do you know until you did the experiment with the rifle by the chair that is was of no value? It certainly – if we knew where the officer was standing and the rifle was placed in four of those locations, it would be of assistance to us here today.

CPL BURKE: It –

MR. SIMMONDS: Didn’t do it.

CPL BURKE: It wouldn’t assist me in –

MR. SIMMONDS: Okay.

CPL BURKE: – obtaining any information of where the rifle came from.

MR. SIMMONDS: Did you ever question yourself where the rifle came from? Did you ever think: Gees, trained police officer, he’s standing somewhere roughly in front of Don Dunphy who’s sitting in the chair, the rifle is big enough, it’s quite visible. Did you ever question yourself, where did it come from? How did it get up there?

CPL BURKE: Yes.

MR. SIMMONDS: Please share it with us.

CPL BURKE: I assessed the information that we had of where the rifle came from and I, you know, made a –

MR. SIMMONDS: What conclusion did you reach?

CPL BURKE: My conclusion that, you know, from the evidence –

MR. SIMMONDS: No, I don't know. Please tell me what –

CPL BURKE: I'm not concluding; from the evidence it suggested to me that the rifle came from the right side of the chair.

MR. SIMMONDS: Okay. If it came from the right side of the chair, so it's not in the chair; not in the chair. Not in the cushion of the chair. It came from the right side. So we're down now to three options. Correct?

CPL BURKE: I'm saying right side of the chair.

MR. SIMMONDS: Right side of the chair. So it's not in the chair by him. You agree with that?

CPL BURKE: It didn't appear that way, no.

MR. SIMMONDS: Okay. So we're down to three options now; in the pocket, the floor or up against the wall. Would it have hurt to have Officer Saunders go back and take those pictures? Do you not agree – with one of the options basically eliminated – that would be valuable information for the Commissioner to assess?

CPL BURKE: I gave my position on that. I didn't feel it was an investigative step that we should've took at that time. And I don't see it as any value now.

MR. SIMMONDS: You didn't see any value in the glasses, yet you sent people out, RMCP officers to go out, interview, attempt to get videotape, various things like that. You did that, even though you said the glasses had no evidentiary value.

This, I put to you, respectfully, has evidentiary value. It would have taken all of 10 minutes to do. And you had the capable, qualified personnel there to do it; yet, it was not done. Now, how do you line up the two?

CPL BURKE: Like I said, I didn't – it didn't come in my mind to go back with the rifle. I don't feel I should've went back with the rifle and took those pictures, and I don't see today how they would be of any evidentiary value.

The glasses; the investigation glasses, the assessment was that they were of no evidentiary value. However, if we didn't do that investigation on the glasses, we would again be seen as unbiased or not thoroughly investigating all the information that we had.

MR. SIMMONDS: But, Sir, I believe that many, many people, including likely the Commissioner and counsel here, are wondering, have wondered –

MR. AVIS: Excuse me, I'm not wondering.

MR. SIMMONDS: Good.

MR. AVIS: And with respect –

MR. SIMMONDS: If you've got it settled then you can –

MR. AVIS: With respect –

MR. SIMMONDS: – tell me, Mr. Avis.

MR. AVIS: Mr. Simmonds does not get to speak on what you're wondering about. With all due respect, and I think he's going way beyond here. And, no, it's not my witness, but I'm certainly going to be up and down. If this is going on with my witnesses –

MR. SIMMONDS: Absolutely, absolutely.

MR. AVIS: – it would be hard to keep me sitting down.

MR. SIMMONDS: Absolutely, don't –

THE COMMISSIONER: Sir, Mr. Simmonds, I'm –

MR. SIMMONDS: You're looking at the time (inaudible).

THE COMMISSIONER: No, no, I'm just – Mr. Avis has a valid point and –

MR. SIMMONDS: Move on.

THE COMMISSIONER: – I haven't intervened because I realize you're almost to the end, so.

But, Mr. Avis, your point is well noted.

MR. SIMMONDS: Officer Burke, did you question the really contrasting circumstances of a man who comes from dinner with his daughter, goes home, appears to have changed into his pyjamas, appears to have either been lying on the couch – because I think his slippers were over by the couch and there's a blanket on the couch – or been sitting in his chair, one of the two places, has no history of ever having confrontation with any police force.

In fact, we heard from the officer that did the stop when he was busted for the drugs, very polite, very appropriate – or when he was stopped in relation to the drugs and he had a licence to show it; a man who would have had no reason to expect he was going to receive a visit at that time from the RNC or any police force.

Do you line that up and try and figure what would have driven him to get that rifle, put it out somewhere near the chair, and then pull it out and point it at a police officer. It doesn't fit with the scenario of Don Dunphy that we've been told about. Forget he has a messy house, and his house is run down. He has a real issue with Workers' Compensation and we understand how it's got to that point. Well, we also understand that this partially disabled guy was not violent, was appropriate, and that day he had been having a very good day. In fact, had just left his daughter's house, passed his friend on the road and then sent him a text to come up.

Have you ever tried to reconcile the two of how that happened?

CPL BURKE: That's a lot, but I can start from the placement of the firearm or the firearm being present in the residence. There was evidence that there was a firearm in that residence. There's also evidence that there was a bat – not a baseball bat, but a long stick with black tape on it or duct tape, I think.

MR. SIMMONDS: And –

CPL BURKE: And –

MR. SIMMONDS: I'll stop you there for a second and we'll let you go through.

THE COMMISSIONER: Sorry?

MR. SIMMONDS: I want to stop the witness and go through each one of these. And I, I'm not particularly listening to them, but I am listening to you. Is it acceptable to ask him a question as we go through each one of these steps?

THE COMMISSIONER: Each one of which steps, the –

MR. SIMMONDS: Well, he's saying the – I took him through – he's going to say I know about the rifle, we found a stick with tape on it which was a weapon there. And I wanted to ask him a question about that.

THE COMMISSIONER: I see. You want to, you want to – you believe you're going to be interrupting the witness. Well –

MR. SIMMONDS: Go ahead, Officer Burke.

THE COMMISSIONER: Yeah, it's just – you could do it either way, Mr. Simmonds –

MR. SIMMONDS: Go ahead, Officer Burke.

THE COMMISSIONER: – and I don't think it would have mattered.

Go ahead.

MR. SIMMONDS: Go ahead, Officer Burke.

THE COMMISSIONER: If you have the – if you know what the question is.

CPL BURKE: Well, I'm going to explain my, I guess my logic in not being too – like, this scenario not being so far-fetched that it couldn't happen. As I said, there was a bat placed on the left side of the chair, near the left side of the chair and there was a firearm found in the residence previous to that day. That bat, a weapon being present, is indication, or you know – when we, when we're doing a risk assessment, it's an indication for use that there may be other weapons present as well.

It's what we refer to as one plus one. And if there's one weapon present, there's probably another one present. So the firearm in the house and the firearm being in the area or being handled by Mr. Dunphy is acceptable or logical. The fact that Mr. Dunphy came home from Easter Sunday dinner, changed, and things like that, led me to believe that he didn't move that firearm that day. I assumed it was there previous to that day – or reasonably, that was my conclusion.

MR. SIMMONDS: And –

CPL BURKE: Also that there's some indication that he was, I guess – I think Colin Dinn told us about a conversation he had with Mr. Dunphy previous to this incident regarding he said let 'em come for me and I'll be ready, or something along that lines, meaning that he may have been prepared at some point or even thinking about it too, because he – I think there's some items or tweets that he sent out on Twitter before this incident, and nothing to do with the tweets that

came up in this investigation, but it led me to believe that yes, Mr. Dunphy was agitated I guess by something or, and was preparing himself to be visited by somebody at some point.

MR. SIMMONDS: So those are the points that you say. Well firstly, did you inquire about the stick with his daughter?

CPL BURKE: Why? I'm –

MR. SIMMONDS: The stick was lying on the floor in the walkway. He would not have been able to reach it. Did you inquire about the stick with his daughter?

CPL BURKE: I think Ms. Dunphy told us about the stick and what it was used for.

MR. SIMMONDS: And where did she tell you the stick was normally?

CPL BURKE: Can't remember right offhand.

MR. SIMMONDS: You can't remember where she told you the weapon that you just said was so important to your analysis, the one plus one, you can't remember where she told you. It was on the right-hand side, which would have been the opposite side from where it was found. And, in fact, it wasn't found leaning up against the chair; it was found on the floor right in the walkway – was it not? And I can take you to the picture if you want to see that.

CPL BURKE: I remember where it is in the scene photographs.

MR. SIMMONDS: Right. So he couldn't even reach it. Correct? He could not reach it from the chair? And it's out in front of any officer that's going to come in, who's going to see it – correct? They got to walk over it.

CPL BURKE: Yes, it –

MR. SIMMONDS: You got to walk over it.

CPL BURKE: I can only explain where the stick was. I can't say if anyone can reach it or if someone would see it. The stick was on the floor, pretty well in the middle of the archway on the left side of the chair.

MR. SIMMONDS: And he had the gun prepared in case they were coming for him, that's what you said, right?

CPL BURKE: No, I didn't say that.

MR. SIMMONDS: What did you say? I thought you said he had the gun out because he was expecting or was agitated –

CPL BURKE: I didn't say that. I didn't say that. I said that there was a weapon in the house, a one plus one would lead a trained police officer in any type of risk assessment that there may be another weapon there. The firearm was in the house behind the couch, as Ms. Dunphy has pointed out to us, so there was a firearm in the house. That's basically where –

THE COMMISSIONER: Corporal, I read the use-of-force manual where they get into this one plus one. Is it not a message to police officers not to let their guard down just because they found one weapon or just because they've seen one suspect?

CPL BURKE: Yes.

THE COMMISSIONER: Because it's applied in both those cases, isn't it –

CPL BURKE: Yes.

THE COMMISSIONER: – with respect to weapons and possible subjects? Would you agree there's not much logic in the fact that because Mr. Dunphy had a stick with duct tape that therefore he's going to have another weapon?

CPL BURKE: It's part of our training of one plus one, if you see one weapon you may see –

THE COMMISSIONER: I'm trying to understand the rationale behind it. We will have an expert on the use of force coming, so I just wanted to get your view (inaudible) –

CPL BURKE: I'm just saying that if a person has one weapon, they may have another.

THE COMMISSIONER: Okay.

MR. SIMMONDS: And the last place that that weapon was located was behind the couch, which is some distance away from where he was seated in the chair.

CPL BURKE: Yes.

MR. SIMMONDS: So you believe in preparation, he had taken it from the couch, back of the couch, and moved it over next to the chair. Well, that's what you got to believe. If you accept what you're saying, you've got to believe that his arm is not long enough to go out over the chair, back of the couch and take it. He had to, before Officer Smyth arrived, gone and removed it from behind the couch and put it somewhere adjacent to the right-hand side of the chair – correct?

CPL BURKE: I'm just saying it's not outside the logic to think that that firearm was moved prior to that day.

MR. SIMMONDS: Okay. So what made him move it from behind the couch to the right-hand side of the chair?

CPL BURKE: I have no idea.

MR. SIMMONDS: You have no idea. And why would he have a gun with a bullet in it, that's not cocked and can't be fired, if he really wants to use it on someone? Because that's the way the gun was found –

CPL BURKE: Yes.

MR. SIMMONDS: The bolt was open. It couldn't be fired. It couldn't hurt anybody, unless you clubbed him with it.

CPL BURKE: Yes

MR. SIMMONDS: So your theory doesn't add up – number one, you got to have some reason, logically, to draw the inference that he went and moved it; number two, you have to have some reasonable belief as to why the stick, which everybody has said was on the right-hand side, is now on the left-hand side, in the floor, in a walkway; number three, if you're going to say he

moved the gun and put it by the chair somewhere on the right-hand side, with the bullet in it, intending to use it, then explain to me why the bolt wasn't activated so that the gun could fire. All of those things refute your assessment.

CPL BURKE: I don't know if Mr. Dunphy was intending to fire his firearm.

MR. SIMMONDS: You don't know if Mr. Dunphy was intending to fire his firearm.

CPL BURKE: And the action being opened tends me to say that he didn't intend to fire it.

MR. SIMMONDS: And the last place it was seen was by his – no one else in his 50-odd years, 56, 57, whatever he was, no one else ever reported, Dick and Debbie next door, no one ever reported him seen utilizing, doing anything with respect to firearm whatsoever. You don't have a shred of evidence of that, do you? A shred of evidence of him having anything to do with firearms before.

This was an old gun belonged to his father, Meghan's grandfather. She saw it when she was cleaning; it was behind the couch. That's the only reference. Dick and Debbie said they hadn't seen it, don't know what happened to it. They took two and he got one. You have no, no evidence at all of him ever utilizing, ever having anything to do with that firearm – correct?

CPL BURKE: Correct.

MR. SIMMONDS: You have no evidence whatsoever of him ever getting violent with police, ever – correct?

CPL BURKE: Correct.

MR. SIMMONDS: If you had your time back, would there be other forensic examinations, tests, assessments you would do, Officer Burke?

CPL BURKE: I – no, I don't know.

MR. SIMMONDS: You don't know? Well, you must have thought about this. When you know you're coming to an inquiry, you're going to be asked about it. Wouldn't you say, you know – did you ever think, well, gee, you know, I'm going to have to say, if I had my time back again, I would do this?

CPL BURKE: I never, no, I don't have any – I didn't think of anything that I would've done forensically that I didn't do.

MR. SIMMONDS: The only exhibit that was ever fingerprinted was the rifle and no prints were found on that or obtainable from that rifle. Correct?

CPL BURKE: Correct.

MR. SIMMONDS: None of the ammunition found at the scene – there was one bullet on the table, one bullet in the gun. None of that was ever fingerprinted, was it?

CPL BURKE: No.

MR. SIMMONDS: Can you imagine the value if you had have fingerprinted either one of those bullets and found a print that matched with Officer Smyth's?

MR. KENNEDY: Commissioner, I don't know if that's a fair –

MR. SIMMONDS: Oh, I think it is a fair question.

THE COMMISSIONER: Well –

MR. KENNEDY: We don't even know if the bullets could be fingerprinted. I mean, come on, that's –

MR. SIMMONDS: No, that's a fair question.

MR. KENNEDY: There's only so far you can go with this, Commissioner.

THE COMMISSIONER: Well, Mr. Kennedy, the submission of Ms. Dunphy and counsel is that they believe the scene was changed, or they're submitting that Constable Smyth's testimony in this regard is not to be accepted. And the clear inference, if not direct statement, is that it did not come down the way Constable Smyth said it did.

And, as I understand, what Mr. Simmonds is saying now is that if there was a fingerprint found on that round in the rifle, and there's no – this is nothing more than conjecture – then that would have been significant evidence in that it would indicate that Constable Smyth had been involved with the rifle to the extent of arguably placing a round in the rifle, or at least it would indicate that Constable Smyth had had the round in his hand and there's no one else, except Mr. Dunphy, to –

MR. SIMMONDS: And I can add to that, that Mr. Dunphy –

THE COMMISSIONER: – in the room. But let me make it clear, there is no evidence to suggest that that's what Constable Smyth did.

MR. SIMMONDS: Correct.

THE COMMISSIONER: You are, as I take it, using that as an example of why having –

MR. SIMMONDS: Other tests should –

THE COMMISSIONER: – a fingerprint test off the bullet that was found in the rifle would be significant.

MR. SIMMONDS: Absolutely.

THE COMMISSIONER: So, Mr. Kennedy, again, reiterating there is absolutely no evidence that that is the case, as far as the question is concerned in terms of the value of such evidence, as a matter of conjecture, to test the witnesses' position on it, I think it is a fair question to put and I'll let you answer it, Corporal. If you want to rephrase it –

MR. SIMMONDS: I'll rephrase the question.

If on that round that was found in the rifle they were able to lift fingerprints, and either the fingerprints of Constable Smyth or the fingerprints of Don Dunphy were on it, would that not be valuable information in your investigation?

CPL BURKE: The – there was no – I guess you have to base your forensic analysis or what you request from the lab on the evidence that you have in front of you at that time, and some tests

that are, you know, that would forward your investigation, basically. And at that time we had no reason to believe that the firearm was handled by Constable Smyth.

MR. SIMMONDS: You don't know that, okay; but second to that, if indeed – the bullet didn't walk from wherever it was, hop up and go into the gun. Someone had to place it into the barrel of the gun. The evidence on that, if there was prints that could be lifted from that bullet, that would be a furtherance of your investigation. Would it not, Officer Burke?

CPL BURKE: Yes.

MR. SIMMONDS: Thank you.

The ammunition itself on the table was never fingerprinted.

CPL BURKE: No.

MR. SIMMONDS: The stick, the one of the one plus two, the stick that's on the doorway with the duct tape on it, that was never fingerprinted.

CPL BURKE: The stick itself I don't think was – I don't think you can lift fingerprints from a piece of wood like that.

MR. SIMMONDS: Officer Burke, I don't know. I know with today's technology they are able to do many things, but was it attempted, or was it attempted to see if there was any fingerprints on the duct tape on the stick?

CPL BURKE: Not to my knowledge.

MR. SIMMONDS: Not to your knowledge.

Do you think, again, if prints had of been lifted from that, Mr. Dunphy's or Constable Smyth's, would that not be valuable information for your investigation?

CPL BURKE: We knew the stick was in the residence and it was owned by Mr. Dunphy.

MR. SIMMONDS: You didn't know how the stick got from the right to the left-hand side and out in the walkway. You did not know that. And the best thing, info, that you've received during this was that the stick was always on the right-hand side. Now, if there was fingerprints on that that matched with Mr. Dunphy or if they matched with Officer Smyth, would that not be valuable information?

THE COMMISSIONER: Mr. Simmonds, the fact that Mr. Dunphy's prints were found on the stick surely would only indicate that it was his stick and he'd used it.

MR. SIMMONDS: It would be a process of elimination to see if his prints are there, to see if Officer Smyth's prints are there.

THE COMMISSIONER: Finding his prints there doesn't seem to me would add anything. Now, if they found Constable Smyth's prints that's something else.

MR. SIMMONDS: That would add a lot.

There was no testing done on the stick, period.

CPL BURKE: No.

MR. SIMMONDS: Do you know if the rifle could have been sent to a more advanced lab for – the rifle was sent to a lab here in Newfoundland?

CPL BURKE: No, it was sent to Ottawa.

MR. SIMMONDS: Ottawa.

CPL BURKE: Yes.

MR. SIMMONDS: Do you know if it could have been sent to a more advanced lab that would have been able to determine whether there were any prints on the stock or the barrel? Did you inquire into that?

CPL BURKE: No. However, we've used what would – you know, labs besides the RCMP lab for more advanced techniques, or for more advanced analysis on items, evidence, and with regard to touch DNA, that's the only thing that –

MR. SIMMONDS: But did you check that out? I understand they can lift prints from human skin. Did you check out to see if there was any –?

CPL BURKE: We consulted with our forensic strategists in Ottawa, and Corporal Lee is the expert in Newfoundland, and there were no options to fingerprint that firearm to my knowledge.

MR. SIMMONDS: And you did no further checking on the DNA. You got the information that it would have to be handled on a regular basis and you left it there. You didn't see if there was any more advanced DNA testing that could have been done with respect, particularly, to the rifle and the stick?

CPL BURKE: I can only go to who I would consider has expertise in that field, and that was the information that I obtained.

MR. SIMMONDS: Do you agree that some further fingerprinting of some of the information that was – some of the items we've talked about may have indeed clearly assisted in your investigation?

CPL BURKE: I can only go back to where the investigation was at that time and the decisions I made, and I stick by those decisions.

MR. SIMMONDS: You stick by those decisions.

Officer Smyth gives you a scenario of how he entered the house. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: And I understand Ms. Breen contacts, sends an email to you and a second statement is set up for Meghan to come and speak to you.

CPL BURKE: Is this the statement that Sergeant Osmond obtained?

MR. SIMMONDS: Yes.

CPL BURKE: Yes.

MR. SIMMONDS: Okay.

And present at that was also her boyfriend, Billy Corcoran.

CPL BURKE: Yes.

MR. SIMMONDS: And this was on April 8. The event took place on the 5th, this was April 8. Correct?

CPL BURKE: Yes.

MR. SIMMONDS: On that date – and you can go to Exhibit 0037 at page 71 and 72. Or 71, lines 12 to 33; and on page 72, lines 28 to 43. What the –

MR. KENNEDY: Sorry, what is that?

MR. SIMMONDS: The exhibit is 0037, page 71, lines 12 to 33; and page 72, lines 28 to 43. On April 8 you and Sergeant Osmond attended – met with Meghan Dunphy, Billy Corcoran, and Ms. Breen. Correct?

CPL BURKE: I wasn't present for that interview.

MR. SIMMONDS: You were not present for that interview?

CPL BURKE: No, I wasn't.

MR. SIMMONDS: Did you have any input into the questions that were going to be asked or the answers that were received?

CPL BURKE: No, not a whole lot.

MR. SIMMONDS: When you say a whole not – not a whole lot –

CPL BURKE: I knew that Ms. Dunphy was coming in for an interview and it was going to be conducted by Sergeant Osmond.

MR. SIMMONDS: Did Sergeant Osmond tell you what he was going to say to her?

CPL BURKE: No, he didn't.

MR. SIMMONDS: Those lines would indicate that Sergeant Osmond said he believed everything Officer Smyth had told him as to why he visited Don Dunphy, right up to entering the house. Now this is on the 8th of April he told her this and it's recorded in his statement.

How could – and I'm not asking you to speak for Sergeant Osmond, I'm asking you to speak for you. You could not have come to that conclusion right then, could you?

CPL BURKE: No.

MR. SIMMONDS: You would agree that that appeared to be precipitous or premature for Sergeant Smyth to say that there were.

CPL BURKE: Sergeant Osmond.

MR. SIMMONDS: Or Sergeant Osmond.

CPL BURKE: I can't really speak to Sergeant Osmond and what he said.

MR. SIMMONDS: And Billy Corcoran asked an interesting question, which has been asked before but he asked it during that interview: Why didn't he call him? Why didn't he call first? Why didn't he call Meghan first? You ever grappled with that, that why Officer Smyth didn't call first, drives all the way down there. That didn't seem odd to you?

CPL BURKE: No, it didn't seem odd to me. No.

MR. SIMMONDS: It didn't seem odd to go down there on Easter Sunday over tweets of concern – not threats – from someone that they never had any history of threats on before. That, to you, didn't seem odd or unique or strange?

CPL BURKE: No.

MR. SIMMONDS: Okay.

And that he was only going down to get an explanation from him.

CPL BURKE: Yes.

MR. SIMMONDS: That's what you understood.

CPL BURKE: Yes.

MR. SIMMONDS: Smyth has told us many times in many of the documents he didn't perceive the tweets as a threat. They were tweets of concern, they weren't a threat. He said that many times. Do you agree?

CPL BURKE: Yes.

MR. SIMMONDS: I'd like to go to Exhibit 0513. These are the latest cellphone analyses. And I'm not very literate with respect to the difference of tweets and BBMs and emails, but they're communications on an electronic device. And this was an officer who has consistently told us no threat, went down to get an explanation, very low risk. These were in fact deleted and we were able to get them back just recently in February.

He's tweeted by a friend and he replies: Going to deal with some lunatic threatening the premier – going to deal with some lunatic threatening the premier. Is that consistent with what you heard before, Corporal Burke?

CPL BURKE: When we first attended the – were first called to Mitchells Brook it came in to me, personally, as an uttering threats complaint.

MR. SIMMONDS: We have Officer Smyth – and I'm sure if I – and, of course, the counsel on the other side of me will correct me. Officer Smyth has told us many times in many statements, I believe in fact in the statement that he gave which you were present with Officer – Corporal Henstridge, that he did not consider these as threats. I think his phrase was: Not a threat, no way. Yet, on the 4th of April he writes to his friend: Got to go deal with some lunatic. Now the lunatic obviously has to be Don Dunphy. Have you seen any information to prove that Don Dunphy was a lunatic?

CPL BURKE: No.

MR. SIMMONDS: Do you have anything, anything whatsoever, to give any indication that Don Dunphy had any kind of a diagnosable mental issue?

CPL BURKE: No.

MR. SIMMONDS: So can you assist me in asking why – can you assist me at all, assist the Commission, as to why Officer Smyth would refer to him as a lunatic?

CPL BURKE: I can't offer any assistance.

MR. SIMMONDS: And I'm still unaware as to how it's threatening the premier but we'll move on to the reply.

Cool, his friend writes back. We'll have a beer waiting for you. He replies: "If I have to arrest him then I'll be late" – if I have to arrest him then I'll be late.

Now, this wasn't going down to arrest, this wasn't a threat, it was low risk. On what basis could he possibly – can you offer any insight? Under what basis could he possibly arrest Don Dunphy, the lunatic?

CPL BURKE: I can't offer any explanation.

MR. SIMMONDS: If I have to arrest him, I'll be late. Then he says: "Too much paperwork." And his friend says: "Give him a warning." Or his friend says: "Bring him for a psych assessment." He replies: "Not a bad idea."

Again, I ask you: Do you have any information that would ground any kind of psychiatric, psychological or mental assessment on Mr. Donald Dunphy?

CPL BURKE: No.

MR. SIMMONDS: A little bit later he indicates: Got delayed – got delayed at work, at home. Question: "Did you arrest busy"? And then he replies: "Buddy." And then Officer Smyth replies: "Nope, tomorrow ... Got all the background etc done."

On what basis, again, I ask you – he's going to arrest him the next day. Can you please assist us, with your significant investigation into this matter, of what evidence came forward to show Officer Smyth had any basis, any reasonable and probable grounds, that Mr. Dunphy was about to commit a criminal offence to which to arrest him. Can you assist us in that regard?

CPL BURKE: No, I can't.

MR. SIMMONDS: These are Officer Smyth's own words. But yet he told every RCMP officer that day, every person he spoke to, not a threat, tweet's a concern. Don't even relate to the premier – don't even relate it to the premier; the premier was just tagged in it.

But that's not what he told you and Corporal Henstridge, is it? In the meeting he didn't tell you about these. He didn't tell you he called him a lunatic and was going down to arrest him did he?

CPL BURKE: No.

MR. SIMMONDS: The RCMP didn't have these messages. They were deleted, weren't they?

CPL BURKE: I can see deleted on the screen so I assume.

MR. SIMMONDS: Strange they come out now.

MR. KENNEDY: Yeah, that is – it is strange, Commissioner, quite frankly.

MR. SIMMONDS: I have no further questions. Thank you (inaudible).

MR. KENNEDY: It is strange.

THE COMMISSIONER: Well, we'll explore the strangeness I guess.

You're finished, Mr. Simmonds?

MR. SIMMONDS: I am finished.

THE COMMISSIONER: All right, we'll recess for 15 minutes.

Who is going next, if I might ask?

MR. KENNEDY: I will be.

THE COMMISSIONER: Who?

MR. KENNEDY: I will be.

THE COMMISSIONER: Mr. Kennedy. Okay.

MS. SHEEHAN: All rise.

I declare this Commission in recess.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Okay. Thank you.

Go ahead when you're ready.

MR. KENNEDY: Mr. Commissioner, before I commence questioning, I want to raise an issue.

Over the last period of several weeks, there've been a lot of allegations made against my client, a lot of what I would suggest is speculation. Today, we hear about the bullets in the gun and the lack of fingerprinting and DNA testing.

Commissioner, you have wide powers under this inquiry. My client is willing to consent to the testing of these bullets, either fingerprint or DNA, and the gun, and we would ask you to consider to order that these items now be tested so that we can remove some of these allegations that are out there against him. It's just not fair, Commissioner, I would suggest.

He will provide his fingerprints. He will provide his DNA. Let's get some of the testing done.

THE COMMISSIONER: Well, Mr. Kennedy, first of all, usually in order to get testing, you have to have some basis for it. You have to indicate that there's some point to it.

Now, the problem, and if you want to address this to Corporal Burke, you may, but I understood the bullet was taken away to be destroyed, to be – am I wrong there? Have you seen that in the documents?

What's the problem? Too many mics on?

UNIDENTIFIED MALE SPEAKER: Sorry.

THE COMMISSIONER: Okay.

MS. O'BRIEN: Thank you, Commissioner.

I can give some assistance on that. The bullet that was destroyed was the one that was found in the room after the fact.

THE COMMISSIONER: Right.

MS. O'BRIEN: I think reference is made to the one in the – in the gun.

THE COMMISSIONER: I'm sorry, you're referring to the bullet in the gun, yes, okay. All right.

MS. O'BRIEN: We will be getting some evidence from the FIS team as to their consideration of being able to take fingerprints from that bullet.

THE COMMISSIONER: Right.

MS. O'BRIEN: So we will be hearing further relevant evidence on that topic.

THE COMMISSIONER: Okay.

MR. KENNEDY: Well, shouldn't that have been raised today, before Mr. Simmonds was allowed to go down that road, Mr. Commissioner, and –?

THE COMMISSIONER: Why? Why, Mr. Kennedy?

MR. KENNEDY: Well, because what happens is it's put out there, it's speculation, but it's put to Corporal Burke as if it can be done. Now, I have no evidence. I don't know if it can be done. I was left with the impression today from Mr. Simmonds examination that it can be done. And if it can be done, my client's request is that it should be done. He will provide his fingerprints and DNA and whatever else is required.

We have to remove some of this uncertainty.

THE COMMISSIONER: Okay, that's noted and the investigators will consider that, and I'll see what the evidence is with respect to the likelihood of that being possible and I'll give consideration to your request.

MR. KENNEDY: That's fine. Thank you, Commissioner.

THE COMMISSIONER: As far as the bullet, as far as the – do you mention the rifle, as well?

MR. KENNEDY: Yes, the rifle and the bullet, yeah.

THE COMMISSIONER: Is there – again, there's a lot of reading here and some of this I read quite a while ago.

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: But I seem to recall there were problems indicated in getting prints from the rifle, were there not?

MR. KENNEDY: It's my understanding that the touch DNA was not utilized because of the – there was concerns as to what the touch DNA would show. But, Commissioner, having regard to the line of questioning and what I would suggest the allegations being made, is that any and all tests that can be performed here should be performed in terms of the rifle, the bullets; and as I've indicated, my client will consent to providing fingerprints and DNA.

THE COMMISSIONER: All right, that's noted.

Now, do you want to – do you have questions to put to Corporal Burke?

MR. KENNEDY: Yes, I do, Sir.

Corporal Burke, we've heard now for the last couple of weeks all kinds of theories being put to various witnesses as to what happened on that date in question. Sir, could it be as simple and did you determine it was as simple is that, for whatever reason, Mr. Dunphy pointed a firearm at Constable Joe Smyth and Constable Joe Smyth, as he was entitled to do under section 25 of the *Criminal Code*, defended himself?

CPL BURKE: That was my conclusion.

MR. KENNEDY: So we've heard – and we're going to go through this in some detail. We've heard all kinds of allegations of incomplete investigation, insufficient investigation. Sir, the kinds of mistakes that have been alleged you made, did they affect – even if they were mistakes, did they affect your overall conclusion?

CPL BURKE: No, they did not.

MR. KENNEDY: Your overall conclusion, Sir, after an extensive and lengthy investigation, is that you had no reasonable grounds to believe that Constable Joe Smyth committed a criminal offence. Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: Sir, when you're saying, or there's reference to a homicide investigation, homicide doesn't mean murder by itself, does it?

CPL BURKE: No.

MR. KENNEDY: Homicide can be either culpable or non-culpable as defined in the *Criminal Code*.

CPL BURKE: Yes.

MR. KENNEDY: Non-culpable homicide is homicide that is not blameworthy. Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: So when you're doing a homicide investigation, you haven't concluded anything other than there was a sudden death which requires investigation?

CPL BURKE: Yes, and homicide means that it was inflicted by another person.

MR. KENNEDY: One – another person. So there have been all kinds of allegations here, Sir, and we're going to go through this in some detail, in terms of preferential treatment.

How many homicide investigations have you been involved in, Corporal Burke?

CPL BURKE: Well, I'll say a dozen.

MR. KENNEDY: Do you know how many Sergeant Kent Osmond would have been involved in?

CPL BURKE: A dozen-plus, maybe another half-dozen. I'm not sure.

MR. KENNEDY: Homicide investigations can be complex, but they can also be very simple, can't they?

CPL BURKE: Yes.

MR. KENNEDY: They're complex because there's another human being who has lost his or her life, and society dictates that there has to be a full and fair investigation into what occurred. Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: But they can be as simple as one person pointing a firearm and the police officer acting under Section 25, can't they?

CPL BURKE: Yes.

MR. KENNEDY: Sir, there have been questions about the preferential treatment. What grounds did you have or did the RCMP have to detain Constable Joe Smyth at the scene that day?

CPL BURKE: We didn't have any grounds to detain Constable Smyth.

MR. KENNEDY: Sir, we've heard of various – we know there are various terms in criminal law. There's a reasonable suspicion, there's reasonable grounds, correct?

CPL BURKE: Correct.

MR. KENNEDY: In order to detain Constable Smyth, you would have had to have some grounds to believe that he had committed a criminal offence at that time, correct?

CPL BURKE: Yes.

MR. KENNEDY: Acting Sergeant Smyth, now Constable Smyth, tells the first two police officers he comes in contact with, Corporal O'Keefe and Constable Cox, Constable Kelly ...? Kelly ...?

CPL BURKE: Downey.

MR. KENNEDY: Yeah, tells them that Mr. Dunphy pointed a firearm at him and he shot him. Mr. Dunphy. Correct?

CPL BURKE: Yes.

MR. KENNEDY: You go in the house or the police go in the house; there's a firearm there.

CPL BURKE: Yes.

MR. KENNEDY: So at that point you've no reason to dispute what Constable Smyth is saying, but it doesn't mean that you accept what he is saying either, does it?

CPL BURKE: Correct.

MR. KENNEDY: What it means is that you have to do a further investigation but, at first glance, there is evidence to support what he's telling you or telling the police.

CPL BURKE: Yes.

MR. KENNEDY: So in terms of him going back to the police station, you had no grounds in law to bring him back to the police station, did you?

CPL BURKE: No.

MR. KENNEDY: He had to voluntarily go along. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Which he did.

CPL BURKE: Yes.

MR. KENNEDY: Then, you had no grounds to – or the police, again – when I say you I'm talking about the police at this stage because you've – at around 5 o'clock that day, Sunday April 5, you get involved in the investigation. The police had no grounds to detain him further, did you?

CPL BURKE: No.

MR. KENNEDY: And under section 10(b) of the Charter, the right to counsel, it arises upon arrest or detention. Correct?

CPL BURKE: Correct.

MR. KENNEDY: That detention can be a psychological detention, can it not?

CPL BURKE: Yes.

MR. KENNEDY: So as you have indicated, you – any statement given by Constable Smyth that day would have to be voluntary.

CPL BURKE: Yes.

MR. KENNEDY: Now, on the issue of the voluntariness, Sir – and Mr. Simmonds asked you about the second re-enactment and the note, the concerns you had about getting a second re-enactment – do you remember phoning Constable Smyth about that?

CPL BURKE: Yes.

MR. KENNEDY: He agreed immediately, didn't he?

CPL BURKE: Yes.

MR. KENNEDY: Remember your testimony the other day where you indicated that Constable Smyth, if he was given the right to counsel he mightn't be – he mightn't talk, he mightn't give a statement.

CPL BURKE: That was an assumption.

MR. KENNEDY: Yeah, because sometimes lawyers will advise their clients to give a statement if they're telling the truth. Do you – does that sound logical to you?

CPL BURKE: Yes.

MR. KENNEDY: Where people get tangled up in talking to the police is when they tell them lies or they try to mislead the police and you investigate that further. Correct?

CPL BURKE: Yes.

MR. KENNEDY: So it can be of an accused person, or a person of interest, a suspect's benefit to give a statement to the police. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Now, in this particular case on April 6, Constable Smyth at – gave his statement that was – appears to me to be about an hour and a half, an hour and 36 minutes long. Correct?

CPL BURKE: Yes.

MR. KENNEDY: In the video the other day – and I'm trying to find a reference to – if we could have Exhibit 0119, please, brought to the screen. If we could go to, it's page 50 – 65, 66 of my notes, Commissioner. It could be a page off. It's –

THE COMMISSIONER: We'll find it.

MR. KENNEDY: Okay. If you just go to the next page, please. Okay, let's try the next page. Page 66; go down, please, yeah. Yeah.

Okay, right there. So you see here – and this was in the video clip that was played the other day. Corporal Henstridge says: "They won't do the autopsy until we spoke with you" Smyth says

yeah. And there's a little pressure on to see if you are okay to do it. Smyth says: "Yeah. No, and I was – I was doin' it today. I was"

Go down a little bit further: "The only delay actually was the Association lawyer was in a, you know, a grievance hearing and he was gettin' the afternoon, he said he ... wasn't gonna be available. I'm like well I – I'm sorry I got ... I'm comfortable doing this ... I appreciate your ... you wanna be there or you wanna ... go over with me ... And you being there or anyone else being there is not gonna change that, so unless you got some really good reason for me not to go down there by myself, I'm going down there."

So he's saying to you at that point, even though he really hasn't or doesn't appear to have had a lot of time to talk to a lawyer, he's doing this anyway. He's giving you this statement.

CPL BURKE: Yes.

MR. KENNEDY: In fact the night before – and we're going to come to this in some detail – he wanted to give a statement, didn't he?

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

Then two days later, April 8, he does re-enactment number one. Correct?

CPL BURKE: Correct.

MR. KENNEDY: For whatever reason it doesn't work. April 10 he does re-enactment number two.

CPL BURKE: Yes.

MR. KENNEDY: And do you remember when you called him, he said I got another issue ongoing, another professional issue ongoing but, you know, he agreed immediately.

CPL BURKE: Yes.

MR. KENNEDY: Now, that's the same day that the email to the RNC, all the members of the RNC has been leaked to the press. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Did you know that at the time?

CPL BURKE: Did I know about the email when (inaudible)?

MR. KENNEDY: Yeah, the email had been – was out in the media. By the time you spoke to Constable Smyth and asked him to do re-enactment number two, did you know if that was out in the media?

CPL BURKE: I don't know. I really don't know.

MR. KENNEDY: But in any event that's the same day that the email is leaked to the media, five days, six days after the event, that he immediately agrees to do re-enactment number two.

CPL BURKE: Yes.

MR. KENNEDY: He gives consent to search his phone.

CPL BURKE: Yes.

MR. KENNEDY: You know he gave a lengthy statement to the Saskatoon Police on June 17.

CPL BURKE: I wasn't aware of that.

MR. KENNEDY: Did you ever see that statement?

CPL BURKE: No, I didn't.

MR. KENNEDY: Okay.

Well, I can tell you he gave a lengthy statement to Sergeant Grant Little on June 17. On August 26 he was asked to come back for an RCMP interview and he gave one immediately.

CPL BURKE: Yes.

MR. KENNEDY: On September 14 he was asked back for another interview, gave one immediately.

CPL BURKE: Yes.

MR. KENNEDY: And then he was asked to give a statement in relation to the unanimous letter, gave one immediately.

CPL BURKE: Yes.

MR. KENNEDY: Have you ever seen, in your experience as a homicide investigator, an individual give as many statements and be as co-operative as Constable Joe Smyth has been in this case?

CPL BURKE: No.

MR. KENNEDY: No. It's very unusual, isn't it?

CPL BURKE: Yes.

MR. KENNEDY: For someone to give this many statements and to co-operate as fully as he has. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Now, Sir, there's been references to him sending you emails and doing it himself. Did you ever get an email or a letter from a lawyer on Constable Smyth's behalf?

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

MR. KENNEDY: Other than that reference to – in the first statement to a lawyer or counsel, did he ever make any reference to lawyers after that?

CPL BURKE: No.

MR. KENNEDY: If those requests that had come to you from updates, if they had come from a lawyer, you wouldn't have had any problem with that, would you? You mightn't have given any information but you wouldn't have had a problem with the letter coming to you from a lawyer.

CPL BURKE: No.

MR. KENNEDY: Did Constable Joe Smyth ever refuse any request made to him by the RCMP to provide assistance in this investigation?

CPL BURKE: No.

MR. KENNEDY: Did he ever say in the middle of any interview: I need to speak to a lawyer or I need to consult counsel?

CPL BURKE: No.

MR. KENNEDY: Did he ever say prior to a request for an interview: I got to talk to my lawyer first, then I'll get back to you?

CPL BURKE: No, no.

MR. KENNEDY: So now I want to come back to this statement that's given on the night in question because there's been questions about whether he should – a police officer should give a statement immediately, whether he should give it later on, things like that. You said you had read an article. Correct?

CPL BURKE: Yes.

MR. KENNEDY: But I want to make it clear that on that point – on that Sunday night, the night of the incident, the police had no grounds to detain or arrest Constable Smyth. Correct?

CPL BURKE: Correct.

MR. KENNEDY: And there was no obligation in law on him to give a statement to the RCMP.

CPL BURKE: Yes.

MR. KENNEDY: Sir, I want to deal now with this issue of the 24 – or the giving of the statement right away. You are familiar with ASIRT.

CPL BURKE: Yes.

MR. KENNEDY: You met with, did you – or did you meet? I know someone in the RCMP met with Ms. Hughson. Is that her name?

CPL BURKE: Yes.

MR. KENNEDY: Susan Hughson?

CPL BURKE: Yes.

MR. KENNEDY: She's the executive director of the Alberta Serious Incident Response Team, ASIRT.

CPL BURKE: Yes.

MR. KENNEDY: Sir, during a pre-inquiry interview with Commission counsel, Ms. Hughson was asked – and this was on January 13, 2017. She was asked at page 126: When should an officer be asked to give a statement? Ms. Hughson: That's a very interesting question. Ms. O'Brien: Okay. Ms. Hughson: There are, there was some research that supports that an officer involved in a Critical incident that his memory is better 48 to 72 hours after an incident occurs. Ms. O'Brien: Okay.

Ms. Hughson: So there is some articulable reason not to interview a subject officer immediately following critical incident, so it becomes a judgement call. They almost inevitably should talk to counsel and have that opportunity to contact counsel and then you also have to deal with that particular issue if you want.

So when should an officer be called upon to give a statement? Well, you can't force him to give a statement before he is ready, obviously. We do not take a statement from a subject officer immediately following a critical incident. Ms. O'Brien: Okay. Ms. Hughson: As a general rule – now, that's not without exception, but as a general rule we will not, based on the fact that the psychology of an officer's response to a critical incident suggest that the better evidence can be obtained shortly thereafter.

Ms. O'Brien: So what is your practice; what is the time frame to get the statement? Serve them a designation notice immediately at the scene; advise them of their rights, to get all the evidence that we need for them. And then we release them and we allow them to contact counsel and we will talk to them over the upcoming days about whether they're prepared to give a statement.

So what I've just read there to you from Ms. Hughson; is that consistent with what you've learned or read since April 5?

CPL BURKE: Yes.

MR. KENNEDY: On the night in question, is that what the officers were saying to you or said to you, or people in the RCMP office, is that it's better to give a statement within 24 or 48 hours after the incident – correct?

CPL BURKE: Correct.

MR. KENNEDY: Now, that's been made into or made out to be giving Constable Smyth special treatment. Did you in any way give him any special treatment that night where you had no grounds in law to detain him? You couldn't compel him to give a statement and, in fact, there appears to be reason not to take a statement immediately. Is that preferential treatment?

CPL BURKE: Not – no.

MR. KENNEDY: Then the question is put to you: Why do you go to Ms. Dunphy and take a statement from her that night? There's a significant difference between Ms. Dunphy – and I'm not taking away from the trauma that Ms. Dunphy is under, but Constable Smyth is the subject of a homicide investigation – correct?

CPL BURKE: Yes.

MR. KENNEDY: So he has certain rights as every other Canadian citizen; is that correct?

CPL BURKE: Yes.

MR. KENNEDY: So you've been asked a number of times, well, why are police officers treated differently. Do you remember being asked that and hearing that question being asked?

CPL BURKE: Yes.

MR. KENNEDY: Page 128, Ms. O'Brien says to Ms. Hughson: So how are police officers different from those of us who are not police officers who get involved in serious incidents? And from what I understand, the police practice is to try to get statements from your person of interest as soon as possible.

Ms. Hughson: That is something that I had to sort of come to terms with when I came on, because obviously as a prosecutor in homicide cases, if you have a subject in a homicide case immediately, you will take that statement as soon as possible for a variety of reasons. And some of those reasons don't necessarily apply in the case of an incident involving a police officer. But it is the research respecting the psychology of a police officer involved in a critical incident that makes it different from your average citizen who's using force in a different context and different circumstances.

Do you agree with those statements?

CPL BURKE: Yes.

MR. KENNEDY: Again, the question – I will read this to you to see if you took this into account or was this in your thinking at the time, or do you agree with it. Ms. Hughson said: There's a difference between being involved in a traumatic event and being a police officer engaged in the execution of your duties being involved in an incident. And the difference is, in that, is that there is research suggesting that the psychology and the impact on the officer's memory is different.

Now, whether it is, I'm not saying you shouldn't do it in other cases, because I don't know. But I am saying there's an identifiable principled reason to wait to get the best evidence from a police officer.

Is that what was put to you that night, and is that what the RCMP agreed to?

CPL BURKE: Yes.

MR. KENNEDY: Do you agree with the statement I just read to you from Ms. Hughson?

CPL BURKE: Yes.

MR. KENNEDY: There are also questions being asked if Constable Smyth was given preferential treatment because association members were allowed to meet with him. Do you remember that?

CPL BURKE: Yes.

MR. KENNEDY: Now, was there any consideration when the association members were allowed to meet with Constable Smyth that night to instruct them not to speak to Constable

Smyth about the incident, and for Constable Smyth not to speak about the incident? Do you remember if that discussion took place?

CPL BURKE: I don't remember, no.

MR. KENNEDY: Because Ms. Hughson says, at page 132: We do allow contact between the association member and the subject officer or the witness officer and also counsel. But the contact with the association member is limited and it is not to discuss the circumstances surrounding the events, and that is the same as witness officers.

So it appears, Sir, that while ASIRT will allow contact with the association member, there's restrictions put on that, on that contact. There was no discussion on that night.

CPL BURKE: Not to my recollection.

MR. KENNEDY: Was there any instructions given to the RNC officers to document anything that was said in that room?

CPL BURKE: I didn't give that instruction.

MR. KENNEDY: Sir, there's been suggestion, again, that you should have asked Constable Smyth for a blood or alcohol test. Do you remember that being put to you?

CPL BURKE: Yes.

MR. KENNEDY: We know that there were Constable Cox, Corporal O'Keefe – I forget the female officer, Constable Kelly –

CPL BURKE: Kelly Downey

MR. KENNEDY: Kelly Downey, Constable X, the two paramedics and maybe Staff Sergeant Tiller. I'm not sure of his involvement. They all had very close contact with Constable Smyth on the date in question.

CPL BURKE: Yes.

MR. KENNEDY: We also know that there were four RNC officers in a room with him.

CPL BURKE: Yes.

MR. KENNEDY: Correct?

CPL BURKE: Yes.

MR. KENNEDY: Did anyone give any indication of a smell of alcohol on Sergeant – on Constable Smyth's breath?

CPL BURKE: No.

MR. KENNEDY: Did anyone give any indication of any bizarre behaviour, or unusual behaviour, which could lead to any suspicion that there was drugs or alcohol involved?

CPL BURKE: No.

MR. KENNEDY: No.

So, in conducting an investigation, Sir – and you’ve been asked this a number of times now, if you could go back and there’s been talk about hindsight. But on that date in question, was there any reasonable suspicion or reasonable grounds to make those requests of Constable Smyth?

CPL BURKE: No, there wasn’t.

MR. KENNEDY: So you act on grounds. You act on evidence, or facts, or call it what you like. Correct?

CPL BURKE: Yes.

MR. KENNEDY: So do you go out start asking people for blood tests because there’s a homicide – there’s a nature of an – the nature of the investigation by itself?

CPL BURKE: No.

MR. KENNEDY: It’s like talking to the neighbours on the night in question. Initially in the investigation, you get preliminary information, as much as you can. Correct?

CPL BURKE: Yes.

MR. KENNEDY: You know that Constable Smyth had contact with Dick and Debbie Dunphy.

CPL BURKE: Yes.

MR. KENNEDY: You know that Constable Smyth – his vehicle was seen by Rochelle Nolan.

CPL BURKE: Yes.

MR. KENNEDY: You know that Mr. Dunphy, he has a daughter named Meghan.

CPL BURKE: Yeah. The Rochelle Nolan, I don’t know if that – if we knew that or if it came up through the neighbourhood inquiries.

MR. KENNEDY: It did but she does give a statement on the night in question.

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

So early in the investigation you’re not zooming in on each potential witness in terms of, this is the – you know, you’re trying to determine what witnesses are out there. Correct?

CPL BURKE: Yes.

MR. KENNEDY: And it’s like with Ms. Dunphy. I mean, there’s nothing wrong with going back if she had said, no, I can’t talk tonight, you can come back later, we’ll talk then. You wouldn’t have had a problem with that, would you?

CPL BURKE: No.

MR. KENNEDY: So there's no problem, and I'm assuming that in homicide investigations you have oftentimes revisited witnesses and taken other statements.

CPL BURKE: Yes.

MR. KENNEDY: Because when you talk about this pure version statement, Sir, essentially what you're trying to do is get a (inaudible) unbiased version of events without any leading or suggesting questioning. Correct?

CPL BURKE: Yes.

MR. KENNEDY: And the reason you do that is because the police have been criticized in the past for suggesting answers to witnesses or suggesting things to them. Correct?

CPL BURKE: Correct.

MR. KENNEDY: Also, we've heard the term interrogation being used here on a number of occasions. Do the police interrogate people anymore or do you interview people?

CPL BURKE: Interview is a better term, I guess.

MR. KENNEDY: Yeah. Because interrogation is what – with the Reid technique, the confrontation, the good guy-bad guy police officer, the use of tricks and threats and things like that. Correct?

CPL BURKE: The interviewing techniques are ever evolving, so I don't want to –

MR. KENNEDY: Yeah. Do you remember – do you know what I talk about when I talk about the Reid technique?

CPL BURKE: Yes.

MR. KENNEDY: That's no longer used by the RCMP or any other police force in this country, is it?

CPL BURKE: No.

MR. KENNEDY: You use now either PEACE or in model of PEACE or the pure version statement taken. Correct?

CPL BURKE: It's – like I said, it's an ever-evolving technique, interviewing. And I can't, I don't want to –

MR. KENNEDY: Okay.

CPL BURKE: – say anything that is incorrect with regards to interviewing.

MR. KENNEDY: But one of the things that has changed in interviewing techniques – and you've indicated that you did a – was it a two-week course?

CPL BURKE: Yes.

MR. KENNEDY: And when was that, Sir?

CPL BURKE: 2011 maybe.

MR. KENNEDY: Because one of the things that has changed, the accusatory tone, the confrontational tone, that's very seldom used anymore, is it?

CPL BURKE: It all depends on the circumstances.

MR. KENNEDY: Yeah. But with witnesses you're certainly not going to use that tone, are you?

CPL BURKE: No.

MR. KENNEDY: In terms of Constable Smyth, there's again been suggestion of preferential treatment by referring to him by his first name. You would do that with – depending on the circumstances you could do that with other suspects or persons of interest being interviewed. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Have you done that in the past; refer to persons of interest or suspects by their first name?

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

In terms of investigating a police officer would you agree with me, Sir, that you need to be unbiased?

CPL BURKE: Yes.

MR. KENNEDY: In fact, you need to be unbiased in represent – in investigating any citizen. Correct?

CPL BURKE: Correct.

MR. KENNEDY: Now, I'm going to suggest this to you, Sir – and you may not agree with me but I'm going to suggest it to you – the easiest thing to do here, for you and the RCMP, was to recommend charges against Constable Smyth, wasn't it? You know – and this is what I mean by that: Then it becomes someone else's issue or someone else's problem.

CPL BURKE: I don't know how to answer that question. It's – if I were to recommend charges in an incident that I did not believe that there – charges or reasonable grounds to believe that the charges were applicable, then I would be – I wouldn't lay the charge.

MR. KENNEDY: Then you would not be complying with your oath to investigate fully and fairly. Correct?

CPL BURKE: Yes.

MR. KENNEDY: So the fact that he's a police officer probably works against him in certain ways. Do you agree with me? And I'm going to show you – I'm going to take you through this in a second.

CPL BURKE: Yes.

MR. KENNEDY: The length of this investigation, if this was a – two friends, a domestic situation, it wouldn't have taken 17 – or two years to investigate. Seventeen months, is that the length of time we're dealing with? Do you remember?

CPL BURKE: I think so

MR. KENNEDY: It wouldn't have taken you 17 months to conclude this investigation, would it?

CPL BURKE: That's not something I can comment on really what –

MR. KENNEDY: It's a pretty simple fact scenario. A guy says one – the suspect, the person of interest says the other person pointed a gun at me. There's a gun found in the house. That wouldn't take 17 months to resolve that one, would it?

CPL BURKE: I can't say yes or no.

MR. KENNEDY: Because I'm going to suggest to you –

THE COMMISSIONER: (Inaudible) don't have the reports, Mr. Kennedy. They had to wait. Not all of them, some of them, I think.

MR. KENNEDY: Yeah, and we'll go through that in a second, Commissioner. But I'm going to suggest to you, and I think Mr. Simmonds put it to you, that this was a unique case.

CPL BURKE: Yes.

MR. KENNEDY: I'm going to point out to you now and ask you for your comment on some of the reasons as to why this was unique; one, it's an officer-involved shooting.

CPL BURKE: Yes.

MR. KENNEDY: That means there is going to be intense scrutiny by everyone involved. Correct?

CPL BURKE: Yes.

MR. KENNEDY: You knew that. As soon as this happened you knew that your investigation would be put under the microscope.

CPL BURKE: Yes.

MR. KENNEDY: I'm a bit concerned or I wonder – and we can go through this if you want to – but why was Ms. Dunphy given the details of what occurred three days after the incident? Can you explain that to me?

CPL BURKE: No, I can't.

MR. KENNEDY: You do know that she was provided exactly with what was alleged to have taken place.

CPL BURKE: Yes.

MR. KENNEDY: Would you have done that?

CPL BURKE: I don't know.

MR. KENNEDY: Within – again, I've got all the letters here, and we can come– we'll probably come to some of them shortly. The deceased's family was alleging bias and asking for a outside police agency within, was it a week, two weeks of the investigation, days? How long into the investigation before this allegation that there was bias?

CPL BURKE: I don't know if the letter came on April 14, maybe, or somewhere before, you know, mid-April, I guess.

MR. KENNEDY: Okay. And these letters kept coming, didn't they?

CPL BURKE: Yes.

MR. KENNEDY: There were letters to the Minister of Justice for the province.

CPL BURKE: Yes.

MR. KENNEDY: To the premier of the province.

CPL BURKE: Yes.

MR. KENNEDY: To Chief Superintendent Boland.

CPL BURKE: Yes.

MR. KENNEDY: To Commissioner or Deputy Commissioner Hardy, whatever her rank was.

CPL BURKE: Yes.

MR. KENNEDY: To the federal Minister of Justice, Peter McKay – do you remember that, do you know about that one?

CPL BURKE: Yes, I think so.

MR. KENNEDY: To the Commissioner, Bob Paulson, in Ottawa.

CPL BURKE: Yes.

MR. KENNEDY: Had you even been involved in a case, Sir, where allegations of bias were being made right to the federal minister of justice and to the commissioner of the RCMP?

CPL BURKE: No.

MR. KENNEDY: No. And it all started over the glasses, didn't it, or it appear to.

CPL BURKE: Yes.

MR. KENNEDY: The allegations of bias and tunnel vision started over the glasses.

CPL BURKE: Yes.

MR. KENNEDY: Now, early on – and again, I know you didn't make this decision, and we're going to find out about it. But early on there is an independent observer appointed. You'd never seen or heard of one in any of your criminal investigations in the past, had you?

CPL BURKE: No.

MR. KENNEDY: Then as of April 8, three days into this investigation – and we're going to come specifically to this shortly – Ms. Dunphy alleged that the police officer was lying, that he shot her father for whatever reason and then staged the scene. You're aware that those allegations were made three days in, weren't you?

CPL BURKE: Yes.

MR. KENNEDY: We then got the numerous interviews with Constable Smyth, which is unusual, you've already indicated, the number of statements he gave.

CPL BURKE: Yes.

MR. KENNEDY: And we're going to come to the role of the independent observer, but steps are taken at his direction, even though you question whether or not they should be done, you take the steps that he suggests.

CPL BURKE: Yes.

MR. KENNEDY: You take steps at the suggestion of the, of Mr. Dunphy's family or his daughter.

CPL BURKE: Yes.

MR. KENNEDY: Again, all of this is very unusual, isn't it?

CPL BURKE: Yes.

MR. KENNEDY: I think at one point you were asked a question by Commission counsel whether or not you were being directed, or you felt directed by Ms. Dunphy's lawyer or herself.

CPL BURKE: Yes.

MR. KENNEDY: And I think you indicated that you did.

CPL BURKE: Yes.

MR. KENNEDY: Does that not, Sir – is that not a potential interference with the independence of a police investigation?

CPL BURKE: Yes.

MR. KENNEDY: Did you go to anyone, or did anyone go and say look, we can't operate like this, we cannot have people telling us, outside individuals telling us how to do our investigation?

CPL BURKE: It was a, yes, it was a conversation with regards to Justice Riche and we were wary of the fact that Ms. Breen was suggesting that we do things.

MR. KENNEDY: Did you feel at any time, Sir, that the independence of your investigation was compromised by these, by the influence of outside sources?

CPL BURKE: No. Not compromised.

MR. KENNEDY: It wasn't appropriate, was it, in your mind?

CPL BURKE: No, it's, it's an element that I didn't deal with before and I thought it was –

MR. FLAHERTY: (Inaudible) what's not appropriate? You say it wasn't appropriate. Was it – I just want to know what Mr. Kennedy is referring to?

CPL BURKE: I thought he was referring to the outside influences –

MR. KENNEDY: That's exactly what I'm –

CPL BURKE: – from Ms. Breen and –

THE COMMISSIONER: No, the question was, did you ever feel that the investigation had been compromised by the involvement of outsiders, I believe was the question.

MR. KENNEDY: So then my next question –

THE COMMISSIONER: And the answer, the answer was no, he didn't agree that it was compromised. He did agree that it wasn't appropriate. Is that –

MR. KENNEDY: That's right

THE COMMISSIONER: – am I understanding you correctly, Corporal?

CPL BURKE: Yes.

THE COMMISSIONER: Are you having something fall on your head?

CPL BURKE: I just noticed some water there.

THE COMMISSIONER: Pardon?

CPL BURKE: I just noticed a leak.

THE COMMISSIONER: Oh, there's a leak, yeah. Well, we've gone from freezing to thawing. So I think thawing is better, I'm not sure. You're now into waterboarding I guess so.

Okay. The, so that's – I think that's clarified, that the witness I think you did say you didn't consider it appropriate?

CPL BURKE: No.

THE COMMISSIONER: But it didn't compromise the investigation.

CPL BURKE: Yes.

THE COMMISSIONER: I –

MR. SIMMONDS: Well, if we're going to make an allegation –

THE COMMISSIONER: Sorry, Mr. Simmonds, speak up.

MR. SIMMONDS: If there's going to be an allegation here that Ms. Breen did something inappropriate, which is what I think we're hearing –

THE COMMISSIONER: No, I don't – I'm not hearing that. What I'm hearing is that in Corporal Burke's opinion some, the, the – some members of the police force, wherever the buck stops I don't know, may have acted inappropriately in permitting the involvement of outsiders.

MR. SIMMONDS: Okay. Well that's different. Yup.

MR. KENNEDY: I'm not alleging Ms. Breen did anything.

MR. COMMISSIONER: Sorry?

MR. KENNEDY: I'm not alleging –

MR. SIMMONDS: Then I'm – then I'm misunderstanding.

THE COMMISSIONER: Okay, we'll start it here, yup. Okay.

MR. KENNEDY: Okay. So now let's keep – let's continue. We've got the significant public and media attention to this case right from day one, correct?

CPL BURKE: Yes.

MR. KENNEDY: You're aware of that, your team is aware of that, from day one?

CPL BURKE: Yes.

MR. KENNEDY: You're also, Sir, aware of the vicious and vitriolic attacks on Constable Smyth on social media.

CPL BURKE: Yes.

MR. KENNEDY: Also, those attacks were directed towards the RCMP at times, weren't they?

CPL BURKE: I'm not sure.

MR. KENNEDY: Or do you know? Pardon?

CPL BURKE: I'm not sure.

MR. KENNEDY: Okay. We've got the anonymous letter after the inquiry is called. Again, adds to the unusual nature of this.

CPL BURKE: Yes.

MR. KENNEDY: Did the anonymous letter indicate that the person was looking in through the window and saw Constable – or, excuse me, saw Mr. Dunphy go over to the couch and get the gun? Do you remember that?

CPL BURKE: I can't remember, actually. I –

UNIDENTIFIED MALE SPEAKER: Did you see that letter?

MR. SIMMONDS: No.

THE COMMISSIONER: Well, the letter is around somewhere. I know it – that'll be –

MR. SIMMONDS: The letter is around.

MR. KENNEDY: Mr. Simmonds, I don't want to –

THE COMMISSIONER: Has that been filed?

MR. SIMMONDS: Yes, it was filed. I filed the letter.

THE COMMISSIONER: All right. We can get that.

MS. O'BRIEN: Sorry, Commissioner, it's not an exhibit.

THE COMMISSIONER: Sorry?

MS. O'BRIEN: It's not an exhibit as of yet, but we can – we certainly have it and can make it an exhibit.

MR. KENNEDY: I think it should be an exhibit, yeah.

THE COMMISSIONER: Well, we'll get it for after lunch.

MR. KENNEDY: Okay.

THE COMMISSIONER: No reason why it shouldn't be –

MR. KENNEDY: I'll make a note to come back to that, Commissioner.

THE COMMISSIONER: Yeah.

MR. KENNEDY: So you don't remember what the content was, do you?

CPL BURKE: Not specifically, no.

MR. KENNEDY: So we'll come back to that after lunch.

CPL BURKE: Yes.

MR. KENNEDY: We have then the ASIRT review.

CPL BURKE: Yes.

MR. KENNEDY: Had that ever happened in a case you'd been involved in in the past?

CPL BURKE: No.

MR. KENNEDY: At some point yesterday – and again, my note wasn't clear, Corporal, Corporal Burke, but you'd indicated something about government officials either directing you or being involved in somehow or other. Do you remember some comment about government officials? I was left with the impression government officials were either directing or influencing the investigation.

CPL BURKE: Me?

MR. KENNEDY: In gen – you made some comment about government officials.

CPL BURKE: Oh, I think it was a lab request. It was requesting why it was taking the lab so long to produce their results.

MR. KENNEDY: That was coming from where, from government officials?

CPL BURKE: That was coming from me about the public pressure and I think I was, the Justice Minister had some – you know, it was in the media. It wasn't directed at me, personally, to have the investigation – you know, he was waiting for the results of our investigation to move on further.

MR. KENNEDY: So it appeared to you that there were meetings taking place with the Minister of Justice where police officers were present?

CPL BURKE: No, no, no, in the media.

MR. KENNEDY: In the media, okay.

CPL BURKE: In the media he –

MR. KENNEDY: Okay.

CPL BURKE: That's – yes.

MR. KENNEDY: So again, there appeared to you to be pressure from government officials.

CPL BURKE: Yes. Well –

MR. KENNEDY: Is that the way it appeared to you?

CPL BURKE: Yes.

MR. KENNEDY: Okay. So, Sir, when you put all of this together you know, not necessarily you're going to be sitting where you are today, but you knew that this case was going to be minutely scrutinized and potentially criticized. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Now, Sir, in terms of potentially making mistakes, that's something that can happen in any investigation, isn't it?

CPL BURKE: Yes.

MR. KENNEDY: There's no such thing as the perfect investigation, is it?

CPL BURKE: Correct.

MR. KENNEDY: Yeah.

What you do, Sir, as a sworn police officer is do the best you can. Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: You gather the evidence and you make a decision.

CPL BURKE: Yes.

MR. KENNEDY: Had you at any time or do you know if anyone within the RCMP had consulted the director of Public Prosecutions or the director of Public Prosecutions' office?

CPL BURKE: Sorry, you'll have to ask the question again.

MR. KENNEDY: Yeah, do you know if you or anyone in the RCMP had any time consulted the director of Public Prosecutions or someone in the director of Public Prosecutions' office seeking advice on how to conduct the investigation?

CPL BURKE: No.

MR. KENNEDY: Just so we're clear on this, it's my understanding that in our jurisdiction the police make a determination whether to lay a charge. That's your understanding, correct?

CPL BURKE: Yes. Yes.

MR. KENNEDY: The prosecutor or director of Public Prosecutions office or the Crown attorneys then determine whether or not there's a reasonable prospect of conviction.

CPL BURKE: Yes.

MR. KENNEDY: However, are you aware or do you know if there are times when police investigators can go and seek advice or assistance from the Crown attorneys or the director of Public Prosecutions prior to determining whether to lay a charge?

CPL BURKE: Yes.

MR. KENNEDY: Did that happen in this case?

CPL BURKE: No.

MR. KENNEDY: Again, was that partly because there was such intense scrutiny and such attention to the case that everyone was trying to make sure they did things absolutely and totally appropriately?

CPL BURKE: Yes.

MR. KENNEDY: There have been questions, Sir, not only in terms of preferential treatment but in terms of when to take a statement and I've read you Ms. Hughson's comment. But taking statements from individuals involved in investigations, homicide investigations, has to depend on a number – a lot of factors, right?

CPL BURKE: Yes.

MR. KENNEDY: There's the character of the individual who's being interviewed. Correct?

CPL BURKE: Yes.

MR. KENNEDY: You have to look at who you're dealing with.

CPL BURKE: Yes.

MR. KENNEDY: Are you dealing with a hardened criminal as opposed to a vulnerable individual who is under the influence of alcohol and/or drugs.

CPL BURKE: Yes.

MR. KENNEDY: There are times, Sir, when you provide details to witnesses. Correct?

CPL BURKE: Yes.

MR. KENNEDY: So that the provision of details to Constable Smyth in this particular case, that wouldn't have been the first time that that's ever happened in a witness interview, is it?

CPL BURKE: No.

MR. KENNEDY: No, because that can lead to further discussion. Correct?

CPL BURKE: Yes.

MR. KENNEDY: That can lead to someone potentially making a comment that he or she shouldn't, shouldn't make.

CPL BURKE: Yes.

MR. KENNEDY: Or can give you evidence.

CPL BURKE: Yes.

MR. KENNEDY: It can lead to contradictions or inconsistency in the person's version of events. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Some of the other techniques that are used, Sir; there can be holdback evidence. You can hold back something from public attention or giving to the media and not tell anyone so that – to see if the person will admit to something.

CPL BURKE: Yes. Yeah.

MR. KENNEDY: So there's all kinds of different things that can be done here. Correct?

CPL BURKE: Yes.

MR. KENNEDY: So when we say, or say when it's said that there's only one person who can tell us what happened – and that's correct in terms of Constable Smyth. But forensic evidence will also tell you a lot or can tell you a lot. Can it not?

CPL BURKE: Yes.

MR. KENNEDY: The RCMP has different investigative – all police forces have different investigative techniques available to them; forensic and scientific techniques.

CPL BURKE: Yes.

MR. KENNEDY: Police forces co-operate not only throughout Canada but throughout the world. Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: So if the RCMP went to the FBI or to INTERPOL you would get co-operation if requested. Correct?

CPL BURKE: Yes.

MR. KENNEDY: So let's look at some of the things that were done here. In this case, you knew from day one that ballistics would be important.

CPL BURKE: Yes.

MR. KENNEDY: Because Constable Smyth says: This is what happened; this is where I was when I fired the gun.

CPL BURKE: Yes.

MR. KENNEDY: So ballistics or scene re-creation or a combination of both would tell you whether or not he's telling that version of the events is correct.

CPL BURKE: Yes.

MR. KENNEDY: So when he's telling you what happened, when he's doing his re-enactment you know, as an investigator, that this is something that can be checked.

CPL BURKE: Yes.

MR. KENNEDY: Because the trajectory of the bullets will tell you where the bullets, or give you a good idea of where the bullets are fired from.

CPL BURKE: Yes.

MR. KENNEDY: The scene re-creation can tell you whether or not what the individual says is consistent with what they find at the scene.

CPL BURKE: Yes.

MR. KENNEDY: In fact, Dr. Avis, before he did the autopsy, wanted to know what Constable Smyth had to say about where the bullets were fired. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Did you find anything inconsistent in terms of – or was there anything discovered inconsistent between what Constable Smyth told you as investigators and what the ballistics or scene re-creation people found?

CPL BURKE: No.

MR. KENNEDY: No.

He had no idea at that point – or let me put it to you this way, and we are going to hear from these other people, but that's something that you're holding in your pocket as an investigator knowing that this will tell us a lot.

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

Early in the investigation you had discussed whether or not a polygraph could be used. If I understand, it was around the 8th or the 9th that you have discussions with Staff Sergeant Townsend about the polygraph. Am I right on that?

CPL BURKE: Yes, I tasked that to Corporal Henstridge – Sergeant Henstridge at the time.

MR. KENNEDY: Sir, you had asked or there had been questions as to whether or not there was any blood spatter.

CPL BURKE: Yes, that was something that Sergeant Saunders looked into.

MR. KENNEDY: It's a science – it's a part (inaudible) or a forensic review which can tell you – sometimes can tell you a lot.

CPL BURKE: Yes.

MR. KENNEDY: The issue of touch DNA had been explored and for whatever reason, wasn't utilized.

CPL BURKE: Yes.

MR. KENNEDY: The fingerprinting of the gun was attempted.

CPL BURKE: Yes.

MR. KENNEDY: But couldn't get fingerprints.

CPL BURKE: Yes.

MR. KENNEDY: The gun residue testing was done –

CPL BURKE: Yeah.

MR. KENNEDY: – on Mr. Dunphy's clothes.

CPL BURKE: Yes.

MR. KENNEDY: Now, that became important, did it not? Because if a gun was fired within 76 centimetres, I think, or 30 inches, then there would be gun residue left on the clothes. Do you understand that to be correct?

CPL BURKE: Yes.

THE COMMISSIONER: What's your distance there?

MR. KENNEDY: I said 70 centimetres or 36 inches, Commissioner – or 30 inches, excuse me, I think it's – that's what I read yesterday somewhere.

CPL BURKE: I just wanted to – something to clear it up.

MR. KENNEDY: Sure.

CPL BURKE: It's – gunshot residue and firearm residue is two different things.

MR. KENNEDY: Okay. Please, if you could explain, yeah.

CPL BURKE: I –

MR. KENNEDY: Gunshot residue would be on the hands of the person who fires the gun, is that correct?

CPL BURKE: Yes.

MR. KENNEDY: Okay.

CPL BURKE: And then the lab tested for firearm residue, which means –

MR. KENNEDY: Okay.

CPL BURKE: That's where they got that distance.

MR. KENNEDY: So if Constable Smyth were telling you I was six feet away when I fired the gun and there was firearm residue on Mr. Dunphy's clothes, you know there's something –

CPL BURKE: Yes.

MR. KENNEDY: – gone astray, isn't there?

CPL BURKE: Yes.

MR. KENNEDY: That's the kind of things you're looking for, isn't it?

CPL BURKE: Yes.

MR. KENNEDY: As put to you by Commission counsel and she referred to, I think, by the statement of Mr. Barr, you're looking for anything that either refutes or corroborates what Constable Smyth is saying.

CPL BURKE: Yes.

MR. KENNEDY: So are you only looking for corroboration or are looking for anything which makes you question his credibility?

CPL BURKE: Yes, both.

MR. KENNEDY: Yeah.

So all of these allegations of bias, Sir, and all the allegations that have been made against you, is it fair, do you think, that you didn't – to say that you didn't take the steps required to do a fulsome investigation?

CPL BURKE: I think the investigative steps we took and the tests and the analysis we had done would show – you know, corroborate or refute any statements that we obtained in the investigation.

MR. KENNEDY: So if I could ask to have P-0003 brought to the screen, please. If I could ask you to go – it would be page 35 –

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. KENNEDY: Okay, sorry, go back, the paragraph that begins The RCMP investigation. Right there, please.

“The RCMP investigation was comprehensive in nature, as outlined above.”

Do you believe, Sir, that your investigation was comprehensive?

CPL BURKE: Yes, I do.

MR. KENNEDY: “Investigators obtained many statements in order to gain understanding and insight into the event.” Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: “Due to the fact that there were no independent witnesses, investigators relied heavily on forensic analysis.”

CPL BURKE: Yes.

MR. KENNEDY: So it's not as simple that you took what Constable Smyth had to tell you and accepted that, absolutely, is it?

CPL BURKE: No.

MR. KENNEDY: In fact, the allegation that you accepted it right from the beginning, what he had to tell you, that's not correct either, is it?

CPL BURKE: No.

MR. KENNEDY: “The combination of the work of the Chief Medical Examiner's Office, the RCMP Forensic Identification Section, RCMP Forensic Laboratory, RCMP Subject Matter Expert for Use of Force, RCMP Crime Analysis Section and an external/independent review of the shooting evidence by Bulletproof Forensic Consulting, led to no evidence that disputes the statements of Cst. SMYTH.” That's what you say.

CPL BURKE: Yes.

MR. KENNEDY: No evidence that disputes the statements of Constable Smyth.

CPL BURKE: Yes.

MR. KENNEDY: You go on in the next paragraph talking about the gun. “There was no evidence found that a struggle occurred at the scene.” You see that’s in –

CPL BURKE: Yes.

MR. KENNEDY: Okay.

Now the glasses, we’ve heard about the glasses. I’m not going to go through it in detail, but do you know if in the autopsy report, Constable Avis – excuse me, Dr. Avis, makes any findings that there were any abrasions, scratches, bruises, or cut marks on the face of Mr. Dunphy?

CPL BURKE: No.

MR. KENNEDY: There were none found were there?

CPL BURKE: No.

MR. KENNEDY: As an investigator, if there was a struggle and glasses were either hauled off or whatever is alleged to have occurred, you would expect to find marks on the face of the individual, wouldn’t you, of the deceased?

CPL BURKE: Yes.

MR. KENNEDY: Page 34, the last paragraph. Oh, excuse me, I want you to go back to that last sentence there. “There was no evidence at the scene that casts any shadow or doubt over the version of events offered by Cst. SMYTH.”

CPL BURKE: Yes.

MR. KENNEDY: Then – do you stick by that statement, Sir?

CPL BURKE: Yes.

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

CPL BURKE: Yes.

MR. KENNEDY: That’s your conclusion.

CPL BURKE: Yes.

MR. KENNEDY: Sir, you didn’t say there’s some evidence or there’s, there’s questionable, there are issues here but we don’t have enough to make reasonable grounds. You say there’s no evidence, don’t you?

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

Sir, we've now also heard, again today – I'll go through this in some detail with you, that Mr. Dunphy had come home, he'd had a good day, he didn't have a history of violence which everyone concedes, that, you know, he was lying back, he invited Mr. Dinn down; at 1:46 he sent a text asking Mr. Dinn if he wanted to drop by – presumably to smoke marijuana, although I think the text referred to a load of wood, which appears to relate to marijuana.

Sir, Mr. Simmonds says to you why would Mr. Dunphy pull a gun on Joe Smyth? I'd ask you that – the, I don't know if obverse is a word, the opposite of that question: Why would Constable Smyth shoot Donald Dunphy for no reason? Can you offer any explanation for that?

CPL BURKE: No.

MR. KENNEDY: No. Sir, you had seen or were aware of Mr. Dunphy's social media comments in the previous months?

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

You had seen, are you aware of the ones on March 3 and 4 where he's talking about injured workers carrying guns, and injured workers should commit suicide and things like that?

CPL BURKE: Yes, I had, Constable Nippard did a task on the media history, social media history.

MR. KENNEDY: Yeah. You were aware that Workers' Compensation were following his tweets?

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

You were aware, Sir, that in those particular social media exchanges he was expressing discontent. Not only with his long-standing grievance with Workers' Compensation but with government officials. Were you?

CPL BURKE: Yes.

MR. KENNEDY: Particularly Premier Paul Davis and Deputy Premier Steve Kent.

CPL BURKE: Yes.

MR. KENNEDY: Did you become aware during this investigation that in fact there had been an ongoing exchange between Mr. Dunphy and Deputy Premier Kent when he was minister of Health trying to help Mr. Dunphy?

CPL BURKE: Yes.

MR. KENNEDY: And were you aware Sir, that that exchange, or those attempts to assist, when they went nowhere, led Mr. Dunphy to criticizing Mr. Kent?

CPL BURKE: Yes.

MR. KENNEDY: So we've got Mr. Dunphy criticizing government officials. We've got Mr. Dunphy in the proceeding months – I think we can describe some of the tweets – would you agree that they're disturbing?

CPL BURKE: Yes, it all depends on your interpretation of disturbing, I guess.

MR. KENNEDY: Okay. Well, I'd say disturbing –

THE COMMISSIONER: I couldn't hear that last remark.

CPL BURKE: It all depends on your interpretation of disturbing.

MR. KENNEDY: Okay. So when you see some of the ones that we talked about and, again, we can bring them up if you want to see them to refresh your memory, about injured workers carrying guns and there's references to murder and suicide, not again him going to do this, but does that –

CPL BURKE: Yes.

MR. KENNEDY: They're disturbing comments, aren't they?

CPL BURKE: I would say they're disturbing, yes.

MR. KENNEDY: Yeah.

Then we have Meghan Dunphy indicating that her father could get excited.

CPL BURKE: Yes.

MR. KENNEDY: Okay. Remember that? That in fact he could go off pretty quick.

CPL BURKE: Yes.

MR. KENNEDY: That he would wave his arms, jump, not necessarily jump around; I don't mean that, but wave his arms and could be quite animated –

CPL BURKE: Yes.

MR. KENNEDY: – in his discussion. That he was quite vocal in terms of whoever was in the room or the house, whoever was there? Correct?

CPL BURKE: Yes.

MR. KENNEDY: So then he's called a puppet or he refers – Constable Smyth says he refers to him as an effing puppet or an arm of government or something like that. Remember those terms?

CPL BURKE: Yes.

MR. KENNEDY: And Ms. Dunphy says, yeah, I can see my father saying that. Correct? Do you remember those?

CPL BURKE: I remember the comments that Constable Smyth said. I don't know if Ms. Dunphy said those. I don't remember that part.

MR. KENNEDY: So Mr. Simmonds says to you: Well, why would Donald Dunphy take out a gun?

Well, oftentimes in investigations, Sir, whether it be homicide or just criminal investigations in general, there's not always explanations for why people act the way they do, is there?

CPL BURKE: Yes.

MR. KENNEDY: That people can act out of character. They can act on the spur of the moment, especially if confronted with circumstances they don't like. Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: So when we have all of these circumstances put here, a volatile individual with a long-standing grievance against an agency who is making comments towards government, you put that in with Colin Dinn's comment, again, very – whatever it meant that let 'em come. Or if they're going to come, let 'em come.

CPL BURKE: Yes.

MR. KENNEDY: I'll be ready for them. Then is that not – does that not make sense that Mr. Dunphy, in fact, on that date in question, acted exactly as Constable Smyth said he did?

CPL BURKE: It didn't cause me concern that that was the version that Constable Smyth gave. You know, when I looked at the history of Mr. Dunphy and some of the comments he made, I didn't think it was farfetched to believe that the gun was moved or obtained by Mr. Dunphy.

MR. KENNEDY: Yeah. Because what you got to do in an investigation, you also have to apply common sense, don't you?

CPL BURKE: Yes.

MR. KENNEDY: You also have to look at it and say, well, we'll never absolutely know what happened when there's only two people, but what we can try to do is determine as best we can what happened.

CPL BURKE: Yes.

MR. KENNEDY: And in this case you concluded, the investigative team is what your report says, concluded that there was no reason to dispute Constable Smyth's versions of events. Correct?

CPL BURKE: Yes.

MR. KENNEDY: This is after a 17-month investigation with a review by outside or an independent team and ASIRT, with intense scrutiny and significant public attention and media attention. Correct?

CPL BURKE: Yes.

MR. KENNEDY: So when you say the investigative team reached these conclusions, and I think that's the last paragraph of your report, that's what you say: "It is the findings of the RCMP investigative team"

Who else was on the investigative team that would have assisted or who would agree with those findings?

CPL BURKE: Yeah, it would have been the Major Case Management Triangle.

THE COMMISSIONER: Sorry, who did you say?

CPL BURKE: The Major Case Management Triangle, which was Sergeant Kent Osmond as team commander and myself as primary investigator, and the file coordinator, Sergeant Dion Foote.

MR. KENNEDY: Okay, and there's a – sorry.

CPL BURKE: And the team goes on from there, I guess. It's not only this triangle but the team that we use to investigate the incident.

MR. KENNEDY: And, Sir, although homicide investigations can be complex, they can also be simple. But you still take extensive steps, don't you?

CPL BURKE: Yes.

MR. KENNEDY: In this particular case, you had no eyewitness identification issues to deal with. There were no witnesses other than the anonymous letter saying they saw what happened.

CPL BURKE: Yes.

MR. KENNEDY: That can add, that can be tricky in terms of your investigation, can it not?

CPL BURKE: Yes.

MR. KENNEDY: There's no – it's not the nature of a sexual assault where there's DNA and DNA can get complicated if there's mixed samples or degraded samples et cetera. Correct?

CPL BURKE: Yes, correct.

MR. KENNEDY: There were no confidential informants, agents or undercover operators which complicate investigations.

CPL BURKE: No.

MR. KENNEDY: There are no wiretaps involved.

CPL BURKE: No.

MR. KENNEDY: In fact, this case, I don't think there was even any search warrants, are there?

CPL BURKE: No.

MR. KENNEDY: Have you ever been involved in a homicide investigation where there are no search warrants?

CPL BURKE: It all depends, I can't say for certain. But it's usually a technique that's utilized.

MR. KENNEDY: But you didn't have to search in this case because Constable Smyth was consenting to whatever you asked for, correct?

CPL BURKE: Yes.

MR. KENNEDY: And Ms. Dunphy – again, to be fair – consented to Mr. Dunphy's phone –

CPL BURKE: Yes.

MR. KENNEDY: – being provided.

So, Sir, when it's – as an investigator, when it's said to you that this case is all about what Joe Smyth has to say, that's not quite correct is it because there was forensic evidence which plays a significant role. Do you agree with me?

CPL BURKE: Yes.

MR. KENNEDY: The autopsy can also play a role.

CPL BURKE: Yes.

MR. KENNEDY: Again, the autopsy can be a combination of – it depends how you look at it, and I guess we'll hear from Dr. Avis. Although there's signs in terms of – there's also the interpretation of injuries, correct?

CPL BURKE: Yes.

MR. KENNEDY: Did Dr. Avis express any concerns to you in terms of what he found or issues that could arise that you should investigate further?

CPL BURKE: No.

MR. KENNEDY: And then, Sir, you went – in this particular case, I understand that you did something that's not usual is that the 3-D scene re-creation?

CPL BURKE: Yes.

MR. KENNEDY: And that's not a usual technique, is it?

CPL BURKE: No.

MR. KENNEDY: No. So – I was going to call you his Lordship – when the Commissioner – sorry, Commissioner. When the Commissioner pointed out earlier, that in terms of the length of the investigation, part of that was because you were trying as an investigative team to cover off everything, weren't you?

CPL BURKE: Yes.

MR. KENNEDY: Because it already – and this was a quote also that you had made, and I'm a bit surprised by this, but I just want to get clarification or get your point on this, is that you refer to the fact that there – even before a determination is made, whether there is charges, that people are calling for an inquiry? Did you say that yesterday?

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

MR. KENNEDY: Okay. So no, there wouldn't have been anyone calling for – or do you know if anyone was calling for an inquiry prior to the determination being made as to whether or not there were charges going to be laid?

CPL BURKE: Yes.

MR. KENNEDY: There were or weren't people calling for an inquiry?

CPL BURKE: I heard the term inquiry before we made a determination there are no charges going to be laid.

MR. KENNEDY: So again, my point is that at some point you or members of your team, if you didn't lay a charge, could be expected to be sitting exactly where you are today. Correct?

CPL BURKE: Yes.

MR. KENNEDY: So, Constable, or Corporal Burke, as an experienced investigator are you gonna open yourself and your other officers – you're gonna open yourselves up to those kinds of criticisms or are you gonna try to do the best job you can?

CPL BURKE: The best job we can.

MR. KENNEDY: Yeah.

So that early on, Sir, and I'm not going to try to – but I would suggest it would've been prudent to give the caution but you've given your explanation for that, have you, Sir?

CPL BURKE: Yes.

MR. KENNEDY: I think ASIRT indicated – and again, I would suggest it's sensible – that the informality of the interview is not really a good thing, is it? If you had to do that again you wouldn't do that the same again, would you?

CPL BURKE: Probably not, no.

MR. KENNEDY: No, not probably no. Would you do the same thing again?

CPL BURKE: No.

MR. KENNEDY: No.

But, Sir, there's no question that within a short period of time after this investigation commenced, the RCMP knew, and you knew as the primary investigator, that you had to dot every i and cross every t. Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: Sergeant Osmond, did he appear to be of the same viewpoint?

CPL BURKE: Yes.

MR. KENNEDY: Then you had Inspector Pat Cahill. How was – what was Inspector Cahill's role here? We've talked about the Major Case Management, but what was Inspector Cahill's role?

CPL BURKE: Inspector Cahill was the IC of Major Crime in B division.

MR. KENNEDY: And at one point, Sir, we've got – I think it's Superintendent Sachsse. How do you pronounce her name, sorry?

CPL BURKE: Sachsse.

MR. KENNEDY: What's her role? Is she the federal policing officer or the CROPS?

CPL BURKE: She – at the time she –

MR. KENNEDY: Boland is CROPS, right?

CPL BURKE: At the time, I think she was acting as the officer for Support Services. And she was a federal officer –

MR. KENNEDY: General policing.

CPL BURKE: – and now she's a Criminal Operations Officer.

MR. KENNEDY: Okay. Because if we talk about the way that the RCMP is structured, we've gone through Major Case Management, we would have – is it Assistant Commissioner Harding, she was at the top?

CPL BURKE: Yes.

MR. KENNEDY: Then we would have had the Criminal Operations Officer, was that Chief Superintendent Boland?

CPL BURKE: Yes.

MR. KENNEDY: Then we had the federal policing officer, who would that have been during this investigation?

CPL BURKE: That was Superintendent Sachsse.

MR. KENNEDY: Then we come down a bit further and now we're going to have superintendents, correct?

CPL BURKE: Yes.

MR. KENNEDY: Numbers, Sir. How many superintendents?

CPL BURKE: Inspectors.

MR. KENNEDY: Okay. No superintendents?

CPL BURKE: She was the superintendent at the time.

MR. KENNEDY: Okay.

CPL BURKE: Chief Superintendent was Andrea Boland.

MR. KENNEDY: Yeah.

CPL BURKE: She was the superintendent, and there's a superintendent in the Operations and Support Services, which goes above Major Crime. Major Crime is under that umbrella, and I think Superintendent Sachsse was acting in that role at the time of this investigation.

MR. KENNEDY: So how does Inspector Cahill fit into it, now superintendent? How did he fit in at the time?

CPL BURKE: He would fit in under Superintendent Sachsse.

MR. KENNEDY: Sir, going back to these reports, and I think your general report, there's an indication that as early as the day after, or within a couple of days of the death, of Mr. Dunphy's death, that Chief Superintendent Boland is present at briefings.

CPL BURKE: Yes.

MR. KENNEDY: As we move through this, we've got all of the senior officers who are present at meetings.

CPL BURKE: Yes.

MR. KENNEDY: Is that usual in a homicide investigation in this province that you get the highest ranking RCMP officers in the province taking a direct and personal interest in an investigation?

CPL BURKE: I'm sure they take an interest in our investigations –

MR. KENNEDY: (Inaudible.)

CPL BURKE: – but they're not necessarily involved in meetings or briefings.

MR. KENNEDY: Yeah, let me rephrase that. I'm sure that they take an interest but, you know, in terms of their – they're not present and directing like they were in this case, are they?

CPL BURKE: No.

MR. KENNEDY: No.

Again, makes the case very unusual, doesn't it?

CPL BURKE: Yes.

MR. KENNEDY: Sir, we heard again, Mr. Simmonds today referred to the gun; whether the gun could be fired or not on the date in question. That's not the issue for section 25 of the *Criminal Code*, is it?

CPL BURKE: No, it isn't.

MR. KENNEDY: Is a police officer expected to say: Well, is that gun loaded, Sir? Or, you know, what are you doing with that?

That's not how this works, is it?

CPL BURKE: No.

MR. KENNEDY: In your use-of-force training, you are trained if faced with grievous bodily harm or a serious – is that the term used? I'm trying to remember the term used.

CPL BURKE: Death or grievous bodily harm.

MR. KENNEDY: Yeah. Then you are trained to react.

CPL BURKE: Yes.

MR. KENNEDY: And to fire until the threat no longer exists.

CPL BURKE: Yes.

MR. KENNEDY: So, Sir – and again, we'll come to the independent observer shortly, I'm not going to spend a lot of time on him. But whether or not there are two shots fired or three shots fired, is that – do you take that into account in making a determination under section 25?

CPL BURKE: No.

MR. KENNEDY: No.

Okay, yes, perhaps if we could – we could move to this now, Commissioner, just before lunch. The –

THE COMMISSIONER: You mean my efficient team has provided you with the anonymous letter. Is that it?

MR. KENNEDY: Yes, very efficient, Commissioner.

If I could –

MS. O'BRIEN: Sorry, before Mr. Kennedy –

THE COMMISSIONER: (Inaudible.)

MR. KENNEDY: (Inaudible.)

MS. O'BRIEN: – starts his questioning, I just ask to have them both entered as Exhibits P-0555 and P-0556.

Thank you.

THE COMMISSIONER: Okay. P-0555 –

MR. KENNEDY: Okay, if we could bring P-0555 –

THE COMMISSIONER: – and P-0556. Okay, which is in chronological order, is it?

MR. KENNEDY: Yeah, 0555 would be the letter itself.

THE COMMISSIONER: Okay.

MR. KENNEDY: And this is – I’m going to use this as another example of how thorough the RCMP investigation was or was trying to be.

So this letter is brought to your attention. The inquiry has been called. The reports are ready to be released, if I remember, Commissioner, and they had to be delayed somewhat as a result of the anonymous letter.

You’ll see Ms. Breen: Don’t forget witness in the window at Don Dunphy’s – next page, sorry, Madam Clerk. “Don’t forget witness in the window at Don Dunphy’s home on the day he was shot by Joe. There was no scuffle between Don or Joe. The gun Don got from the room was still on” the table when Joe pulled his gun out.

Don was about six to eight feet from –

UNIDENTIFIED MALE SPEAKER: Joe.

MR. KENNEDY: – Joe –

UNIDENTIFIED FEMALE SPEAKER: That I could see.

MR. KENNEDY: – that I could see and “Don looked towards the window I know he saw me and Joe was turning his head and I ran in the woods I was about 50 ft from Don’s when I heard 4 shots fast and when Don went towards the room Joe unhooked the ...” – can anyone read that? The –

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

THE COMMISSIONER: Scrip, is it, or zip?

MR. KENNEDY: – of his gun –

UNIDENTIFIED MALE SPEAKER: Clip, I think it says.

THE COMMISSIONER: What?

MR. KENNEDY: – the clip of his gun and was talking to someone on his cell. Joe checked the gun –

UNIDENTIFIED MALE SPEAKER: Don came from the room.

MR. KENNEDY: – and laid on the table. Joe had – I can’t – black gloves on. Joe knows me from the –

UNIDENTIFIED MALE SPEAKER: Past.

MR. KENNEDY: – from the past. I visited Don almost every morning by boat in leaving –

UNIDENTIFIED MALE SPEAKER: I’m leaving the province because I’m scared Joe –

MR. KENNEDY: I’m scared Joe saw me and I know what he could do. Paul Davis is the one at fault with Joe on Don’s death. Sorry, I can’t –

UNIDENTIFIED FEMALE SPEAKER: Help yet.

MR. KENNEDY: – help.

Now, did this letter come to you – whatever way it reached you, did it come to you?

CPL BURKE: Yes.

MR. KENNEDY: Or did it come to you directly or to one of the other officers, I guess my question is.

CPL BURKE: It went to – I think it went to the CROPS officer.

MR. KENNEDY: So this is pretty serious stuff. If this – if this is true it has a significant impact on your investigation, doesn't it?

CPL BURKE: Yes.

MR. KENNEDY: What was written in this letter is written in a way, makes it seem like it's certainly true, doesn't it? It was written with a sense of authority and I'm there and I see this happening.

CPL BURKE: Yes.

MR. KENNEDY: It's mailed from Port aux Basques.

CPL BURKE: Yes.

MR. KENNEDY: Now, when you got that letter or the RCMP got that letter, what did you do with it? Did you just throw it aside and say, nah, this doesn't make any sense; we've already made our decision. Or did you investigate it?

CPL BURKE: We investigated it.

MR. KENNEDY: How many witnesses were spoken to in relation to this?

CPL BURKE: Maybe 12, 15.

MR. KENNEDY: Over what period of time did the investigation take place?

CPL BURKE: Within a week.

MR. KENNEDY: There was some urgency because of the –

CPL BURKE: Yes.

MR. KENNEDY: – getting the reports out. The inquiry was – was called, right?

CPL BURKE: Yes.

MR. KENNEDY: Okay.

THE COMMISSIONER: We were ready to release –

MR. KENNEDY: Yeah, ready to release the reports, Commissioner.

THE COMMISSIONER: – the reports.

MR. KENNEDY: Okay.

So in terms of conducting this investigation, was there anything found that could lead credence to, even an ounce of credence to anything that was in this letter?

CPL BURKE: No.

MR. KENNEDY: The coming by boat, every day?

CPL BURKE: Yeah, that didn't – there's no way to land a boat anywhere near where Don Dunphy lived. And if he went by boat the day he witnessed the event, the body of water in front of Mr. Dunphy's residence was frozen.

MR. KENNEDY: And it appears to say that Don, being Mr. Dunphy, had the gun on the table. Is that correct?

CPL BURKE: Yes, I think so.

MR. KENNEDY: Yeah.

So, Sir, in terms of – if there had been anything in that letter which turned out to be accurate, would you have reassessed? Would the RCMP have reassessed their investigation?

CPL BURKE: Yes, of course.

MR. KENNEDY: Okay.

Was there anything in there that affected anything?

CPL BURKE: No.

MR. KENNEDY: No. In fact, the information there, I think you indicated yesterday, either was available in the media or was of somewhat general knowledge.

CPL BURKE: The part about the four shots –

MR. KENNEDY: Yeah.

CPL BURKE: – that was available in the media.

MR. KENNEDY: Now, where did the four shots that was available in the media – how did that get out there?

CPL BURKE: How was it raised to the media?

MR. KENNEDY: Yeah.

CPL BURKE: It looks – I researched it and it was an interview that Justice Riche did.

MR. KENNEDY: Justice Riche. So basically the RCMP didn't release that information.

CPL BURKE: No.

MR. KENNEDY: Did you see any media reports prior to Justice Riche's interviews where there was reference to four shots?

CPL BURKE: No.

MR. KENNEDY: No.

Because that's the kind of thing you would hold back. That's the kind of thing you wouldn't tell people necessarily. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

Do you know when this anonymous letter was received?

CPL BURKE: Some time in November.

MR. KENNEDY: Do you know when Justice Riche made his comments publicly?

CPL BURKE: That would have been sometime in September maybe.

MR. KENNEDY: Do you know if Justice Riche had a confidentiality clause in his agreement with the police?

CPL BURKE: Yes.

MR. KENNEDY: Commissioner, I'm going to go in – I'm going to go into another area. I'm not going to be as long as I thought I was going to be, so this perhaps might be a –

THE COMMISSIONER: Yes, it's almost 12 – well, we're only at – I think we're right on 12:30, the right time to break.

All right, we'll break for lunch until 1:30.

How long do you think you might be, Mr. Kennedy?

MR. KENNEDY: I expect, Commissioner, that it's going quicker than what I thought, so a half-hour, I would think, probably at the most.

THE COMMISSIONER: Good, nice to hear.

Thank you.

Okay, we'll recess.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Okay, Mr. Simmonds (inaudible).

MS. O'BRIEN: Thank you, Commissioner.

Before the cross-examination begins, we have one new exhibit to seek to have entered. That would be Exhibit P-0557.

THE COMMISSIONER: Okay, who – Mr. Kennedy, you have some –

MR. KENNEDY: Yes, Sir.

Excuse me, Madam Clerk, if I could have Exhibit P-0312 brought to the screen, please? This is your General Report, Corporal Burke, that's approximately 20 pages long.

And if we could go to, I guess it would be – my page 5, but I guess it would be page 6.

MS. SHEEHAN: Could you turn your mic on, Mr. Kennedy, please?

Thank you.

MR. KENNEDY: Page 6?

You may or you may not be able to answer this for me, Corporal, but if not, we're going to hear from Constable Nippard.

Okay, see under Constable Nippard. This is now – so we're on April 9. So four days after the incident. "Paramedics were interviewed and both noted obvious injury to forehead. They noted the position of the arms of the deceased and the fact that the firearm at scene was a bolt action and that the gun was propped up on something."

Do you know where you got that from?

CPL BURKE: Yeah, this would have been a briefing, like a round-table discussion about the completion of tasks that day or the day previous.

MR. KENNEDY: So are you noting what Constable Nippard had said or this is review of statements taken by Constable Nippard, what is it?

CPL BURKE: It would be a round-table discussion and each investigator would have a chance to detail their completion of tasks previous to the meeting or previous to the briefing, and this is what Constable Nippard would have told me or told the investigative team regarding interviews with paramedics.

MR. KENNEDY: Okay. If I can now ask you to go to – it will be April 30, which would be page 13. Okay, when I see it there in brackets, I take it that that's your note. That's a note or an addition that you put in, is it?

CPL BURKE: I think so.

MR. KENNEDY: Sorry?

CPL BURKE: I think it's a note that I would have put in there.

MR. KENNEDY: So basically when you say this will 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 known location of one would have been behind the couch. Essentially you are referring to – what I will refer to as the staging theory.

CPL BURKE: Yes, I believe, yes.

MR. KENNEDY: So the police, you were aware of this allegation of staging the scene early in the investigation, correct?

CPL BURKE: Yes.

MR. KENNEDY: Is it something that you addressed your mind to throughout the investigation?

CPL BURKE: Yes.

MR. KENNEDY: We're going to come to this a bit more in a second. If I could now ask you to look at July 27, this would be page 18 – if I can just go down a little bit, the last, both, okay. You see this is in reference to retired Justice Riche – I'm not going to discuss this; you've discussed this in detail, and we'll be hearing more later. But your note here is both Justice Riche and the member agree that a firearm was presented by Dunphy, regardless of its origin.

CPL BURKE: Yes.

MR. KENNEDY: So is that – did retired Justice Riche say that day that no matter what happened here, a firearm was presented by Dunphy?

CPL BURKE: Yes.

MR. KENNEDY: Okay. So you both agreed, you didn't appear – you didn't agree on a lot of the other things there but you agreed on that, that a firearm had presented by Mr. Dunphy?

CPL BURKE: Yes.

MR. KENNEDY: If I could ask you to go now to the next page, which would be page 19, and I would it take it that this is where the first hint of a cover up or a staging theory – this comes from the first statement of Meghan Dunphy on April 8.

This is – you've – there are excerpts – is that correct, first?

CPL BURKE: Yes, I'm just – can you repeat the question?

MR. KENNEDY: Yeah, my – the first, what I'm going to refer you to now or you have excerpts in your General Report –

CPL BURKE: Yes.

MR. KENNEDY: – from the statement of Meghan Dunphy on April 8, 2015. I’m suggesting to you that this is where the first hint or possibility of a staging-the-scene scenario is raised, correct?

CPL BURKE: Yes.

MR. KENNEDY: So three days into the investigation, you were aware, the police were aware, that this allegation was out there?

CPL BURKE: Yes.

MR. KENNEDY: And I think by this stage, has, has Ms. Dunphy retained legal counsel by this stage?

CPL BURKE: In August?

MR. KENNEDY: This is April.

CPL BURKE: Yes.

MR. KENNEDY: Okay. Now, in April 8, it’s within the following week that the glasses and the request for an out-of-province police force is made, correct?

CPL BURKE: On April 8 –

MR. KENNEDY: Within a week of April 8 –

CPL BURKE: Yes.

MR. KENNEDY: – the request for a out-of-province police force alleging tunnel vision and the glasses being significant evidence, that’s made within a week?

CPL BURKE: Yes.

MR. KENNEDY: So early in this investigation you’re aware of the tunnel-vision theory of Ms. Dunphy and her counsel.

CPL BURKE: Yes.

MR. KENNEDY: And also the staging or cover-up theory.

CPL BURKE: Yes.

MR. KENNEDY: Okay, if we could just go through this a little bit, please.

So this is the document here, and I’m just referring to this, we can go to the statement if need be, but these are the excerpts you use and this is where Ms. Dunphy indicates that when she moved the couch the gun was flat.

Go down a little bit further, please. Okay. See right here, just down a little bit more, Clerk, please. Right here. “When I moved the couch the gun was flat like say I didn’t lift the couch there was no need to lift down the dads he wasn’t particular about like you know what I mean.” So this is the, where she tells the police that the gun was behind or under the couch.

CPL BURKE: Yes.

MR. KENNEDY: Then if we go – you see the next line: It probably just kicked out the couch. It was kind of stuck under the couch.

So the last place that Meghan Dunphy saw the firearm was under the couch, behind the couch. Correct?

CPL BURKE: Yes.

MR. KENNEDY: And this would have been, I think she said between January and early February, when her father was in hospital.

CPL BURKE: Yes.

MR. KENNEDY: If we can go to the next page, please, Madam Clerk.

Okay, keep going down a little bit further. Just a little – okay.

You see there in the fourth Dunphy – and we should make clear that these are excerpts of Ms. Dunphy’s longer statement of April 8, correct?

CPL BURKE: I think I cut and paste –

MR. KENNEDY: Yup

CPL BURKE: – a portion of the statement.

MR. KENNEDY: “So I did see that and it was behind the couch.”

Then the last sentence is – so Ms. Dunphy says: “So my issue thinking now is just you know the way I see it I know my dad where he sat I know if the officer went in there he sat so I’m just wondering how my father managed to go behind the couch and get the gun if per say that’s how it went.”

So the scenario has been put forward that her father actually got up and retrieved the gun?

CPL BURKE: Yes.

MR. KENNEDY: The next two more Dunphy’s: So “he pulled up in the driveway and then the officer who was parked down the road just must have come right behind him. So he invited him in openly and then within 15 minutes like I can’t understand how my dad managed to get up and go behind the officer where he was sitting and haul out this gun and then point it at you.”

So again she reiterates in this statement that her father must have went and got the gun as opposed to having the gun somewhere else, correct?

CPL BURKE: Yes.

MR. KENNEDY: Now, this is where I would suggest to you Ms. Dunphy first points out she has a lot of questions. She points out the issue of what could have happened and this is – “It’s never been in another place,” the stick, she says. “My dad didn’t clean up before this you know he got up enough time to get in the shower brush his teeth,” et cetera. “So you know it’s not like he planned everything out. So you know could it have been this stick that he was getting at,

reaching for and then you know if this cop had seen that gun, and I'm not saying he's bad or anything like that ... but you know my dad could have pulled the stick on him and then if he sees the gun well how did you know he didn't put the gun there."

So this is now clearly put out to you on April 8 that there was the police officer – something happened other than what the police officer said and that he planted the gun. That's what she –

CPL BURKE: Yes.

MR. KENNEDY: – seems to be suggesting there. One suggestion she is making is that her father could have been reaching for the stick, could have taken the stick out and then Constable Smyth could have mistaken it for a gun. That's what she's saying, is it?

CPL BURKE: Yes.

MR. KENNEDY: Okay.

If I could now ask you ...

I was provided with a copy of Ms. Dunphy's statement. Commissioner, I'm just trying to – not a lot of room here. I'm just trying to find it.

If we could now bring up exhibit P-0037.

And if I could ask, Madam Clerk, if we could go to page 10 to begin with. So go down a little bit, please.

So Ms. Dunphy at line 29: "Like I know, you ... first thing my dad would do is if buddy kept repeating himself saying well you threatened the Premier or you done this..."

"Hmm."

"...and dad would say no I didn't and then he'd say well you did or if he kept repeating himself and telling my dad that he done something that he didn't feel he done."

"Hmm, hmm."

"Well that would ... set him off his head."

"Yeah."

"He would of got really up in arms and he would of eventually told buddy to get the" eff "out."

See that?

CPL BURKE: Yes.

MR. KENNEDY: So were you aware of those statements in that same interview that Ms. Dunphy had given where she talked about the stick and the potential –

CPL BURKE: Yes.

MR. KENNEDY: – planting of the gun?

Just a couple more quick references on this, Sir.

At page 20 on lines 21 to 25.

No, page 20, sorry. Page 21, sorry about that. It's the top page, the green number. Go down a little bit, please. Okay.

On line 21, Ms. Dunphy says, "Did not happen in his peripheral vision. He probably saw a stick. No ... he didn't even see a stick I don't ... believe now that there was anything hauled out. Because my father would be on the edge of his seat with his arms going like this" – and obviously she makes some kind of demonstration – "if he was in a rage to do that. That's the type of person he was ... flicking his arms and he'd be telling him off and that's how it would go."

See that? Were you aware of that statement?

CPL BURKE: Yes.

MR. KENNEDY: Just two more quick references. Page 32.

Now, this is just for background. This is where the police officer, Sergeant Osmond, is telling Ms. Dunphy what took place. So you are aware that he told her that Constable Smyth said he saw the gun out of his peripheral vision.

CPL BURKE: Yes.

MR. KENNEDY: So there was a fair amount of detail given during this interview by Sergeant Osmond to Ms. Dunphy, correct?

CPL BURKE: Yes.

MR. KENNEDY: Okay, last reference here, Sir. Page 64, if we could go down to lines 32:

"Well you know the fact that you told me that he was there and some of the things that he's recalling my dad said well then I know what kind of a mood my father was in. So you know if he called him just a puppet for the Government I know he was riled up and he was ready to like say you know hop the" eff. "I still don't think he'd haul out the gun but you know that might be something that I'm just gonna have to live with... But you know you've told me something I can actually believe so I know the RCMP officer isn't making everything up you know what I mean so that's ... helpful actually."

So she describes some of the things or she corroborates that some of the things that Constable Smyth said her father said are things that he would say. Is that your reading of the statement?

CPL BURKE: Yes.

MR. KENNEDY: Some of the actions that Constable Smyth describes of her father are things – the way her father would act.

CPL BURKE: Yes.

MR. KENNEDY: So, now, back to your General Report, if I could now go back to P-0312. And this, again, when you were questioned about page three – P-0312, page 21 – excuse me, P-0312, page 21.

If I could now look at – okay, the – yeah.

“So the information that you wanted to pass on is that you did see the gun in the house.”

“Yeah.”

“Osmond: But it was sort of thrown in behind the couch.

“Dunphy: Yeah.

“Osmond: And to the best of your knowledge that’s where it was last ...

“Dunphy: Yes.”

“... like situated ...”

“Hmm, hmm.”

“... kind of thing right?”

“Yeah.”

So, basically, it’s not just that it’s once that Ms. Dunphy’s asked in this statement where the gun was, but she’s asked on a number of occasions that confirms that the last time she saw it was behind the couch, correct?

CPL BURKE: Yes.

MR. KENNEDY: Okay.

If I could ask you to go to the next page, please, page 22.

Now, this is where you’re discussing with Justice Riche, and Justice Riche’s theory here at 10:30. This is on – it appears to be in August. Is that correct, Corporal Burke? August 6, 2015?

CPL BURKE: I’d have to see a date.

MR. KENNEDY: Okay. Well, if you look down at the bottom of the page here you’ll see August 7.

CPL BURKE: Yes.

MR. KENNEDY: Okay. So this is where Justice Riche now, and you’re responding to Justice Riche’s theory 10:30: He feels there was a confrontation between Dunphy and Smyth (clarified as verbal) and Dunphy proceeded to go behind the couch and retrieve his gun and tell Smyth to get out of the house and that was when Smyth shot him.

So then – you went through this yesterday, so I’m not going to go through it. So you basically outlined your reasons why you didn’t think that that was accurate.

CPL BURKE: Yes.

MR. KENNEDY: The bottom of the next – keep going down a little bit to August 7. Then – down a little bit further, please, August 7.

Now, there's a meeting of a member, being yourself, "along with Insp. CAHILL and Sgt. OSMOND met with Justice RICHE at RCMP HQ. Member noted the following from Justice RICHE: The only evidence/witness police have was provided by the person who done the shooting."

Well, that's the only verbal evidence.

CPL BURKE: Yes.

MR. KENNEDY: But where did this come from?

"Meghan Dunphy saw the gun behind the couch less than 24 hours before he was killed."

CPL BURKE: That's a note I made that –

THE COMMISSIONER: Sorry?

CPL BURKE: It's a note I made that retired Justice Riche made.

MR. KENNEDY: So Justice Riche, retired Justice Riche made this comment and you noted, "Meghan Dunphy saw the gun behind the couch less than 24 hours before he was killed."

CPL BURKE: Yes.

MR. KENNEDY: Did you ask him where he came up with that?

CPL BURKE: I think he was inferring that Meghan was in the house a day prior, maybe that Saturday, and she didn't see the gun by – she didn't see a gun, basically.

MR. KENNEDY: Okay. Now, I'm now going to ask to go to Exhibit P-0359, that's a 493 page exhibit. It's the last page of that exhibit. This would be the daily log.

Okay, we'll just make that a little bit bigger, please. I just want to clarify who's saying what here.

So, "Cpl. BURKE received a call from Justice RICHE. He advised he was out of the country and had messages from Pat CAHILL to give him a call."

Do you remember that call?

CPL BURKE: Yes.

MR. KENNEDY: September 16, 2016. "Cpl. BURKE said that Supt. CAHILL was trying to reach him to update him that the RCMP were releasing their findings in the media. The following is a summary of the comments by Justice RICHE: The RCMP did not release his report because they were not happy with it and he said the investigators did not cross-examine the witnesses."

Is that a verbatim quote that you've got there in your notes?

CPL BURKE: Yes. Not verbatim, but it's what I'd written in response to something I heard from Justice Riche.

MR. KENNEDY: The next point: “The RCMP did not want him to investigate or act as ‘Columbo.’”

CPL BURKE: Yes, that’s – Columbo is a verbatim term.

MR. KENNEDY: So this is Justice Riche saying that the RCMP did not want him acting as Columbo.

CPL BURKE: Yes.

MR. KENNEDY: And Columbo, I take it, you would be referring to the detective, or that TV detective series.

CPL BURKE: Yes.

MR. KENNEDY: And I think that that’s a fair comment, that you did not want him acting as Columbo, did you?

CPL BURKE: Yes.

MR. KENNEDY: “He said that he would not change one thing in his report.”

Had anyone asked him to change things in his report?

CPL BURKE: No.

MR. KENNEDY: Then, “He advised that while he was away he was contacted by the media.” Correct?

CPL BURKE: Yes.

MR. KENNEDY: And then he advised of a pending – you advised of “a pending Public Inquiry and the RCMP were not prepared to release any reports. Justice RICHE responded that the person responsible will have to answer to his actions.”

Do you know what he was talking about there?

CPL BURKE: I assume that he was speaking of Constable Smyth.

MR. KENNEDY: Yeah.

CPL BURKE: And he’ll have to answer to the actions that he took.

MR. KENNEDY: Because it became clear to you pretty early, I would suggest, that Justice Riche did not believe what Constable Smyth was saying, did he?

CPL BURKE: I don’t know really.

MR. KENNEDY: Could you really – okay. On that point, could you really understand what it was that Justice Riche was saying, or what his conclusion was?

CPL BURKE: What part do you want me to comment on?

MR. KENNEDY: So let’s use, for example, the “two angry men” scenario that he put forward.

CPL BURKE: Yes.

MR. KENNEDY: Did you understand where he got that from?

CPL BURKE: No, not in evidence. I can, I guess, assume –

MR. KENNEDY: Constable Smyth would have been – obviously, he was talking about the British Virgin Islands incident.

CPL BURKE: Yes, I assume.

MR. KENNEDY: Where did he come up with the conclusion that Mr. Dunphy was an angry man? Did he explain that to you?

CPL BURKE: No.

MR. KENNEDY: Was retired Justice Riche, to the best of your knowledge, instructed or told not to give statements to the media?

CPL BURKE: I don't know.

MR. KENNEDY: Did constable – do you know if he ever contacted anyone and asked if it was okay to give statements to the media?

CPL BURKE: Not to my recollection.

MR. KENNEDY: Do you know who would be the best person to ask those questions? Would it be Inspector Cahill, Staff Sergeant Osmond, Chief Superintendent Boland, do you know which one, or either of them?

CPL BURKE: I think Inspector Cahill would be the one to answer that question.

MR. KENNEDY: Okay.

The last area I want to cover with you, Sir, is the staging theory. So early on the RCMP are made aware that this is an allegation.

CPL BURKE: Yes.

MR. KENNEDY: Now, let's use the stick theory for a second. So that the stick had to come up and then – it seems to be the suggestion that Constable Smyth either panicked or did something and shot Mr. Dunphy and realized, look what he did. Was that your suggestion – is that your understanding of what was being suggested?

CPL BURKE: Yes.

MR. KENNEDY: Was there any indication – how would he have found the gun or known the gun was in the house. Did anyone ever put that to you, or explain that to you?

CPL BURKE: No one explained it to me. I didn't know how he would've found a gun.

MR. KENNEDY: And so then, now you have to find a gun. He has to find a couple of bullets. Correct?

CPL BURKE: Yes.

MR. KENNEDY: Then he has to take the bullet and put it in the gun.

CPL BURKE: Yes.

MR. KENNEDY: Has to move the stick to where it wasn't before. Correct?

CPL BURKE: Yes.

MR. KENNEDY: And then has to stage the gun, and has to stage Mr. Dunphy's hands. Is that correct?

CPL BURKE: Yes.

MR. KENNEDY: Would you agree, all that's based on the evidence you have totally, speculative and improbable?

CPL BURKE: Yes.

MR. KENNEDY: Now, let's take it a step further, that he's got to find the gun behind the couch or he's got to take a gun with him that just happens to be an old .22 rifle that looks like the one that – or could be the one that was in Mr. Dunphy's house.

CPL BURKE: Yes.

MR. KENNEDY: That's another scenario. Correct?

CPL BURKE: Yes.

MR. KENNEDY: He would have to find, or he'd have to have a couple of bullets with him.

CPL BURKE: Yes.

MR. KENNEDY: I'm going to take it a step further for you now. Is it your understanding, from Corporal O'Keefe and Constable Cox, that the pictures – and you saw some of them yesterday, we can bring them up if you want – that the pictures depict the scene as they found it when they went into that house, to clear the house?

CPL BURKE: Yes.

MR. KENNEDY: That Corporal – Constable Smyth was now out of the house and was not back in the house after that.

CPL BURKE: Yes.

MR. KENNEDY: So according to the paramedics, the gun as depicted in the pictures is not the way it was found.

CPL BURKE: Yes.

MR. KENNEDY: So now, let's take the stage and theory, that Constable Smyth had to stage a theory but he didn't stage it good enough. So now the RCMP have to help him. How probable does that sound to you?

CPL BURKE: Not probable, no.

MR. KENNEDY: Sir, when you're dealing with an investigation, you're looking at evidence, aren't you?

CPL BURKE: Yes.

MR. KENNEDY: Do you speculate as to what could have happened?

CPL BURKE: No.

MR. KENNEDY: Even when you have evidence that could be somewhat, what we refer to as circumstantial or you're looking at the evidence as a whole. You still don't speculate, do you?

CPL BURKE: No.

MR. KENNEDY: These conspiracy theories, Sir, did you see them start to surface in social media shortly after Mr. Dunphy's death?

CPL BURKE: Yes.

MR. KENNEDY: Do you remember Paul Davis, the premier, sent Constable Smyth out to assassinate Mr. Dunphy. Do you remember that one?

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

Sir, did you see any evidence in your investigation that would indicate to you in any way that anyone had staged anything?

CPL BURKE: No.

MR. KENNEDY: And then by the time we get to November, or September or November – I think it was after September – Constable Smyth emailed you or phones you, he was pretty upset. Isn't he? Do you remember Judge Riche's comments, did you get an email from him or did you get –

CPL BURKE: Yes.

MR. KENNEDY: Yeah.

Do you remember them putting – there was pictures of him and his wife and child upon the – someone put it up on Facebook. Do you remember that?

CPL BURKE: Yes.

MR. KENNEDY: Did you take any steps as a result of that? Did you – my understanding is you went to your superiors and suggested that they should contact Constable Smyth.

CPL BURKE: Yes, I didn't feel it was my position to take any action on that but I wanted anyone, you know, the RNC to know that this was out there, or if they could offer some assistance to Constable Smyth.

MR. KENNEDY: Okay. Two last, or a couple of last questions for you. I don't understand, perhaps you can help me with this, or did anyone ever explain to you, how do the glasses fit into the staging theory, or the planting theory?

CPL BURKE: I don't think the glasses fit into any theories, a struggle theory. But staging, it didn't fit into a staging theory, I don't think.

MR. KENNEDY: So they were put forward to demonstrate or to illustrate tunnel vision?

CPL BURKE: Yes.

MR. KENNEDY: The last reference I want to make, and I'm going to have counsel, Commission counsel help me with this one, or I can just put it to you, I don't know if they know it – there's a letter from Ms. Breen to the Hon. Peter McKay, minister of Justice and Attorney General dated June 19, 2015. Do you know what P exhibit that would be?

MS. O'BRIEN: It's in evidence, but I don't have it here on my listing for Corporal Burke.

MR. KENNEDY: I just want to read you the last line. This is the line and it deals with the independent observer,

MS. O'BRIEN: Sorry, Mr. Kennedy, what was the date of the letter?

MR. KENNEDY: The letter would be June 19, 2015

MS. O'BRIEN: No, thank you. That's fine, I don't need –

MR. KENNEDY: And the last line in the second page, paragraph: The presence of an independent observer is sufficient and cannot remedy basic investigative problems.

Was it your – what was your understanding of Ms. Dunphy or her lawyer's position in relation to the use of the independent observer in this investigation?

CPL BURKE: I didn't hear the comment in the letter.

MR. KENNEDY: Okay. Sorry, the line in the letter is: The presence of an independent observer is insufficient and cannot remedy basic investigative problems.

CPL BURKE: Yes.

MR. KENNEDY: Okay. Was that line or that comment repeated to you before or did you have any understanding of what Ms. Dunphy or Ms. Breen's position was in relation to the use of an independent observer?

CPL BURKE: It appeared that the use of an independent observer was insufficient and not, I guess, enough to make sure our investigation was done thoroughly and unbiasedly.

MR. KENNEDY: My last question for you, Sir, and, again, you may be the person to answer this or it may be better asked by someone else, but why didn't the RCMP send this out to an out-of-province agency, whether another police force or a special investigative unit? Do you know the answer to that?

CPL BURKE: No. We attended for the sudden death investigation. We started the investigation and I was advised that I was the primary investigator and that's all I really needed to know.

MR. KENNEDY: So you just followed the instructions that were given to you in terms of the decision whether or not to send it out of province, you had no say in that?

CPL BURKE: No.

MR. KENNEDY: So do you know – I guess – well, we’ll be hearing from Chief Superintendent Boland so I’m sure he’ll be able to answer that.

Okay. Those would be my questions, Corporal.

Thank you very much.

THE COMMISSIONER: Mr. Avis.

MR. AVIS: Thank you. Good afternoon.

Good afternoon, Corporal Burke. My name is Nick Avis and I’m counsel for the Royal Newfoundland Constabulary. I will try not to be too long. My estimate is half hour, 45 minutes, depending on how we go. And at the same time I’m going to have to cross out stuff as I go along that’s already been covered.

I just want to ask you, you asked him a question about conflict and whether or not your superior officers asked you at the beginning, or you asked other people, if any members of the team had a conflict.

Do you remember those questions?

CPL BURKE: Yes.

MR. AVIS: Now, correct me if I’m wrong, but it’s my understanding that, like any other professional who deals with people, you are supposed to be conscious of potential conflicts, that it’s an ongoing evaluation and that’s it’s your obligation to bring it to them because you’re the only one that would know. Is that correct?

CPL BURKE: Yes.

MR. AVIS: So sometimes you don’t know there’s a conflict till you see a face. It can happen at any time. Correct?

CPL BURKE: Yes.

MR. AVIS: So whether you are asked or not, whether any of your members were asked or not, you all know you have this professional obligation, you have it all the time and if a conflict arises, it’s your obligation to bring it forward.

CPL BURKE: Yes.

MR. AVIS: And there was never any conflict in this case. Is that correct?

CPL BURKE: Not to my knowledge.

MR. AVIS: Talk a little bit about your role, okay and your job. Firstly, you know, there’s criticism. You delegate tasks, correct?

CPL BURKE: Yes.

MR. AVIS: You direct people to do it. You have a thoroughly professional, experienced team to rely upon. Is that correct?

CPL BURKE: Yes.

MR. AVIS: And you are entitled to rely upon their work products and their conclusions, even though you are ultimately responsible, you are entitled to rely upon their work product and conclusions, correct?

CPL BURKE: Yes.

MR. AVIS: Would it be fair to say, for example, the criminal analyst sometimes, that's a really big part of the work in an investigation, a lot of paperwork, a lot of stuff to put together, correct?

CPL BURKE: Yes.

MR. AVIS: They generate thousands of pages, am I right?

CPL BURKE: Yes.

MR. AVIS: And it's not your job to read every minute detail of a criminal analyst, it's to get the gist of it, make sure it's correct, as far as you know, and utilize the information and proceed, correct?

CPL BURKE: Yes.

MR. AVIS: I'm not sure of the exact number but guesstimates of the number of pages of your file is about 6,000 pages. Does that sound about right for the RCMP file?

CPL BURKE: I'm not sure.

MR. AVIS: You wouldn't know, okay.

Do you have the time to review everything everybody else does?

CPL BURKE: No.

MR. AVIS: I assume, though, that if an issue were to arise, you may have to get into the depth of any particular piece of work done by anyone of your team members?

CPL BURKE: Yes.

MR. AVIS: And while in the criminal analyst area, you would have similar expertise and so forth when it comes to people like pathologists and crime scene workers, you really have to take their opinion most of the time. You're not in a position to challenge it, are you?

CPL BURKE: No.

MR. AVIS: If you have a major issue, you might be able to get them to redo it but it's their expertise and you're expected to rely on it.

CPL BURKE: Yes.

MR. AVIS: Just as a thing in general, we have a lot of, I guess, opinions from the Dunphy family. In your experience as a police officer, how much reliance do you often place, or weight, on family members' opinions about each other?

CPL BURKE: I take all the information into consideration and see where it goes.

MR. AVIS: And I know it's been touched upon but I just want to clarify. With respect to interviewing Constable Smyth and Meghan Dunphy, it seems to me that they were – as pointed out by Mr. Kennedy all you were responding to is Constable Smyth exercising his rights. Correct?

CPL BURKE: Yes.

MR. AVIS: And some understanding you have developed about this 24-hour, 72-hour period. Correct?

CPL BURKE: Yes.

MR. AVIS: And it's your understanding, you read an FBI article, that that 24 to 72 hours is actually not just a national standard but it's an international standard. Is that your understanding or am I going too far for you?

CPL BURKE: I have knowledge that it's a theory of when to get the best evidence from a –

MR. AVIS: Okay.

CPL BURKE: – first responder involved in a critical incident.

MR. AVIS: And with respect to Meghan Dunphy, she could have agreed or disagreed, just like Constable Smyth, to allow you to interview her. Correct?

CPL BURKE: Yes.

MR. AVIS: In light of the way things have gone, what do you think might have happened if you didn't speak to her that night? Would you be in just as much trouble?

CPL BURKE: No.

MR. AVIS: And importantly so, she was not a witness to the event, was she?

CPL BURKE: No.

MR. AVIS: Had she been any kind of a witness – any kind of a witness to the event, of course, you would have been interviewing all those people as quickly as possible, but they weren't any more or less. Correct?

CPL BURKE: Yes.

MR. AVIS: Just to clarify something; in the questions by Mr. Simmonds he was talking about how crucial the scene was et cetera, et cetera, et cetera. Is the scene any more crucial in one investigation than another, or is it simply a matter of when there's a scene you process it as thoroughly and as professionally and as expeditiously as you can?

CPL BURKE: Yes.

MR. AVIS: And every scene is important to its own offence?

CPL BURKE: Yes.

MR. AVIS: Lots of reference made to Mr. Dunphy's disability. Did anyone in the Dunphy family ever tell you he had any difficulty moving his right arm?

CPL BURKE: No.

MR. AVIS: Or any difficulty with his right hand?

CPL BURKE: Not to my recollection.

MR. AVIS: Forgive me, Commissioner, (inaudible).

CPL BURKE: Take your time.

MR. AVIS: I'm just going through the ones that are covered, making sure.

You were being questioned about how, according to Meghan Dunphy, her father could get excited; something like go off the head pretty quickly, animated, vocal. But motive isn't an element of an offence, is it? You don't need to know the motive to lay a charge, do you? Why he may or may not have got angry with Constable Smyth. Correct?

CPL BURKE: No.

MR. AVIS: Sorry?

CPL BURKE: No.

MR. AVIS: Right.

And what you're focused in on when you're looking at whether or not he shot the gun, it's not why he did it or where it came from. Ability means an intent and he had all three, didn't he?

CPL BURKE: Yes.

MR. AVIS: He had the ability to carry it out, the means to carry it out and it appeared, by pointing it and following him with the gun, he had the intent didn't he?

CPL BURKE: Yes.

MR. AVIS: And you don't need any more than that to lay a charge, do you?

CPL BURKE: No.

MR. AVIS: Motive can be an important issue in murder and other cases but it's never necessary, a necessary element is it?

CPL BURKE: No.

MR. AVIS: Okay.

Independent – I'd like to talk a little bit briefly about, you know, the labelling or the name that we gave this investigation. And really all I want to get to is regardless of the label that is attached to this investigation – criminal, sudden death or what have you – would you have treated your investigation any differently?

CPL BURKE: No.

MR. AVIS: If it was called criminal, would you have taken it more seriously?

CPL BURKE: No.

MR. AVIS: Right.

I'd just like to refer the witness to Exhibits 0546 and 0545; they are the past and present. I presume they're from the Division Operational Manual, and if you could bring those up.

0546 is the one that comes up; that's the new one. Policy 1.1 – I'm sorry.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: Okay, I'm sorry. Thank you for the correction.

They're both in force. I took it as – one has amended at the top. They're both in force; one is national, one is Division B. So the one you have in front of you now – and I thank counsel for that – is the one that's national. And it says: "1.1. All reportable deaths occurring within RCMP jurisdiction must be treated as suspicious and thoroughly investigated."

Do you believe you complied with that policy?

CPL BURKE: Yes, I do.

MR. AVIS: Good.

Bring up the 0545. And they don't call it criminal or anything, so that doesn't matter whether it's criminal or otherwise. A reportable death is a reportable death and they will all be treated the same. Correct?

CPL BURKE: Yes.

MR. AVIS: And it doesn't matter if a police officer is involved; it's still a reportable death and you will still investigate it as thoroughly as any other investigation. Correct?

CPL BURKE: Yes.

MR. AVIS: Policy 1.1 –

THE COMMISSIONER: Do you –

MR. AVIS: Sorry, Commissioner.

THE COMMISSIONER: They use reportable death – did the other document have reportable death? I see this one does.

MR. AVIS: Yes, they both use the phrase –

THE COMMISSIONER: Okay.

MR. AVIS: – reportable death.

THE COMMISSIONER: Thank you.

MR. AVIS: So we now have the other one up there which, again, is the B Division, the local one: “All reportable deaths (see point 2.3) will be investigated to rule out any suspicion of foul play.”

Did you follow that policy in your investigation?

CPL BURKE: Yes.

MR. AVIS: In all your murder – or, sorry, reportable death investigations – did you follow this policy?

CPL BURKE: Yes.

MR. AVIS: Is there anything in your policy that says a police officer-involved shooting is a different kind of homicide investigation or a reportable death investigation?

CPL BURKE: No.

MR. AVIS: In your experience, other than some of the unique elements to this, can you tell me any difference between a reportable death investigation, whether the police officer is the shooter or not? What differences would there be? Other than legal, which I may – I’ll get to it.

CPL BURKE: No differences.

MR. AVIS: So in terms of the kind of exhibits you file and so on and so forth, it’s all the same.

CPL BURKE: Yes.

MR. AVIS: The investigation would be the same. Correct?

THE COMMISSIONER: Wouldn’t there be a difference, possibly, in the attitude of the investigators if they did not believe it was a criminal investigation or if they didn’t have this in front of them – this policy, all reported deaths will be investigated to rule out any suspicion of foul play? I think – and if they didn’t realize that it actually goes further in that you don’t rule it out until you have satisfactory evidence to do so.

Wouldn’t that be fair?

CPL BURKE: Yes.

THE COMMISSIONER: Now if an investigator did not have that in front of his or her mind, might there not be a tendency to be too quick to accept the testimony of – well, in this case, it would be Constable Smyth. I’m not saying – I’m using this as an example. Might there not have been too quick an assumption that oh, well, officer-involved shooting, Constable Smyth says the person aimed a firearm, he responded, end of story. No danger of that happening, in your opinion?

CPL BURKE: Not for the Major Crime Unit. Not for us as Major Crime investigators.

THE COMMISSIONER: Right.

CPL BURKE: This policy is applicable to all our sudden death investigations.

THE COMMISSIONER: Okay. So you're saying all of your Major Crime investigators would have this front and centre, as far as you know. Would other police officers who might be involved as the first responders, say, in this situation?

CPL BURKE: The thing with first responders – and I can speak for first responders because I was one – is that when you go to a sudden death investigation this, you know, you assess the scene or assess the death and you have to rule out any suspicion.

THE COMMISSIONER: Uh-huh.

CPL BURKE: That I do remember from going to sudden deaths as a general duty member. I don't know if – and that's, you know, I'm speaking as a first responder. As an investigator I can't, I don't know if other members would be quick to make any decisions on if there's an officer involved, if they would be quick to make any assumptions because there's an officer involved.

THE COMMISSIONER: Do you see if there's a risk that that might be the case if they're – if it's not continuously put to them, keep in mind that it's suspicious and/or criminal, that you're investigating until you have evidence of contrary?

CPL BURKE: Yes, it would be key to remind members or keep that in their mind.

THE COMMISSIONER: They should have that in their minds.

CPL BURKE: Yes.

THE COMMISSIONER: Okay. Thank you.

Go ahead when you're ready, Mr. Avis.

MR. AVIS: Thank you. That actually is the area I was just moving into.

THE COMMISSIONER: (Inaudible), go ahead.

MR. AVIS: I want to go through the evidence on that very point, so it is a timely question by itself. What I want to review with you in general was the knowledge at the scene. I'm addressing some general issues, but your knowledge at the scene, what information was available to, what legal obligations and rights applied, the kind of information you can rely on and the law, even the level of information you rely on at a stage.

So the first thing I just want to clarify; it's been said but, in this case, in order to arrest Smyth, you would need reasonable and probable grounds to believe an offence has been committed. Is that correct?

CPL BURKE: Yes, that he committed the offence.

MR. AVIS: Right, and you never reached that level.

CPL BURKE: No.

MR. AVIS: And as my friend, my learned friend, Mr. Kennedy, has pointed out, similarly, you could not detain him, you had no grounds for a search warrant because that level of proof had not been met. Correct?

CPL BURKE: Correct.

MR. AVIS: And ultimately your conclusion there was actually no evidence ever to have arrested him, detained him, done any searches; is that correct?

CPL BURKE: Yes.

MR. AVIS: Now, let's talk about the kind of evidence you can rely on. At that stage of an investigation and when coming to your conclusion about reasonable and probable grounds, you can rely on hearsay? Correct? Information from other officers?

CPL BURKE: Yes.

MR. AVIS: Okay, information from anybody if you consider it reliable, is that so?

CPL BURKE: Yes. You would have to assess their reliability.

MR. AVIS: You would have to assess their reliability and that, of course, goes to the reasonableness of your belief and the objective nature of your belief. Is that correct?

CPL BURKE: Yes.

MR. AVIS: Okay so let's have a – and is it fair to say, you know, your, the direction an investigation takes can change at any time based upon the information you have?

CPL BURKE: Yes.

MR. AVIS: But you only have the information you have. Correct?

CPL BURKE: Yes.

MR. AVIS: You cannot speculate on theories for which there is absolutely no evidentiary basis, can you?

CPL BURKE: No.

MR. AVIS: So – and as with, you know, any aspect of your investigation, there's an ongoing evaluation as to the direction the investigation is taking whether that direction is supported by the evidence and so on. Correct?

CPL BURKE: Yes.

MR. AVIS: So let's have a look at the notion that Constable Smyth was in the execution of his duty. Now, I understand that you would have known that because Constable Smyth had contacted a member of the RCMP in advance to advise that he was coming into RCMP jurisdiction, you were aware of that at the scene?

CPL BURKE: Yes.

MR. AVIS: And that occurred before the incident? Am I right?

CPL BURKE: Yes.

MR. AVIS: And you have one of your own officers can corroborate that evidence. Is that correct?

CPL BURKE: Yes.

DR. AVIS: So how reliable would you consider that evidence?

CPL BURKE: Reliable.

MR. AVIS: Right.

And was it – you’ve already indicated that at the scene two other officers passed on the information that Constable Smyth had said to them, that essentially I was there in the execution of my duty, correct?

CPL BURKE: Yes.

MR. AVIS: You even had an idea specifically what he was investigating.

CPL BURKE: Yes.

MR. AVIS: Okay.

Now, as between – the difference between a citizen and a policer officer, a citizen is never in the execution of their duty, are they?

CPL BURKE: No.

MR. AVIS: So there’s a significant legal distinction between a police officer in the execution of his duty and the citizen. And it has nothing to do with preferential treatment; it’s the law.

CPL BURKE: Yes.

MR. AVIS: The second one: carrying a loaded handgun. Now, a police officer in the execution of their duty must carry a loaded handgun at all times, with some very few exceptions. Is that fair to say?

CPL BURKE: Yes.

MR. AVIS: A citizen however, carrying a loaded handgun – I can’t think of a circumstance in which it wouldn’t be an offence. Am I correct there?

CPL BURKE: Yes.

MR. AVIS: Right.

So the fact that the person in this case had a loaded handgun, the difference again between a police officer and a citizen is he has to carry it with him. Correct?

CPL BURKE: Yes.

MR. AVIS: A citizen, except again, in most exceptional circumstances, would have a hard time explaining why they had a loaded handgun with them, wouldn't they?

CPL BURKE: Yes.

MR. AVIS: So again, that's a major distinction in the law and has nothing to do with preferential treatment, does it?

CPL BURKE: Yes.

MR. AVIS: Okay.

Third, police officers have an obligation, legal obligation to prevent the commission of offences. Is that correct?

CPL BURKE: Yes.

MR. AVIS: Citizens essentially can run away, police officers can't, can you?

CPL BURKE: Yes.

MR. AVIS: Now, you can go for cover, you can reposition, but you can't run away, can you?

CPL BURKE: No.

MR. AVIS: And pointing a firearm is a serious offence and Constable Smyth had to prevent that, as well as defending himself, but even if he wasn't actually in danger, he could have been pointing at somebody else, he can't leave, can he?

CPL BURKE: No.

MR. AVIS: And that has nothing to do with preferential treatment. It is another aspect of the law, *Criminal Code*, *RNC Act*, you name it, that distinguishes the two, correct?

CPL BURKE: Correct.

MR. AVIS: Police officers are trained in use of force; citizens are not. Correct?

CPL BURKE: Yes.

MR. AVIS: So would it be fair to say that this gives credibility to the notion – and I'm just talking about the outset. I'm not talking about any conclusions. You haven't reached conclusions; you're just getting this information. But you know a police officer trained in the use of force – would that not lend some credence at that moment to the notion that he's very well trained, like the rest of us, probably did it right, likely followed his training, is trained to do it in accordance with the law?

Those would not be unreasonable assumptions at the outset, would they?

CPL BURKE: Yes.

MR. AVIS: Did you become aware – or when did you become aware that Constable Smyth was in Dunphy's house with his consent and invited in? When did you learn that?

CPL BURKE: I'm not sure if I was informed of that by attending members, first responders or if it came up in his statement.

MR. AVIS: Okay, so it could have been first responders. But that's an important piece of information that suggests the lawfulness of his presence, the credibility of his version of events, at that moment in time when you were gathering the information.

CPL BURKE: Yes.

MR. AVIS: At some point in time you had heard that Mr. Dunphy presented and pointed a firearm to him, and that he was sitting in the chair or his couch. At some point, I guess, you went into the home and you would have seen at least Mr. Dunphy sitting in the chair, the gun present and so forth. Am I right?

CPL BURKE: Yes.

MR. AVIS: And there was absolutely no evidence of struggle or staging to be seen at that moment?

CPL BURKE: Not when I first went there.

MR. AVIS: Right. Now, again, no conclusion, but you're just sort of doing your walk-through. That's an obligation of yours to get a sense of the big picture.

CPL BURKE: Yes.

MR. AVIS: You were in the process of getting a big picture. And so would that not add some credibility, that if indeed there was a gun, it was in fact loaded, he was in the chair, pretty much as it had been told to you, correct?

CPL BURKE: Yes.

MR. AVIS: And again you're not coming to a conclusion at that point. We're just looking at what you can do.

Number of shots fired, that seems to have caused alarm in the public and the judge. Nothing unusual about four shots, are there?

CPL BURKE: I can't say it was unusual or nothing unusual, it's just –

THE COMMISSIONER: Sorry, just to be clear on which judge you're talking about.

CPL BURKE: You're not a judge; you're a Commissioner.

THE COMMISSIONER: Okay.

MR. AVIS: Sorry. A quick way out.

Okay, but would the number of shots have caused you any particular concern at the time?

CPL BURKE: No.

MR. AVIS: As you said, your training is to keep shooting until the threat stops and that can take any number of shots, can't it?

CPL BURKE: Yes.

MR. AVIS: The firearm was loaded. That lends some credence to the idea that Constable Smyth's life was threatened, correct?

CPL BURKE: Yes.

MR. AVIS: We've already pointed out no sign of a struggle, no sign of injuries to Mr. Dunphy. Now, that would have been reported to you by the first responders – or, as I understand it, the first responders didn't come to tell you his face was scratched up. Nobody brought to your attention any injuries, at that stage, on his face.

CPL BURKE: Yes, that's correct.

MR. AVIS: And that was later corroborated by the autopsy.

In addition to which Constable Smyth was completely co-operative, which is a significant factor in measuring his credibility at the time, if not ultimately. Fair to say?

CPL BURKE: Yes.

MR. AVIS: Okay.

So you're being accused of tunnel vision. I'm going to suggest to you that the investigation here, as you've stated, you have absolutely no evidence, certainly at this stage, that any offence has been committed by Constable Smyth. Is that correct?

CPL BURKE: Yes.

MR. AVIS: Had you had the slightest inclination you would have arrested him, detained him and so forth. Am I right?

CPL BURKE: With reasonable grounds.

MR. AVIS: Yeah.

And the only offence was the one reported to you, was pointing a firearm.

CPL BURKE: Yes.

MR. AVIS: And that would have been Mr. Dunphy, correct?

CPL BURKE: Yes.

MR. AVIS: And later on, the thought, unsafe storage of a firearm, that was a potential offence there, too, correct?

CPL BURKE: Yes.

MR. AVIS: Did you consider possession of a weapon dangerous to the public peace as a possible offence he was committing?

CPL BURKE: Yes.

We weren't considering offences by Mr. Dunphy, other than what was reported initially.

MR. AVIS: Right. I understand, I'm just simply saying those are the possible –

CPL BURKE: Yes.

MR. AVIS: Okay.

So just in summary, then, when you left the scene, can you tell me what preferential treatment you were supposed to be giving him?

CPL BURKE: No.

MR. AVIS: One last concern, one last question, probably got to find it amongst all my stickies.

Now, yesterday you were being questioned about your contact with the RNC by inquiry counsel. And inquiry counsel, if I got it correct, said your liaison person or contact person – and I say yours; I mean the RCMP – was Inspector Jason Sheppard, correct?

CPL BURKE: Yes.

MR. AVIS: And you said he was basically your contact point for any kind of information such as training records, use-of-force reports and so forth.

CPL BURKE: Yes, for that particular reason.

MR. AVIS: Right, and did I understand your evidence correctly that your interaction with him was entirely limited to those things, provision of information as best as he could do?

CPL BURKE: Yes.

MR. AVIS: Now, there seemed to be – and it's important for me that I get the evidence correct. I'm only going by my notes, but you said with respect to the use-of-force forms, did I get it correctly that you said, I assumed I got them all? Did I hear that correct?

CPL BURKE: Yes.

MR. AVIS: So that was an assumption on your part. Am I right?

CPL BURKE: Yes.

MR. AVIS: And in fact you said that twice. You said you asked for the use-of-force reports and I assumed that I got them all, but you didn't get them all, did you?

CPL BURKE: I don't know if any others existed.

MR. AVIS: Okay, you still don't know.

I'm going to go to the correspondence because none of the correspondence between Inspector Sheppard and the RCMP was put to you in questioning, so I have to go through that, because it is very specific what was asked and the answer was very specific.

What I'm mostly concerned about, if I have it correctly stated, is you attended at the RNC headquarters to review the personnel file. Am I right?

CPL BURKE: Yes.

MR. AVIS: And you didn't take any copies.

CPL BURKE: No.

MR. AVIS: You took notes.

CPL BURKE: Yes.

MR. AVIS: But the question put to you, if I have it recorded correctly, so you only got to see what the RNC showed you, and you said, yes. Why would you say yes to that question? Is there any evidence that you only got to see what the RNC showed you?

CPL BURKE: The RNC presented me with a file and that's what I looked at.

MR. AVIS: Okay.

Do you have any concerns that you weren't shown the whole file?

CPL BURKE: No.

MR. AVIS: I'd just like to go through the correspondence. The first one is P-0557. That's the one that I just had put in over lunchtime. This is your request to Inspector Sheppard. Second paragraph is the one, number two, if you could stop right there: "... and previous use of force incidents that feasibly may have an impact on our investigation."

So you were giving him some discretion as to what he provided you, weren't you?

CPL BURKE: I assume, yes.

MR. AVIS: I'm sorry, that's the letter. Can you pop – put it up, Madam Clerk (inaudible)?

THE COMMISSIONER: Oh, your screen is not working, is it?

MR. AVIS: Sorry about that.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: Oh no, no. That's okay.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: That was from Inspector Pat Cahill, not your correspondence.

CPL BURKE: Yes.

MR. AVIS: So the request was for previous use-of-force incidents that feasibly may have an impact on our investigation. So were you aware that that was a correspondence sent to Inspector Sheppard?

CPL BURKE: Yes.

MR. AVIS: Okay, so it's a very specific request. And if – sorry, Madam Clerk, thank you; if you could bring up P-0151, which is the response, and I go to page 3 of that, if you could.

Page 3, Madam Clerk, if you can get there for me; so it's page 3, the last two paragraphs. If you could run it up just a little bit. Right there, perfect.

“I have checked our ‘Use of Force Report Forms’ from 2010 to 2015. Cst. J Smyth has not had occasions to use force since 2010 other than this incident involving Mr. Donald Dunphy and his Use of Force form is attached.” So you were advised – the RCMP was advised that he hasn't used force since 2010 except for this one occasion. There's nothing to stop you from going back and saying, oh, can we please get the ones from before 2010, was there.

CPL BURKE: No.

MR. AVIS: So it's not a question of you being provided with what they were willing to show you. He responded to the letter and you had every opportunity to get whatever use-of-force forms you needed. Correct?

CPL BURKE: Yes.

MR. AVIS: Let me ask you this because this wasn't put either: What relevance would past use of force, before 2010 or in the past, have to this investigation?

CPL BURKE: When I, when we requested use-of-force reports, we're looking at a pattern of behaviour that may have been concerning.

MR. AVIS: Right.

Okay, so do you feel it – but you didn't, you didn't look at those, did you?

CPL BURKE: No.

MR. AVIS: You didn't ask for them.

When you were interviewing Constable Smyth did you ask him about his previous use of firearm, whether it was just withdrawn, pointed, low ready or otherwise?

CPL BURKE: No.

MR. AVIS: Okay, so you didn't pursue it with him.

Last paragraph: The only outstanding matter that you have requested is a copy of Constable Smyth's professional standards file. Rather than photocopy and release the file, I request that your investigators come to RNC HQ and review his file. If there is anything that your investigators feel is applicable to their investigation, our legal counsel, Ms. Wendy Zdebiak, will be glad to assist.

Who went over?

CPL BURKE: I did.

MR. AVIS: Did Ms. Zdebiak assist you?

CPL BURKE: Yes.

MR. AVIS: Were you given complete access to the file?

CPL BURKE: As far as I knew, yes.

MR. AVIS: Did you request anything to be photocopied that wasn't photocopied?

CPL BURKE: No.

MR. AVIS: In your experience with the RNC is – do you have any issues with them not providing you the information that you requested of them?

CPL BURKE: No.

MR. AVIS: Thank you.

Those are my questions.

THE COMMISSIONER: Thank you, Mr. Avis.

Now, do we have others wishing to raise questions and in what order? Have you decided on the default order, if there is one?

MR. DROVER: I think I'm – I think I'm next in order.

THE COMMISSIONER: Go ahead.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MR. DROVER: Pardon?

UNIDENTIFIED MALE SPEAKER: I said I'm second last (inaudible).

MR. DROVER: Yeah, yeah. Okay.

Believe me, I don't have many questions left; I've been ticking them off as the day is going. But I do have a few questions and it might take me a moment to find some of them.

Now, I'll take you back a couple of days to your first day of direct examination by Ms. O'Brien. And you told her that you had no concern at the time, meaning when this investigation was ongoing, that other members did not view the investigation as criminal. And the natural follow-up question, which I believe wasn't asked was: Why did you feel that way?

CPL BURKE: We're all experienced police officers and I didn't – there was no indication given to me that anyone was acting outside as they would in any sudden death or shooting event.

MR. DROVER: In terms of your common approach or common practice in interviewing suspects in major crimes and particularly homicides, is it – at what stage in the process would you normally interview the subject of the investigation? Would you interview them first, somewhere in the middle, towards the end when you've gathered information?

CPL BURKE: It varies by each investigation.

MR. DROVER: Can you tell us a little bit, maybe, about the factors that might influence that decision?

CPL BURKE: The number of witnesses we wanted to interview and any other evidence that we wish to explore before we spoke to the subject of the investigation.

MR. DROVER: Would it be normal then to interview at least some witnesses and gather some information before interviewing that subject?

CPL BURKE: Yes, it would be.

MR. DROVER: You were asked about a long list of questions that you did not ask such as – and this was particularly for Dick and Debbie Dunphy. And there were questions, you know, that you were asked of that you didn't ask Constable Smyth; for instance, was he taking steroids, was he using supplements, to ask Dick and Debbie what he was wearing that day? Do you have a standard list of questions that you would ask?

CPL BURKE: Usually our list of questions would, after the pure version if we're interviewing witnesses, they would be applicable to the offence that we are investigating or the incident that we're investigating.

MR. DROVER: And this is something that you've said quite a few times over the last few days, is that you are investigating a *Criminal Code* offence and you are investigating elements of the offence.

CPL BURKE: Yes.

MR. DROVER: Can you explain that a little better for the Commissioner?

CPL BURKE: Our purpose as police officers in this incident, we weren't – I know police officers do internal investigations as well, but our investigation was a *Criminal Code* investigation in the fact that the shooting death of Mr. Dunphy was a homicide and we were trying to ascertain whether that homicide was culpable or non-culpable homicide.

MR. DROVER: In terms of questions about whether the weapon was loaded or whether the weapon was capable of being fired, does that affect the, I guess, the elements of self-defence or the elements under section 25 which would allow an officer to discharge his weapon?

CPL BURKE: No.

MR. DROVER: Could there be a case where someone points a realistic toy gun at an officer and an officer could be justified under section 25?

CPL BURKE: Yes.

MR. DROVER: In this case, a family liaison was assigned for the Dunphy family, for Meghan Dunphy. Is that a common part of an investigation, a homicide investigation?

CPL BURKE: For a homicide investigation it is. And for any investigation by the RCMP anyway, there's always – not necessarily a role of a family liaison but there is, you have to note your contact with the family involved.

MR. DROVER: Would it be common for the primary investigator – you know, in the command triangle, would it be common for the primary investigator to fill that role?

CPL BURKE: Not initially, no.

MR. DROVER: Mr. Simmonds suggested that in the very early stages of your investigation that you focused too much on Mr. Dunphy's mental health or mental state or mental well-being. Were these questions that arose because of the state of the property that Mr. Dunphy was living in?

CPL BURKE: There was a, I guess, a number of things that we wanted to investigate further with regards to Mr. Dunphy's mental well-being. The residence that he lived in was one part of it.

MR. DROVER: What were the other parts?

CPL BURKE: The comments he made on Twitter; the information that we obtained through people, the witnesses we spoke to. I can't recall any others off the top of my head, but it was something that we wanted to explore further.

MR. DROVER: There's been some questions around when you took possession of Constable Smyth's cellphone, and I'm not gonna say seized because seized seems like more of a positive act than what happened here. But on the point of seizing it, did you have any grounds to seize that phone on April 5?

CPL BURKE: No.

MR. DROVER: What would have been the process and the grounds required to obtain that phone on April 5?

CPL BURKE: Consent from Constable Smyth.

MR. DROVER: And if you had sought a judicial warrant, what grounds would you have required?

CPL BURKE: Reasonable grounds to believe that an offence had been committed and reasonable grounds to believe that the evidence, evidence for that offence would be contained in the cellphone.

MR. DROVER: And did you have those grounds on April 5?

CPL BURKE: No, we didn't.

MR. DROVER: This morning a question was put to you about, I guess, doing your own testing with the rifle and placing it around various places in the room when you still had the scene secured. And I believe Mr. Simmonds's question was: Wouldn't that have been useful for the Commissioner? And my question, I guess is, were you investigating for this public inquiry?

CPL BURKE: No.

MR. DROVER: Have you ever heard of a fingerprint technician being able to lift a print from human skin?

CPL BURKE: No.

MR. DROVER: Mr. Avis asked you a question about whether or not you had any evidence that Mr. Dunphy had a disability to his right arm, whether he could move his right arm or his right hand. Did you, in fact, have any evidence from anybody that Mr. Dunphy suffered a disability?

CPL BURKE: There – no. I’m going to say no, but I would want to review his medical records again.

MR. DROVER: But Dr. McGarry gave evidence here, and his evidence was that there was no disability. He had an injury for sure, but I don’t think he characterized it as a disability.

THE COMMISSIONER: Well, he’s not sure –

MR. DROVER: Is that correct?

THE COMMISSIONER: – that’s correct. Is it – Mr. Drover, was there a reference with respect to a limp in the left leg.

MR. DROVER: That’s what I’m saying. They’re saying he had injuries, but on a direct question about whether he was disabled, I don’t believe that the evidence was that he was disabled or had any disabilities.

THE COMMISSIONER: Well, I guess we’ll have to get into what disability and disabled means. It would strike me that if a person is limping as a result of an injury that happened over 20 years before, that that – as I would see it, I’ll keep an open mind until you convince me otherwise, but I’d see that as a disability.

MR. DROVER: In terms of –

THE COMMISSIONER: Maybe I’m wrong. Maybe it’s a politically incorrect word, but –

MR. DROVER: Well, I mean, it is an inference –

THE COMMISSIONER: Sorry?

MR. DROVER: It is an inference that you can draw, and it depends on where you draw the line of what’s a disability and what’s not a disability. What’s an injury and what’s a disability, that’ll be, ultimately, for you to decide. But my question was whether anybody directly told him that Mr. Dunphy was disabled or had a disability.

THE COMMISSIONER: Right.

MR. DROVER: Describing a limp is not directly saying that somebody has a disability. You can infer from that that it is a disability, and that’s completely up to you to decide.

THE COMMISSIONER: All right.

MR. DROVER: The question was about direct –

THE COMMISSIONER: Go ahead.

MR. DROVER: – evidence of a disability.

And this is my final question. In terms of – Justice Riche and Mr. Kennedy had gone over some points, some comments that were made with Justice Riche while he was on vacation. And one issue that he had was that investigators did not cross-examine the witnesses. And so I know you’re not a lawyer, and I think we can take judicial notice of this, that cross-examination generally involves leading questions. So can you comment again on the problems with the approach to asking leading questions of witnesses?

CPL BURKE: We like to obtain witness statements and, you know, an uninfluenced version of the events that a witness would have. When we ask, we don't – if we were to ask leading questions, it would mean that we would be putting ideas or influencing their version of the events, and that's not something police officers do with regards to statement taking.

MR. DROVER: So is it appropriate then to cross-examine your witnesses?

CPL BURKE: No.

MR. DROVER: Those are all my questions, thank you.

THE COMMISSIONER: Mr. Williams, you have some brief remarks?

MR. WILLIAMS: I only have five or six very pointed questions, Mr. Commissioner.

Corporal, in your experience having been an RCMP officer for, since you joined the force in what year?

CPL BURKE: 2002.

MR. WILLIAMS: 2002. So having approximately 14, 15 years' experience and your 12 homicide investigations, has any of your investigations or reports ever gone through the scrutiny or review that this particular investigation has gone under?

CPL BURKE: No.

MR. WILLIAMS: Okay. And with respect to this particular report and investigation, at any time whether by way of formal review or through the process we've been here today, has anybody ever questioned your failure to interview any pertinent witnesses in relation to this investigation?

CPL BURKE: No.

MR. WILLIAMS: And do you feel, having been involved in the investigation from the start, that you had an opportunity to question any and all relevant witnesses with respect to the matter?

CPL BURKE: Yes.

MR. WILLIAMS: Corporal, I know that from review of the evidence that has been submitted by the RCMP that you or your team saw fit to interview Ms. Donna Ivey of Premier Davis's office.

CPL BURKE: Yes.

MR. WILLIAMS: And what was the purpose for interviewing her? What relevance did she have to your investigation?

CPL BURKE: Ms. Donna Ivey was the person that brought the attention of the tweets to Constable Smyth. And we wanted to further develop the information that she had or further explore the information that she may have had with regards to the reason for Constable Smyth's attendance in Mitchells Brook.

MR. WILLIAMS: Okay. And it's also noted that at no point was there ever any interviews done of former Premier Davis or his chief of staff Joe Browne with respect to any involvement they may have had in the investigation. Is that correct?

CPL BURKE: Yes.

MR. WILLIAMS: And why did you think that was not relevant to interview those two gentlemen?

CPL BURKE: I didn't feel they had any information to further our investigation.

MR. WILLIAMS: So would it be fair to say that upon completing, over the course of conducting your investigation you felt that neither one of these gentlemen had anything to add to your investigation?

CPL BURKE: I didn't obtain any information that would lead me to believe they had any information to help our investigation or assist with our investigation.

MR. WILLIAMS: So four or five quick points along those lines. Was there ever any evidence to indicate whether or not Mr. Davis knew Mr. Dunphy prior to the events of April 5, 2015?

CPL BURKE: No.

MR. WILLIAMS: Was there ever any evidence that Mr. Davis was aware of the tweets that were forwarded by Mr. Dunphy prior to April 5, 2015?

CPL BURKE: No.

MR. WILLIAMS: Was there ever any evidence to indicate that Mr. Davis had any involvement either in the assessment or interpretation of the tweets in question prior to April 5, 2015?

CPL BURKE: No.

MR. WILLIAMS: And at any time was there ever any evidence that indicated that Mr. Davis may have had any involvement in either directing Constable Smyth to investigate the tweets or, more importantly, at any time was there ever any evidence to indicate that he directed Constable Smyth to attend at the home of Mr. Dunphy?

CPL BURKE: No.

MR. WILLIAMS: Okay. That's all the questions I have.

Thank you.

THE COMMISSIONER: Thank you.

Who would be next? I'll just check now – for scheduling purposes, we're going to take a break maybe before you start.

Who do we have left? The RCMP, Ms. Rasmussen, you'll be having some questions, will you? Do you anticipate or can you predict roughly how long you expect to be?

MS. RASMUSSEN: Yes, I'll probably have almost nothing left.

THE COMMISSIONER: There's a lot being covered. Mr. Flaherty, how about your scheduling, roughly?

MR. FLAHERTY: An hour.

THE COMMISSIONER: An hour.

Okay, let's recess now for 15 minutes.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

The Commission of Inquiry is now in session.

Please be seated.

THE COMMISSIONER: Okay, Mr. Flaherty, when you're ready.

MR. FLAHERTY: Good day – is it, sorry, Corporal or Constable –

CPL BURKE: Corporal Burke.

MR. FLAHERTY: Corporal Burke –

UNIDENTIFIED MALE SPEAKER: (Inaudible).

MR. FLAHERTY: I will mess that up more than once and, believe me, no disrespect is intended.

So just earlier this afternoon when Mr. Kennedy was cross-examining you, he said that it's when people lie or provide misleading evidence that they can get themselves in trouble, 'cause misleading evidence requires further investigation – I may be paraphrasing, but do you remember a question like that that was just posed to you by Mr. Kennedy?

CPL BURKE: Misleading information?

MR. FLAHERTY: Do you recall Mr. Kennedy asking you a question saying that it's when people lie or provide misleading evidence that they get themselves in trouble, because misleading evidence requires further investigation?

CPL BURKE: Yes.

MR. FLAHERTY: So what we do know on the date of death is, is that Constable Smyth provided misleading evidence, misleading information to the police officers on that date, did he not?

CPL BURKE: Not to – I don't know. Not to my knowledge.

MR. FLAHERTY: Okay.

He said that he was there – before he went down to Donald Dunphy’s, he called into the RCMP and said he was going down with respect to threats made to the premier. When officers responded to the scene after the death, he said I was here because of the threats made to the premier. He said those things, did he not?

CPL BURKE: First responders categorized the tweets as threats.

MR. FLAHERTY: Pardon?

CPL BURKE: When you, are you saying threats to the premier? That’s the words I read as the first responders at the scene.

MR. FLAHERTY: So the first responders at the scene are making misleading notes as to why Constable Smyth was there?

CPL BURKE: I remember reading a report by Constable Adrian Cox and he uses the terms “threats to the premier.”

MR. FLAHERTY: Okay.

And so do you have any reason to doubt that that’s what Constable Smyth actually said to RCMP officers on that day?

CPL BURKE: No, I don’t doubt that.

MR. FLAHERTY: So he told police officers he was going to see Donald Dunphy because of the threats he made to the premier. Was there, in fact, threats made to the premier?

CPL BURKE: Not from what I saw.

MR. FLAHERTY: So right off the –

CPL BURKE: (Inaudible.)

MR. FLAHERTY: Sorry, go on, Sir.

CPL BURKE: They could be interpreted as threats or they can be interpreted as tweets of concern. I’ve heard a lot of references made to the actual tweets that were sent by Mr. Dunphy.

MR. FLAHERTY: A concerning tweet and a threat are two different things, though.

CPL BURKE: Yes, they are.

MR. FLAHERTY: Okay.

So we have evidence that Constable Smyth provided a misleading account as to why he was at Donald Dunphy’s house on the day of Donald Dunphy’s death. He was there to investigate threats made to the premier.

CPL BURKE: That’s what I read in the first responders’ reports.

MR. FLAHERTY: And did you ever take Constable Smyth to task on that? We have evidence to suggest that you went to Donald Dunphy’s to investigate a threat to the premier, but I can’t

find one and, in fact, now you're saying there were no threats – did you ever try to pen down why that discrepancy existed?

CPL BURKE: There was a discrepancy or different interpretations of what was out there. My concern was that Constable Smyth was in Mitchells Brook and at the residence of Mr. Dunphy in the performance of his duties as a police officer.

MR. FLAHERTY: Okay. So one of the elements is that he was there in the performance of duties of an officer.

CPL BURKE: Yes.

MR. FLAHERTY: Okay, an element of section 25.

And so his evidence as to the duty he was performing was investigating threats to a premier. That's what he told RCMP officers on the day of the death, did he not?

CPL BURKE: I can only go by what the first responders said, and that was what they noted.

MR. FLAHERTY: So generally, when someone kills another person and their stories start to change, what does that suggest to you?

CPL BURKE: In that particular incident, it didn't suggest anything to me.

MR. FLAHERTY: The credibility of Constable Smyth, the determination of his credibility, was absolutely crucial in your investigation given the fact that he's the only witness and not only the only witness but a self-interested witness. So determining how credible his evidence is was absolutely crucial. Correct?

CPL BURKE: Yes.

MR. FLAHERTY: And so you're saying that although Constable Smyth killed a man and his story with respect to why he was even there in the first place, even though that changed, that didn't cause any concern, it didn't cause you to take any further investigative steps?

CPL BURKE: I was satisfied that the reason that Constable Smyth was at Mr. Dunphy's residence were in relation to tweets that were sent by Mr. Dunphy. You could classify those tweets in a number of different ways and whether they were a threat or a tweet of concern or ambiguous, I didn't, I wasn't concerned with that.

MR. FLAHERTY: When was the first time that Constable Smyth said I was there due to a tweet of concern? When do you see that show up in the evidence? Was it the next day when he got interviewed? He said: I wasn't there for a threat; I was there due to a threat of – tweet of concern.

CPL BURKE: I think he used the word "ambiguous" in his statement, if I can recall.

MR. FLAHERTY: But he's saying now that there never was a threat. He has said that. He's provided testimony that it was not a threat and he told you during the interview it wasn't a threat.

CPL BURKE: Yes.

MR. FLAHERTY: Does it not colour the entire incident in a different way? If a first responder shows up to a shooting scene and someone says I was here because that man threatened the

premier, as opposed to an assistant in the premier's office showed me an ambiguously worded tweet of concern. Is there a difference there at all? Could that not colour the perception or the thoughts of first responders?

CPL BURKE: I don't know.

MR. FLAHERTY: When the first responder shows up and someone says I was here because this man made a threat to the premier, does that not further a narrative that that man is a threatening individual and if he was a threatening individual, he likely did pull a rifle on the constable?

CPL BURKE: Yes.

MR. FLAHERTY: So we have an inconsistent evidence with respect to why Constable Smyth was actually at Donald Dunphy's house. I've also noticed a disturbing lack of consistency with the timing that Constable Smyth has provided to the RCMP over the course of this investigation.

Do you not agree that his evidence with respect to the timing of – the timing in relation to the shooting incident, him going to the house; do you not agree that there's been changes in those, in the times that he's presented to you or told you?

CPL BURKE: I didn't see the times that – provided by Constable Smyth as a concern.

MR. FLAHERTY: With all due respect, if I was a subject, a person of interest, and you're interviewing me and on day one I tell you, well, this incident took 10 seconds to happen, and then in interview two I tell you it took two minutes to happen and that – and that's only one example and there's further examples of the time, of timing issues, of timing inconsistency. Does that not cause you concern (a) with the overall credibility of the statement but also to a lesser degree, the reliability of the evidence?

CPL BURKE: The times, I took them as being estimates or approximate times. And the times provided and that I viewed, I put a certain amount of weight on those times. And I knew they were estimate times for the most part and I wasn't concerned with that.

MR. FLAHERTY: But shouldn't the police officer who shot someone be as specific as possible with respect to timing of the incident? Should he not?

CPL BURKE: He can only say what he knows of the – or what he can say – I guess it's a, if – what he remembers as the time is the only thing that he can say.

MR. FLAHERTY: But when his memory keeps on changing with respect to the timing of certain events –

MR. KENNEDY: Commissioner, I don't know if that's – if there's going to be questioning along those lines, shouldn't there be specific references as opposed to general comments that times keep changing? I'm not certain that that's a fair characterization.

MR. FLAHERTY: Well I –

THE COMMISSIONER: Well –

MR. FLAHERTY: Sorry, I'm just trying to do this rather quickly. And I mean this is the primary investigator; he has gone through the entire report.

THE COMMISSIONER: Yeah, do you have specific references there, Mr. Flaherty?

MR. FLAHERTY: No, not this time.

THE COMMISSIONER: I can recall one in particular. I think it was – there's some change in the time in which Constable Smyth estimated it would take him to get out of the room – sorry, in the time from which he was looking around the living room and looking down at his folder, and then in peripheral vision saw the rifle.

It was an estimate or some change in from two or three minutes to, I think, five or – sorry, two or three seconds to five or six seconds in the estimated time that it could have taken, Mr. Kennedy. That's just one that just comes to mind but a we'll see. Mr. Flaherty, it would be better if you can refer us specifically to an example.

Sorry, Mr. Kennedy. Did you have something to add?

MR. KENNEDY: No, you're right; it's a larger issue that we can deal with later. You're not incorrect on that point –

THE COMMISSIONER: Yeah.

MR. KENNEDY: – but there's a nuance to it, I think, that I'll deal with at some point.

THE COMMISSIONER: Okay.

MR. FLAHERTY: As the –

THE COMMISSIONER: Go ahead, there's no –

MR. FLAHERTY: As the primary investigator, upon review of your file did you ever see any inconsistent evidence provided by Constable Smyth with respect to timing of certain incidents?

CPL BURKE: No, not – the times he gives I know they're approximate. So the times – when I see inconsistencies, that doesn't – inconsistencies didn't concern – didn't concern me or raise any concern for me.

MR. FLAHERTY: So your, your policy – your RCMP policy says that you are to treat reportable deaths suspiciously; however, you're going to rely on approximate times with respect to the death of a man. A man who just got shot, I'm going to rely on approximate times.

CPL BURKE: I – there's no other way to obtain those times other than them being approximate.

MR. FLAHERTY: Now, there's been some issue with the amount of time following the shooting of Donald Dunphy and when Constable Smyth called the shooting in to the RCMP. As the primary investigator, what was your determination on that time period?

CPL BURKE: The time period was an estimate, an approximate time and it could have been 15 minutes or it could have been two minutes. The time for him to clear the house and to assess Mr. Dunphy I took as approximate.

MR. FLAHERTY: So there's no difference between two minutes and 15 minutes?

CPL BURKE: Yes, there is. But –

MR. FLAHERTY: Okay.

CPL BURKE: – those times are approximate. I don't know if it would take Constable Smyth two minutes to assess the scene or clear the scene and to assess Mr. Dunphy, or it would have took him 10 minutes to do it.

MR. FLAHERTY: So – well, first off, how long do you think – how long do you think it would take to assess whether or not Donald Dunphy was dead? How long?

CPL BURKE: Not long.

MR. FLAHERTY: Okay. Are we talking seconds or are we talking minutes?

CPL BURKE: I would say seconds.

MR. FLAHERTY: Okay.

Now, you can see the diagram over there of Mr. Dunphy's house and you've been to Mr. Dunphy's house. How long would it normally take to clear an area that size in your experience?

CPL BURKE: It's difficult to say. Each residence is different and this particular residence was different. There was a lot of rooms and additions, a lot of doors and a lot of items in the house. I can't give you really an estimate on the amount of time it would take me.

MR. FLAHERTY: So the difference between two and 15 minutes didn't cause you concern?

CPL BURKE: No, I knew those times were approximate.

MR. FLAHERTY: Okay. At what, at what point do you become concerned?

CPL BURKE: When there's –

MR. FLAHERTY: If it was two minutes and 40 minutes are you concerned then?

CPL BURKE: When the times are approximate I have to gauge and if the time is totally outside of what would be expected for, say, a task to be performed.

MR. FLAHERTY: Okay.

So taking 15 minutes to half clear that little house, that's reasonable, that's probable.

CPL BURKE: I knew the time on the timeline was approximate as well. So if it was 15 minutes or it could have been 10 minutes, it could have been two minutes, I knew that time was approximate.

MR. FLAHERTY: Okay.

CPL BURKE: But the call to the RCMP OCC, you know, I would take as a definite time.

MR. FLAHERTY: Okay.

And so – well, I'm just going to go back. I know you're working with approximate times and that's what you base your considerations on, but how much – and we've been talking about this two minute, 15 minute difference. How much of a gap would there have to be between the two

ends before you would actually get concerned about what Constable Smyth was doing and what time he had to do things with?

CPL BURKE: If the approximate times were much greater than what they were.

MR. FLAHERTY: Well, what's much greater? In my opinion, 15 minutes seems a lot different from two.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

CPL BURKE: I don't know how to answer that question. The time that it took to clear the house and to call the RCMP I took as approximate. I couldn't rely heavily on those times and to make any conclusions from the time it took him to clear the house to the time he called the RCMP.

MR. FLAHERTY: So you know that staging has been an issue.

CPL BURKE: Yes.

MR. FLAHERTY: Okay. And we have an inconsistency in time being two minutes or 15 minutes. In your opinion, would you be able to stage a scene better in 15 minutes as opposed to what you could have done in two minutes?

CPL BURKE: I don't know.

MR. FLAHERTY: Now, so we have inconsistencies with respect to time, we have inconsistencies as to why Constable Smyth is even at Don Dunphy's house. I want to briefly talk about his notes. Now, did you ask for a copy of Constable Smyth's notes during his first interview?

CPL BURKE: Yes. It was our understanding that – I don't know if we requested him to bring his notes to the interview, but he had notes at the interview.

MR. FLAHERTY: Did you take a copy?

CPL BURKE: Not at that time.

MR. FLAHERTY: Okay. Should you have taken a copy of his notes, or at least not take them but ask for a copy of his notes?

CPL BURKE: That was our intention. It was – we simply forgot at the interview to obtain his notes.

MR. FLAHERTY: Okay. And did you ask him questions about when and how he came up with his notes?

CPL BURKE: No.

MR. FLAHERTY: Okay. Because based upon RNC research, and the research that was provided to you, I mean if he came to an interview with notes that he made an hour after he got home, sure there'd be issues with the reliability of the evidence in those notes. Correct? Or there could be.

CPL BURKE: What are you –

MR. FLAHERTY: What use were his notes, given the fact that you'd provided him 24 hours to sit back and contemplate things, let his memories coalesce, I guess. You gave him 24 hours. Wouldn't you want to know – because there may be an issue with his memory. Wouldn't you want to know when he made the notes, just to ensure whether or not the notes were credible and reliable?

CPL BURKE: As far as I knew, he made his notes. They would've been date and timed.

MR. FLAHERTY: So the notes he had were date and timed. The notes he brought to the interview.

CPL BURKE: I don't know.

MR. FLAHERTY: Okay. And did you ask him if anyone helped him with his notes.

CPL BURKE: No, I didn't.

MR. FLAHERTY: And you didn't because he's a police officer.

CPL BURKE: Pardon me?

MR. FLAHERTY: You didn't ask him because he's a police officer. Correct?

CPL BURKE: No, it wasn't a question that we posed.

MR. FLAHERTY: In your evidence earlier, you stated that – you seemed to suggest, sorry, that you wouldn't have to ask because police are very aware of the policies with respect to their notes.

CPL BURKE: Yes.

MR. FLAHERTY: And that police are supposed to draft their own notes.

CPL BURKE: Yes.

MR. FLAHERTY: Okay. And so that's the reason why you didn't ask him if anyone helped him with his notes. Correct?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. So you didn't ask a question based upon his status as a police officer.

CPL BURKE: We would expect a member to write – a police officer to write their own notes, yes.

MR. FLAHERTY: And I'm not saying that that alone is evidence of bias that throws your whole investigation into question. I'm not going to say that you're purposely biased, but that is a bias of some sort, not asking a question given the status of the person you're asking the question to. Correct?

CPL BURKE: Status –

MR. FLAHERTY: Is the status of a police officer –

CPL BURKE: Yes.

MR. FLAHERTY: In your mind, you believe that he is acting in accordance with duties, policies, procedures of a police officer.

CPL BURKE: Yes.

MR. FLAHERTY: Police officers are supposed to take their own notes.

CPL BURKE: Yes.

MR. FLAHERTY: And because of that knowledge in your head, you didn't ask him if anyone helped him with his notes.

CPL BURKE: Correct.

MR. FLAHERTY: Okay.

Now, I'm going to apologize, somewhat. This examination is going to be a little bit disjointed, but that's because I'm trying to fill in some holes and go a little bit quicker.

There's been some issue, some talk of there was no marks on Donald Dunphy's face which would suggest that his glasses were knocked off.

CPL BURKE: Yes.

MR. FLAHERTY: Is that the case?

CPL BURKE: Yes.

MR. FLAHERTY: Would you need to have a visible injury, or would everyone – would a person have a visible injury because someone knocked their glasses off. Is that a definite, is that a guarantee?

CPL BURKE: No.

MR. FLAHERTY: Okay.

He's not a doctor, but he can use common sense, right? I could flick – someone could flick off your glasses, correct? You don't need special knowledge of a doctor to understand that I don't need to bruise your face to knock your glasses off.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

So I'm just going to get into some preferential treatment questions here now. So the RNC, members of the RNC showed up and advised Constable Smyth not to provide a statement because of research suggesting that police should be provided a certain amount of time to think about what happened.

CPL BURKE: Yes.

MR. FLAHERTY: They didn't provide you the police research, did they?

CPL BURKE: No.

MR. FLAHERTY: Would it surprise you that, following your testimony, I did a simple Google search with respect to the issue of taking statements from police officers and there appears – from the FBI with respect to FBI literature – there appears to be no consensus with respect to the fact that you should wait a day, two or three days to interview a police officer. In fact, some police forces still insist that an officer engaged or an officer involved in a shooting must give their evidence right away.

Does that surprise you?

CPL BURKE: No, it doesn't surprise me.

MR. FLAHERTY: Okay. And we understand that Ms. Hughson has provided an interview to Commission counsel with respect to this research. Portions of it were provided to you, I believe, by Mr. Kennedy.

Can you make any comments on her position on this research without having seen the research she's talking about?

CPL BURKE: No.

MR. FLAHERTY: Okay. The research that suggests that police officers should, should be given a day or two or whatever to think about their story. Does that research include situations where the police officer is the only witness? Do you know that?

CPL BURKE: No, I don't.

MR. FLAHERTY: And even though some police officers, some individuals may think that police officers should be provided extra time, that's only a general rule and isn't the rule applicable in all circumstances. Correct?

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

Do you recall – you recall your interview with Commission counsel, correct?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. I'm unsure of the exhibit number but I'd like to refer Corporal Burke to page 24 of his interview transcript.

MS. O'BRIEN: It's not entered as an exhibit, Mr. Flaherty. You just –

THE COMMISSIONER: They're not exhibits. They'd be –

MR. FLAHERTY: Oh, haven't been entered. Okay, sorry.

THE COMMISSIONER: No.

MS. O'BRIEN: You can just read it out.

MR. FLAHERTY: Do you recall during that interview saying that bias in not a problem?

CPL BURKE: If it's there, yes, I would agree with it.

MR. FLAHERTY: As a primary investigator, you should be concerned with the possibility of bias in the police force in your investigations, the officers under your command. You should be live to the fact that maybe there could be bias. Correct?

CPL BURKE: It wasn't a concern for me at the time.

MR. FLAHERTY: And that, in fact, is a type of bias, wouldn't you, wouldn't you agree? That at the time you didn't think there was a problem of bias and that in at least an unconscious way closes your mind to whether or not there's evidence or instance of bias in an investigation – correct?

CPL BURKE: It doesn't close my mind to anything.

MR. FLAHERTY: But if you, but if you think that something is not a problem, I mean are you really actively scanning to see if a problem may occur?

CPL BURKE: As long as I've been a police officer, bias or preferential treatment towards other police officers when it comes to an investigation or any criminal offences was a never an issue that I've come across.

MR. FLAHERTY: Has police bias in an investigation ever been an issue anywhere, with any police force? Is there ever any evidence of police bias?

CPL BURKE: I don't know. I could go by what I know is general knowledge. You know, I don't have any specific examples of police bias or anything that I've been involved in.

MR. FLAHERTY: So police bias is not a problem?

CPL BURKE: That's – I don't know.

MR. FLAHERTY: Your experience tells you that police bias is not a problem?

CPL BURKE: It's not – it wasn't an issue (inaudible) –

MR. AVIS: Commissioner, I'm sorry. Police bias – I don't know what the man is asking him about. Is police bias a problem, in what, in what circumstances? Is it racial bias? Is it –

MR. FLAHERTY: Commission of their duties, investigation –

MR. AVIS: Anything – it's too vague.

THE COMMISSIONER: I think if – I think Corporal Burke understood what he was saying. If he wanted to clarify it, he have him clarify it. He's done that all day I think and all day yesterday.

Go ahead, Mr. Flaherty.

MR. FLAHERTY: If there were no issues of bias in police investigation, why would an independent observer be appointed?

CPL BURKE: I had no involvement in appointing a independent observer.

MR. FLAHERTY: But that appears to be a step taken in order to counteract bias, correct?

CPL BURKE: I don't think it was to counteract bias. It was a – and I'd have to look at the terms of reference with Justice Riche, but it was to ensure that the investigation was thorough, complete, unbiased and independent.

MR. FLAHERTY: Okay. So he was there to make sure it was unbiased, okay.

It was your evidence that Sergeant Osmond was concerned about the buddy-buddy nature of your interview with Joe Smyth, correct?

CPL BURKE: Yes.

MR. FLAHERTY: Have you ever had a superior officer make a statement like that to you with respect to an interview you've conducted?

CPL BURKE: No.

MR. FLAHERTY: Okay.

When asked if you'd provided updates to persons of interest or subjects of an investigation in the past, you said it's not something I would normally do. Have you ever done it?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. Why do you do it?

CPL BURKE: When the person is not suspect, or is a person of interest or is a subject of an investigation, you know, they either call me and I'll provide them an update. I don't have an issue with that.

MR. FLAHERTY: There's some evidence that suggests that certain officers involved in the investigation didn't know if it was a homicide investigation or a criminal investigation. That didn't concern you?

CPL BURKE: It wasn't – it didn't arise as a concern, or it didn't arise to me as an area of concern that members didn't know if it was a homicide or criminal investigation.

MR. FLAHERTY: Now, during your cross-examination it appeared to me that you were indicating that an investigation is an investigation whether or not it's criminal or not, they're treated all the same; is that correct?

CPL BURKE: We only do criminal investigations.

MR. FLAHERTY: Okay.

Is there anything special, any special procedural steps that an RCMP officer is supposed to do, or is supposed to take in situations involving a police officer shooting death or the death of a person in police custody?

CPL BURKE: Police custody, there's policy on police custody. A police officer involved shooting, there's no, we didn't – there's no policy regarding police-involved shootings for our investigation other than the *Criminal Code*.

MR. FLAHERTY: Okay.

I'm just going to put your attention to Exhibit P-0546, page 3. Is that in front of it?

CPL BURKE: No.

MR. FLAHERTY: I am looking for Exhibit P-0546, page 3. Now, I refer you to Policy 2.2.5. It says, "Immediately notify your supervisor if a death occurred as a result of police action, or while the person was held in RCMP custody, under arrest or control of the police whether in hospital, ambulance, other transport, or police facility."

So that right there is a different investigative step that you must take, procedural step?

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

And then, Policy 2.4.1. says: If the death occurs as outlined in section 2.2.5., immediately send a briefing note to National Headquarters at the attention of whatever – that's different, is it not?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. So different investigations have different considerations?

CPL BURKE: Yes.

MR. FLAHERTY: Now, am I correct in saying that it's your opinion that Constable Monty Henstridge inappropriately passed along information to Constable Smyth in his first interview?

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

Do you recall Constable Henstridge saying that Constable Smyth's evidence was powerful and there was no need for him to second-guess himself?

CPL BURKE: Do I recall it?

MR. FLAHERTY: Yes.

CPL BURKE: Yes.

MR. FLAHERTY: I mean, to me, that indicates he's trying to tell Constable Smyth don't change the story; it's all good. Would you agree with that? Is that what he was trying to convey?

CPL BURKE: I don't know. I can't answer for that.

MR. FLAHERTY: Now, of course, we do know that Constable Henstridge was providing information in a roundabout way to Constable Smyth during the interview. The example I will give you is, is that Constable Smyth was under some stress as to whether or not he wanted to know if there was a bullet in the chamber. Because if there wasn't a bullet, then he – you know, if there was a bullet in there, then he felt like he saved his life. And then Constable Henstridge said: You saved your life. What is that meant to convey?

CPL BURKE: That there was a bullet in the chamber?

MR. FLAHERTY: Okay. There's been some talk about the voluntary nature of the evidence provided by Constable Smyth. And in the context of homicide investigations generally, you can say that he probably provided more voluntary evidence than normal, correct?

CPL BURKE: Constable Smyth?

MR. FLAHERTY: Yes. Is he more forthcoming than most homicide subjects?

CPL BURKE: Oh, yes. Yes.

MR. FLAHERTY: Now, here's a question: Did he have any professional duty to co-operate and make a full and true account of what his actions were on the day of death?

CPL BURKE: I don't know.

MR. FLAHERTY: Would you expect the police – okay, so if you leave here today, you have a self-defence situation, you kill someone. Are you under an obligation to co-operate with police in that investigation?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. So is it logical to assume that Constable Smyth had an obligation to co-operate?

CPL BURKE: Policies are different for different police forces. I didn't assume anything.

MR. FLAHERTY: You didn't assume anything.

CPL BURKE: With regards to him, with regards to RNC policy in giving an account of the events that happened.

MR. FLAHERTY: Now, if Constable Smyth had clammed right up and didn't provide you any information, would that arouse suspicion?

CPL BURKE: I don't know.

MR. FLAHERTY: Would you have been suspicious if Constable Smyth said, I'm not telling you anything?

CPL BURKE: Yes, but we also are aware of the fact that when members are involved, police officer involved in a use-of-force situation or a situation that's under investigation, they don't give statements or, you know, it wouldn't be surprising to me if a member involved did not provide a statement.

MR. FLAHERTY: Sorry, can you just say that again?

CPL BURKE: From my experience –

THE COMMISSIONER: They don't always volunteer information.

CPL BURKE: Yes. From my experience and from the experience that I was advised by Sergeant Osmond, that when members are under investigation they are likely not to provide a statement.

MR. FLAHERTY: Why – do you know why that is?

CPL BURKE: No, I don't.

MR. FLAHERTY: So a police officer can kill someone, and then there's not an expectation that they'll provide a true and full account of it?

CPL BURKE: Not always, and they don't have to provide an account of it, as part of the *Criminal Code*, and I've – I'm aware of other situations where police officers do not provide accounts to investigating officers of information they have regarding that event.

MR. FLAHERTY: What are those situations? What are we talking about here?

CPL BURKE: If a person is involved in a use-of-force situation or an internal investigation situation, members, through the advice of their lawyers or whatever, would just as likely not to provide a statement as to provide a statement. It doesn't tell me anything, really, that a member would provide a statement or not provide a statement. It doesn't lead me to believe anything.

MR. FLAHERTY: Okay. I'm just going to move to the vehicle here right quick. Yourself and Corporal Saunders talked about the vehicle being part of the scene, correct?

CPL BURKE: Yes. Is that from my notes?

MR. FLAHERTY: Well, I'm just asking you, did you discuss the vehicle?

CPL BURKE: I think so, yes.

MR. FLAHERTY: Okay.

And you were the one who decided not to have it searched.

CPL BURKE: Yes, it was my decision.

MR. FLAHERTY: Because you assumed there was no evidence of probative value inside the vehicle.

CPL BURKE: I had no reasonable grounds to believe that there was any evidence in that vehicle.

MR. FLAHERTY: But your policy says that you're supposed to be suspicious of these types of deaths. Someone drove to another person's house and killed them, rightfully or wrongfully, and you're not going to go in and take a look at the vehicle.

CPL BURKE: There was no reason for me to believe that there was any evidence in that vehicle.

MR. FLAHERTY: So, at that time, you were willing to guarantee there was no evidence. No evidence – I guarantee there is no evidence in this vehicle. That was your determination.

CPL BURKE: I didn't have any reasonable grounds to believe that there was anything in that vehicle of evidentiary value.

MR. FLAHERTY: This is speculation. I'm just going to put it out there and it has nothing to do with any kind of allegation I'm putting against Constable Smyth, but I'm just going to put it to you, and it's with respect to the thoroughness of your investigation.

What if you had found gloves in the car that could have been used in the staging? What if you found another clip that hadn't been accounted for? What if you found a piece of clothing with blood on it in the car? I mean, you couldn't guarantee that those items weren't in the car, correct?

CPL BURKE: I had no indication to believe that anything –

MR. FLAHERTY: How much of a hassle would it be for an RCMP officer to inspect that vehicle?

CPL BURKE: Well, you I would've had reasonable grounds to get in that vehicle.

MR. FLAHERTY: You couldn't ask the RCMP, hey, can we take a look inside your vehicle?

CPL BURKE: The RNC?

MR. FLAHERTY: Yes, RNC, sorry.

CPL BURKE: Yes, we could have, yes.

MR. FLAHERTY: But you didn't think about that, did you?

CPL BURKE: No.

MR. FLAHERTY: I know you say that you didn't have reasonable grounds to think that there was anything of probative value in the car, but would you admit that there's a possibility that there could have been probative evidence –?

MR. KENNEDY: Commissioner, I think the record, again, should disclose that this vehicle was in police – was in RCMP custody. It was passed over to the police and I think it was Corporal Noel, at the time, of the RCMP who drove the vehicle. So it's not like the vehicle was left police custody and went to a civilian member. It went to another police officer.

MR. FLAHERTY: Okay, but I'm talking about investigating, using it as part of the scene, so –

MR. KENNEDY: But that means now another police officer, Corporal Noel or Constable Benoit, would have to now – they see (inaudible) –

MR. FLAHERTY: Is this an objection or argument?

MR. KENNEDY: Excuse me, excuse me.

MR. FLAHERTY: No, I mean, you're interrupting everyone all the time. Is this an objection here?

MR. KENNEDY: Speculation.

THE COMMISSION: All right, everybody sit down for a second now. One second – one second.

Mr. Kennedy, what's your objection?

MR. KENNEDY: Yeah, the objection, again, is what I've been objecting to earlier today. There's total speculation here that is not consistent with the facts. The vehicle was passed over to police officers, and the inference that's being asked to be drawn is that these police officers would have seen bloody clothing, gloves or something else and not done something about it.

MR. FLAHERTY: I specifically –

THE COMMISSION: Mr. – okay, one second, now. Now, Mr. Flaherty, give me your response to the objection.

MR. FLAHERTY: I specifically set up this line of questioning. It has nothing to do – I'm not suggesting that there was evidence, that Smyth had evidence in that vehicle (inaudible).

THE COMMISSIONER: I agree. I agree. I agree with you.

There was no suggestion. He made it clear at the beginning of his line of questioning, and he's giving that as an example of the sorts of things, Mr. Kennedy, that might have been in that vehicle. Yes, it was still in police custody, it was passed over to an RNC officer the next day, I think, and it was released from the scene, basically the next day on my recollection.

But I think it's a fair question to ask why it would not be searched in terms of something that could be of evidentiary value being found there. And all Mr. Flaherty is doing is saying – giving an example of the type of thing. I mean, another extravagant concept or extreme example might be another rifle being found, you know, which would be – no evidence that was done.

If it had been a civilian shooting, a civilian called in, citizen called in, and said I've shot Mr. Dunphy in self-defence, wouldn't you have considered it would be worth your while to search in that vehicle, to search that vehicle?

CPL BURKE: Every investigation is different, and in other investigations, homicide investigations, we have searched vehicles that were on the property. However we didn't search Constable Smyth's vehicle, nor did we search Mr. Dunphy's vehicle that was also on the property.

THE COMMISSIONER: All right, so you made a judgement call based upon what – the evidence that you had at that time.

CPL BURKE: Yes, that's correct.

THE COMMISSIONER: Yeah.

Go ahead, Mr. Flaherty, sorry.

MR. FLAHERTY: I would agree with him. It's reasonable not to – or inspect Donald Dunphy's car. That vehicle would have no relation to his shooting death. Correct?

CPL BURKE: I didn't believe it had any relation to the shooting death.

MR. FLAHERTY: Okay.

Now, earlier today, I believe – and you can correct me if I’m wrong. Okay first, I’m just going to ask you: When was the rifle moved to the right side of Donald Dunphy’s chair?

CPL BURKE: I don’t know.

MR. FLAHERTY: Do you recall ever saying when you thought it had been moved there? Was it moved there the day of his death, the day before his death?

CPL BURKE: I don’t know. I can only expect, or reasonable for me to believe that it was moved prior to Mr. Dunphy arriving home that day, just because of the approximate times that it would have taken him to get home, change and send a text. I didn’t think it was moved that day.

MR. FLAHERTY: Okay. You didn’t think it was moved that day.

CPL BURKE: Or in that time from him getting home from the dinner he went to.

MR. FLAHERTY: So it was moved prior to when he got home is what you’re saying.

CPL BURKE: I can only, that’s my – I can only reasonably believe that.

MR. FLAHERTY: Now, Meghan Dunphy told you the last time she saw the rifle it was behind the couch. Correct?

CPL BURKE: Yes.

MR. FLAHERTY: You didn’t ask any questions with respect to the rifle, any follow-up questions because you didn’t want to provide leading questions. Correct?

CPL BURKE: The information that Ms. Dunphy provided regarding the rifle were vague. Like, she provided all the information that she could but she admitted herself that she didn’t have any really distinguishing descriptions of where and – where she found the rifle and how it appeared or how it looked.

MR. FLAHERTY: Do you know who the last person in Donald Dunphy’s house was other than Donald Dunphy or Constable Smyth?

CPL BURKE: I have to check. Mr. Dinn visited him quite often and so did Mr. Hearn, and Ms. Dunphy herself, I think, was there on Saturday before, the day before.

MR. FLAHERTY: And it didn’t strike you that maybe you should ask her – not necessarily a leading question, but you could have said: Did you notice anything different about the living room the last time you were there? You could’ve asked her that question. That’s not a leading question now, is it?

CPL BURKE: No.

MR. FLAHERTY: Okay. Because I’m pretty certain if she saw a .22 rifle in that room, she’d bring it to your attention. Correct?

CPL BURKE: Yes.

MR. FLAHERTY: Did you bother to show any family members or Meghan Dunphy pictures or provide descriptions of the rifle that was used in the, that was used by Donald Dunphy that day?

CPL BURKE: No, we took the descriptions that the witnesses provided independently.

MR. FLAHERTY: Now, there's been some, I guess, controversy with respect to your interview of Meghan Dunphy the date of her father's death. And it's been put to you that if she didn't want to be interviewed she could just say no. Right?

CPL BURKE: Correct.

MR. FLAHERTY: And you agree with that?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. Do you really think it would be that easy for a young woman to say no to a police officer on that day, with respect to a question for an interview?

CPL BURKE: I don't know.

MR. FLAHERTY: Okay. Do you not agree that Meghan Dunphy was likely suffering from some sort of trauma that day?

CPL BURKE: Yes.

MR. FLAHERTY: That she was likely in some sort of shock.

CPL BURKE: Yes.

MR. FLAHERTY: Okay. So do you believe that she even had the real mental wherewithal to consider whether or not she should give a statement on that day?

CPL BURKE: We took those considerations into account and we asked Ms. Dunphy if she wanted to provide a statement and she said yes.

MR. FLAHERTY: Yeah, I know she said yes. But, once again, I'm saying that there was, there's a likelihood that she really couldn't think out that decision because she was in trauma, because she was in shock. Do you not agree with that?

CPL BURKE: We tried to understand, you know, how Ms. Dunphy would have been feeling that day and we took that into account. We asked her if she wanted to provide a statement at that time and she provided her statement.

MR. FLAHERTY: How reliable are statements when they're provided by people who suffer trauma and/or, and/or are in shock? How reliable is that evidence, generally? Do you have – what does your experience, training and research tell you?

CPL BURKE: You have to gauge the reliability of every statement.

MR. FLAHERTY: Okay, that's true. Now, engaging the circumstances and context that Meghan Dunphy found herself in the night that her father was killed by a police officer, in those circumstances do you have any concern – did you or should you have had any concern with respect to the reliability of her evidence that she was going to provide you?

CPL BURKE: We obtained her statement. We looked at it for reliability and, you know, there – of course she was, her father is deceased and I can understand that she would be in, you know, a

state of shock, or you know – so those were considerations that we took and she provided a statement and that was information that we used.

MR. FLAHERTY: Was her, did her statement provide to you credible and reliable evidence?

CPL BURKE: I would consider what Ms. Dunphy said to be reliable, yes.

MR. FLAHERTY: Okay. Generally, Corporal, what are your thoughts on the fact that Constable Smyth was trying to direct the media with respect to the story?

CPL BURKE: Can you tell me more about that, or ...?

MR. FLAHERTY: Okay. Are you aware that Smyth, Constable Smyth sent a text to Mr. McLeod of *The Telegram*?

CPL BURKE: No.

MR. FLAHERTY: Are you aware of any communications between Constable Smyth and members of the media?

CPL BURKE: There appear to be some texts or – that I could have assumed that would have been to a person of the media.

MR. FLAHERTY: Is that appropriate?

CPL BURKE: I don't know. It's not something I would do.

MR. FLAHERTY: Okay. And so in the course of a homicide investigation, if you find out that the subject – if you found out that the subject was directing media, how would you – would you address that with the subject? Would you say why are you going to the media and providing details of this? Would you ask that question?

CPL BURKE: I would consider that information and how it related to the event that happened, the event that was under investigation, and if it impacted that in any way.

MR. FLAHERTY: Now, you didn't ask for Constable Smyth's cellphone the date of Donald Dunphy's death. Right?

CPL BURKE: Right.

MR. FLAHERTY: And is it fair to say you didn't ask for it because you just didn't think to do so? Or did you actually consider the issue and then determine no, I'm not going to ask him for his cellphone.

CPL BURKE: The issue with Constable Smyth's cellphone was that the phone and the information contained on the phone was not a direct evidence towards the shooting event. As I explained earlier, in – cellphones are a valuable piece of evidence if you're doing a, like a drug investigation where there's conversations back and forth between the dealer and the buyer, basically. Or there's some incident where there may be a conspiracy or there may be an ongoing history between the person involved and the person under investigation.

We wanted to get Constable Smyth's cellphone as the investigation went on and – just to ensure that we had a complete knowledge of, you know, everything that we could. But the cellphone

itself on that day we didn't – there was no indication to believe that the cellphone itself had any bearing on the investigation.

MR. FLAHERTY: We're left with two options here: one option, Constable Smyth killed Don Dunphy in self-defence; the other option is that it was an unlawful killing. Would someone who had unlawfully killed another person, is it not reasonable to assume that they may text, they may email, they may pick up the phone and say – I don't know what, say: I just killed someone, what should I do? Is there any possibility of that?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. So you're left with two options and you just – you choose not to ask for the cellphone because –

CPL BURKE: On that day.

MR. FLAHERTY: Okay.

And I would put to you that the conversations that have been found, the BBM conversations that have been found on Constable Smyth's phone which were deleted, provide evidence or information which is contrary to what Constable Smyth has said. Is that, is that correct?

CPL BURKE: In what?

MR. FLAHERTY: Okay, did Constable Smyth tell you that Don Dunphy had a mental illness?

CPL BURKE: No.

THE COMMISSIONER: Didn't hear that, sorry.

MR. FLAHERTY: Did Constable Smyth ever tell Corporal Burke whether or not Donald Dunphy had a mental illness?

CPL BURKE: No.

MR. FLAHERTY: Okay. And yet he called the man a lunatic to his friend when he was discussing that file or that investigation. He called Donald Dunphy a lunatic. Does that raise any concern for you?

CPL BURKE: It – not really, no.

MR. FLAHERTY: If – I'm not a police officer so I'll ask you, if I was going to talk and possibly arrest a lunatic, should I not take another police officer along with me?

CPL BURKE: All depends on your definition of lunatic.

MR. FLAHERTY: Okay.

CPL BURKE: But if it's a person that has mental health issues, yes.

MR. FLAHERTY: Okay.

Now just as an aside, what if Constable Smyth had – or sorry, Donald Dunphy had mental issues. What was the probative value in that?

CPL BURKE: You know, it's an incident where you get all the information that you can obtain regarding Mr. Dunphy or anybody involved in the situation.

MR. FLAHERTY: Are people with mental illness more likely to commit violent crimes?

CPL BURKE: I don't have – I don't have any information on that.

MR. FLAHERTY: So just to go back, so he calls Mr. Dunphy a lunatic. Did Constable Smyth, in his interview, ever state to you that there was a risk that he'd have to make an arrest, a real risk?

CPL BURKE: No, he was going to assess the –

MR. FLAHERTY: He was going to build a rapport. Is that something he may have said to you, he wanted to build a rapport to get information to make a risk assessment?

CPL BURKE: I think he said that to Constable Cox in his initial call with –

MR. FLAHERTY: Did he –

CPL BURKE: – the RCMP.

MR. FLAHERTY: Did he ever suggest to you that he contemplated having to – did he ever suggest to you that he contemplated having to make an arrest on that day?

CPL BURKE: I took it as he went to Mr. Dunphy's to assess the tweets that he sent out.

MR. FLAHERTY: No. No, but that's not what he says in his B – in his BBMs there now. He says, I – he indicates that he may have to make an arrest.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

Did he ever say to you in any of the interviews or have you seen in your file any suggestion that he, Constable Smyth, contemplated making an arrest?

CPL BURKE: No.

MR. FLAHERTY: Because if he's actually contemplated on making an arrest, common sense would dictate let alone your training, that you take someone along else with you, right?

CPL BURKE: Yes, and you assess the risk, of course.

MR. FLAHERTY: And so Constable Smyth gets a BBM message from his friend: Did you arrest buddy? He says: Nope, tomorrow.

CPL BURKE: Yes.

MR. FLAHERTY: Does that suggest that he was going to arrest someone?

CPL BURKE: I don't know.

MR. FLAHERTY: That's what he's saying, isn't it? That's what he's saying: Did you arrest buddy? Nope, tomorrow.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

Did Constable Smyth ever tell you that he contemplated providing a warning to Donald Dunphy or that he contemplated having to haul him in for a psychological assessment?

CPL BURKE: No.

MR. FLAHERTY: Now, doesn't that sort of change the colour of this incident? The story that we've been provided is that Constable Smyth went there to build a rapport to get information. But now we're seeing him telling, who I assume is one of his close friends, a warning might be appropriate. Isn't going to someone's house to provide them a warning different than going to build a rapport? Is it not?

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

And, in fact, what warning is he going to give? Is there any – is there any evidence of what a police officer or why a police officer should go to Donald Dunphy's house and warn him? What is he warning him about?

CPL BURKE: I don't know.

MR. FLAHERTY: These are questions you probably should have asked him. If you had – if you had these BlackBerry messages you would have asked him I assume. Correct?

CPL BURKE: That would have formed part of our investigation.

MR. FLAHERTY: In what – oh, sorry.

CPL BURKE: I don't –

MR. FLAHERTY: (Inaudible) questions would have formed a part of your investigation or these BBMs would have?

CPL BURKE: I don't know how he would have assessed those BBM messages, I only learned of them yesterday. And I would rather, you know, have had them initially in the investigation and to be able to assess them along with all the other information we had at that time.

MR. FLAHERTY: So we have a police officer who in one time or at one time says: This person made threats to the premier, I'm going out to see him, might have to arrest him; providing him a warning might be a good idea. That I would put to you is dramatically different than the testimony evidence narrative that has been put forward since the death of Don Dunphy. Would you not say that?

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

Now this is just a minor question here, Corporal Burke. I believe in your testimony at one point you doubted the probative value of the BlackBerry messages because it was casual conversation.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

In your history of being a police officer and particularly in drug crimes, when you make a wiretap if someone makes an admission during casual conversation or if someone provides you – or someone provides evidence which, excuse me, could be used in the investigation, you use that don't you?

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

So the fact that Joe Smyth was engaging in casual conversation which contradicts the information he had provided, just because that arose in casual conversation it still has value, it still has probative value.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

You had said during your testimony, Corporal Burke, that when you went to Dick and Debbie Dunphy's you went to get a pure statement. Correct?

CPL BURKE: Pure, pure version statement.

MR. FLAHERTY: Pure version statement, sorry.

And you went there, you said you went there without – or sorry, you asked questions without an agenda.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

But really now, shouldn't you have an agenda, shouldn't your agenda be I'm going to cross-reference their info against Constable Smyth's info, and I want to get as much info from the Dunphys in order to see how it lines up with Constable Smyth's story?

CPL BURKE: We had limited information on Constable Smyth's story at that time.

MR. FLAHERTY: Yeah, okay. So that prevented you from asking what I would say are many important questions that you should have asked, such as what was he wearing, what was his demeanour – questions of that sort. You didn't ask those questions because you never had much information from Constable Smyth; is that what you're saying?

CPL BURKE: That's where – we obtained witness statements from these people and those questions did not arise.

MR. FLAHERTY: Okay.

Now, you said one thing that sort of concerned me. Maybe I should be concerned; maybe I shouldn't be concerned. You were asked questions with respect to Constable X's actions in trying to divert Constable Smyth from speaking about the incident, and at one point I thought you said members are conditioned to not get involved if MCU is coming. What do you mean by conditioned, and what do you mean by not get involved?

CPL BURKE: It's been my experience – and I can't speak for other members, but when MCU is involved in an investigation, members tend to leave the information gathering or the investigation to MCU if they have been asked to assist in an investigation.

MR. FLAHERTY: So are you concerned that first responders do not pick up or account or record relevant material evidence that they, that they see? I mean, aren't they supposed to?

CPL BURKE: Yes.

MR. FLAHERTY: Now, I'm not an expert in police work, police techniques or strategy, but I have to say the fact that Constable Smyth was told that security cameras were not operable, I find that deeply concerning. Is that not concerning that that information was passed on to Constable Smyth?

CPL BURKE: I thought it was obvious information.

MR. FLAHERTY: How is it obvious?

CPL BURKE: Because when I went there, it as obvious to me that the cameras appeared not to be working.

MR. FLAHERTY: Okay. How did you make that consideration that the cameras weren't working?

CPL BURKE: I looked at the camera that I saw and it didn't appear to be operable.

MR. FLAHERTY: Did you have any evidence that Constable Smyth looked at any of the cameras, inspected any cameras?

CPL BURKE: No.

MR. FLAHERTY: Okay.

So we have a situation where there's only one living witness; however, his evidence could potentially be contradicted by security camera footage and you told him that source of contradiction doesn't exist, didn't you?

CPL BURKE: Yes.

MR. FLAHERTY: And at that point, I mean, doesn't that take a lot of pressure off a subject, knowing that there is no other witness to events?

CPL BURKE: He provided his version of the events before he knew that information.

MR. FLAHERTY: But he still asked, didn't he? He asked whether or not the cameras were working?

CPL BURKE: Yes.

MR. FLAHERTY: I would put to you in actual fact you probably should have said they were working, that that additional pressure would lead to better evidence. Do you not agree with that?

CPL BURKE: It wasn't considered.

MR. FLAHERTY: Do police ever tell subjects, persons of interest, that there are witness who've seen what they done but those witnesses don't exist, or there's security cameras that saw what they done but those cameras don't exist? Is that a technique that's used?

CPL BURKE: Yes.

MR. FLAHERTY: Did you speak with Monty Henstridge with respect to the inappropriateness of some of the statements he made during the, during the interview with Constable Smyth?

CPL BURKE: Yes, we had a discussion about it.

MR. FLAHERTY: What did you tell him or what did you say to him? What was the discussion?

CPL BURKE: Sergeant Osmond had a discussion with myself and Corporal Henstridge.

MR. FLAHERTY: Okay. And when did that occur?

CPL BURKE: After the interview with Constable Smyth.

MR. FLAHERTY: And did – sorry, it was Osmond you said?

CPL BURKE: Yes.

MR. FLAHERTY: Did he tell you what the possible impact of giving information like that – did he tell what the impact was that he was concerned of?

CPL BURKE: It wasn't giving the information; it was the friendliness or apparent friendliness with the subject.

MR. FLAHERTY: Okay. Okay, so –

MR. KENNEDY: Excuse me, Commissioner, I don't mean to interrupt I have to leave. I have to catch a flight. I just didn't want to walk out without letting anyone know.

THE COMMISSIONER: Okay, Mr. Kennedy; it's all right.

MR. FLAHERTY: And during your testimony you stated that missing the bullet that was later found by, I believe it was Ms. Dunphy, that that wasn't an oversight. Was it an oversight or was it not an oversight?

CPL BURKE: I don't think it was an oversight.

MR. FLAHERTY: Why don't you think it's an oversight?

CPL BURKE: The room was quite messy and it was found in another area of the room. In order to find that bullet we would have had to clean the whole room out entirely, and I didn't think it was part of our scene assessment.

MR. FLAHERTY: So based on your experience, are the forensic officers or forensic experts utilized by the RCMP, are they able to deal with messy crime scenes?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. So why weren't they able to deal with this one? Why did they miss the bullet?

CPL BURKE: Missing the bullet didn't impact a thorough examination of that room.

MR. FLAHERTY: Where was the bullet found?

CPL BURKE: I believe, according to Ms. Dunphy, it was found near the mantel, to the right side of the mantel, under a vacuum cleaner I think, or near a vacuum cleaner.

MR. FLAHERTY: Who was near the mantel during the time that Don Dunphy got killed?

CPL BURKE: Constable Smyth.

MR. FLAHERTY: Okay. And where did Don Dunphy point his gun from? On the other side of the room?

CPL BURKE: Yes.

MR. FLAHERTY: So doesn't that strike you as strange that there's just a random bullet, nowhere near Don Dunphy's body but near where Constable Smyth was standing?

CPL BURKE: That didn't strike me as strange, no.

MR. FLAHERTY: If you had of found – once again, this is not to say that you would find Constable Smyth's fingerprints on that bullet, but if you found his fingerprint on that bullet, what different investigative steps would you have then taken?

CPL BURKE: If we found Constable Smyth's fingerprint on it?

MR. FLAHERTY: Yep.

CPL BURKE: What bullet are you referring to, the one –

MR. FLAHERTY: The one that the RCMP could not find that Meghan Dunphy did. What would you have done if you'd found that bullet yourselves and found a fingerprint belonging to Constable Smyth on it?

CPL BURKE: I can't give an answer for that.

MR. FLAHERTY: And you didn't seize the bullet?

CPL BURKE: I obtained the bullet and I made it an exhibit eventually.

MR. FLAHERTY: Okay.

CPL BURKE: For safe keeping.

MR. FLAHERTY: Is that biohazardous material? Would you consider a live round biohazardous material?

CPL BURKE: I don't know if it's biohazardous or explosive; I don't know how to describe a bullet.

MR. FLAHERTY: Yeah, and I know. I wouldn't normally use biohazardous material as a descriptor of a bullet. I'm not a bullet expert. However, it did cause me some confusion. In the Human Deaths Policy, Policy 1.2 says, "All scenes must be assessed for potentially biohazardous material, including the presence of a dangerous suspect."

So when I read that, it suggests that even a dangerous suspect falls within the definition of –

THE COMMISSIONER: (Inaudible) dangerous substance.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. FLAHERTY: Well, presence of a dangerous suspect it says here in my copy.

THE COMMISSIONER: Suspect – it doesn't make a lot of sense, I don't think.

MR. FLAHERTY: It doesn't make a lot of sense but I guess – God knows. I'm not the expert; that's why I prefaced it.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. FLAHERTY: Exhibit P-0546, page 1.

UNIDENTIFIED MALE SPEAKER: P-0546, page 1. There you go. Dangerous suspect, yeah.

THE COMMISSIONER: Yeah.

UNIDENTIFIED FEMALE SPEAKER: What section?

MR. FLAHERTY: Policy 1.2.

THE COMMISSIONER: Page 1. It is 1.2.

MR. FLAHERTY: So you'll see right there –

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. FLAHERTY: So when you read that, did you fail in your assessment, do you think, of whether or not there was potentially biohazardous material in the room?

CPL BURKE: No.

MR. FLAHERTY: It says: "All scenes must be assessed" So you made a reasonable assessment for potentially biohazardous material. Is that what you're saying?

CPL BURKE: No.

MR. FLAHERTY: That's not what you're saying or no, you didn't make a proper assessment?

CPL BURKE: We didn't – as far as I know, we didn't assess the scene for potentially biohazard material, no.

MR. FLAHERTY: You didn't seize the bullet because it didn't have any evidentiary value.

CPL BURKE: Yes.

MR. FLAHERTY: But we do know that you did take investigative steps that did not have any evidentiary value. Correct?

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

Why do you think that the bullet didn't have evidentiary value? Are you talking about a legal standard here? Or are you talking about a practical standard?

CPL BURKE: Legal and practical I guess. The bullet was found in a scene that was not controlled by the RCMP.

MR. FLAHERTY: Okay.

And I think we all agree that to admit that into evidence at a trial would be near impossible, if not impossible; however, are you saying that there would be no information that you could get from that bullet which could impact your investigation?

CPL BURKE: Not without continuity of that piece of evidence.

MR. FLAHERTY: Okay.

So you're telling me that if you had found Constable Smyth's fingerprints on that bullet that you wouldn't have any follow-up questions with Constable Smyth?

CPL BURKE: It's not a test or an investigative step that we considered.

MR. FLAHERTY: No, I know you didn't consider it because you didn't have – okay, sorry –

THE COMMISSIONER: How are you doing timewise?

MR. FLAHERTY: I'm getting there.

THE COMMISSIONER: Thank you.

MR. FLAHERTY: I'm getting there.

Was there a breakdown in communication between you and the FIS? Would you say that, at some point, there was a breakdown of communication between you and FIS?

CPL BURKE: At the scene or ...?

MR. FLAHERTY: At any point during the investigation.

CPL BURKE: No.

MR. FLAHERTY: Okay.

Providing – not providing Smyth’s, Constable Smyth’s statement to FIS members, that wasn’t a miscommunication or that wasn’t an error?

CPL BURKE: No.

MR. FLAHERTY: How important do you take note taking with respect to investigation notes?

CPL BURKE: It’s important.

MR. FLAHERTY: During your testimony, and tell me if I’m wrong, did you say sometimes notes are good, sometimes notes are bad?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. They are what they are.

CPL BURKE: Yes.

MR. FLAHERTY: As a primary investigator, shouldn’t you take a more proactive approach as opposed to they are what they are? Shouldn’t you ensure that all the note taking that forms part of your investigation is done properly according to policy and procedure?

CPL BURKE: As a primary investigator, I obtained notes from various police officers. It’s not my duty as a primary investigator to ensure that members take accurate and concise notes.

MR. FLAHERTY: But aren’t their notes – don’t their notes aid in the direction and speed and flow of your investigation?

CPL BURKE: Yes, they do.

MR. FLAHERTY: Okay. And so if someone is handing in less-than-adequate notes, can’t that not lead to a less-than-adequate investigation?

CPL BURKE: Every piece of information forms our investigation.

MR. FLAHERTY: Can taking less-than-adequate notes lead to a less-than-adequate investigation?

CPL BURKE: It all depends – the notes are considered part of the investigation and I can’t say –

MR. FLAHERTY: So if they are less than adequate, can they lead to a less-than-adequate investigation? Could they compromise an investigation if the notes are that poor?

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

And, in fact, RCMP officers can be disciplined – not by you, but RCMP officers can be disciplined due to poor note taking.

CPL BURKE: Yes.

MR. FLAHERTY: Correct. Okay.

Now, I don't want to go into Mr. Riche's report too much, but it seemed that you had taken issue with whether or not he, Constable Smyth attempted to fatally injure Donald Dunphy. Is that correct?

CPL BURKE: Yes.

MR. FLAHERTY: Did Constable Smyth know he was pointing at Donald Dunphy's head, at any point? From shot one to shot four, did he know he aimed at the head at any point?

CPL BURKE: Yes, I think so.

MR. FLAHERTY: Okay.

So if I'm going to shoot you in the head, can you glean what my intention is from that?

CPL BURKE: If – and I can go – I looked at firearms training by the RCMP and the RNC, and, you know, whether a shot to the head was in line with their firearms training.

MR. FLAHERTY: Yeah.

CPL BURKE: So that's what I made my assessment on.

MR. FLAHERTY: Okay. No, but the question is: If someone shoots another person in the head and they know they're doing it, they're intending to fatally injure, or at least are open to the fact that that person will be fatally injured. Correct?

CPL BURKE: Another person is not a police officer or training –

MR. FLAHERTY: Or a police officer – if a police officer shoots me in the head, what is he intending to do?

CPL BURKE: Stop a threat that's apparent to him.

MR. FLAHERTY: Okay.

And how am I going to be stopped? Am I likely going to be stopped because I'm going to die from gunshot to the head? Are you likely to die from a gunshot to the head? Do you know that?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. So let's move on.

Whose idea was it to have the folder experiment, the folder re-enactment?

CPL BURKE: I'm not sure. One of the investigators.

MR. FLAHERTY: Okay.

And what probative value did that experiment have?

CPL BURKE: None.

MR. FLAHERTY: Okay.

THE COMMISSIONER: Which one was that you're talking about now?

MR. FLAHERTY: The folder experiment.

THE COMMISSIONER: Okay.

MR. FLAHERTY: And, in fact, the experiment that was conducted wasn't even conducted in accordance with the evidence that you had been provided with respect to the folder drop. Correct?

CPL BURKE: Correct.

MR. FLAHERTY: Why wasn't there a gun-dropping experiment?

CPL BURKE: There would have been no value in that either.

MR. FLAHERTY: Yeah.

I'm going to put to you that the investigators had this folder experiment and the purpose of this folder experiment was: (a) to prove that a folder could be dropped, thrown and land in a perfectly organized way on a table and (b) the follow-up to that is, is that that takes care of a loose end with respect to Constable Smyth's story. Correct?

CPL BURKE: It was an experience that we tried and we didn't hold much weight in the conclusions of that experience.

MR. FLAHERTY: Am I correct or am I not correct?

CPL BURKE: I didn't hold any weight in that experiment.

MR. FLAHERTY: No, am I correct or not correct? What was the purpose of the experiment?

CPL BURKE: Just to try to recreate a folder drop.

MR. FLAHERTY: And if the folder drop appeared to conclusively support Constable Smyth's story of what happened in that room, would it have been used as evidence?

CPL BURKE: There was no conclusive evidence gained from that folder drop.

MR. FLAHERTY: No, I know. But if there was, you were going to use it to say Constable Smyth's story is true. He dropped the folder and although it landed in a totally bizarre fashion, we can recreate that drop.

CPL BURKE: It's a step that we took.

MR. FLAHERTY: Do you know why it was taken?

CPL BURKE: We tried to assess everything we possibly could. That we had –

MR. FLAHERTY: But you didn't. You didn't do a gun drop, did you?

CPL BURKE: No.

MR. FLAHERTY: Have you done an investigation review? Like you as a primary investigator, do you do interim reviews of an investigation, final reviews of an investigation?

CPL BURKE: Yes, in some circumstances.

MR. FLAHERTY: Okay.

Have you done one in this circumstance?

CPL BURKE: Not as far as I know. I wouldn't do it as the primary investigator.

MR. FLAHERTY: Even on, I would guess, an informal or voluntary basis, would you not review your investigations to see if everything went according to plan or if there's any best practices that could be implemented or any improvements you could make?

CPL BURKE: In certain investigations that has been done.

MR. FLAHERTY: You haven't done it for this one, have you?

CPL BURKE: No.

MR. FLAHERTY: So you could have reviewed the file and you could have made some determinations with respect to errors and omissions that were made by the RCMP and its officers, but you didn't do that. You never came here to this inquiry with the ability to provide a frank opinion as to what errors or omissions may have been made in your investigation?

CPL BURKE: No.

MR. FLAHERTY: Okay.

Constable Smyth – sorry, you had said during your testimony Constable Smyth was enabled to assess risk without an interview. Is that correct?

CPL BURKE: With the information he had and him going to Mr. Dunphy's, it was not a – it was not – it didn't alarm me or concern me in any way.

MR. FLAHERTY: Okay, no – and that's true but that's different from the question I'm asking you. Are you saying that you found this fact that Constable Smyth was unable to assess the risk posed by Donald Dunphy without interviewing him?

CPL BURKE: I don't – it would have been – with the information that Constable Smyth had, that the information I know he had, it would have been hard to assess the risk without an interview or further investigation.

MR. FLAHERTY: Now Mr. Kennedy, when he was here, talked about the probabilities of things and the staging of things. And he only provided you one example of how this could have – how this could have been staged; that at some point Constable Smyth somehow found a gun behind the couch and then staged it.

CPL BURKE: Yes.

MR. FLAHERTY: That's – I'd agree that's sort of improbable, not impossible though and I'm going to tell you and I'm going to see if you agree with me on this. In your evidence you said that any well-trained officer, or any trained officer, is aware of this one-plus-one rule?

CPL BURKE: It comes up in our, in our training –

MR. FLAHERTY: So –

CPL BURKE: – as RCMP members.

MR. FLAHERTY: – when you walk into a room and you see a, I don't know, a three- or four-foot fashioned club, that's not normal. You don't usually see that in people's houses do you, just laid out and about.

CPL BURKE: No.

MR. FLAHERTY: Okay.

So if there ever was a time that some – that you might want to look into it and see if there's other weapons, it's that time. Your first introduction to the house there's a four-foot fashioned bat there.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

Do you find it probable – okay, no, just to back step. Are you aware that Constable Smyth did checks to see if Donald Dunphy had a firearm?

CPL BURKE: I'm not sure if – he checked with Richard and Debbie Dunphy, yes.

MR. FLAHERTY: Yeah. He never had any –didn't do any PROS or ICAN checks that would –

CPL BURKE: I don't know.

MR. FLAHERTY: Okay. I'm going to put to you – put to you that he did. Would that surprise you?

CPL BURKE: No.

MR. FLAHERTY: Okay.

He checks with the police with respect to the issue of firearms. He checks with Dick and Debbie with respect to the presence of a firearm. He then walks down Donald Dunphy's house or travels to Donald Dunphy's house, walks into his house, sees a four-foot bat, three-foot bat. Are you telling me it's probable that a police officer in that situation doing a risk assessment is not going to ask: Excuse me, is there another weapon here or are there any firearms present? I mean is that probable?

CPL BURKE: It would be a question that logically had to be posed, yes.

MR. FLAHERTY: Did you pose that question to Constable Smyth? How is it that you asked everyone that day whether or not Donald Dunphy has a gun; you walked into his house, you see a four-foot fashioned bat and you didn't ask. Did you ask him that question?

CPL BURKE: No.

MR. FLAHERTY: Because that's where things take a turn, because I would think – and I'll put that out there that it's probable, indeed likely, that he did ask if there was a gun present. I honestly think it was probable. I mean his training suggests that he should ask if there are other weapons there. He already had an interest in firearms.

MR. DROVER: Do you know what the probable answer was? You're making up a story of what happened.

MR. FLAHERTY: Are we having, like, proper objections or arguments here? Like, I don't know what's going on.

THE COMMISSIONER: Continue, Mr. Flaherty. Mr. Drover knows –

MR. DROVER: I'm sorry. I'm feeling –

THE COMMISSIONER: – got carried away I think.

MR. DROVER: I'm feeling overtired and I blurted out. It won't happen again, my apologies.

My apologies, Mr. Flaherty.

MR. FLAHERTY: I get that (inaudible).

So I would say it's likely that he asked if there was a gun present. And if he asked if there was a gun present, then he could have been told where the gun was or the gun could have been brought out for his inspection. Is that – that's not improbable, is it, that that could have happened that way?

I'm not saying that you found it that way but that's not improbable. That's how you think things would logically go. Correct?

CPL BURKE: I can't – how things would logically go, I don't know. I looked at the evidence and –

MR. FLAHERTY: Is it probable or improbable that a police officer would not ask is there a firearm present when he's doing a risk assessment, given the circumstances that I've outlined to you?

CPL BURKE: Yes.

MR. FLAHERTY: It's improbable. Correct?

CPL BURKE: No, it's probable that a police officer would ask that question. Yes.

MR. FLAHERTY: It's probable.

CPL BURKE: Yes.

MR. FLAHERTY: Is it improbable he wouldn't?

CPL BURKE: I don't know.

MR. FLAHERTY: I would put to you that it is. And so if he did, if he had to ask if there was a firearm there, he may have been provided the answer. So all of a sudden – what I'm trying to get

at is, is that you agreed with Mr. Kennedy that staging seemed improbable or the method of staging was improbable, but now we're starting to get to a place where, logically, if you believe that Constable Smyth went there and acted in accordance with his training and policies, he would have – should have early on found out where the gun was and/or had it brought before him.

THE COMMISSIONER: Mr. Flaherty, I don't know if you're – it might be a good submission to make at the end of the hearing. But I tell you, I'd be very surprised if an experienced police officer would ask – I don't question it, that the question, to suggest it might be put at some stage. One question I have is when would it be put? If Constable Smyth was trying to build a rapport it might not be put earlier rather than later; but, what I really find a little difficult to say would be logical, would be if an experienced police officer asked if there was a firearm and the firearm was brought out, it wouldn't stay in the suspects hand very long I suspect if it was brought out. Or if Constable Smyth had been directed to where the firearm might be behind the couch, I wouldn't see the police officer standing by and saying, well, go over and get it for me. He'd be right on top of it, wouldn't he, in terms of just protecting himself?

MR. FLAHERTY: Well, you would expect.

THE COMMISSIONER: Yeah. Well, this is just – the scenario you're putting to Corporal Burke I'm just finding a little difficult, considering there's no evidence. We're just trying to logically establish, by pure logic. I'm having some difficulty seeing how that scenario could work.

But – go ahead.

MR. FLAHERTY: Something out of the norm happened that day.

THE COMMISSIONER: Yeah.

MR. FLAHERTY: So we have to ask ourselves what was improbable and what was probable. The questions are going before Constable Burke. So I wanted to see initially as to whether or not they considered these things and in particular, what consideration he gave to the fact that a rifle wasn't – is consideration of the fact that Constable Smyth never asked if there was another weapon or firearm in the house. Is that probable or improbable?

THE COMMISSIONER: Uh-huh, that's fair enough.

MR. FLAHERTY: And –

THE COMMISSIONER: I'm just –

MR. FLAHERTY: No, I know –

THE COMMISSIONER: It seems to me I'm going to have to, in the course of my report, consider – go on from that and consider whether it would be logical that that firearm would be left anywhere near Mr. Dunphy if Corporal – sorry, Constable Smyth was told it was around, you know.

MR. FLAHERTY: And I'm engaged in the argument here, but here's the thing, I would say that it's not improbable that if Donald Dunphy said: My gun is behind the couch. That Smyth would say: Well, that's where you're going to leave it. You can leave that there because that gun's not going to do anything, anything to me, there's a couch on it.

Did you know that constable –

THE COMMISSIONER: I guess I need more, more training in breaking of my instincts in that regard.

Go ahead, sorry.

MR. FLAHERTY: Fair enough.

Do you know that Constable Smyth referenced the bat to Mr. Dunphy?

CPL BURKE: Yes, I think he did.

MR. FLAHERTY: Okay. And what did he say? Leave it there.

CPL BURKE: Something along that line, yes.

MR. FLAHERTY: So where, wherever the weapons are to, as long as they're not posing an immediate danger, it appears that he said, that Constable Smyth said: Leave the weapon where it is.

CPL BURKE: Yes.

MR. FLAHERTY: Okay.

THE COMMISSIONER: And he said something to the effect of, no problem, as long as it stays where it is, no problem.

MR. FLAHERTY: As long as it stays where it's to, we got no problem. It's just like there'd be no problem if the gun stays where it's to.

This is a violent death, correct?

CPL BURKE: Yes.

MR. FLAHERTY: Okay. And you found a club, an instrument of violence next to a dead body. Did you not see any kind of connection between the violent death and the weapon which was in close proximity? Did you see any connection between those two things?

CPL BURKE: No. The club you mean?

MR. FLAHERTY: Yeah, the club.

CPL BURKE: As a forward causing –

MR. FLAHERTY: Or just having any connection because, I mean, at this point you want to be testing every piece of evidence that Constable Smyth is going to, is going to bring to your attention, provide to you.

CPL BURKE: Yes.

MR. FLAHERTY: So at a very early time in the investigation, you find a weapon next to a dead body. Is there a sufficient connection there that you might want to take some analysis or assessment of that bat, that club?

CPL BURKE: There's no indication to believe that the bat was used in that incident.

MR. FLAHERTY: Okay. But I would say that there is because, do you have any evidence suggesting that that bat was ever left to the left side of the chair in the archway? Any evidence?

CPL BURKE: That it was there?

MR. FLAHERTY: That it was ever there before, before police responded to the scene.

CPL BURKE: Not to my knowledge.

MR. FLAHERTY: No. Did you ever ask – did you ever seek to ask or really investigate the club? I mean the club – everyone always saw the club to the right where Constable Smyth says the rifle was to and then after his death his club's found to the left. That didn't, that didn't dawn upon you that, that there might be something to the position of that club?

CPL BURKE: No.

MR. FLAHERTY: Okay.

Almost done there, Commissioner.

Do you think it's probable that, or likely – or have you found –sorry, I guess you did find. But do you think it's probable that someone would knowingly invite a police officer into their living room where there is a loaded, unregistered firearm. I mean, is that – that's bizarre, is it not?

CPL BURKE: I never looked at that scenario before, or considered that in that way.

MR. FLAHERTY: Well, I would put it to you that you should've considered it because you have a police officer saying I had to kill in self-defence because a man had a rifle that was easily accessible, loaded and unregistered in his living room. And you found no hiding area for it to hide in per se, did you?

CPL BURKE: Hiding place?

MR. FLAHERTY: Yeah.

CPL BURKE: No.

MR. FLAHERTY: Is there anywhere where – obviously, it was hidden.

CPL BURKE: No.

MR. FLAHERTY: So once again, is it not bizarre and should you not have thought about that? To say, you know, let's take a second.

Sorry.

The evidence is that the gun – the only place anyone ever saw that gun was behind the couch. And now, all of a sudden, Donald Dunphy invited Constable Smyth into the room with a criminal charge waiting to happen – unregistered, loaded firearm in his living room.

Does that not seem somewhat bizarre? Does it not seem bizarre?

CPL BURKE: It – yes, it seems bizarre.

MR. FLAHERTY: It seems bizarre. Thank you.

Okay, the pen. Why wouldn't you ever look to see where the pen was, the pen that Constable Smyth used to allegedly take notes?

CPL BURKE: We didn't consider that an investigative step.

MR. FLAHERTY: Okay. So the story that you're provided, the self-defence story is: I'm writing notes. I'm not really paying attention. In my peripheral vision a 60-year-old man without a history of using guns is pointing a rifle at me. So I had to drop the pen.

I mean, wouldn't you want to corroborate that story? I mean the need for self-defence, I would put to you, arose due to the fact if it happened the way Constable Smyth said it happened, because he wasn't paying attention. He was writing notes.

So wouldn't you want to see whether or not he actually was writing notes?

CPL BURKE: Yes. We found notes in the yellow folder.

MR. FLAHERTY: You did, but you didn't find a pen. He could've made those notes anytime, couldn't have he? He could've.

CPL BURKE: Yes.

MR. FLAHERTY: Yeah.

Mr. Kennedy, in his cross-examination, said to you that anyone can act out of character and they can act out if they're faced with something, problem or issue or crisis – paraphrasing at that point. I mean, that type of logical reasoning is equally applicable to Constable Smyth, is it not?

CPL BURKE: Yes.

MR. FLAHERTY: Is it true that you think that the amount of shots fired are not relevant at all in a section 25 investigation?

CPL BURKE: It's something that you can consider.

MR. FLAHERTY: It's something you can consider, okay. I thought you said it didn't matter, and I was going to ask you, you know, if you found someone with 20 bullets in them, in the circumstances that we've been talking about here, wouldn't that – that would be a an issue for concern, would it not?

CPL BURKE: That would be an issue of concern for a use-of-force expert, or he would have an opinion on that, I guess.

MR. FLAHERTY: Now, out of fairness, I want to give you this opportunity. You suggested that you didn't have time to review all the documents during this investigation – is that correct?

CPL BURKE: No, I tried to review every document with regards to this investigation –

MR. FLAHERTY: But you–

CPL BURKE: – however, you know, things like phone records, and things that, you know, I would review the results of that analysis.

MR. FLAHERTY: Okay.

Did you have the time if you wanted to, to review all the records, or all the documents in the file?

CPL BURKE: Yes.

MR. FLAHERTY: And, of course, MCU has no issues with respect to resources, correct?

CPL BURKE: Correct.

MR. FLAHERTY: Okay.

Mr. Avis, in his cross-examination of you, had some questions with respect to motives, and motive isn't required to establish the elements of a section 25 offence. That's correct, isn't it?

CPL BURKE: Yes.

MR. FLAHERTY: But you do sometimes look into motive, don't you?

CPL BURKE: Yes.

MR. FLAHERTY: Did you make any findings with respect to the possible motives of either Constable Smyth or Don Dunphy?

CPL BURKE: No.

MR. FLAHERTY: You said during your evidence there was no evidence of a struggle when you first walked in.

CPL BURKE: When I first walked in the scene?

MR. FLAHERTY: Yes.

CPL BURKE: No, but it was a limited assessment at that time.

MR. FLAHERTY: It was limited. I would put to you that, you know, given the fact that the room was so messy that you couldn't find a bullet, I mean, you couldn't even make a reliable cursory determination at that point when you walked into the room – could you?

CPL BURKE: No. Of a struggle, no.

MR. FLAHERTY: The fact that there was a bullet in the gun, in the rifle, really, what probative value did that have? Because the offence that you were looking into was pointing a firearm, does that require a bullet in the chamber?

CPL BURKE: No.

MR. FLAHERTY: The presence of a bullet in the chamber doesn't support nor refute Constable Smyth's story, does it?

CPL BURKE: No.

MR. FLAHERTY: Because there was a bullet in the chamber doesn't mean that Donald Dunphy definitely, unexpectedly pointed a rifle at Constable Smyth. Correct? I jibber jabbered

that one. The fact that there was a bullet in that rifle, that's not conclusive proof that Donald Dunphy pointed the rifle at Constable Smyth?

CPL BURKE: No.

MR. FLAHERTY: Those are all my questions.

Thank you very much.

THE COMMISSIONER: Ms. Rasmussen, do you still have the same questions left?

MS. RASMUSSEN: It will take about two minutes.

THE COMMISSIONER: Don't feel rushed, take your time; we can run over if we have to.

MS. RASMUSSEN: No, really.

THE COMMISSIONER: If anybody wants to.

MS. RASMUSSEN: Corporal Burke, when are you authorized to handcuff someone?

CPL BURKE: Upon arrest.

MS. RASMUSSEN: It was put to you yesterday that there was some urgency in seeking Constable Smyth's phone and the implication was, in the questioning, was the delay in obtaining the phone led to a loss of evidence. Were you concerned at the time that data would be lost that could not be retrieved from the phone if you waited a week or two?

CPL BURKE: No.

MS. RASMUSSEN: And you said yesterday that disclosure was provided to Justice Riche in paper form.

CPL BURKE: Yes, correct.

MS. RASMUSSEN: Was there a reason for that that you know of?

CPL BURKE: He wanted it in paper form and we would have provided it in electronic form and we would have provided him with a computer to view the electronic form, but he wanted it in paper.

MS. RASMUSSEN: Those are my questions, thank you.

THE COMMISSIONER: Now, Ms. O'Brien, you had a question.

MS. O'BRIEN: I do; I will be very brief.

Corporal Burke, quick question with respect to the phone records. I understand in response to some of Mr. Simmonds questions you said that you only spent a very short amount of time with the phone records, reviewing the phone records – Constable Smyth's. Is that right?

CPL BURKE: Yes, initially, yes.

MS. O'BRIEN: Okay.

And who – did you task somebody to give those phone records a more detailed review?

CPL BURKE: Wanda Richards.

MS. O'BRIEN: Okay.

Now, I understand from Wanda Richards's report, which is not currently entered into evidence, but it will be when she testifies, that she says that through conversations with Corporal Steve Burke of MCU East, it was determined that a temporal analysis would lend much to the understanding of the case.

So when I read her report, I understand that she was reviewing those phone records for the purposes of putting together essentially a timeline. Is that right?

CPL BURKE: Yes, and an analysis of the phone information.

MS. O'BRIEN: Had you also asked her to do an analysis of the phone information otherwise to find other potentially relevant evidence there that would have no relevance to the time line, but could have relevance to the investigation – is that what you're saying?

CPL BURKE: Yes.

MS. O'BRIEN: Okay.

So she'll understand she had that instruction when I –

CPL BURKE: That's the way I remember it, yes.

MS. O'BRIEN: Okay.

Thank you.

THE COMMISSIONER: Corporal, just before we adjourn, getting back to Mr. Flaherty's – I guess we'll call it an alternative scenario. Would that be fair? In terms of Constable Smyth having asked Mr. Dunphy whether there was a firearm in the house and –

MR. FLAHERTY: That is an alternate scenario.

THE COMMISSIONER: Sorry.

MR. FLAHERTY: That is an alternate scenario.

THE COMMISSIONER: Yeah, and explain what evolved from that.

Your experience, if you're in the house, Mr. Dunphy is seated in his chair, you're over by the left side of the mantel and you ask Mr. Dunphy is there a firearm in the house, and Mr. Dunphy says yeah, there's one right there behind the couch and Mr. Dunphy is closer to that firearm than you are, what are you likely to do?

CPL BURKE: Make every attempt to secure the firearm or to prevent Mr. Dunphy from obtaining the firearm.

THE COMMISSIONER: You wouldn't just continue your questioning while the firearm was in that position?

CPL BURKE: No.

THE COMMISSIONER: Would you ask Mr. Dunphy to go bring the firearm over?

CPL BURKE: No, I wouldn't.

THE COMMISSIONER: In terms of asking if there was a firearm in the house, keeping in mind Constable Smyth's statement, rightly or wrongly, that he was doing something to – or he was approaching the investigation or interview in terms of building rapport with Mr. Dunphy.

Would you see the early asking of that question, do you have a firearm, as furthering the objective of building a rapport or not?

CPL BURKE: It wouldn't further the objective of building a rapport.

THE COMMISSIONER: Would it possibly take away from that building of rapport?

CPL BURKE: Yes, it would.

THE COMMISSIONER: In any event, your – you considered the statements of Constable Smyth and other witnesses, and your conclusion was that the scenario that was set out by Constable Smyth had not been refuted by the evidence that you found in your investigation?

CPL BURKE: Yes, that is correct.

THE COMMISSIONER: Is that correct? Okay.

All right. We'll adjourn – sorry, if there's – go ahead, Mr. Simmonds. I should have –

MR. SIMMONDS: No, I have – just one question.

THE COMMISSIONER: I intended to let you – I meant to have questions arising from our exchange, yeah.

MR. SIMMONDS: Very, very briefly.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: Your scenario, Mr. Commissioner –

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: – was that the gun was behind the couch and you said the left side of the mantel.

THE COMMISSIONER: No, if Constable Smyth was where he was, which is what I understood to be the left side, if you're facing the mantel.

MR. SIMMONDS: Mr. Dunphy is here.

THE COMMISSIONER: Yes.

MR. SIMMONDS: Constable Smyth says he moved back and forth around the mantelpiece here.

THE COMMISSIONER: Yes, that's correct, yeah.

MR. SIMMONDS: Okay.

THE COMMISSIONER: My question was posed in terms of if he had been – he said he was towards the left side of the mantel more –

MR. SIMMONDS: To the left side.

THE COMMISSIONER: – than anywhere else, but anyhow.

MR. SIMMONDS: He would be closer to the gun. The gun would be behind this couch.

THE COMMISSIONER: Yes, I – but which side of the couch is the –?

MR. SIMMONDS: Well, it really wouldn't matter. I shouldn't say really wouldn't matter. This side or that side. If he was in this area here, which is where I understand him to be, initially.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: He said he went over as far as here. I know this in not showing up on the record. Excuse me, Officer Burke, you should be seeing this, too.

If indeed he was this side, moving in this area of the mantel and the gun is behind the couch now.

THE COMMISSIONER: Well, I'm –

MR. SIMMONDS: You're saying it was on this side.

THE COMMISSIONER: I'm assuming that if it were on the left side, I forget now what Ms. Dunphy – but we have it in. On the transcript, we have her statement of where she saw the gun when she was vacuuming. And I frankly don't recall right now what –

MR. SIMMONDS: No, and I don't either.

THE COMMISSIONER: Right, okay.

But, in any event, I note your point. It's not clear that he'd be closer to, but if a foot or two or the 38.5 inches, I'm not sure that matters too much.

Sorry, go ahead, Mr. Flaherty.

MR. FLAHERTY: Two quick follow-up questions.

THE COMMISSIONER: Sorry?

MR. FLAHERTY: Two very quick follow-up questions.

THE COMMISSIONER: Go ahead.

MR. FLAHERTY: Using your logic and what you would have done, i.e. secure the gun, the rifle, should've Constable Smyth secured the club?

CPL BURKE: It was, I guess, a judgement call. I –

MR. FLAHERTY: No, now, come on now. You just said he should have secured the gun in behind the couch. Should've he secured the bat next to Mr. Dunphy?

CPL BURKE: I think he addressed the bat that was in the room and said it's okay if it stays there.

MR. FLAHERTY: Okay. And so that's what he did, so is it beyond belief, then, that he would say, well, as long as the gun stays in behind the couch, you can keep it there?

CPL BURKE: It's not something that I would do, no.

MR. FLAHERTY: No, no.

CPL BURKE: I can't speak for Constable Smyth.

MR. FLAHERTY: Can't speak for Constable Smyth. Okay. So speaking for yourself, would've you secured that bat?

CPL BURKE: I don't know. I might have secured it. I don't know.

MR. FLAHERTY: And with respect to securing, is there much of a chance that a injured man who's sat down is going to be able to move a couch away and get a gun before a police officer can get a hold of him? Like, for all intents and purposes, I'd say it's pretty secure. It's under a couch. He's not moving it that quick, is he?

CPL BURKE: Not to my knowledge, I don't know.

MR. FLAHERTY: Thank you. Those are my questions.

THE COMMISSIONER: All right. Good note to end on. We'll adjourn until 9:30 tomorrow morning, and we're continuing then with ...?

MS. CHAYTOR: Sergeant Tim Buckle.

THE COMMISSIONER: Sergeant Tim Buckle okay. Thank you.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

THE COMMISSIONER: So we may break early.

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry closed.