



COMMISSION OF INQUIRY RESPECTING THE DEATH OF  
DONALD DUNPHY

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Transcript

Volume 4

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*Commissioner: Honourable Justice Leo Barry*

Monday

16 January 2017

**MS. SHEEHAN:** All rise.

I declare this Commission of Inquiry open.

Commissioner Leo Barry presiding.

Please be seated.

**THE COMMISSIONER:** Good morning, everybody.

I suppose I should note the delay for the record that we're starting at 11 instead of 9:30 because of a snowstorm. I want to just briefly get counsel comments on whether we can cut back the time. Right now we're, in the event of closures, we're following the hours of the court, which normally would be not opening until 11. I think we probably could have started an hour earlier today.

I think the problem with the court is there has to be clearing of these two lanes down there in order for anybody to get a place to park; whereas here, by the looks of it, we have pretty generous parking spaces.

The other uncertainty, from my perspective, is I'm not sure the, what the home conditions are for various individuals. And it may be that in some cases that you have to be plowed out by either City Hall or, or someone else in order to get here.

Anything you want to tell me in terms of your unique situation, otherwise I'm inclined to say we, if the courts are going to open at 11 that we do, we aim for an hour earlier, say for 10, but again I'd listen to counsel in that regard; anybody have anything to suggest? It's not a big deal, but we might make up an extra hour (inaudible) sorry –

**MR. AVIS:** Just mention that I don't listen to the radio and I came out here, I had no problem getting here at 9:30.

**THE COMMISSIONER:** Right.

**MR. AVIS:** The road I live in is one of the last roads to be plowed in St. John's –

**THE COMMISSIONER:** Right.

**MR. AVIS:** – because it's about 50 feet long. But I also lived in Corner Brook for 19 years and I think they closed everything down.

**THE COMMISSIONER:** Right.

**MR. AVIS:** In St. John's, unnecessarily, but that's beside the point.

**THE COMMISSIONER:** All right, well you wouldn't object then to our starting at 10 rather than 11 in these situations. Anybody else?

All right, well then, just for the record, I think we'll aim for 10 o'clock; it'll depend upon the uniqueness of the situation. Right now, we're on a system where we're notified by the person who does the same thing for the courts, that they'll be closing at 11 and what I would propose is that we just put up on the website the hour 10 o'clock being when we'd reopen in those circumstances. And we'd probably call the media as well, call the radio stations that perform that service.

Mr. Simmonds.

**MR. SIMMONDS:** We are prepared, Mr. Commissioner, if wanted to, to take a half an hour for lunch to make up a half an hour.

**THE COMMISSIONER:** Yeah, well, there's things that have to be done behind the scenes I'm not sure I want to put too much pressure on. It's not the end of the world. In this situation today we, we'll make up some time because Mr. William Corcoran was scheduled for next week and we finished with him last week. So we have a little bit of slack there and we'll do some catching up that way. All right, well, that's – let's try it the next time. Maybe we'll get lucky and it won't happen again, but we'll start at 10 if the courts start at 11, generally get an extra hour.

Now, I also had a letter – Mr. Flaherty, you sent me a letter regarding funding, possibility of funding for your coalition, the community coalition –

**MR FLAHERTY:** Yes, Mr. Commissioner.

**THE COMMISSIONER:** I am not in a position – we don't have it budgeted and originally, in terms of deciding whether your group should have standing, because I was concerned that there would be some duplication, we ended up granting standing because there was no funding being sought. However, right now you're raising a matter of, and it's understandable, a lot of time and more, I'm sure, than you were originally anticipating going to be taken out of your schedule, your calendar.

But, I'm going to suggest – and I haven't raised this with Mr. Simmonds and Ms. Breen. I'm going to suggest that while I'm not in a position to recommend to government that there be funding directly for your coalition, it seems to me your coalition and the Dunphy family, Mr. Simmonds and Ms. Breen representing them, have quite a similarity of interest and it may very well be that if you speak to Ms. Breen and Mr. Simmonds together or individually, I'm not sure, that they may be able to avail of your services, may need your services, in which case it would be a matter of recommending approval for those individual billings that you might be involved with.

For example, they might feel that you could deal with a particular witness if things get too hectic for either one of them. I seem to recall there was something coming up in February you had some concerns about. So I'll just leave it at this for now, that I'd recommend that Mr. Flaherty, Mr. Simmonds and Ms. Breen get together and just chat in terms of whether there's something that can be done to work through this. I scratch my head and it's the only Solomon's judgement that I could figure to come out in the situation.

I don't want to, as I say, get into duplication of effort for which government would be paying. I have to be conscious of the demands of the public purse, so I'm trying to control costs. But if there's work that Mr. Simmonds and Ms. Breen are going to require anyhow and you're in a position to be able to do it, whether it be research on a legal issue or whether it be the preparation of various witnesses, it seems to me there might be something that could be arranged that you'd meet some of your needs anyhow and it might meet the needs of the Dunphy family and Mr. Simmonds and Ms. Breen.

Anybody have any – and we can come back to this if you want whether in a case management meeting or in a hearing. I'm doing it in – it's the sort of thing, sort of detail we can work out behind the scenes in a case management meeting but I wanted to deal with it directly today so that we don't delay any further – seeing as we're getting off to a late start.

Now one other point before we get into the testimony of the witness for today, Constable Smyth. At a case management meeting, over a week ago now, Mr. Simmonds and Ms. Breen made a request or asked me to consider retaining a biomechanical engineer. The idea being to perform certain tests or experiments, I'm not sure what term should be used, with a view to challenging Constable Smyth's version of events when Mr. Dunphy was in the chair and it was in Constable Smyth's version of the

events and he is the one who was present there. He said he started to reach for something which Constable Smyth got out of the corner of his eye.

I'm doing a rough version now, but the point is that Ms. Breen and Mr. Simmonds believes that there could be some useful information obtained by utilizing a professor at Memorial who is involved in biomechanical matters. I expressed some questions as to how useful would be the information obtained in that type of scenario, but I left open the revisiting of the issue.

Mr. Simmonds and Ms. Breen on Jan 13 sent a letter with an application on behalf of Meghan Dunphy to have Dr. Stephen Czarnuch, biomechanical engineer, called as an expert witness. Now, I'm still not in the position to say that I'm ready to make that order, and I'll listen to counsel before going much further. But I did want to raise today that the question of what happened when Donald Dunphy, while sitting in his chair, raised what Constable Smyth says was a firearm and what Meghan Dunphy and others suggest might be, might have been a stick, that is so central and so crucial to that line of inquiry that it seems to me that it might be proper for me to go so far as – while not, as I say, without hearing further from counsel; it might be desirable for me to authorize some testing as set out by Professor Czarnuch in a proposal which I authorized the Meghan Dunphy counsel to proceed with in terms of a modest funding for the biomechanical engineer to set out what he might be able to do and what might result from what he did.

This – on January 12 there was a preliminary statement received related to the Commission of Inquiry respecting the death of Donald Dunphy, prepared for Ms. Breen and Mr. Simmonds and prepared by Assistant Professor Stephen Czarnuch, Ph.D., engineering.

I still have many questions and considerable concern as to whether expenditures in this area, expenditures of money and/or time in this area is going to result in evidence which is going to be of more than so many different variables leading to so many different results that I would not be able to see it being usefully considered.

But, as I say, because it's so central to the, to the questions that are put by, by counsel, it has occurred to me that possibly the way to proceed might be to see what such an experiment might result in, and then – and I could only make, I could only make a final decision regarding the admissibility of this evidence after hearing the testimony of Constable Smyth and, arguably, after hearing the testimony of the forensic team that worked on, on the case.

So the – basically at this stage it would be a provisional order that I'd be involved in, in terms of authorizing the preparation of a report along the, along the lines proposed in his preliminary statement by Professor Czarnuch and the recommendation to government that payment be made to cover the preparation of the subsequent report.

The – I'm going to ask for, for counsel's comments in a moment. Some, some of the reasons I have for, for going slowly in this area, and being concerned as to whether it's likely to result in evidence with sufficient probative value, is a number of, a number of variables that come into play, including, first of all, where was the, the object, whether, whether a gun or stick, relative to the parties and relative to particularly that chair in which Mr. Dunphy was sitting. We don't have any evidence, I don't think.

It's proposed, I think by, if I read his statement correctly, Mr. Simmonds, Ms. Breen – it's proposed by Professor Czarnuch that there, there be tested on with the gun in the firearm in a number of different positions. I think five has been suggested. Whether that's enough, whether it's too much, would have to be considered; but the other, the other variable would be, or one of another variable would be the physical condition of the individual who was sitting in the chair. We've heard that Mr. Donald Dunphy had certain anatomical problems, certain disabilities; one, in particular, relating to one of his legs, which might or might not affect the speed in which he would be able to bring up a firearm.

We have some indication, I think, that he might have had some marijuana in his system, or the cannabis derivative, whatever. I believe the medical examiner indicated it wasn't enough to be of significance. I'm not sure of – I forget the wording, but I think he said it wouldn't have been a factor in the shooting. However, I'm not sure that it was put to the examiner whether it would have affected the ability of Donald Dunphy to bring that firearm around in the way that it's suggested he might have done.

There are other variables. Professor – the biomechanical expert suggests that what he would do would be to have five average individuals, average males, I think, and test them at the different locations as indicated, fully-able bodied adult males at the same height and basic measurements as Mr. Dunphy reaching for the rifle and timing the different trials and bringing in certain results which he expected to be able to produce the following results:

First, a list of possible locations to the right of the chair that the rifle could have been stored and accessible to Mr. Dunphy, but potentially not visible to Mr. Smyth. Well, a bit of a problem with that one in that I think Constable Smyth has testified that he probably should have seen a firearm if it was where he stated it was, but he just didn't see it, either because he was focusing on Mr. Donald Dunphy or because of litter on the floor, or some other reason he just didn't pick it up.

So I'm not sure how you would deal with that in your proposed timing trials. I won't, I'm not going to go into all of this, but the results and the question of the which way the firearm might have been pointed at particular times, and he referred to the, the engineer refers to different classes which refer to a location that would be accessible by the same or similar physical and anatomical human movements, while allowing for some variation in the actual placement.

For example, a class could be classified as – quote – on the floor, approximately parallel to the chair with the barrel toward the mantle. I mention that just as an example of how these trials would be carried out.

Accessible to Mr. Dunphy suggests that he could reach the rifle without leaving his chair. Arguably, that's something that would be acceptable on either version. Potentially not visible to Mr. Smyth suggests that under some circumstances, Mr. Smyth may have been able to see the rifle. I think Constable Smyth may have conceded that that might have been the case.

It goes on: But that it was possible he could see it, depending on location, environmental conditions, et cetera. And then another location class would be identified by physical dimensioning and examination of the room and rifle.

I understand that – Mr. Kennedy, I think you might have mentioned to counsel that you might be seeking to have video entered of the re-enactment. I think Commission counsel will hear from them shortly. We're planning to just bring in certain portions, but you indicated you might want to see the full version of the re-enactment. That might, that might have factors, or there might be in that certain things that should be considered in the – I'll call them timing trials, if I may, the matters that are dealt with by Professor Czarnuch. I hope I'm pronouncing his name correctly. And then there's a static biochemical model of a young able-bodied male of similar anatomical dimensions to Mr. Dunphy in his chair and reaching for the rifle in the location classes. In other words, five different classes identified in the first step.

I've already mentioned the problems that arise from comparing what an able-bodied male might – a young, able-bodied male might be able to do and what Mr. Dunphy might have been able to do. And it goes on to say: this model will primarily identify the transformation of the posture and positioning of a man similar to Mr. Dunphy that would be required under ideal conditions to reach the rifle. And that might discount certain possible locations based on the motions required to reach them.

And the third point, a set of simulated or real trials to help characterize how long time-wise it would take a young, able-bodied adult male to obtain the rifle into a defined position. And that involves first

assuming that the firearm was being held in a certain way in terms of the positioning of the left hand and right hand, for example; another variable, the rifle being held and pointed at the probable location of Mr. Smyth. There's nothing definite about what his location was. We know generally he was over by the mantle in the room and he accepts for these trials that it might be to have to take the rifle not being oriented properly, and then doing it in another orientation.

Anyhow, I'm not going to go through all this but the last paragraph was how this opinion would assist the Commission in carrying out its mandate, and Professor Czarnuch purports to describe what might be gained. The first thing I'd say in terms of winding up this point this morning is I still have difficulty understanding what the question is which the biomechanical engineer is going to be asked to answer. And I was thinking about it over the weekend, and it seems to me, and I know it goes – you're questioning the credibility of Constable Smyth, but as has been discussed any number of times, the credibility is going to be tested by referring to the facts, referring to evidence-based facts, not speculation.

And the, other than your question being: Was Constable Smyth giving a truthful description of what happened? If you go further, as I think you have to, if – I think you have to ask if, arguably – I should say I think, and please understand I'm not taking final positions here on the evidence. Any conclusions I draw with respect to the evidence will be in the context of having all the evidence before me and considering the totality of the evidence. And what I'm doing here is dealing with one specific form of evidence for which admission has been requested. And, as I say, which I may have to wait until I get at least a fair bit more of the evidence before I am able to make a final decision on its admissibility.

If – I'm not sure, and I'd welcome comments in this regard. I'm not sure that it's sufficient just to say: Well, we're going to use this to challenge the credibility of Constable Smyth. Looking at the facts, looking at the evidence, I believe we have to ask if Constable Smyth's version is not correct, what facts do we have or evidence upon which we could draw the conclusion that another scenario should be found to be the most likely.

I don't think – again, subject to what counsel has to say. I don't think from what I've seen so far that it's highly likely I'm going to be able to bring in an absolute, final, definite conclusion as to this is what happened, this and nothing else. Would it be that we could be so certain in this type of situation, but because of the nature of the event where we have one witness, one eyewitness surviving the encounter, we have to do the best we can with the evidence that's available. We have to ask is the evidence sufficient to support another scenario. And I guess it's going to be arguably up to Ms. Breen and Mr. Simmonds to suggest what that other scenario might be, based upon, based upon the facts so – and common sense at some point is going to come to bear as well, I hope.

Now, with those very, very general comments, I'll go back to what I'm proposing that I could do – I am not saying I will do this; what I'm proposing I could do is authorize the preparation of a report and indicate willingness to recommend to government that it pay that, whatever the reasonable cost is of doing it.

I'll need, the first thing I'll need is how long does counsel understand it would take to do this based upon Professor, the conversation you might have had with Professor Czarnuch. And we can push it, presumably we can push this down the road a bit until – we've got over a month probably to go at least in terms of testimony of other witnesses.

But I'm not looking at recommending that we wait for a six-month series of timing trials. I'm looking at probably a month and I'm not looking at the cost is going to break the budget any more than it is already broken, or break the provincial budget. It's going to have to be a reasonable cost.

Do you have any idea what timing your expert would require in order to complete that test or tests, those tests?

**MR. SIMMONDS:** Mr. Commissioner, we have purposely not engaged in any conversations with Professor Czarnuch to ensure that there is no issue with respect to his impartiality. I can indicate to the Commission –

**THE COMMISSIONER:** Well, you have to have some, some communication with them –

**MR. SIMMONDS:** – we had a very – know that they have been all done by email and we have a string of emails to provide to the Commission –

**THE COMMISSIONER:** Yeah, but there has to be communication because you have to indicate what you want to find out, if he can supply for you.

**MR. SIMMONDS:** The first conversation which he would took detailed notes will be available and that was just to see if he was willing to do this. He has, through his actions so far in his emails, indicated that he was willing to drop what he was doing and make particular efforts to provide this, which he did, on time last week.

**THE COMMISSIONER:** That's the preliminary statement, you say, this –

**MR. SIMMONDS:** The preliminary statement, so I would believe without having consulted with him that he would take every opportunity to ensure that he could comply with whatever time frame the Commission sets down.

**THE COMMISSIONER:** Well, that's encouraging, but I'm not sure he will accept my directing, you know, that we bring a report the day after tomorrow, so we're talking about weeks probably. But what I'm concerned about is whether we're talking about months and how many months –

**MR. SIMMONDS:** Well, Mr. Commissioner, again, I preface my comments by saying I have not spoke with him –

**THE COMMISSIONER:** All right, well –

**MR. SIMMONDS:** But the man appears to be very reasonable. He has made special effort –

**THE COMMISSIONER:** That's fine, but do you have any problem in ascertaining how long it might take?

**MR. SIMMONDS:** I don't think –

**THE COMMISSIONER:** We can come back to this then.

**MR. SIMMONDS:** Yeah, I don't think that would be a problem.

**THE COMMISSIONER:** And you can get – it seems to me that other counsel would not object or should not object to your communicating directly rather than by email in this regard. It's one thing – and I know, I was involved in the preparation of a science manual for judges of which a large part of it revolves around the independence of experts, whether they're properly independent. So that's an important factor but we can't let that go so far as to prevent us from obtaining expert evidence which might give use – and I say which might be; I underline the might. You shouldn't assume that I'm satisfied that it's going to be of any great probative value.

All right, I suppose Mr. Kennedy should be the one to, to respond next – give us a brief comment. By the way we, I'm hoping we're not going to take up too much time this morning, but I know Mr. Kennedy will have some concerns on this point.

**MR. KENNEDY:** My comments are of a more general nature, Commissioner, in terms of the way the matter, the way we're proceeding here. On the first point in terms of Mr. Simmonds speaking to the expert, I have no difficulty with any of that. I mean, a professional, I have no reason to doubt that the conversation will be professional and within the bounds that we're allowed to speak to experts. The Ontario Court of Appeal has recently ruled – I forget the name of the case – that in terms of procuring experts that lawyers have to talk to them. So in that respect that is not an issue.

What I have a concern about, Commissioner, and I'm going to refer to several experts from Professor Ratushny's book (inaudible).

**THE COMMISSIONER:** I left his on my desk, but I have another. Go ahead, that's fine.

Thank you.

**MR. KENNEDY:** I'll be, I'll be quick, Commissioner. These are –

**THE COMMISSIONER:** Has counsel, other counsel seen this by the way?

**MR. KENNEDY:** I just did this last night, Commissioner.

**THE COMMISSIONER:** Yeah, okay. That's fine. We'll have – we'll –

**MR. KENNEDY:** I've got a couple of copies here but I –

**THE COMMISSIONER:** Yeah, I'll consider it in a preliminary sort of fashion. We'll come back to it whether it's tomorrow or later on in the, in the proceedings, but go ahead for now, Mr. Kennedy.

**MR. KENNEDY:** Yes, Commissioner, first, as you're –

**THE COMMISSIONER:** Just for the record this is from *The Conduct of Public Inquiries* and it's Ed Ratushny who was the right-hand man of Justice Lamer in the Lamer Inquiry. He wrote a very good book which I've read and gone over a couple of times actually. So you go ahead. You're referring me to page –

**MR. KENNEDY:** I will refer you to –

**THE COMMISSIONER:** – 184 –

**MR. KENNEDY:** There's four excerpts to that, Commissioner.

**THE COMMISSIONER:** Okay. Thank you.

**MR. KENNEDY:** First, Commissioner, as you've stated on a number of occasions and it's clear in the law, a commission and a commission of inquiry must act within the terms of reference as provided to you. The position put forward by counsel for Meghan Dunphy is that the, this evidence would come within section 3(1)(f) and 3(1)(j) of the terms of reference.

**THE COMMISSIONER:** Right. And just, just for the record quickly, 3(1)(f) deals with the circumstances of Mr. Dunphy's death and 3(1), is it (j), deals with –

**MR. KENNEDY:** (j) is material deficiencies in the investigation.

**THE COMMISSIONER:** Deals with any material deficiencies in the investigation. Okay, go ahead.

**MR. KENNEDY:** The second point, Commissioner, is that the, we have rules of procedural practice in that the – it's recognized that the strict rules of evidence do not apply in an inquiry and that the Commission is entitled to receive any relevant evidence. Again, relevance is to be determined by looking at the terms of reference and what it is you're trying to do.

**THE COMMISSIONER:** Whether – and whether the evidence that's being sought to enter will further the resolution of these issues. Okay.

**MR. KENNEDY:** Rule 17 deals with the calling of witnesses where Commission counsel decides not to call evidence and allows a party to apply for leave to call evidence, if the Commissioner is satisfied the evidence is necessary. So, again, where it's up to your – you have a wide discretion in terms of what evidence is allowed at an inquiry.

**THE COMMISSIONER:** I have considered that and I believe I might be entitled to take, what they might call, a generous approach under certain conditions to ensure that the factors which you've set out – which is set out by Mr. Ratushny, Professor Ratushny, I guess, on page 184 talks about fairness, efficiency, transparency and thoroughness. Arguably, fairness, transparency and thoroughness, anyhow, would come, come into play as factors in the issue we're considering here now.

**MR. KENNEDY:** At the bottom of page 184, Professor Ratushny reviews the comments of Commissioner Goudge in the Goudge inquiry where he talks about Commissioner Goudge adopting the principles of fairness, efficiency, transparency and thoroughness. However, he added – he being Commissioner Goudge – that it is, quote, unquote: important not to confuse thoroughness with exhaustiveness and he also adopted the principle proportionality.

Commissioner, you're (inaudible) what you're talking about –

**THE COMMISSIONER:** Some of this – I know you were doing it quickly last night, Mr. Kennedy. Some of it is cut off a bit in my copy but you go ahead.

**MR. KENNEDY:** The inquiry's preparation and hearing times were allocated in proportion to the importance of the issue of the mandate.

**THE COMMISSIONER:** Right.

**MR. KENNEDY:** So that's what you're talking about here today. My concern, Commissioner, is that we remember one of the basic principles of dealing with commissions of inquiry, that this is an inquisitorial, not an adversarial process. It is not a trial. It is an inquiry as to what happened as outlined in the terms of reference.

At page 185 of Professor Ratushny's book – again, I quote from Commissioner Goudge in the second paragraph: "Commission counsel did not follow every conceivable lead, interview everyone with any information that might be relevant, or collect all documents of possible relevance. Rather, we focused on what was significant."

So significant, thoroughness, these are issues that you referred to earlier today, Commissioner, in terms of what I'm reading into your comments. So it's important, however, that the matter not become a trial.

Now I just want to put this out for your consideration, Commissioner. So counsel for Meghan Dunphy is given permission to retain an expert. That expert provides an opinion. Is that going to be also provided to commission – to counsel for Constable Smyth, an expert to challenge the expert of counsel for Meghan Dunphy? That's the kind of rabbit hole we can start to go down here, once we start this process where it becomes adversarial to a certain extent.

The next reference I would refer you to, Commissioner, is at page 198, 199 of Professor Ratushny's book and specifically the role of the Commissioner at paragraph – at page 199. You will see in the second full paragraph, page 199.

**THE COMMISSIONER:** Go ahead.

**MR. KENNEDY:** “One commissioner included a chapter in his report entitled ‘Why so long? Problems and Frustrations of an Adversarial Inquiry.’ The following are some excerpts: Several of the parties took a very adversarial and sometimes bitter confrontational approach to one another.” – I’m not suggesting any of that’s taking place here; I’m just reading the quote – “Witnesses were cross-examined endlessly ... there was an overall problem that some counsel appeared to be frequently playing to the press and television cameras ... Counsel were frequently at each other’s throats ... the Inquiry was forced to accept the ‘leave no stone unturned’ position, and to chase down many blind alleys.”

Well, I’m suggesting to you, Commissioner, here that we – if we are going to properly apply the principles of Commission’s Inquiry, then chasing down blind alleys is not the way to go and this should be an inquisitorial, not an adversarial process. I’m not saying that any of this is taking place at this point. I’m simply suggesting that this is the kind of thing that can happen.

Paragraph 310 – page 310, Commissioner, the second last (inaudible) I’ll refer you to.

**THE COMMISSIONER:** Go ahead.

**MR. KENNEDY:** It’s page 309 actually. Professor Ratushny says, the last paragraph: “A commission of inquiry” – as you’ve stated on numerous occasions – “is also bound by the principle of fairness when considering evidentiary issues.”

At the top of page 310 the comment is: “If a commissioner is faced with evidence that is not admissible according to an exclusionary rule of evidence, that should be a warning that the evidence might be unreliable ....”

**THE COMMISSIONER:** Sorry, I’ve lost you now.

**MR. KENNEDY:** At the top of page 310, Commissioner, the first full paragraph.

**THE COMMISSIONER:** Before that. I’m still back looking for your other one.

**MR. KENNEDY:** That was on page 309.

**THE COMMISSIONER:** 309, yeah.

**MR. KENNEDY:** That last paragraph, first sentence.

**THE COMMISSIONER:** The Commission of Inquiry is also bound by the principle of fairness. Okay.

**MR. KENNEDY:** – which you’ve stated on numerous occasions.

**THE COMMISSIONER:** Right.

**MR. KENNEDY:** Page 310.

**THE COMMISSIONER:** Right.

**MR. KENNEDY:** “If a commissioner is faced with evidence that is not admissible according to an exclusionary rule of evidence, that should be a warning that the evidence might be unreliable to some degree. This warrants the further examination as to whether it would be unfair to receive that evidence. And that examination must take into account the context in which the evidence is tendered. If it is submitted in support of an allegation of serious misconduct against an individual, then special care must be given as to whether or not to receive it.”

Final quote, Commissioner, is the role of experts in an inquiry at page 323 of Professor Ratushny’s book.

**THE COMMISSIONER:** Okay.

**MR. KENNEDY:** And this is where Professor Ratushny is talking about the strict rules of evidence not applying and how in an inquiry the Commissioner determines how the inquiry will proceed and determines relevance and necessity. But relevance and necessity are also two of the issues when you’re looking at the admissibility of expert evidence in a trial. The four main criteria are relevance, necessity – necessity being defined as the – being capable of assisting the trial or a fact; the same principle, I would suggest, would be modified in this case that would be can the evidence that’s being proposed reasonably assist the Commissioner in making the determination that has to be made.

You referred on a number of times, Commissioner, to –

**THE COMMISSIONER:** I’m sorry, where you referred to the relevance and necessity, where is that?

**THE KENNEDY:** Those are from earlier quotes. I’m summarizing, I’m going to now look at page 323 –

**THE COMMISSIONER:** I have it, yeah.

**MR. KENNEDY:** The second paragraph where Professor Ratushny talks about expert opinion –

**THE COMMISSIONER:** The second full paragraph?

**MR. KENNEDY:** The second full paragraph, Commissioner.

**THE COMMISSIONER:** Okay, expert opinion. Right.

**MR. KENNEDY:** “The major exception, however, is ‘expert opinion.’ Persons who are qualified by some special skill, training, or experience may give opinions on matters within their expertise. Usually, it is a combination of such qualifications. It is usually desirable that commissions of inquiry follow the rules of evidence when dealing with expert testimony.” So the point I’m simply making, Commissioner, is that the Mohan criteria, which you would apply as a judge at trial, should also be applied here at the inquiry if you accept the suggestion put forward by Professor Ratushny.

Professor Ratushny goes on to state, “This means that the subject matter of the opinion truly requires expertise, that it is within a recognized discipline, and not within the ‘common stock of knowledge’ of the public. Nor should an expert opinion be given directly as to key findings the commissioner must make. That could be seen as abandoning the role of the commissioner in favour of the expert.”

I’m putting forward these points, Commissioner, for you to determine simply to consider as you make your determination as to how we will proceed with this matter. At this point you’ve indicated that your preliminary opinion in terms of some funding – while I have some concerns about that, this inquiry is within your jurisdiction and purview as to how you wish to proceed. So I’m not going to argue as to what you should do in that respect. That’s entirely up to you.

I'm simply outlining some of the guidelines that I would suggest will ultimately have to come into play as we move down this road. I'm trying to highlight some of the issues that could arise, and I'm trying to highlight, Commissioner, that this should not become a trial. Also, if the – and I make this to be my final comment. Is that if there is going to be an expert allowed for one party, then another party also has to be provided that similar right.

We cannot be expected to accept that simply what an expert – if this person is an expert, by the way, which I would suggest will have to be determined at another point.

**THE COMMISSIONER:** Well, he supplied what seems to be a good resume in terms of establishing review of his publications by his peers and so forth. And he's assistant professor at Memorial University in the School of Engineering, and they're not known for hiring, shall we say, quacks. Although I'm sure there have been failures at times.

**MR. KENNEDY:** I'm not arguing at this point, Commissioner, with any of that.

**THE COMMISSIONER:** No, I know that.

**MR. KENNEDY:** But what I'm suggesting to you is that this appears to be an area of novel science, which would require a –

**THE COMMISSIONER:** Well, I actually Googled biomechanical engineering. I think I'm pretty sure I got one book that was here was *Biomechanics for Dummies*, which I'd be happy with. So it does seem to have built up in the last few years, it would seem, a body of work which claims to have scientific value. And it would be a matter for argument as to whether or not it is in fact new science, novel science or junk science, an area where I have some interest and have had some cases to consider in that regard. And as I say, the text that I had the honour of being involved with in preparing through the National Judicial Institute, a science manual for judges gets into that.

Junk science was the flavor of the month for, well, for many years, but really got kicked off in the early '90s and it was about two years after my appointment so – or three years. I found that of interest and, and, and that there was a need to stay on top of it because of the way in which the envelope is being pushed in terms of what is scientific and what should – what is real science, what is junk science, what should get admitted in order to establish a particular fact or issue, or resolve an issue.

And I'm going to be going back to Mr. Simmonds before we leave this right now this morning, in terms of pushing a little bit further, in terms of what question this – or questions this expert might be able to help us on. I don't know if you have any –

**MR. KENNEDY:** What my final comment –

**THE COMMISSIONER:** – submissions to that regard.

**MR. KENNEDY:** My final comment, Commissioner, would be – and, again, I recognize that this inquiry will be – it's not bound by the strict rules of evidence. You're, you've indicated the principles that are outlined by a Professor Ratushny.

My request would simply be that if you're going to allow one side to call, give – provide funding for one side to call an expert witness, then that same, that same principle should apply to us, but not waiting a month or two down the road to determine whether or not that expert, we can retain an expert. I'd be asked also to get permission now to retain an expert to start work on this from our perspective.

**THE COMMISSIONER:** And on it goes.

**MR. KENNEDY:** Down the blind alleys we go, Commissioner.

**THE COMMISSIONER:** I mean I'd refer, I'd refer you to – seriously, there is a *Biomechanics for Dummies* which I've always found a useful jumping-off point when I got into areas of science. There is a *Forensic Biomechanics* by Patrick Hannon; *Trauma Biomechanics*, I don't know how relevant that would be, by a Kai-Uwe Schmitt, S-c-h-m-i-t-t; *Biomechanics for Dummies*, Steve McCaw, M-c-C-a-w; and *Biomechanics of Musculoskeletal Injury*. That was just a one quick, quick search

'Cause I, like yourself, was curious as to how far science, science in this area had evolved. And there's an article by Daniel L. Schneck, S-c-h-n-e-c-k, entitled, "Forensic Biomechanics" which came up on one of these Google searches. This is April 2005, *American Laboratory*, Volume 37, number 8, for anybody who wants to get on top of this issue.

Now, I think what I'm going to have to do is reserve any further decision until I've had a chance to consider your comments, Mr. Kennedy. Before we break though, I do want to, to, to see where, or hear where Ms. Breen and Mr. Simmonds are, are going in this regard.

**MR. DROVER:** Mr. Commissioner, can I make some comments before you go to –

**THE COMMISSIONER:** Yeah, sure. Sorry, we'll make the appropriate – hear from Mr. Drover –

**MR. KENNEDY:** My final comment, Commissioner; I'm quite comfortable and confident in you exercising what I would suggest is the gatekeeper role that the Supreme Court of Canada has outlined the, a trial judge should use. And I would simply ask you to utilize the same – play the same role in this inquiry having regard to the potential significance of the evidence which we really don't know what it is. So I can't comment on the evidence at this point.

Those would be my comments, Commissioner, unless you have any other questions. I simply want to outline some general principles and reinforce those principles.

**THE COMMISSIONER:** Sure

**MR. KENNEDY:** Thank you, Sir.

**THE COMMISSIONER:** Thank you, Mr. Kennedy. Mr. Drover?

**MR. DROVER:** Yes, thank you Mr. Commissioner. Mr. Commissioner, I went a little step further on the biomechanical engineer, not to just find out what they do but to find out how it's been used in Canadian case law. And I can provide my search results to the Commission. Maybe you'd want to have a look at some of those cases.

**THE COMMISSIONER:** Yeah, we'd love to see it. That'll be something I can look at –

**MR. DROVER:** I looked at –

**THE COMMISSIONER:** – over the next couple of days while I – what I'm proposing, I think, probably to happen is that we come back to this in two or three days, maybe four days.

**MR. DROVER:** (Inaudible.)

**THE COMMISSIONER:** I don't want too much time to pass before certain decisions are taken. It's either going to happen or not. If, if, if some form of expert opinion is going to be coming to the court, there's going to have to be time to have that prepared, whether there's one expert or two or more. And I've got to keep control of – following the principle of efficiency, I've got to keep control of, not lose

control of how long this inquiry is going to go on for and how many so-called expert reports we're going to have.

But, yes, we'd like to see your –

**MR. DROVER** Well, I think there are two issues here, one is the –

**THE COMMISSIONER:** Give it – make it available to all counsel of course.

**MR. DROVER:** Yes, I will. One is what is the role of biomechanical engineers in Canadian case law. And of the 79 cases that I looked at where there were biomechanical engineers, seven of them were criminal cases. All seven dealt largely with mechanism of injury, mostly shaken baby cases. The rest were motor vehicle accidents, slip and falls where, again, it was causation and mechanism of injury. There has never been a situation where a biomechanical engineer has been called upon by a court to determine how somebody was able to move, how they were able to retrieve a gun, what the reaction times were, that sort of stuff.

On top of that, I don't know how deep you got in to Professor Czarnuch's preliminary statement and his CV, but I mean in his preliminary statement he says: I graduated with a degree in biomedical engineering. A biomedical engineer and a biomechanical engineer are not the same thing.

**THE COMMISSIONER:** Yeah, I noticed that.

**MR. DROVER:** One deals with the forces exerted on and by the human body and the other one, a biomedical engineer which Professor Czarnuch is, deals with the development of clinical equipment and clinical processes.

You can see that Professor Czarnuch's work, his longest stint in the job market was with General Motors where he worked for nine years and mostly dealt with human tracking and how you can keep humans out of the way of the robots that are doing their work.

So apart from the fact that there's no precedent in Canadian law for using a biomechanical engineer in this regard, on top of that Professor Czarnuch is not a biomechanical engineer, has never done an experiment like he's proposing. There are no other experiments with which to compare it. And in that sense I would support Mr. Kennedy in saying, you know, that he would also require an expert because somebody is going to have to verify the results of that experiment which are completely novel. And I would argue it's – to have a biomedical engineer doing this sort of work is complete junk science.

**THE COMMISSIONER:** Now we have – I think we had been referred, maybe counsel could help me out, to another individual before, before the – I don't know if we brought the name up at the, the case management meeting that we had with three items that were raised by – I don't know which one, one of you. Scheduling was one. I think it was by, by Mr. Simmonds and Ms. Breen.

But in the course of that discussion, I know we got into the request for reliance upon biomechanical engineering and we had a – either Mr. Simmonds refers to Mr. Ee or –

**MR. SIMMONDS:** I referred Commission counsel, Mr. Commissioner, to a biomechanical engineer that Ms. Breen and myself had utilized in the Matchim case. And he gave evidence in that case, expert evidence with respect to the shaken baby syndrome and provided a great deal of detail and assistance. And I believe Ms. O'Neil spoke with him – or Ms. O'Brien spoke with him.

If there are any other comments, I would like to address a couple of the comments that were made –

**THE COMMISSIONER:** Oh yes. Yeah, no, I'm not going to cut you off if you want to just in sequence deal with –

**UNIDENTIFIED MALE SPEAKER:** Mr. Commissioner, we have comments as well.

**THE COMMISSIONER:** – something that was relevant here. Yes, no, no, I'm not going to stop here. You'll get your chance. I just wanted to have this other gentleman's name brought into the mix to show that it's not a matter of relying just on one individual.

The individual – the first question might have to be are we going to permit this type of evidence to be admitted. But before we get to that, Ms. O'Brien, could you –

**MS. O'BRIEN:** Yes, thank you, Commissioner.

Just to be, to help clarify for the public, too, a little bit how our process works, Commission counsel was consulted by Ms. Breen, Mr. Simmonds about the possibility of retaining a biomechanical engineer. They did recommend the name of someone that they had used before. He's an adjunct professor, I believe, out of Wayne State University in Michigan and his name is Chris Van Ee, V-a-n E-e.

We contacted Chris Van Ee and had a discussion with him in some detail about, about how he would approach a case such as this and what he might add to it. As a result of our investigations into the matter, Commission counsel determined that we did not feel that it would be relevant to bring forward this kind of evidence to you. We took a look at relevance, value to the terms of reference. We decided not to seek out such an expert and we communicated that to Mr. Simmonds and Ms. Breen. Pursuant to our rules of practice and procedure it was then open to them to make the application to you today to seek that such an expert be called.

Depending on how you rule, Commissioner, it is open to you at, at this point to, if you do rule that an expert be called in this area, to have Commission counsel call that expert, which would then keep it from being one party's expert or the other. That's a possibility but as you know, our rules of practice and procedure are very flexible and you have the discretion to do it in what way you see fit.

I would also like to add that I disagree with Mr. Drover's statement there, that a biomechanical and a biomedical engineer are necessarily two different beasts. There is sort of overlap in this area based on my knowledge and looking into this, and a little bit of my background. And so someone who is, does have a degree in biomedical engineering may well have expertise in biomechanical engineering, although not necessarily.

**THE COMMISSIONER:** Okay. Thank you, Ms. O'Brien.

I didn't realize I was getting medical experts when I brought on Commission counsel, thank you.

**MR. FREEMAN:** Good morning, Mr. Commissioner, Mark Freeman.

**THE COMMISSIONER:** Mr. Freeman, how are you?

**MR. FREEMAN:** Good morning, thank you. I'm good, thank you.

It seems there may be two issues here that we're dealing with. Whether the parties can retain experts of their own, but then also we've heard some discussion about Mohan criteria and the WBLI criteria threshold reliability of any report, the qualifications of this expert, whether it's a properly qualified expert, et cetera, et cetera, et cetera. So I was prepared here this morning to take no position on whether a party could retain an expert, but of course, we'd have to reserve our rights and wouldn't be prepared

today to proceed with argument on whether threshold reliability is satisfied, the Mohan criteria are satisfied, this is a properly qualified expert, et cetera.

We have some concerns with what's being proposed. We would echo some of your comments about the variables at play and could add more at a later date. And think this may well fall into the area of novel science that needs that special attention that's required by WBLI, the most recent Supreme Court of Canada case on the issue of expert evidence.

So with respect to whether Ms. Breen and Mr. Simmonds, and Mr. Kennedy can retain experts, we're taking no position on that, but we have to reserve our rights on the question of qualified expert, threshold reliability and those questions which are much more tangly and complicated, if you will.

**THE COMMISSIONER:** Thank you, Mr. Freeman.

Mr. Avis.

**MR. AVIS:** Thank you, Commissioner.

I'd just to like to say from our perspective, everything about this says no. Everything we're hearing says no, you should not be entertaining this at all. The first thing is, all due respect to the gentleman who's putting himself forward, he got qualified in this in 2014. He's never done anything like this before. He's never been called as an expert and a witness in a courtroom.

**THE COMMISSIONER:** We all have to start somewhere, Mr. Avis.

**MR. AVIS:** I understand, but we're talking about a novel science for which he was only qualified in two years ago, and he's never actually done anything like this before. You read his CV; I cannot see that he's ever done anything like this –

**THE COMMISSIONER:** We used to have a magistrate in St. John's who basically let every young lawyer win his first case, which we missed then when he retired. I'm not saying that's what should happen with a rookie biomechanical engineer, but in itself it shouldn't – we might have missed the contribution of Professor Einstein if we'd adopted that test we're hearing from.

**MR. AVIS:** Yeah. Well, you know, I'm not looking at it in an isolated way. Firstly, this man is a biomedical engineer. There's nothing that says he does biomechanical engineering, maybe the two overlap.

**THE COMMISSIONER:** You don't need to get into that. We're not making a decision now on whether he's qualified or not, but I note your point, yeah.

**MR. AVIS:** Okay. Well, I just think it's dangerous to go with this. I don't think this is science. There's no science to support it.

**THE COMMISSIONER:** Again, you're getting a little ahead of where we are here.

**MR. AVIS:** Okay. Then, I'll save that for later.

**THE COMMISSIONER:** Thank you.

And you may have been reading my mail when I did indicate at the case management meeting that my real question was are we needing any more than common sense in terms of considering the credibility of what's put forth by Constable Smyth in terms of how the event unfolded, and that's why I'm still reserving final determination on that point as to whether we need any more than common sense.

I should note, by the way, the other thing that comes from considering this issue of biomechanics is if there were a decision that there should be the time trials mentioned then arguably they should be done in the chair itself at – or on the scene of the death of Mr. Dunphy. And that request was also made by Mr. Simmonds and Ms. Breen, but they seem to be tied together to some extent, if not whole – you’ll get another chance Mr. Simmonds, but we’ll hear from some other counsel first.

Just probably finish that point. Mr. Williams, the request was made – just for the record – by Mr. Simmonds and Ms. Breen that regardless, as I understand it, of whether or not there’s a decision taken on the biomechanical engineer, and that’s admitted into evidence, or prepared and admitted, that they would want to have the chair available and I raise some concerns, some questions about that as well.

Go ahead, Mr. Williams.

**MR. WILLIAMS:** Yes, just a very brief comment, Mr. Commissioner, and, again I echo, I think, your sentiments of application of common sense in this. I mean, clearly Commission counsel have already put their mind to this issue. It’s not a new issue that’s coming here today. We have considered this issue before. It’s been brought before the inquiry. They’ve turned their mind to it, as your counsel, and have deemed it would not be relevant evidence for purposes of your consideration.

I would see the merit in the arguments of Mr. Kennedy saying that once we open this door, there has to be equal consideration of the relevant parties – obviously, my client has no direct interest in this. But having come from the Reid inquiry, these things can take on lives of their own and my only concern is that we don’t get caught up in a race of experts here on evidence that probably, at the end of the day, may not be totally relevant.

And therefore, I think your opening comments of hearing all the evidence with respect to forensics and the evidence of Constable Smyth are certainly worthy before we start down the path of giving preliminary authorization for reports because once we, once we cross that hurdle, I think we might be at a point of no return.

**THE COMMISSIONER:** Thank you.

Anybody else before I hear from Ms. Breen? Mr. Simmonds?

Okay, a few brief remarks and we get on –

**MR. FREEMAN:** Mr. Commissioner.

**THE COMMISSIONER:** Oh, sorry; Mr. Freeman, go ahead.

**MR. FREEMAN:** I just wanted to follow with one, a brief comment. It sounds to me like when we’re saying common sense, what we’re talking about is necessity, whether it’s necessary for you, as the trier of fact, or the Commissioner in this case –

**THE COMMISSIONER:** Yeah, when I look at that rule – we drafted it so – but it might have slipped by. Necessity can be a, if you want, a pretty high hurdle to meet, but I think one of you referred this morning to necessity can also mean almost the same as relevance in terms of it would promote the, or assist in resolving the issue or finding a fact.

In the rule for the inquiry, there’s also another rule which basically I would suggest might over – I wouldn’t say override but permit the Commissioner to relax the rules in certain situations. I know you’re hesitant to adopt that broad a, broad an interpretation but in the – sorry, I can’t remember the – maybe Ms. O’Brien – yeah, here it is here.

Twenty-one of our rules of procedure and practice, “When Commission counsel indicate that they have called the witnesses whom they intend to call in relation to a particular issue, a party may then apply to the Commissioner for leave to call a witness whom the party believe has evidence relevant to that issue. If the Commissioner is satisfied that the evidence of the witness is necessary, Commission counsel shall call the witness to testify.”

Now, there’s another one there that talks about the discretion of the Commissioner. Ms. O’Brien, you gave us this morning I think –

**MS. O’BRIEN:** Yes, thank you; that would be rule 11, Commissioner. You should have a second sheet there.

**THE COMMISSIONER:** Okay. All parties and their – I had it right in my hand there, yep – All parties and their counsel shall be deemed to undertake – yeah, shall be deemed to undertake to adhere to these rules, which may be amended or dispensed with by the Commissioner – by the Commission as it sees fit to ensure fairness. Any party may raise any issue of non-compliance. Okay, so that permits the Commissioner to amend or dispense with a particular rule to ensure fairness.

I think that that’s probably the argument, the argument that’s made by one of them, by Ms. Breen and Mr. Simmonds is that, in fairness, they should be permitted to test the, the scenario that’s been proposed that’s set out, re-counted by Constable Smyth as to what exactly happened.

You have something to add, Mr. Simmonds? You look like you’re about to –

**MR. SIMMONDS:** Just very briefly. First, I apologize to Ms. O’Brien for calling her Ms. O’Neill.

Mr. Commissioner, I spoke to this gentleman. He told me he is a biomechanical engineer.

**THE COMMISSIONER:** Yeah, we’ll deal with – we’ll look at his –

**MR. SIMMONDS:** I appreciate the comments of Mr. Kennedy and with those comments I will make contact with the professor and determine a time frame.

Number three, Mr. Commissioner, I think he’s clearly set out in his preliminary statement to you how he believes his evidence can be of assistance. What I would urge the Commission to do is wait till we have heard the evidence of Constable Smyth, wait till the forensic evidence is called and then make a submission, which you would be in a better position to deal with.

I also understood, and perhaps I understood it wrong, the application I was presenting was that the Commission – and that’s why we have tried to make sure we didn’t go anywhere near this gentleman unless we had it properly recorded, which everybody could read, so that the Commission would call this expert and it would not be in a situation of duelling experts which we see in trials. That was the reason we did this and, and we’re willing to stand by that.

If you wish, Commission counsel can have the contact with him as opposed to myself or Ms. Breen and they can make the (inaudible) –

**THE COMMISSIONER:** Yes, okay, I see that; it’s in your second sentence there yeah, for the Commission to call Professor Czarnuch. Yeah, I’m not sure however that that satisfies the concerns or would satisfy the concern of Mr. Kennedy in that, or for that matter, whether the Commission should be undertaken, should be regarded as having to call that particular witness as opposed to another one.

**MR. SIMMONDS:** Well, fine, if the Commission wishes to call another one who is equally qualified and who can supply, I have no, I have no issue –

**THE COMMISSIONER:** Which is why I'm trying to keep this away from –

**MR. SIMMONDS:** Yep.

**THE COMMISSIONER:** – his qualifications –

**MR. SIMMONDS:** Absolutely.

**THE COMMISSIONER:** – and so forth and into whether this type of evidence –

**MR. SIMMONDS:** Exactly.

**THE COMMISSIONER:** – whether this type of report, opinion evidence should be prepared and paid for of course –

**MR. SIMMONDS:** Exactly in that –

**THE COMMISSIONER:** – in the context of the inquiry.

**MR. SIMMONDS:** And if Commission counsel have an expert that they would sooner go to, we have no issue with that. I don't have a report from Professor Czarnuch to tell me it's going to come down to our side, Mr. Kennedy's side, anybody's side – I don't know.

**THE COMMISSIONER:** I know, but what you might help me out on is what is the question that you want that expert opinion to go to.

**MR. SIMMONDS:** Well, Mr. Commissioner, you asked somewhat unexpectedly of Ms. Dunphy, what did she think happened, almost urging her to have a guess as to the scenario that might have taken –

**THE COMMISSIONER:** No, no, no, no –

**MR. SIMMONDS:** Might have taken place (inaudible) –

**THE COMMISSIONER:** – what is she proposing as what reasonably might have happened. And I have to say that she responded in an impressive fashion –

**MR. SIMMONDS:** Uh-huh.

**THE COMMISSIONER:** – in terms of saying what she thought might have happened. And I think, in fairness, she's entitled to have that tested within reason, and this is part of what is going to start today when we get to it, hopefully before too long, in the testimony of Constable Smyth. But we're still in the situation of having to ask what question – and by the way, the reason for the Commission putting – myself as Commissioner putting forth that question is because that was in a normal course of events the last chance for Ms. Dunphy to state to the Commission what she believed occurred.

She could have been called obviously later, but the fact that she was the second witness brought that, brought that into view as an issue fairly quickly, more quickly than if she was at the end obviously. But it was not put to, as you know, cause – put Ms. Dunphy in a difficult position. If it had been designed for that, she got herself out of the difficult position, I think, by her response. But she's saying, look, this is what I believe happened. Now, we can't just have opinions being put out there as pure speculation, as you say.

And when I put the question to her, for example, of why wasn't there better staging, if that's in fact what the result of your position was, that having to do with the way in which the facts as we know them are

presented, the position, the final position of the firearm and so forth. And it was not meant to take, obviously, an initial position as to what should be adopted as the facts. It was to give Ms. Dunphy an opportunity to, point blank, what are we dealing with here? What is the result of a finding that Constable Smyth – or I should put it this way. What evidence does the Commission require in order to be able to say: No, Constable Smyth, that's not credible?

That's, you know, that's the – that seems to me to be what you're opening up in your position, and Ms. Dunphy is opening up in her position: we don't accept Constable Smyth's scenario; we don't believe his scenario. And finally, at the end of the process, I'm going to have to look at both or all reasonable scenarios in the context of the evidence as put forth.

**MR. SIMMONDS:** And here's why we don't believe Constable Smyth, is where we're going to go with this. And that's why I believe, as you indicated, your comment was: do the best we can with the evidence available. This evidence I believe could be instrumental in assisting you to reach what was reasonable, what's unreasonable, what's believable, what's credible. But I do believe it would be appropriate for you to wait until Constable Smyth has given his evidence –

**THE COMMISSIONER:** I've already said that, but –

**MR. SIMMONDS:** (Inaudible) and then that –

**THE COMMISSIONER:** – the problem, the problem that's there, Mr. Simmonds, is it's getting late in the day then, in terms of the inquiry –

**MR. SIMMONDS:** And I will call –

**THE COMMISSIONER:** – for someone to do that type of work.

**MR. SIMMONDS:** I will have that conversation with the professor. But again, I emphasize, the reason I suggested Commission counsel was solely to ensure that it couldn't be said to be our experts or Constable Smyth's expert. That it was an expert, just like the other experts that are being called here by the inquiry, this expert would fall into the same –

**THE COMMISSIONER:** Right.

**MR. SIMMONDS:** I do have –

**THE COMMISSIONER:** Okay, we're going to, we're going to move on now in a moment. You had another point there?

**MR. SIMMONDS:** No, I don't have another point; I just wanted to speak about the chair.

**THE COMMISSIONER:** Yes, go ahead.

**MR. SIMMONDS:** I do want the chair. I would ask, respectfully ask that the chair be made available for not just cross-examination but direct examination of Constable Smyth. The reasons being that firstly the measurements of the chair are vitally important to making a determination as to what happened here. The allegations –

**THE COMMISSIONER:** They're not – you're not satisfied with the measurements taken by the forensic team?

**MR. SIMMONDS:** No, I'm not. I'm not, not at all satisfied with them. I think the chair here – but if I might finish, the allegations re: the location of the gun with respect to the chair, one part is that it could

have been inside the chair, it could have been attached to the side of the chair, or it could have been under the chair, or it could have been a distance from the chair. All of those things need to be measured in light of the chair –

**THE COMMISSIONER:** And the firearm.

**MR. SIMMONDS:** And the fire – and that's the point I was just going to make, the gun and the stick are in evidence. Why is there any prejudice or problem with the chair being there? If anything, the confidential pictures that are going to be presented here would possibly be the most prejudicial thing that could be presented to inflame.

I'm not concerned about that. I really don't think Mr. Kennedy can say he's concerned that you're going to be inflamed or prejudiced by anything you see here. This chair, which Mr. Dunphy is sitting in, which this rifle came over the arm of or somewhere, came from somewhere, is vitally important to making that determination. And I think it's fair to the officer to have it here when he gives his –

**THE COMMISSIONER:** Yeah.

**MR. SIMMONDS:** – direct and also fair because questions are – clear questions are going to be put to him with respect to measurements and the chair.

**THE COMMISSIONER:** Okay, we're going to come back to that when we come back to the, the question of whether we should have this type of expert report prepared for admission, which is going to be several days down the road.

Sorry, Mr. Simmonds, go ahead. You want –

**MR. SIMMONDS:** I would like the chair here for cross-examination purposes, clearly require it for cross-examination purposes. And that's why I want to give him the opportunity to have the chair here for his direct examination.

**THE COMMISSIONER:** Okay, so that we've got –

**MR. SIMMONDS:** How is it any different than that gun, Your Honour – Mr. Commissioner?

**THE COMMISSIONER:** You want it – why do you need it for the, for the direct examination?

**MR. SIMMONDS:** Because I want to give the officer a chance to address anything that Ms. Chaytor might raise with him in relation to the scenario he says took place. Because I am going to question him on that when I come – and I don't want to be saying, well, hey –

**THE COMMISSIONER:** All right.

**MR. SIMMONDS:** – you didn't have that opportunity first off.

**THE COMMISSIONER:** Okay. Now, it's possible that – and the reason I'm, I'm having these issues, this discussion now is before Constable Smyth's examination starts, I think it's fair to him to know what evidence might be coming –

**MR. SIMMONDS:** Absolutely.

**THE COMMISSIONER:** – and that possibly coming. It might not, but possibly evidence –

**MR. SIMMONDS:** And the chair is available this morning.

**THE COMMISSIONER:** – relating to – okay, relating to the biomechanical aspects. I wanted Mr. Kennedy to know that that was still a live issue in terms of whether we might be going there, and it might be significant in terms of the approach of all counsel, really, all parties with standing, and Commission counsel, as to how they proceed with their examination.

But before I go further, then, Mr. Kennedy, are you still concerned about the presence of the chair?

**MR. KENNEDY:** I don't see the relevance of it, Commissioner, if what we're dealing with here –

**THE COMMISSIONER:** Well, it's almost an aid to the court in that, and it removes one uncertainty. We could go out and get the exact same chair and ask that it be used as an aid to the court in terms of describing what took place, in terms of understanding the evidence. It might be cross-examination rather than direct examination, but in any event, I don't – when I've thought about this it's, I'm not sure there's good reasons I can put up there for not treating it as an aid to understanding the evidence as it goes in, but.

**MR. KENNEDY:** My only concern, Commissioner, would be the chair in isolation could potentially give a distorted picture as opposed to the necessity to replicate the environmental conditions that existed at that time.

**THE COMMISSIONER:** The entire living room. Well, we have the photos – sorry, we have the plan of the living room, we have photos, and we're not in a position to re-enact. And I think counsel had more or less accepted that there wouldn't be a complete re-enactment. But this is not – I don't –

**MR. KENNEDY:** The re-enactment video is pretty good.

**THE COMMISSIONER:** Sorry?

**MR. KENNEDY:** The re-enactment video gives a very clear picture –

**THE COMMISSIONER:** Well, that's fine, but the –

**MR. KENNEDY:** – of the chair and the Boost containers. I don't have a strong position, Commissioner. Again, it's up to you. If you want, if you think it's fair –

**THE COMMISSIONER:** I'm inclining towards – I'm inclining towards to assist them in their examination.

Any other counsel have a question or concerns in that regard?

All right, Mr. Simmonds, you get your chair. You say it's available. I don't think we're going to need it right away. Over lunchtime arrange to have it brought in and –

**MR. SIMMONDS:** I will.

**THE COMMISSIONER:** – have an appropriate sheet or whatever available for placing over it. You'll have to decide how it's going to be looked after as an exhibit. We're not in a position to take it. It's a big building; we only have a small part of it. So we're not into the storage of large exhibits. So you can work that out with other counsel or with Commission counsel. You may have to take it back, in other words, on a daily basis.

Okay, let's – so if you're ready we can – we'll only have a bit over half an hour, but I think it would be better to get it started before lunch.

Mr. Kennedy, if you're – you're looking at me, I don't know if you had any point to make.

**MR. KENNEDY:** Well, my client has raised an issue that –

**THE COMMISSIONER:** Go ahead.

**MR. KENNEDY:** – causes me concern and I just want to put it on the record as a caveat in terms of the utilization of this chair is that there is a stereo there, there is garbage there –

**THE COMMISSIONER:** I know.

**MR. KENNEDY:** – there is a white garbage bucket, you know, the chair in isolation –

**THE COMMISSIONER:** That's why I mention we're not doing a total re-enactment.

**THE KENNEDY:** Well, you have to be careful then, Commissioner, I would suggest. I would ask you to be careful in terms of the way the chair is utilized in the examination – well, in cross-examination –

**THE COMMISSIONER:** You will have your opportunity to object if an attempt is made to proceed in a fashion that's contrary to the rules of evidence. I think you made the same point – you raised the same concern at our case management meeting, Mr. Kennedy. And there's been further discussion I know this morning, but I think it's fair in light of the limited evidence that's available to support other scenarios or to challenge Constable Smyth's, so this is a question of, to a large extent, testing Constable Smyth's credibility and I don't – in fairness, I think there's not going to be sufficient prejudice to, to Constable Smyth to cause me to say that the value of having the chair is outweighed by the possible prejudice. So I'm going to, Mr. Simmonds, be looking carefully at, considering carefully where you're going with this.

If it's used as an aid to help us understand the evidence, if it's just the way you've presented it, fine; but if it's more than that, you may have problems.

**MR. SIMMONDS:** Well, Mr. Commissioner, perhaps you can enlighten me, or Mr. Kennedy can, what do you mean by more than that. I don't see – and perhaps I'm beating a dead horse here, but I don't see any difference in me utilizing the firearm which was found at the scene with respect to cross-examination or Ms. Chaytor using it on direct examination than using the chair on cross-examination. How could I – but I –

**THE COMMISSIONER:** Well, because the chair, arguably, might not be of any probative value.

**MR. SIMMONDS:** He's sitting in the chair –

**THE COMMISSIONER:** Right.

**MR. SIMMONDS:** – the rifle, supposedly, appeared unannounced, unseen from somewhere –

**THE COMMISSIONER:** And the chair didn't cause it to appear.

**MR. SIMMONDS:** Well, that may be a question that's going to have to be dealt with here with respect to where the rifle could have been in relation to the chair, and that's a very important issue with respect to whether or not Constable Smyth's evidence is credible.

**THE COMMISSIONER:** That, well – Mr. Simmonds, the, the fact of where the rifle might have been in relation to the chair is, I know, central to your submissions here but leaving aside for a moment the biomechanical engineering, there's very little evidence regarding where that rifle was.

**MR. SIMMONDS:** Agreed.

**THE COMMISSIONER:** And in terms of – if the chair is going to be here, if you’re proposing to invite somebody to sit down and demonstrate, that’s going arguably further then –

**MS. SIMMONDS:** Mr. Commissioner, I’m not going to do that.

**THE COMMISSIONER:** Okay.

**MR. SIMMONDS:** I am not going to do that. Mr. Commissioner, you’ll be here, I’m sure he won’t be shy if I ask a question that’s inappropriate. I don’t really see the issue with respect to the chair with the greatest – if anything is prejudicial, it’s the firearm but if I ask any questions that you deem are inappropriate with respect to it, I’m sure you’ll advise me of that.

**THE COMMISSIONER:** I will.

We’re going to proceed with the chair. Mr. Kennedy, you’ll remain alert I’m sure, as you always are, to object if there’s something that’s inappropriate in the way it’s being used. And I’ll give careful consideration to your objection.

Okay, we’re –

**MR. KENNEDY:** I thought we were breaking for lunch.

**THE COMMISSIONER:** Oh sorry, I was thinking 1 o’clock but I forgot – 12:30 is our normal time. Okay, I’m easy; if you want to just have Constable Smyth sworn, affirmed and break the ice or –

**MR. KENNEDY:** (Inaudible) the point is that if we are not going to start now then there are a couple of things that I want to review with Constable Smyth. Once he takes the stand –

**THE COMMISSIONER:** That’s fine.

**MR. KENNEDY:** – then my discussions with him are ended.

**THE COMMISSIONER:** That is fine. Okay.

All right, we’re going to come back and hopefully we’ll deal with anything else on a preliminary fashion but it’s going to be short. We’re going to be starting at 1:30 with the testimony, or shortly thereafter with the testimony of Constable Smyth.

Commission counsel have anything to add before – okay, thank you.

All right, we’ll adjourn until 1:30.

**MS. SHEEHAN:** All rise.

The inquiry is now recessed.

**Recess**

**MS. SHEEHAN:** All rise.

I declare this Commission of Inquiry opened. Commissioner Leo Barry presiding.

Please be seated.

**THE COMMISSIONER:** Okay, everybody ready to proceed? Mr. Kennedy, you had nothing?

**MR. KENNEDY:** No, nothing for me now.

Thank you.

**THE COMMISSIONER:** Okay. Thank you. I wanted to make sure.

Okay, go ahead, Ms. Chaytor, when you're ready.

**MS. CHAYTOR:** Okay. Good afternoon, Commissioner.

Our next witness is Joseph Smyth.

**THE COMMISSIONER:** Okay.

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

**CST. SMYTH:** I do.

Joseph Edward Smyth, Royal Newfoundland Constabulary, J-o-s-e-p-h E-d-w-a-r-d S-m-y-t-h.

**MS. SHEEHAN:** Thank you.

**MS. CHAYTOR:** Commissioner, before I get started with Constable Smyth's evidence, there are some exhibits that I would ask, please, to have entered. The new exhibits are P-0030, P-0031, P-0118 to 0225 and there are two confidential exhibits C-0005 and C-0006.

There's, there are also other confidential exhibits, Commissioner, that I may reference in questioning of Constable Smyth, and I would ask that if counsel, in terms of bringing up those confidential exhibits, they will not be shown on the large screens. And I would ask, please, if counsel wished to look at them that they turn up their screens. So the screens in front of them can move so that they can look down at them.

**THE COMMISSIONER:** Okay.

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** All right. So ordered.

**MS. CHAYTOR:** Thank you.

**THE COMMISSIONER:** By the way, I'm going to be ordering that they go in, exhibits go in, unless I hear some objection from counsel just to save time.

**MS. CHAYTOR:** Okay. And these are all exhibits I would say, Commissioner – these are exhibits that were identified by both Commission counsel as well as other counsel for the parties.

**THE COMMISSIONER:** Okay.

**MS. CHAYTOR:** Good afternoon, Constable Smyth.

I'm just going to begin with some background information on you. So perhaps, please, could you tell the Commissioner your education and employment background prior to joining the Royal Newfoundland Constabulary?

**CST. SMYTH:** I graduated from the Atlantic Police Academy in 2001. Previous to that, I had owned my own business for a period of time. I had worked out in Western Canada teaching skiing.

**MS. CHAYTOR:** Okay. And so you did your basic police training at the Atlantic Police Academy. That's in Prince Edward Island, is that right?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. And you said that was in 2001?

**CST. SMYTH:** I graduated in 2001, that's correct.

**MS. CHAYTOR:** Okay. How long a course of training was that at that time?

**CST. SMYTH:** It was one year of training followed by a period of probationary on-the-job training.

**MS. CHAYTOR:** Okay. I'm just going to ask, please, if you wouldn't mind, could you move in a little bit or move your microphone? There you go. Thank you.

Okay. So when did you join the Royal Newfoundland Constabulary?

**CST. SMYTH:** In 2001.

**MS. CHAYTOR:** 2001. And so you did some of your on-the-job training there?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. And so then when did you become a full-fledged police officer?

**CST. SMYTH:** It would have been 2002.

**MS. CHAYTOR:** Sorry, 2002?

**CST. SMYTH:** 2002, yes.

**MS. CHAYTOR:** Thank you.

And what, what is your current position and rank?

**CST. SMYTH:** My current position is with Traffic Services section and my current rank is constable.

**MS. CHAYTOR:** Okay. And what was your position and rank as of April of 2015?

**CST. SMYTH:** I was in an acting sergeant position at the time with our Protective Services Unit.

**MS. CHAYTOR:** Okay. And I'm going to ask you some questions about what the protective service unit was about in a moment. Why were you an acting sergeant?

**CST. SMYTH:** That often happens when there is a need to fill a personnel position whereby a full-time sergeant or a permanent sergeant in the rank may not necessarily be available or qualified to fill that position.

**MS. CHAYTOR:** Okay. So your position that you were holding at the time was deemed to be something that required a sergeant to fill?

**CST. SMYTH:** Yes, it was.

**MS. CHAYTOR:** Okay. And why was that?

**CST. SMYTH:** The specific duties involved supervision, operational planning of other members.

**MS. CHAYTOR:** Okay. Now, you've provided us with a copy of your CV. Thank you.

And I'm going to ask, Madam Clerk, if you could bring up, please, P-0118.

Okay. And if we just go to page 2 in this document, you start your, your career in 2002. So you're in Patrol division as that point in time, is that right, Constable Smyth?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. And then over to page 1 and we see that you're then, from 2008 until 2011, an investigator with the Criminal Intelligence Unit? And you go back to that in 2015, is that correct?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. And then at the top we see that you're NCO acting, Protective Services Unit, 2011 to 2015 in April. And perhaps you can tell, for those who may be listening who aren't aware, what does NCO stand for?

**CST. SMYTH:** NC – NCO is the abbreviation for non-commissioned officer.

**MS. CHAYTOR:** Okay.

Okay, so during your time in the Criminal Intelligence Unit, you indicate that part of your duties and responsibilities included investigation of organized crime groups and provincial threats within a joint-forces environment. And who was that a joint-forces environment? Which other police force?

**CST. SMYTH:** We were periodically joint forces with the Royal Canadian Mounted Police as well as the Canada Border Services Agency and we periodically worked with other law enforcement agencies.

**MS. CHAYTOR:** You also – in your job with the Criminal Intelligence Unit, you were involved in threat assessment and analysis?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** And what did that involve?

**CST. SMYTH:** That could entail threat assessments for specific individuals related to dignitary protection, but it could also relate to broader analysis investigations related to provincial threats, such as organized crime and the sort.

**MS. CHAYTOR:** Okay. And did you then carry out similar duties when you became a member of the Protective Service Unit?

**CST. SMYTH:** Yes I did, specific to that unit.

**MS. CHAYTOR:** Okay. So then in the time period that you're with the Protective Service Unit, in the four years or a little more than four years I understand – first of all, was that also a division of the Criminal Intelligence Unit?

**CST. SMYTH:** That would fall under the umbrella of Intelligence and Organized Crime, in which there are a number of subsections within that. Criminal Intelligence would have been under that same umbrella as well.

**MS. CHAYTOR:** And was this also a – was this a joint or integrated unit with the RCMP?

**CST. SMYTH:** Subsequent to 2013, we were a specifically integrated unit with the RCMP, yes.

**MS. CHAYTOR:** Okay. So from 2013 up until current, is that correct?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. And so prior to that, was the RCMP involved?

**CST. SMYTH:** Not on a day-to-day basis, no.

**MS. CHAYTOR:** So as needed, I take it, on an ad hoc basis?

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay. And one might be, sometimes in that unit, that you might have to call on the RCMP before it became an integrated unit.

**CST. SMYTH:** It would likely be specifically related to a visit that would likely be in their jurisdiction, or whereby there might be overlap between a nationally mandated dignitary being involved with a provincially mandated dignitary, such as a prime minister visit whereby we may have a role also with a visiting premier or our own Premier.

**MS. CHAYTOR:** Okay. And perhaps you could tell the Commissioner then, what is the mandate of the Protective Services Unit?

**CST. SMYTH:** Primarily it would be to provide close protection services to elected officials within the province and to provide and conduct intelligence-based investigation related to threats towards those same officials.

**MS. CHAYTOR:** Okay. And I noticed on your CV you referred to policy and procedure and that during this assignment you prepared several pieces of policy and procedure, and the existing RNC Protective Services Policy was researched and completed in 2012 and officially adopted in 2013. So you were involved, were you, in the drafting and creation of that policy?

**CST. SMYTH:** Yes, I was.

**MS. CHAYTOR:** Okay. Could we bring up, please, P-0031.

And while Madam Clerk is doing that, Constable Smyth, perhaps you could tell me – I also noted on your CV that you had supervisory duties, and I believe the date you gave for your supervisory duties in that unit was 2013. Is that right?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. And so in what respect were you in a supervisory position for the Protective Service Unit?

**CST. SMYTH:** Sorry?

**MS. CHAYTOR:** What did you do? Like who were you supervising? Would you be supervising, for example, the RCMP member?

**CST. SMYTH:** Yes, it would be inclusive of that. Anybody that was assigned full-time to the unit, but we also periodically utilized part-time resources from both agencies that I would be responsible for managing and supervising.

**MS. CHAYTOR:** Okay. So would you make the decisions as to who attended to certain functions, in terms of close protection?

**CST. SMYTH:** I could. I would have input on that, but largely that would have been dictated by schedules.

**MS. CHAYTOR:** Okay. And would you then also make decisions in terms of if you're doing intelligence gathering function, who would attend to doing those functions?

**CST. SMYTH:** Yes, I would.

**MS. CHAYTOR:** Okay. And so this is the policy – is this the policy, then, Constable Smyth? It's dated June 5, 2013. Is this the policy you were involved in drafting?

**CST. SMYTH:** Yes, it is.

**MS. CHAYTOR:** Okay. And we see under section 3 a mandate of the Protective Services Unit, "To provide close protection services for the Premier ... and other designated dignitaries. Specific close protection roles include bodyguard, secure transport and advance security/liaison officer."

And then secondly, 3.2, the mandate is "To gather intelligence on persons and groups of interest, demonstrations and any other matter that could potentially cause direct or indirect harm to the Premier or the Office of the Premier or to any other elected Government Official."

So you understood those were, that was the mandate of your unit?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** And that you worked to carry out duties and responsibilities in keeping with that mandate?

**CST. SMYTH:** Yes, that's correct.

**MS. CHAYTOR:** Who were you reporting to on April 5, 2015, yourself? Who did you report to?

**CST. SMYTH:** My immediate supervisor would have been Inspector Joe Gullage.

**MS. CHAYTOR:** And what role was he in?

**CST. SMYTH:** He was the inspector in charge of intelligence and organized crime section.

**MS. CHAYTOR:** Okay. And so would that, that's within the Criminal Intelligence Unit?

**CST. SMYTH:** No. The Criminal Intelligence Unit would fall under and within the intelligence and organized crime section.

**MS. CHAYTOR:** Okay, I understand. And when you came after April, 2015, and you're back into the Criminal Intelligence Unit, who were you reporting to at that point in time?

**CST. SMYTH:** Sorry, can you repeat that?

**MS. CHAYTOR:** After April, 2015, when you came out of the PSU but remained within Criminal Intelligence Unit, who were you reporting to at that point in time?

**CST. SMYTH:** My direct supervisor at that point would have been Sergeant Glen Noseworthy.

**MS. CHAYTOR:** Okay. I would keep this document up, please, Madam Clerk. Please keep it. Okay; if you could just make it a bit larger, please.

So pursuant to the policy and procedure that we have here, what qualifications did you need to be able to be a member of the PSU?

**CST. SMYTH:** Ideally, they wanted specific training related to dignitary protection, and intelligence-related investigations would be the two primary assets for that unit. If you didn't necessarily have those specific training modules they would seek to get them for you soon after being assigned to the unit.

**MS. CHAYTOR:** Okay. Now if we just look at clause, or section 6, pursuant to the policy, training and qualifications include: 6.1, "Officers being assigned to the Protective Services Unit must be able to: a. complete all modules of Use Of Force; b. pass the PARE test ...." Perhaps you could tell the Commissioner, what's the PARE test?

**CST. SMYTH:** The PARE test is the Physical Abilities Requirement Evaluation and it's a test of your physical abilities, usually firstly done when you apply to a policing career. It involves a series of obstacles, an obstacle course in essence; a push-pull station that would simulate struggling with an individual. It's just meant to push your physical limits.

**MS. CHAYTOR:** And when had you last passed a PARE test for the RNC, up until April 2015?

**CST. SMYTH:** I think the last time I had officially passed one may have been around when I first joined, around 2002?

**MS. CHAYTOR:** Around 2002.

**CST. SMYTH:** Yup. I had run it since then, but I don't think it would have been officially documented.

**MS. CHAYTOR:** I'm sorry?

**CST. SMYTH:** I would have completed the test since that time but I don't think it would have been officially documented or required for anything,

**MS. CHAYTOR:** And how often would you have done that since you joined the RNC?

**CST. SMYTH:** I would say in the range of half a dozen times?

**MS. CHAYTOR:** Okay. And when, up to April 2015, had you last done a PARE test?

**CST. SMYTH:** I can't recall.

**MS. CHAYTOR:** And then you have to pass a 2.4 kilometre run within 12 minutes subject to operational requirements. So upon joining the PSU, you joined the PSU in 2011-2012 – 2011, right?

**CST. SMYTH:** That's when the duties were assigned to me full-time, yes.

**MS. CHAYTOR:** Okay. And were you asked at that point whether or not you could meet these requirements?

**CST. SMYTH:** I don't – I think I would have been asked how my running was, yeah, but I wasn't specifically timed to meet that requirement, no.

**MS. CHAYTOR:** Okay.

And then on the top of the next page it also says, 6.2, Protective Services Unit officers shall successfully complete: a. firearms annual re-qualification. I take it that's a qualification, in any event, for every RNC officer. Is that correct?

**CST. SMYTH:** Any operational police officer, yes.

**MS. CHAYTOR:** Any operational, yes. Okay.

And then, any other training deemed pertinent to the unit. And was it ever stipulated what other training might be pertinent to the unit?

**CST. SMYTH:** Certainly a close protection specific course, as well as threat assessment, intelligence-based investigations course training.

**MS. CHAYTOR:** Okay.

And was that mandated – did all the officers who were working with you have that training?

**CST. SMYTH:** The threat assessment and intelligence training, or both?

**MS. CHAYTOR:** Yeah, and both, both.

**CST. SMYTH:** I think when I was there everybody had the close protection components complete. I don't believe everybody there at that stage either had intelligence-based investigations training experience for specific courses.

**MR. SIMMONDS:** Mr. Commissioner, I am sorry, but it's really difficult to hear.

**THE COMMISSIONER:** Yeah, Constable –

**MR. SIMMONDS:** I think we need to get the gentleman to close the door; there is some background noise there –

**MR. COMMISSIONER:** All right.

**MR. SIMMONDS:** – outside of the room, it’s really difficult –

**MR. COMMISSIONER:** I think it’s a function of Ms. Chaytor being close enough to hear him but try and get close, Ms. Chaytor and yourself, to speak a little more loudly so that everybody can hear.

Thank you.

**MS. CHAYTOR:** Okay, thank you, Mr. Simmonds.

So when did you do the training in the protection course or the VIP protection course? When did you complete that?

**CST. SMYTH:** 2012.

**MS. CHAYTOR:** Okay.

And where did you do that training and how long of a course was that?

**CST. SMYTH:** It was done with the OPP and it was a two-week course.

**MS. CHAYTOR:** Okay.

Was that primarily the bodyguard-type function to cover that aspect of your duties?

**CST. SMYTH:** Yes, it was; it was the operational component.

**MS. CHAYTOR:** Okay. All right.

And prior then to joining the PSU, did you have any experience in terms of protective services or close protection duty?

**CST. SMYTH:** I did have some exposure to that field of policing, yes.

**MS. CHAYTOR:** Okay, and how was that?

**CST. SMYTH:** One of the duties within CIU would have been to assist the RCMP in their nationally mandated dignitary protection operations. I often was the liaison for those.

**MS. CHAYTOR:** Okay.

And other than what every officer would receive through basic training, did you have any specific training in mediation or conflict resolution?

**CST. SMYTH:** Beyond our original training?

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** I had completed various courses around community mediation, mental health training, these types of things, yes. It was covered off in a project management course I had completed, also a supervisory leadership program that I completed through Memorial University as well.

**MS. CHAYTOR:** Okay.

Can we bring up please P-0153?

And, Constable Smyth, I'm going to ask you some questions around the – I haven't forgotten the second component that you referred to in terms of threat assessment, and I will come back and ask you some detailed questions about your training in that regard. But in the meantime, I just want to look at some other courses that we have on record that you've completed.

Could you make this a little bit larger, please? Real large, okay.

Okay, so if I could see the top of this document. The date of this document is April 27, 2015 and I understand this was provided to the RCMP during their investigation. And this is your training records; is that what you understand this document to be?

**CST. SMYTH:** Yes, I do.

**MS. CHAYTOR:** Okay.

And if we come down through – I'll bring you back to the first is your use of force training, and I'll have some questions later for that, but right now I'd just like to bring you to the – it is taking forever, sorry. It's not working, sorry – oh, here you go. Now it's too big.

Okay. I saw in here – and the reason I wanted to bring your attention to this, but I'm not seeing it right now, but I did see in here where you had completed a course related to the Reid-Power inquiry.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay.

**MR. KENNEDY:** (Inaudible.)

**MS. CHAYTOR:** Did I pass that? Okay. I'm not seeing it.

Okay. Yes, so I'm sure I saw it there. Someone just said they saw it, but anyhow, so that was a course, I believe, in mental health awareness and according to my notes here it was an eight-hour course. Is that right?

**CST. SMYTH:** Yes, that's correct.

**MS. CHAYTOR:** Okay.

And do you recall what year you did that?

**CST. SMYTH:** I believe it would have been around 2003, 2004 perhaps.

**MS. CHAYTOR:** Ah, here we go, yes. There it is. June of 2004, an 8-hour course, okay. Was that a mandatory course for all officers at that point in time?

**CST. SMYTH:** I can't recall that specifically. I believe it was but –

**MS. CHAYTOR:** Do you recall then what the – and I, you know, I acknowledge it's over 10 years before – do you recall what was the focus of the course?

**CST. SMYTH:** It was dealing with persons currently experiencing mental health crisis.

**THE COMMISSIONER:** Is it possible if you can speak up just a bit louder again?

**CST. SMYTH:** It was dealing with persons with mental health crisis.

**THE COMMISSIONER:** Thank you.

**MS. CHAYTOR:** Okay.

And then I see on the next page you do have another mental health seminar in May of 2006, and that's an eight-hour course?

**CST. SMYTH:** Yes, that's correct.

**MS. CHAYTOR:** Okay.

And then there's a community mediation course in October of 2006, a 3.3-hour course – is that the one you were referring to in terms of mediation?

**CST. SMYTH:** I believe that particular course may have had some correlation to restorative justice programs?

**MS. CHAYTOR:** Okay.

Other than the seminar that we, that was specifically referred to as the Reid-Power inquiry, is that something that was continued on an annual basis, do you know, by the RNC? The Reid-Power inquiry mental-health-awareness type of training, was that something that was required on an annual basis?

**CST. SMYTH:** I don't believe it was required annually for every officer. I know that that mental health awareness and training has been an ongoing program for the RNC, yes.

**MS. CHAYTOR:** Okay, all right.

And other than the other course that I pointed out here that you completed then in 2005 on mental health, did you have other courses in mental health awareness issues?

**CST. SMYTH:** Not that I can recall specifically, no.

**MS. CHAYTOR:** Okay. So nothing in the past 10 years, or 10 years leading up to the incident with Mr. Dunphy?

**CST. SMYTH:** I don't believe so, no.

**MS. CHAYTOR:** Okay, if we could bring up please, P-0218, and hopefully I'll have more luck with this one in terms of finding my pages. And this is – I understood you to say you had done training in threat assessment –

**CST. SMYTH:** Yes, I have.

**MS. CHAYTOR:** Okay. And perhaps you could tell the Commissioner when and where you did that training.

**CST. SMYTH:** I think the first criminal-intelligence related training I did would have been in Nova Scotia; it was done through the Criminal Intelligence Service Canada. That was done around 2009. The particular exhibit you're referring to there now was a course specifically related to threat assessments, persons of interest, related to managing targeted violence. That was done, I believe, also in 2012.

**MS. CHAYTOR:** Okay. And where did you do this course?

**CST. SMYTH:** That was done in St. John's.

**MS. CHAYTOR:** And were there instructors brought in for that course?

**CST. SMYTH:** Yes, there were. There was an instructor brought in from the – from British Columbia.

**MS. CHAYTOR:** Okay. And so this says the – at the top here: School of Public Safety & Security, JIBC.

**CST. SMYTH:** That'd be Justice Institute of British Columbia.

**MS. CHAYTOR:** Okay. And how long was this course and what did this course entail?

**CST. SMYTH:** I believe the course was five days. It was focused primarily on the threat assessment process for persons who may carry out an act of targeted violence against an individual.

**MS. CHAYTOR:** Maybe you can tell us, what do you mean by an act of targeted violence?

**CST. SMYTH:** It's a specific intended act of violence carried out by an individual on another individual, targeted inasmuch that it's planned.

**MS. CHAYTOR:** Okay. And was this a course that you – you had to attend for five days. Did you have to pass this course?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** And did you pass it?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay. And was there anything with respect to the training from this course that you found relevant to the investigation you were carrying out with respect to Mr. Dunphy in April of 2015?

**CST. SMYTH:** Yes, I did. The process taught in this course would have been the exact process I would have been embarking on during that time.

**MS. CHAYTOR:** Okay. And perhaps you can tell us then exactly what that would have been.

**CST. SMYTH:** It would have been the contemporary threat management process, which would involve intelligence gathering on a specific individual to try to determine if they have proceeded or begin to proceed down a pathway of violence. We'll take into consideration such factors as inhibitors in their life that may be present or not present. We'll consider whether or not that person feels that they're justified in carrying out an act of targeted violence. That may be inclusive of whether or not that person feels particularly aggrieved or if they feel there's been a specific injustice done against them by an individual, an organization or a government entity. We'll consider consequences, whether or not that person perceives consequences as being a mitigating factor on their ability to carry out an act of targeted violence.

Alternatives are another factor that we'll examine –

**MS. CHAYTOR:** I'm sorry, but can you just say that –?

**CST. SMYTH:** Alternatives.

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** Whether or not the subject has considered alternatives to carrying out an act of targeted violence, whether that may be if they're – the specific grievance that's being examined has other alternatives insomuch that there – are there other avenues that they may be able to exhaust to achieve a resolution to what they either perceive to be an injustice or is it an actual injustice.

And finally, I think in that examination, we'd be looking at ability, whether or not that person has an ability to carry out an act of targeted violence, inclusive of physically and if they've made efforts to plan, purchase weapons, these kinds of things.

**MS. CHAYTOR:** Okay.

And I think in answering that you mentioned inhibitors in the person's life. And what do you mean by that?

**CST. SMYTH:** Inhibitors are usually tangible items that either exist or don't exist in a person's life that may contribute to them carrying out an act of targeted violence. An inhibitor would be, for example, their social support structure. If they have close relationships with family, that would be a significant inhibitor, if there is any.

If there isn't any, then that would be cause for concern. Their physical well-being, their health – a person that is healthy and has been in a clean bill of health, that would be considered an inhibitor versus somebody who has been diagnosed with a terminal illness. That may be considered a lack of an inhibitor. It could be a source of employment income and it may be inclusive of their living conditions, these kinds of things.

**MS. CHAYTOR:** Okay, so basically what you're saying is you're looking for somebody who has a lot to lose if they were to do something like an act of violence.

**CST. SMYTH:** Well, I'm not necessarily looking for somebody that has a lot to lose, I'm just trying to examine whether they do have a lot to lose or if they have factors in their life that would prevent them from wanting to carry out an act of targeted violence.

**MS. CHAYTOR:** Okay. And having someone close in your life that you care about, that would be an inhibitor.

**CST. SMYTH:** Absolutely.

**MS. CHAYTOR:** If we could bring up page 61, please.

I think we can just bring up the number, can't we? And just put it in up here. If we can do this, please – I can do it. Okay, let's try 62. Yeah, on the bottom of the next page.

**MS. SHEEHAN:** (Inaudible.)

**MS. CHAYTOR:** Okay, 61, here we go, thank you. And just make it a little bigger, please.

Okay. So on the bottom here we see a slide and this is from Module 5 of your course that you completed: Threat & Risk: Same or Different. And this refers to a threat referring to specific behaviour which someone considers threatening – includes actual utterances and/or observable actions, for example, stalking.

A threat assessment is “A process designed to assess the likelihood that the threatener will carry out the threat.”

So this is – so do I take from that, that there has to be a threat determined before you move on to the next step of completing a threat assessment?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay –

**CST. SMYTH:** No –

**MS. CHAYTOR:** – so maybe you could explain to me what you understood in being taught this?

**CST. SMYTH:** The threat assessment is, is determining whether or not a threat exists. And I think, perhaps, it’s important to maybe examine the language, the usage of the word “threat” in this context.

You know, threat perhaps having two specific definitions: you know, one being what is more commonly known being the – or commonly used, an actual statement of intent to cause harm or danger to somebody; and two, I think the other being a person, place or situation that poses potential danger to a person or situation.

For example, in a more benign context that, the rain this weekend is threatening to cause damage to culverts. That, that being that side of the definition, I think what they’re referring to here would be the, the broader sense of the term. Whether or not the threat exists, we’re trying to determine whether it’s a broad-based threat posed towards an individual versus a specific threat, as in a statement and intent to cause some harm to somebody.

**MS. CHAYTOR:** And what’s the different in risk – what’s the difference in risk? It says here: “Threat & Risk: Same or Different?” So what’s the difference?

**CST. SMYTH:** The risk, risk management and risk analysis would usually fall in as part of a threat assessment and would be a determination of whether or not that person poses a risk to carry out the actual threat, what risk level exists, if there’s a threat identified.

**MS. CHAYTOR:** Isn’t that the same as what it says for threat assessment: A process designed to assess the likelihood the threatener will carry out the threat?

**CST. SMYTH:** It does say that but my understanding would be that would be more related to the risk management side of it, yes.

**MS. CHAYTOR:** Okay. Well, we’ll look at the next –

**THE COMMISSIONER:** Is there another –

**CST. SMYTH:** I think there’s another page here.

**MS. CHAYTOR:** We’ll look at the next page.

**CST. SMYTH:** It might give you –

**THE COMMISSIONER:** – line on the next page?

**MS. CHAYTOR:** Yes, next page.

**THE COMMISSIONER:** Risk. Okay.

**MS. CHAYTOR:** Okay, so here we have risk. So here it says: Risk refers to the chance or possibility danger, injury, loss or other adverse consequences –

**CST. SMYTH:** Which is what I was trying to refer to.

**MS. CHAYTOR:** Okay. And then risk assessment: “A proactive process designed to assess the likelihood that a risky event will occur.”

So, Constable Smyth, on – in April 3 to April 5 of 2015, what were you doing? Are you carrying out a threat assessment? Are you carrying out a risk assessment? What is it that you were doing?

**CST. SMYTH:** I would be very much in the infancy of a threat assessment.

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** I’m sorry, I missed that. The –

**CST. SMYTH:** I said I would be very much in the infancy of a threat assessment.

**THE COMMISSIONER:** In the infancy, just the beginning phases of a threat assessment.

**CST. SMYTH:** The very, very beginning. And in terms of there may be some risk assessment as it relates to my own safety, but the –

**MS. CHAYTOR:** (Inaudible) in terms of your own safety?

**CST. SMYTH:** As it relates to my own.

**MS. CHAYTOR:** Right.

**CST. SMYTH:** Some of the queries that happened previous to visiting Mr. Dunphy would have been dual purpose; they would have lent to both the threat assessment I was conducting, but it would also lend to a risk assessment of my own visitation.

**MS. CHAYTOR:** And would you agree with me, I would think, that your primary risk assessment that you would do before going to visit someone would be for your own safety. And then the secondary risk assessment would be to investigate the perceived threat or matter that you’re there to investigate.

**CST. SMYTH:** Yes, absolutely.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** Yeah. The risk of him carrying out an actual threat would very likely come well after that visit or well after an investigation has been initiated.

**MS. CHAYTOR:** Okay. So before you ever walk into someone’s door you would carry out a risk assessment with the primary focus being your own safety.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay.

Okay, and if we could look at page 96 – okay, actually, I’m going to do this if you don’t mind.

**UNIDENTIFIED FEMALE SPEAKER:** (Inaudible.)

**MS. CHAYTOR:** Okay. I just want to ask you some questions about this, if we could just make this a little bigger as well then.

And this was part of your course and it spoke about watch and waiting. And do remember what you learned about this? And it says when to use: If unsure or if further information is required, effective in long-term monitoring. And then when not to use: If there’s a high risk with a chance of violence, if law enforcement should be notified. And then I’m just going to scroll you down to actually –

**CST. SMYTH:** It’s probably important to note here, too, Mr. Commissioner, that, that this training is also – also involves civilian staff of other different agencies. So sometimes it doesn’t take into consideration that law enforcement have different tools at their, at their availability to utilize here.

Sometimes there’s reference to law enforcement being an actual tool, which is, which would be telling the civilian components of this course that they should sometimes consider engaging law enforcement as a method of carrying out their threat assessment.

**MS. CHAYTOR:** Okay.

And then also if we could look at Module 5, page 66.

**UNIDENTIFIED FEMALE SPEAKER:** Page 66?

**MS. CHAYTOR:** Uh-huh, page 66 in the document. Okay.

**MS. O’BRIEN:** That would be page 69 of the exhibit, so if you go up here.

**MS. CHAYTOR:** Okay. And hopefully our pages are right this time. I’m going by pages in the document.

**UNIDENTIFIED FEMALE SPEAKER:** (Inaudible.)

**MS. CHAYTOR:** Yeah, okay.

This was, this, this would be referred to as a HCR-20. Do you recall what you were taught with respect to this, HCR-20, and what this tool was?

**CST. SMYTH:** I do recall looking at that tool and it being a list of questions that you would consider during the threat assessment process. I’d have to review the actual HCR test and list of questions to probably refresh my memory on it.

**MS. CHAYTOR:** Okay. And from what I understood, and just in reading it as a layperson – but from what I understood here it is a guide, as it says. And even though it’s aimed at an assessment for risk in future violent behavior in criminal and psychiatric populations, it certainly says that it can be used – its basic principles can be used in other situations as well. And then there’s a list of things that you would look for: historical items, five clinical items and five risk-management items.

And I’m just wondering whether you used a tool such as this, either this tool or a tool such as this to systemically assess the risk to yourself, the seriousness of a possible, the possible threat that you were looking into, or the risk of that potential threat coming to fruition. So did you use a tool such as the HCR-20?

**CST. SMYTH:** Not that stage. I would have been at the intelligence-gathering phase of the threat assessment process. It would be challenging to answer a lot of the questions that exist within those tools prior to gathering more information, as it relates to the broader-based threat assessment, on whether or not Mr. Dunphy was capable of carrying out an act of targeted violence against an elected official.

This wouldn't have been taken into consideration as I examined safety towards myself, no.

**MS. CHAYTOR:** And why not? Wouldn't that be your primary object before you go to visit somebody that you'd do that assessment for your own safety?

**CST. SMYTH:** This would be a very cumbersome tool that's not really efficient to examine safety for an officer visiting a house in the circumstances I did. You wouldn't be able to rely on a lot of those answers to whether or not somebody would be violent towards you.

**MS. CHAYTOR:** Did you do anything in terms of a structured way of assessing the risk and how you would measure that risk to determine what may be at stake prior to visiting Mr. Dunphy?

**CST. SMYTH:** A structured way? Can you, perhaps, describe that a bit more?

**MS. CHAYTOR:** Well, anything at all in terms of a formal risk assessment. Like what did you use to try and assess the risk in going to visit Mr. Dunphy?

**CST. SMYTH:** They would primarily consist of some cursory background checks.

**MS. CHAYTOR:** Okay, and that's it? You did your cursory background checks?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay.

I'm just going to leave this line of questioning then. Did you – and I may come back to it when we get into more detail about what checks you did do. Did you have any training or experience specific to how to interpret communications on social media such as Twitter?

**CST. SMYTH:** Specific training in interpreting Twitter comments?

**MS. CHAYTOR:** Yeah, communication on social Twitter. I understand people – you know, the way people speak on Twitter, sometimes there is a lot of hyperbole. Did you have any specific training on how to interpret comments and the way people use social media platforms such as Twitter?

**CST. SMYTH:** Not specific to social media, no.

**MS. CHAYTOR:** Okay, well did you have anything?

**CST. SMYTH:** Interpreting people's comments?

**MS. CHAYTOR:** Yeah, in communications and how they communicate in using social media platforms?

**CST. SMYTH:** I think just basically our core training would examine sometimes interpreting people's comments and threats, inclusive of even the managing targeted violence training when people make veiled, what are perhaps categorized as veiled threats, what they mean and what they can potentially mean, that kind, those kinds of things, but in terms of interpreting Twitter itself, no, we just –

**MS. CHAYTOR:** Or towards social media.

**CST. SMYTH:** – treat Twitter as – it’s 140 characters, so your capacity to interpret 140 characters in a specific tweet and how they may correlate to what else remains in their profile.

**MS. CHAYTOR:** Makes it a little trickier.

**CST. SMYTH:** Sure it does, yeah, absolutely.

**MS. CHAYTOR:** Okay.

Did you undergo any annual performance evaluations as a RNC officer?

**CST. SMYTH:** Our evaluation was more of an ongoing thing. There was a period in time where there was attempts made to establish an annual evaluation process. I don’t think that took off, for lack of a better term.

**MS. CHAYTOR:** Okay, so tell me how – what was the ongoing process?

**CST. SMYTH:** It’s just the onus that would lie on your supervisors that evaluate your performance and capacity to carry out your duties and meet your unit’s specific mandate.

**MS. CHAYTOR:** And how would that happen? There was no formal – then from what you’re telling me, there was no formal forms or interviews with you on an annual or other basis?

**CST. SMYTH:** No, but you’d regularly meet with supervisors. You’re obligated, in my situation, to issue quarterly reports. Again, the constant communication and feedback, whether that be negative or positive, was an ongoing thing.

**MS. CHAYTOR:** Okay, and so I saw in some of our documents where you would prepare quarterly reports for the protective service unit.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Are you saying that was part of your annual – that was part of your performance evaluation?

**CST. SMYTH:** I don’t know. I think they would take those into consideration if a quarterly report wasn’t complete and in how they would expect it to be. I imagine that would be addressed.

**MS. CHAYTOR:** When was the last time, prior to April of 2015, you sat down with a supervisor and he or she went over your performance and gave you feedback?

**CST. SMYTH:** I don’t recall that specifically.

**MS. CHAYTOR:** And in terms of the more specific or the more formalized process that you mentioned in answering the question, I saw in the documents that there were performance development plans –

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Was that what you were referring to in terms of –

**CST. SMYTH:** Yes, it is. I think the acronym was PPPD.

**MS. CHAYTOR:** Okay.

And from what I could see the last time it appears you would have had completed one of those would have been 2006; does that seem right?

**CST. SMYTH:** That sounds right, yes.

**MS. CHAYTOR:** Okay.

Constable Smyth, are you involved in any community or professional associations?

**CST. SMYTH:** Not at this moment, no.

**MS. CHAYTOR:** Okay.

And have you been involved in the past with the RNCA?

**CST. SMYTH:** Yes, I have.

**MS. CHAYTOR:** And in what capacity and when would that have been?

**CST. SMYTH:** I was a director there around 2007, 2008. And probably around 2008 or 2009, I was elected to the executive and served there as treasurer till about 2011.

**MS. CHAYTOR:** Until 2011?

**CST. SMYTH:** Uh-huh.

**MS. CHAYTOR:** So in April of 2015, you were no longer involved with the RNCA?

**CST. SMYTH:** No, I was not.

**MS. CHAYTOR:** Okay.

And during your time on the executive of the RNCA, did that, did you also sit at the same time as Paul Davis?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Have you received any awards or recognitions as a police officer?

**CST. SMYTH:** Yes, I have.

**MS. CHAYTOR:** Okay. And perhaps you can tell us about some of those.

**CST. SMYTH:** I've received rewards related to specific duties, investigations –

**MS. CHAYTOR:** I am sorry, can you speak up?

**CST. SMYTH:** I received rewards and recognitions related to specific investigations and duties.

**MS. CHAYTOR:** Okay.

And I understand that in February of 2015 you were given a life-saving award; is that correct?

**CST. SMYTH:** Yes, I was.

**MS. CHAYTOR:** Okay. And what was that about?

**CST. SMYTH:** It was a young person who was at a Special Olympics event who began choking, and I had used the Heimlich maneuver and dislodged the item.

**MS. CHAYTOR:** Constable Smyth, I understand that there's a mandatory three-day time off work following a critical incident such as what you were involved in April of 2015. Were you off work for those three days?

**CST. SMYTH:** I wasn't engaged in any duties specific to the RNC. I was involved in requirements of the investigation. So I guess it's arguable whether or not I was working or off.

**MS. CHAYTOR:** So requirements of the RCMP investigation, you mean.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** And so you did things like give an interview with the RCMP. Is that what you mean?

**CST. SMYTH:** Correct. It was interviews; there was multiple re-creations, those kinds of things, yes.

**MS. CHAYTOR:** And then when you returned to work, where did you return to work? Which unit were you then assigned? Is that as we saw in your CV, you went into the Criminal Intelligence Unit?

**CST. SMYTH:** Yes I did, that's correct.

**MS. CHAYTOR:** Okay. So you didn't go back to your PSU position?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. And the position that you took in Criminal Intelligence, was that an operational position?

**CST. SMYTH:** At some point in time it became non-operational. Originally, I was left with the understanding it was an operational position.

**MS. CHAYTOR:** Okay. And for how long did, were you in an operational position when you went back?

**CST. SMYTH:** I think it was probably one to two weeks?

**MS. CHAYTOR:** And then what happened?

**CST. SMYTH:** I was told that they felt it was better that I carry out administrative duties.

**MS. CHAYTOR:** Okay. And who told you that?

**CST. SMYTH:** Originally, I was told that by my immediate supervisor, Glen Noseworthy.

**MS. CHAYTOR:** And what was the understanding for taking you out of operational position and putting you on an administrative position?

**CST. SMYTH:** I didn't think they wanted to put myself or the department at risk of being involved in any other type of incident that might – while this one wasn't resolved.

**MS. CHAYTOR:** Okay. So while you were under investigation with, by the RCMP.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay. Did you have any input into that decision?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. And was that a normal practice in terms of the situation which you found yourself to be in, to be assigned an administrative position?

**CST. SMYTH:** I'm not sure if I'm aware of what a normal practice would be.

**MS. CHAYTOR:** Okay. And then how long did you remain in a non-operational position?

**CST. SMYTH:** Up until the following fall.

**MS. CHAYTOR:** I'm sorry, until when?

**CST. SMYTH:** The following fall. I believe it was November of 2015.

**MS. CHAYTOR:** So in November of 2015, what happens then?

**CST. SMYTH:** I took time off work.

**MS. CHAYTOR:** Okay. And what was the purpose of taking time off work in November of 2015?

**CST. SMYTH:** At that point, I had been at work for a number of months and hadn't really, from my perspective, done anything meaningful. And was also, at that stage, the subject of a lot of vitriolic social media commentary. That was becoming increasingly challenging to be exposed to, and the same goes for my family, and ultimately felt it would be best that I not continue to be in a workplace where I wasn't contributing anything meaningful.

**MS. CHAYTOR:** Okay. So, Constable Smyth, was that what we sometimes refer to as, it was a stress leave?

**CST. SMYTH:** I think that would be a safe categorization, yes.

**MS. CHAYTOR:** You went on leave. It was a medical leave that you took?

**CST. SMYTH:** Yeah, I think it would be safe to categorize it as voluntary stress leave.

**MS. CHAYTOR:** Okay. Did you require medical documentation to take that leave?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay. And so it was a mental health leave.

**CST. SMYTH:** I think that would be safe to say, yes.

**MS. CHAYTOR:** And so after this incident you went back to work. Did you take an annual leave shortly after the incident?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay. And so then after you came back from that, you were in Criminal Intelligence Unit –

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** – up until November of 2015.

**CST. SMYTH:** That’s correct.

**MS. CHAYTOR:** So for a few months and then you went on mental health leave.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. When did you then ultimately return to work?

**CST. SMYTH:** October 2016.

**MS. CHAYTOR:** October 2016. And how long did you remain on your mental health leave?

**CST. SMYTH:** Up until May 2016.

**MS. CHAYTOR:** And what happened then?

**CST. SMYTH:** I went on parental leave.

**MS. CHAYTOR:** Okay, so from May 2016 to October 2016 you’re on parental leave.

**CST. SMYTH:** That’s correct.

**MS. CHAYTOR:** Okay. So you were off work from November 2015 up until, then, October of this year.

**CST. SMYTH:** That’s right.

**MS. CHAYTOR:** Okay. Prior to the shooting, Constable Smyth, did you have any mental health issues?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Had you ever been treated by or referred for treatment to a counsellor, psychologist or psychiatrist prior to April of 2015?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Did you have any anger management issues?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Did you have substance abuse issues?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Did the RCMP ask you any questions of this nature in their investigation?

**CST. SMYTH:** I don’t recall.

**MS. CHAYTOR:** You don't recall?

**CST. SMYTH:** I don't recall specifically being asked about – I definitely wasn't asked about substance abuse issues. They may have asked me if I had, if I had consumed alcohol the night before the incident, but I don't recall being asked about substance abuse, no.

**MS. CHAYTOR:** And nothing about your mental health.

**CST. SMYTH:** No, I don't think so.

**MS. CHAYTOR:** You've told us that as a member of the PSU you worked in an integrated unit with the RCMP.

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** And you also indicated that while you're in doing the Criminal Intelligence piece, you worked in a joint unit. The organized crime piece, that was also sometimes a joint-unit environment –

**CST. SMYTH:** At times it was, yes.

**MS. CHAYTOR:** – with the RCMP. Other than that, had you ever been on any joint operation or task force with a member or members of the RCMP prior to April of 2015?

**CST. SMYTH:** Other than what you just referenced?

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** No, not that I can recall.

**MS. CHAYTOR:** In the course of your career, how regular or frequently did you have interactions with RCMP members?

**CST. SMYTH:** It would – I think I would classify it as relatively infrequent. A little more when I was with Criminal Intelligence because much of our work was provincially based in so much that our jurisdiction borders weren't necessarily respected by the persons or groups that we were investigating. So it was a fair bit of overlap there. Prior to Criminal Intelligence, my interactions would have been fairly limited.

**MS. CHAYTOR:** Fairly – I'm sorry?

**CST. SMYTH:** Limited.

**MS. CHAYTOR:** Limited, okay. And do you recall in the interview that you gave with me on December 21 that you said you would have had regular contact with the RCMP when I asked you the same question?

**CST. SMYTH:** During my time with the Criminal Investigation Division, yes.

**MS. CHAYTOR:** Okay. And you indicated that your jobs had – quoting you – no jurisdictional boundaries.

**CST. SMYTH:** Sorry, which particular job are you referring to?

**MS. CHAYTOR:** Our jobs do not have – you said our jobs do not have jurisdictional boundaries.

**CST. SMYTH:** Which specific job are you relating to?

**MS. CHAYTOR:** Would you like to look at that section of your interview? Do you recall saying that to me?

**CST. SMYTH:** Oh yes, absolutely, yes.

**MS. CHAYTOR:** Okay. Well, you tell me what you meant.

**CST. SMYTH:** I think, especially as it relates to investigations, there's never been an issue with an RNC member entering RCMP jurisdiction to carry out aspects of that investigation, and the same would go for RCMP members, of course, entering RNC jurisdiction. Those jurisdictional boundaries largely refer to – I don't think administrative boundary would be the correct way to describe it but permits for proper resource allocation.

**MS. CHAYTOR:** Okay. The lead the investigator for the RCMP with respect to Mr. Dunphy's shooting death was Corporal Steve Burke. Did you know Corporal Burke prior to this incident?

**CST. SMYTH:** I had met him previous in a professional capacity, yes.

**MS. CHAYTOR:** Okay. And perhaps you could tell us about that. How did you know Steve Burke?

**CST. SMYTH:** I think the first occasion I had to meet Corporal Burke was 2008 when I was first assigned to the Criminal Investigation Division. Corporal Burke had, he was assigned I believe to the Whitbourne RCMP detachment and he had an investigation that involved needing to meet with somebody that resided in RNC jurisdiction and I had attended residence with him to carry out that meeting.

**MS. CHAYTOR:** Okay. So he came into RNC territory to visit somebody, a home visit?

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** It was a specific criminal investigation, I believe.

**MS. CHAYTOR:** Okay. And you went along with him?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** And that was, when?

**CST. SMYTH:** I think it was 2008.

**MS. CHAYTOR:** So similar to what you were doing on April 5. You went into RCMP jurisdiction. He was coming into your jurisdiction so you went along with him.

**CST. SMYTH:** I don't believe there was a relationship between the two investigations. I'm confident that he was engaged in a criminal investigation at that time.

**MS. CHAYTOR:** Okay, right, but it was a similar situation. He was coming into your jurisdiction, so you went along with him?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. Did you also know him through VIP work?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay, so tell the Commissioner about that.

**CST. SMYTH:** Corporal Burke, I believe, had specific dignitary protection training, and I would often see him at events whereby there were nationally mandated VIP duties for the RCMP, where I may be acting as a liaison to that department.

**MS. CHAYTOR:** And the first – so how often then would you, in the course of that aspect of your work, how often would you have encountered Corporal Burke over the years?

**CST. SMYTH:** Maybe as many as six times, perhaps as low as three.

**MS. CHAYTOR:** Okay.

And in the first statement that you gave to the RCMP on April 6, 2015, a Corporal Monty Henstridge interviewed you, and Corporal Burke also attended that interview; is that right?

**CST. SMYTH:** Yes, it is.

**MS. CHAYTOR:** Okay. Did you know Corporal Henstridge before April 6, 2015?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** And how did you know Corporal Henstridge?

**CST. SMYTH:** When I was assigned to Criminal Intelligence Unit, I believe I had met Corporal Henstridge while he was engaged in a murder investigation, and we had gleaned intelligence from a confidential source related to their investigation and we had met them to pass over that information.

**MS. CHAYTOR:** Sergeant Kent Osmond of the RCMP was the team commander of the investigation into Mr. Dunphy's death. Did you know Sergeant Osborne – Osmond, sorry, prior to April 5, 2015?

**CST. SMYTH:** I believe I had met Sergeant Osmond on the same occasion that I had met Corporal Henstridge.

**MS. CHAYTOR:** And did you keep in any regular communications with Sergeant Osmond?

**CST. SMYTH:** No. There had been a few communications over their investigation, I think, maybe over phone or email, but it was very, not very many.

**MS. CHAYTOR:** Okay, so during the investigation. So that's after April 5, 2015?

**CST. SMYTH:** No, sorry, I was referring to their original –

**MS. CHAYTOR:** Oh, okay –

**CST. SMYTH:** – murder investigation when I had originally met Corporal Henstridge and Sergeant Osmond.

**MS. CHAYTOR:** Okay.

And, Constable Smyth, is there anyone else who you are aware of that was involved in the investigation of Mr. Dunphy's death that you had a connection with prior to April 5, 2015? Is there anyone else that I haven't asked you about?

**CST. SMYTH:** Anybody that I knew on a professional level at all?

**MS. CHAYTOR:** Yes, who were involved in the investigation.

**CST. SMYTH:** I knew Sergeant Steve Conohan.

**MS. CHAYTOR:** Okay. And did you understand him to have a role in the investigation?

**CST. SMYTH:** I've read since that he had some limited role, yes.

**MS. CHAYTOR:** Anyone else?

**CST. SMYTH:** I might be able to better answer that if I had a list of those officers.

**MS. CHAYTOR:** Okay. And what did you understand to be Conohan's, Sergeant Conohan's role?

**CST. SMYTH:** I think it was something to do with Mr. Dunphy's medicinal grow operation.

**MS. CHAYTOR:** And how well did you know him?

**CST. SMYTH:** I knew Sergeant Conohan a little bit better from my time with Criminal Intelligence. He was with the RCMP drug section and I believe he also had assignments with dignitary protection as well.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** I didn't know him well either, but I had met him a number of times in a professional capacity.

**MS. CHAYTOR:** Okay.

I'm going to turn now then to the – your use-of-force training, and I have some questions for you there.

Up to April 5, 2015, other than the required training of every RNC officer, had you completed any additional training with respect to use of force?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay, so tell the Commissioner about that, please.

**CST. SMYTH:** Our protective policing course that I completed through the OPP would have had several elements of use of force –

**THE COMMISSIONER:** We're losing you again. A little louder, please.

**CST. SMYTH:** The course that I completed through the OPP in November of 2012 had various elements of use of force as well.

**MS. CHAYTOR:** Okay. For example, what? What did you learn through the VIP course about use of force? Would that be use of force training when you have, when you're doing your bodyguard-type function? Is that what that is?

**CST. SMYTH:** It would be inclusive of that, yes.

**MS. CHAYTOR:** Okay. So what percentage of that course – and that course again was how long?

**CST. SMYTH:** Two weeks.

**MS. CHAYTOR:** Two weeks? And so what percentage of that would have been use-of-force training?

**CST. SMYTH:** That's probably difficult for me to answer. There was components of the bodyguard elements that involved some use of force, but we also did a fair bit of firearms training I think over, probably, a three-day period.

**MS. CHAYTOR:** Okay. And were there any differences in the OPP training that you did than what you get through the RNC in term of use of force?

**CST. SMYTH:** There were some differences, yes. We did some training on carbines and we also did a different course of fire with the OPP.

**MS. CHAYTOR:** A different course of fire?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay, and what was different about their course of fire versus the RNC's?

**CST. SMYTH:** Some of those involved using your strong hand alone, while your off hand would have been used to move a person and simulate a protectee, a principle, if you will.

**MS. CHAYTOR:** Okay. So that's being done in the context of your bodyguard function again, protecting the person that you're primarily responsible to protect.

**CST. SMYTH:** Right. Correct.

**MS. CHAYTOR:** Okay. Any other differences?

**CST. SMYTH:** No, not that I can think off offhand.

**MS. CHAYTOR:** Okay –

**CST. SMYTH:** Sorry, there were some differences. We did some shooting exercises around vehicles, from vehicles, having to exit a vehicle and stand outside the drivers, from the driver's side and address a potential threat, also exiting the vehicle with your principle and engaging a threat in a traffic environment.

**MS. CHAYTOR:** Okay.

Anything that would be relevant to the situation you found yourself in on April 5, 2015? Any differences there in terms of what you were trained to do by the RNC in terms of use of force?

**CST. SMYTH:** I don't think necessarily by design, but yes, insomuch that moving while addressing a threat.

**MS. CHAYTOR:** Moving while addressing a threat?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** So tell us, please, about that.

**CST. SMYTH:** Well, standard re-qualification course fire doesn't involve moving while you're addressing your threat. You're stood basically still, other than one point in time where you're advancing forward a couple of steps towards your threat. But this one included a bit more of a dynamic movement where you're moving side to side or laterally while addressing your threat.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** That would have been, unfortunately, similar to the situation I found myself in.

**MS. CHAYTOR:** Okay.

So you did scenarios through your OPP VIP training course, you did scenarios of moving while you're discharging a firearm; is that what you're saying?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Whereas here in St. John's your normal course of fire training, you're stationary, except in one piece of that you move closer to your target; is that right?

**CST. SMYTH:** As part of our annual re-qualification, our original firearms training would have involved some elements of movement.

**MS. CHAYTOR:** Okay. So your annual re-qualification's training, is it all stationary?

**CST. SMYTH:** It is – the vast majority of it is stationary other than, like I said, one particular portion where you would advance forward four paces.

**MS. CHAYTOR:** Okay.

Do you have any specialized training in de-escalation strategies?

**CST. SMYTH:** No, other than the components that might be outlined in some of our mental health seminars, but other than that no, not specifically.

**MS. CHAYTOR:** Okay. And the last one you did again, remind me, 2005, mental health seminar.

**CST. SMYTH:** I would say it's around that time, yeah.

**MS. CHAYTOR:** I understand there are three modules to the RNC use-of-force training. And it's Module 1 is the mandatory, each year firearm retraining re-qualification – is that right?

**CST. SMYTH:** That sounds correct, yes.

**MS. CHAYTOR:** Okay. As of April 5, 2015, were you up to date on your use-of-force training?

**CST. SMYTH:** Yes, I was.

**MS. CHAYTOR:** Okay. If we could bring up, please, P-0153.

Okay, and again, this is a document that was in the RCMP investigation file folder which they've requested during their investigation. And I had this up earlier to show you.

And your certifications and use of force, if we could just make this a little bigger, please, Madam Clerk. Okay. So if we come down through we see Use of Force – Module 1 is what we're looking for here. And this document indicated that the last time you had Use of Force – Module 1 certification was December of 2012. Do you know if that's correct, Constable Smyth?

**CST. SMYTH:** I don't believe that is correct. I believe I completed recertification training in 2014.

**MS. CHAYTOR:** Okay. And if we could bring up, please, P-0157. And I'm going to need three exhibits this time, Madam Clerk, so if you could have them ready, please: 0157, 0158 and 0159.

Okay, and here we have the December 7, 2012, and this is use-of-force training, training log. So we see your signature here in the middle. The page is heavily redacted because that, that were the names of other people who also attended this session.

And I see the signature on the bottom, which I understand to be Sergeant James, Bill James. And he would be your use-of-force instructor, is that right, Constable Smyth?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. So this indicates that it's Module 1, we see at the top, and indicates that you attended your use-of-force training in December 2012.

And I take it – if we could bring up then, please, P-0158, and we'll see a similar document for 2013. And this is Module 1 and this is dated October of 2013, October 29, 2013 – October 28, actually, of 2013. Again, we see Sergeant James' signature and your name as having attended use-of-force training on that date. Constable Smyth, did you pass your training on that date?

**CST. SMYTH:** Yes I did.

**MS. CHAYTOR:** Okay. If we could have P-0159, please.

**MR. KENNEDY:** Commissioner, Constable Smyth is looking for some water. I don't know if it would be appropriate for me to fill his glass, or who should do that.

**MS. CHAYTOR:** Sorry. I should pay better attention to my witness.

**THE COMMISSIONER:** Thanks.

**MS. CHAYTOR:** I apologize.

**CST. SMYTH:** Thank you.

**MS. CHAYTOR:** And here we have, then, Constable Smyth, this is April 17, 2014. And, again, Sergeant James is the instructor who has signed off here, Module 1, and I see your name at the top that day. So you attended on April 17, 2014, it appears, and completed Module 1, use-of-force training. Is that correct?

**CST. SMYTH:** Yes, it is.

**MS. CHAYTOR:** Did you pass on that day?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** What happens after your attendance in training – and if you don't know the answer to this question that's fine. But what happens to then have that translated into you being certified?

**CST. SMYTH:** What happens to this record?

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** I don't know.

**MS. CHAYTOR:** Why do we see your record of certification up until 2012 but no record after your 2012?

**CST. SMYTH:** I don't know the answer to that, I'm sorry.

**MS. CHAYTOR:** Do you get a certificate?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. If we could have P-0155, please.

This issue – if we could make it a little larger, please, Madam Clerk. This issue with the apparent discrepancy in your records was picked up on by Superintendent Jason Sheppard on April 30, 2015. He sent an email to Bill James, your use-of-force instructor, and he had reviewed the letter regarding Constable Smyth's firearm qualifications and cross-referenced it to his training records. "It appears to me as if he has not completed any modules in Use of Force since December 2012. Is this accurate ...."

Then Bill James gave the answer that you were "up to date in all modules of Use of Force." And then he adds about "Module 3 was scheduled for the year 2013. Due to the construction here at HQ we had no facility to conduct the training. An exemption was granted for this Module in 2013 to carry over into 2014." And then in 2014 Module 3 was conducted by the members who were considered to be front line patrol members. Constable Smyth is not considered to be front line. And he hoped that that clarified the inquiry.

So is this correct that you had not completed Module 3 for 2013 or 2014?

**CST. SMYTH:** Can you tell me exactly what Module 3 is, please?

**MS. CHAYTOR:** I cannot off the top of my head. It is not your use-of-force training – not your firearms qualification, I can tell you that.

**CST. SMYTH:** I suspect if Sergeant James is saying it, then it is correct.

**MS. CHAYTOR:** Okay. All right. And did you not consider yourself to be front line? This says that you're not considered to be front line.

**CST. SMYTH:** I would not have considered myself in a front line position, no.

**MS. CHAYTOR:** Okay. So at the PSU you're not front line?

**CST. SMYTH:** We're not considered front line policing, no.

**MS. CHAYTOR:** And does front line policing mean people who go into the community and people who interview persons of interest? Is that a front line person?

**CST. SMYTH:** No. Front line in the policing world generally refers to patrol, emergency operations, emergency response.

**MS. CHAYTOR:** Okay. All right.

So this seems to suggest those people were given the priority in terms of getting Module 3 done.

**CST. SMYTH:** I believe I gathered the same suggestion as well.

**MS. CHAYTOR:** Okay. Constable Smyth, I understand that the RNC requires a use-of-force report to be completed when force has been used by an officer. Are you aware of that, that you would fill out a use-of-force report?

**CST. SMYTH:** Yes, I am.

**MS. CHAYTOR:** Okay. And had you had occasion prior to April 5, 2015, to have used force and to have completed a use-of-force report?

**CST. SMYTH:** Yes, I had.

**MS. CHAYTOR:** Okay. After having submitted a use-of-force report, were you ever spoken to by any supervisor or given any feedback or referred for any additional training?

**CST. SMYTH:** I do not believe so, no.

**MS. CHAYTOR:** Were you ever told whether or not, whether your use-of-force had been excessive?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Prior to April 5, 2015, while with the Protective Services Unit, did you ever have to use force?

**CST. SMYTH:** While with the Protective Services Unit?

**MS. CHAYTOR:** While with the Protective Services Unit.

**CST. SMYTH:** No, I did not.

**MS. CHAYTOR:** We saw on your CV that you did have – you started your career in patrol services.

**CST. SMYTH:** Yes, that's correct.

**MS. CHAYTOR:** Okay. Prior to April 5, 2015, did you ever draw your weapon?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Perhaps then you could tell the Commissioner about the instances in which you had to draw your weapon.

**CST. SMYTH:** Is there any one in specific you'd like me to relay?

**MS. CHAYTOR:** Well, answer this then, how often would you have drawn your weapon prior to then?

**CST. SMYTH:** I think it would be a guess, but probably in the area of a half dozen times over my career.

**MR. CHAYTOR:** And were those always –

**CST. SMYTH:** My weapon, I think you're referring to my firearm?

**MS. CHAYTOR:** Meaning your firearm, yes. Okay, as I take there are other times you had to draw your baton.

**CST. SMYTH:** Yes (inaudible).

**MS. CHAYTOR:** Okay. All right. But your firearm – so you drew your firearm about a half a dozen times?

**CST. SMYTH:** That would be a guess, yes.

**MS. CHAYTOR:** Okay. Did you ever point your firearm at anyone prior to April 5, 2015?

**CST. SMYTH:** I can only recall one time where I may have pointed a firearm at somebody.

**MS. CHAYTOR:** Okay.

And do you recall telling me on December 21st that you had never pointed your firearm at anyone?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay, and why is that?

**CST. SMYTH:** I didn't recall the incident until after I'd left you.

**MS. CHAYTOR:** Okay, and so what caused you to recall that incident?

**CST. SMYTH:** Just giving your question some more thought, in terms of how many use-of-force incidents you had been involved in where you drew a firearm.

**MS. CHAYTOR:** Okay. And what is the incident that you pointed your firearm at somebody? Can you give the – I don't expect you to remember every detail, but perhaps just tell us –

**CST. SMYTH:** I remember it actually fairly clearly. We were, I was with Patrol Division, and we had responded to a person in distress, and the mother of this person had called stating that their son was currently in mental health crisis, was hearing voices, was banging holes in the walls, and was fearful of them acting out violently. We attended the residence; we believed that the person was still inside because the mother, the complainant in this case, had gone to a neighbour's.

I proceeded around to the back of the house, and while I was looking at the house, from behind me, the person that we were looking for came out of a shed and I was in the middle of the yard and they had a shotgun. The shotgun was held up to their chin, and they came out and they were speaking to me and other officers that were on the scene. I didn't have any cover to retreat to; I dropped to one knee and I drew my firearm, engaged in conversation with this person. I'd probably have to read the report to confirm if I pointed my firearm at them, but I believe there was a point where that person began to lower their shotgun in my direction and, at which time I may have pointed my firearm.

They were told not to do that, do not point your firearm, and they eventually retreated back into the shed.

**MS. CHAYTOR:** And Constable Smyth, in that incident there were other officers with you?

**CST. SMYTH:** Yes, there were.

**MS. CHAYTOR:** Okay. And in terms of that incident, did you fill out a use-of-force report?

**CST. SMYTH:** I probably wouldn't have filled one out. The use-of-force report was a requirement for an incident, so another –

**MS. CHAYTOR:** So one, one –

**CST. SMYTH:** Right, so another officer may have filled out the use-of-force report for that incident.

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** I think I saw a reference to that incident. Which document would I have seen that in?

**MS. CHAYTOR:** We do have a number of the use-of-force reports that were provided to us by the RNC that Constable Smyth filled out, so I believe it is amongst some of the reports that we received. There are two or three that I did pull for purpose of just this line of questioning, but – and that one, I don't think is one of the ones, although it may be. There is two that we do have.

One is in which you drew your firearm and pepper spray for a shoplifter that you believed to be armed with a syringe. Do you recall that incident?

**CST. SMYTH:** I don't recall –

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** – pulling my firearm for a shoplifter, no.

**MS. CHAYTOR:** And the other one was a break and enter, but there is another one similar. I think you're right, Commissioner, I believe we do have that report as well.

Okay. So I do – there are a couple that I picked as just samples and we don't have all your use-of-force reports. I indicated to the RNC that wouldn't be necessary, but we do have some of the ones that you did fill out.

**CST. SMYTH:** I don't recall drawing my firearm for a shoplifter though, sorry.

**MS. CHAYTOR:** You don't, no.

**CST. SMYTH:** No.

**MS. CHAYTOR:** I think the shoplifter had left the mall and there was a chase and – you don't recall that one?

**CST. SMYTH:** Okay, that was –

**MS. CHAYTOR:** We can look at it if you wish.

**CST. SMYTH:** Sure.

**MS. CHAYTOR:** Do you want to look at that one?

**CST. SMYTH:** If you want to. I don't think it was a shoplifter, I believe it was an armed robbery.

**MS. CHAYTOR:** There's an armed robbery one as well.

**CST. SMYTH:** Okay.

**MS. CHAYTOR:** Okay. Do you recall that?

**CST. SMYTH:** I thought we were talking about the same incident, but –

**MS. CHAYTOR:** No, they're two different ones. There's one where you get called to the mall, to the Village Mall, I believe, and you're told that the suspect is armed with a syringe and there's a –

**CST. SMYTH:** Right.

**MS. CHAYTOR:** – chase but you find him on a street outside of the mall.

**CST. SMYTH:** Right, I believe that was an armed robbery.

**MS. CHAYTOR:** Okay. So you remember that one?

**CST. SMYTH:** Yes, I do.

**MS. CHAYTOR:** Okay. All right, and that other one was an armed robbery or a break-and-enter incident then? And we can bring those up if you wish.

Actually, we might look at, please, if we could certainly bring up ones – P-0164. These are all 164, 162, 163 and I'm going to refer to them in that order. And I don't necessarily, Constable Smyth, need to go through all the details of these with you, but this one at 164 I understand happened – and the date is kind of hard to see here but the copy that I looked at, I had understood this is March, so March 12, 2017 – sorry, 2007. So you would have been with patrol then, and your handgun was drawn, you used your aerosol weapon and handcuffs on the suspect.

One thing I would point out to you on this form – whoops, sorry – and this is the one, it gives a description here. I don't know if you can read it, but it happened in the area of Forbes Street. Does that help jog your memory? I believe it commenced at the Village Mall and ended up in the Forbes Street area.

But down at that bottom of the form: reviewed by supervisor; reviewed by training section; recommended for counselling, EAP counselling; recommended other training. None of this portion of your form is filled out by anyone. I believe this might just be your S here. I believe that is just from your S. But do you recall – did anyone review this incident with you? This incident in which you drew your firearm, was there any discussion or review with you?

**CST. SMYTH:** No.

**MS. CHAYTOR:** No.

If we could look at 162, please. And again these are all 2007, Constable Smyth, and you're on patrol. So August 14, 2007 and this one your handgun is drawn and your pepper spray.

If we come down to the bottom again, this is your signature.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Reviewed by supervisor, we do have your supervisor's signature here. Reviewed by training section not completed. Recommended EAP not completed. Recommended other training not

completed. And this is an incident where I understood it arise – it arose, sorry, as a break-and-enter incident. I'm just wondering in this incident was there any follow-up or discussion with you about your use of force?

**CST. SMYTH:** No.

**MS. CHAYTOR:** And in completing these forms when you sign it, do you sign it and pass it in, or is your supervisor present and you sign them together?

**CST. SMYTH:** No, I sign them and they're submitted with the rest of the report.

**MS. CHAYTOR:** Okay. And you heard nothing back after submitting your report?

**CST. SMYTH:** No, I didn't.

**MS. CHAYTOR:** Okay.

If we could have 163, please. This one is also in 2007. This one is May 10, 2007. You don't draw your firearm in this incident. I see here there is empty hand – hard; empty hand – soft. And again, no indication in terms of a review by supervisor; none of this part of your form is completed. I'll just give you an indication to help your memory on this incident. It actually happened here at the School for the Deaf.

**CST. SMYTH:** Yes, I remember the incident.

**MS. CHAYTOR:** Do you recall this incident?

**CST. SMYTH:** Yes, I do.

**MS. CHAYTOR:** Yes, okay.

We'll see here that you get called, you and your partner are called, from what I can tell, to the School for the Deaf because there's somebody that's been spotted outside the school and so you were called to respond?

**CST. SMYTH:** Yes, we were called by staff in the school who were maintaining a residence and they believed that somebody was breaking in.

**MS. CHAYTOR:** Okay. Yes, all right.

And this person doesn't respond to your verbal commands from what I can understand here, that Smyth continued to yell verbal commands for the male to stop resisting. And I think by this time you have, you have him on the ground.

“The male refused to comply and Smyth struck him several times in the face with his fist. The male stopped struggling long enough for Smyth to get on his back.” And then Constable Marshall arrived and the male was forced – his hands, I guess it is – were “forced behind his back as he was still noncompliant. The male then stated – in broken words – that he was ‘deaf.’ The officers then realized he was hearing impaired.”

And if we could just go back to the front of the form, did anyone – and nothing, again, is filled out here in terms of any discussion or review with you regarding this incident?

**CST. SMYTH:** No.

**MS. CHAYTOR:** And do you recall whether or not there was, Constable Smyth?

**CST. SMYTH:** Pardon me?

**MS. CHAYTOR:** Did anybody speak to you or provide any feedback in terms of your use of force in this situation?

**CST. SMYTH:** No, they didn't. It was deemed to be an appropriate level of force.

**THE COMMISSIONER:** What was that?

**CST. SMYTH:** It was deemed to be an appropriate level of force.

**MS. CHAYTOR:** And how do you know that?

**CST. SMYTH:** Because there was no sanctions in place for it.

**MS. CHAYTOR:** Because nobody got back to you or spoke to you about it.

**CST. SMYTH:** If there was anything deemed to be inappropriate in any of our use-of-force incidents they would get back to us, yes.

**MS. CHAYTOR:** Okay. And I believe I understood you to say pre – in my earlier questions that you were never spoken to about your use of force prior to, at any point in time in your career.

**CST. SMYTH:** Not that I can recall, no.

**MS. CHAYTOR:** Okay. Now, Constable Smyth, the three incidents – and, again, I just picked, picked a sample, but those three incidents happened in less than a six-month period and –

**CST. SMYTH:** Sorry, can we perhaps review the other incidents in the same way?

**MS. CHAYTOR:** Sure.

You want to look at the detail of those? Okay, we can go back.

P-0162 – and that might not be an unusual number for someone on patrol, I'm just wondering in terms of the process, in terms of review. But you're six years into your career at this point and this is in a six-month period. And so I'm just wondering what the follow-up is in those circumstances but we can certainly look at them.

We have August 14, 2007. And this is the one, there's, who's – there's a break-in in the home. This is the August incident on Spencer Street area.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** This, do you remember this one?

**CST. SMYTH:** I do.

**MS. CHAYTOR:** You parked your vehicle, exited, remained in the alley, alleyway. Looks like you see the suspect, again, walking down Spencer Street from Merrymeeting Road. The male got close, Smyth recognized – him? And you recognized this person, that's why the name is redacted. You identified

yourself. And you drew your service firearm, held it towards the ground, doesn't look like you pointed it at this suspect.

**CST. SMYTH:** No I didn't. No.

**MS. CHAYTOR:** Okay. You remember this one?

**CST. SMYTH:** Yes, I do.

**MS. CHAYTOR:** Okay. We could go back to the first one, was P-0164, March 12, 2007. And I believe that one we didn't, I didn't bring you to the wording but I believe you also used your pepper spray that day.

**CST. SMYTH:** Right. Yeah, I think there was some confusion on whether or not this was a shoplifter or –

**MS. CHAYTOR:** This is the shoplifter one, this one, March 12, 2007, or it originates. And you'll see here there's a syringe referred to –

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** – as the weapon from the other person? It says, I think: Sears Security reported a male had stolen a quantity of goods and then threatened them with a syringe.

**CST. SMYTH:** Right.

**MS. CHAYTOR:** So that's this one.

**CST. SMYTH:** That would be the armed robbery, yes.

**MS. CHAYTOR:** Okay.

Okay, and it says I drew my –

**THE COMMISSIONER:** When you find an appropriate time there, Ms. Chaytor, to take –

**MS. CHAYTOR:** Yes, okay. Did you want to look at any more of the detail of those –?

**THE COMMISSIONER:** – the morning break.

**MS. CHAYTOR:** – Constable?

**CST. SMYTH:** Uh, no, I don't think so.

**MS. CHAYTOR:** No? You're good?

Okay. All right.

So did anyone speak to you at any point in time as to whether or not—you said nobody spoke to you about any of these incidents and that it would have been deemed to be reasonable use of force, or otherwise you would have been spoken to is what I understand you to say.

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. And so you weren't given any feedback in terms of whether or not this is a high number of instances in a period of time, or this was part of the, you know – this is fairly normal for somebody in the type of position that you were in at the time.

**CST. SMYTH:** Yes, I understand that to be fairly normal. It's situational.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** I think there's persons who may work in Patrol division and assigned to certain areas that may have less frequency of having to engage in use of force, and there's other officers assigned to more urban areas that experience a higher frequency of these, these incidents.

**MS. CHAYTOR:** And in your – and for example, when you went to protective service unit you had no incidents of having to use force, up until April 5, 2015.

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay.

Yes, this is a good place, then, Commissioner.

Thank you.

**THE COMMISSIONER:** Okay, we'll recess for 15 minutes.

Recess

**MS. SHEEHAN:** All rise.

I declare this Commission of Inquiry in session.

Please be seated.

**THE COMMISSIONER:** Now, I'm informed that we're getting emails, twitters or tweets, or other social media telling us to speak up, and it may be a function – counsel, we have to direct the mic more than we have been doing, and I'm probably most at fault. But in any event, that's the message from our viewing and listening audience. They could hear us last week, but they can't hear us this week.

**MS. CHAYTOR:** We shall speak up.

Constable Smyth, I'm going to launch another line of questioning now in terms of your past performance and discipline record. Were you the subject of discipline in your employment prior to joining the RNC?

**CST. SMYTH:** Sorry, employment discipline?

**MS. CHAYTOR:** Were you the subject of any discipline in your employment prior to joining the RNC?

**CST. SMYTH:** Not in my employment, no.

**MS. CHAYTOR:** Were you otherwise the subject of discipline, other, in some other respect?

**CST. SMYTH:** I was subject of being charged with theft when I was 17 or 18 years old.

**MS. CHAYTOR:** Okay, no other record of any kind, then?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay, all right.

And have you ever been the subject of disciplinary action by the RNC?

**CST. SMYTH:** Yes, I have.

**MS. CHAYTOR:** Okay. And what were the circumstances that gave rise to that disciplinary action?

**CST. SMYTH:** In 2005, I was on a personal vacation and was the victim of an armed robbery while I was very intoxicated. I made an unsuccessful attempt to capture the suspects and out of frustration I damaged what I thought was an abandoned school bus. I notified police, police arrived. I advised, informed them of the damage I had caused and was subsequently arrested and charged there.

**MS. CHAYTOR:** Okay. And you said you were intoxicated at the time?

**CST. SMYTH:** Yes, I was.

**MS. CHAYTOR:** Were you very intoxicated?

**CST. SMYTH:** Yes, I was.

**MS. CHAYTOR:** Okay. And what hour in the day did this occur?

**CST. SMYTH:** This was probably in the area of 4 a.m.

**MS. CHAYTOR:** Okay, and is your memory of the event affected by the amount of alcohol you had consumed?

**CST. SMYTH:** Yes, it is.

**MS. CHAYTOR:** Okay.

At the time, who was your supervisor at the RNC?

**CST. SMYTH:** Sergeant Marlene Jesso.

**MS. CHAYTOR:** Okay. And do you recall telling her at the time about the incident?

**CST. SMYTH:** Yes, I do.

**MS. CHAYTOR:** Okay.

If we could bring up, please, P-0169. Constable Smyth, you said that you were the victim of an armed robbery. What was the weapon that was used?

**CST. SMYTH:** A knife.

**MS. CHAYTOR:** I'm going to ask you please, Madam Clerk, if you could bring us to page 8 of this document.

Page 9 then please, if you could make it a bit bigger. Okay, here we go. If you could just make it a bit bigger, please.

Okay, the names are blocked out here, which might make it a little bit more difficult for us, but your version is here in the document, Constable Joseph Smyth, and paragraph 8 it says, he had consumed a quantity of alcohol and was faced with an adverse and dangerous situation and acted very unfitting and appropriately – inappropriately, sorry, for which there is no excuse.

Okay, and it says that you plead guilty to the charges?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** That's correct, okay.

And it says here that you ran after the suspect, throwing several objects, causing damage to vehicles in the process. He was unable to catch them. He had a piece of wood and struck an old school type bus, breaking glass in the bus. He was yelling and screaming at the individuals. Is that an accurate account of what happened, Constable Smyth?

**CST. SMYTH:** Yes, it is.

**MS. CHAYTOR:** Okay.

I'm just going to take you back to Marlene Jesso, and she is your immediate supervisor at the time. And she says on May 14, 2005 at approximately 3 p.m. she received a telephone call from Sergeant Tilley who advised her that he received a telephone call from another person, who is friend of yours, who told him Constable Smyth was in custody and being held at the lock-up in the British Virgin Islands.

And then at approximately 3:15 she called the lock-up and was advised that you were speaking with counsel and was told to call back. And then she spoke with you by telephone. Constable Smyth appeared very shaken; he advised he spoke with a lawyer. He had not been charged with any offence and they had 24 hours to lay the charge, and they could hold you indefinitely.

He explained that at approximately 3 a.m. he was robbed at knifepoint by two men. He ran after one of them and during the confrontation a flower pot and a piece of wood were thrown, causing damage to some vehicles. He yelled for help; the police arrived and detained him for property damage.

Do you recall giving Marlene Jesso this account that you threw a flower pot and a piece of wood?

**CST. SMYTH:** Yes, I do.

**MS. CHAYTOR:** Okay.

Did you tell your supervisor that you intentionally picked up a stick and damaged the bus?

**CST. SMYTH:** I don't recall specifically if I told her I intentionally did it or if I had thrown a piece. That may be your interpretation or I may have told her explicitly that.

**MS. CHAYTOR:** Okay.

Constable Smyth, did you downplay the incident to your supervisor at the time?

**CST. SMYTH:** I don't recall doing that.

**MS. CHAYTOR:** Did you do – did you fear repercussions from your work in terms of this incident?

**CST. SMYTH:** I didn't fear repercussions. I knew there would be repercussions.

**MS. CHAYTOR:** Okay.

The next account of the incident is – the name is blocked out, but I understand this to be a friend of yours who was with you on the vacation, and he attended at the police station. You were there, with no shirt on. He says Constable Smyth said I didn't do anything. I was mugged. Someone held a knife to my throat. I shouldn't be here.

Do you recall telling your friend that you didn't do anything and that you shouldn't be there?

**CST. SMYTH:** I probably said that, yes.

**MS. CHAYTOR:** Okay. And why would you say that, that you didn't do anything?

**CST. SMYTH:** I was probably minimizing to him.

**MS. CHAYTOR:** To him?

**CST. SMYTH:** Uh-huh.

**MS. CHAYTOR:** And why is that?

**CST. SMYTH:** I don't know. He was under a lot of stress at the time. I had already told the police at that point that I had intentionally caused damage to one of those vehicles.

**MS. CHAYTOR:** Okay. Well, let's look at what the police officer says you told him.

And this is sergeant – his name is blocked out here. He spoke to you at the hospital, is that right? Did you have to go to the hospital?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** And why is that?

**CST. SMYTH:** I had sustained some injury.

**MS. CHAYTOR:** And how did you sustain injury?

**THE COMMISSIONER:** I'm sorry, I can't hear.

**MS. CHAYTOR:** I believe – could you repeat your answer, please? We (inaudible).

**CST. SMYTH:** I had sustained some injury.

**MS. CHAYTOR:** Okay. And how did you sustain injury?

**CST. SMYTH:** I was pushed into a cell.

**MS. CHAYTOR:** So were you injured by the officers who arrested you –

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** – or were detaining you?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. And he says you advised that you had been drinking in several bars and while walking in the area you were robbed by two black males, one put a knife to his neck, they took his black leather jacket, black – I'm sorry, black leather wallet with his police identification badge and credit card and some money. He gave a brief description. Constable Smyth advised when the suspect ran away he threw a pot at them and ran after them. Constable Smyth was taken back to the area to show where it occurred, but he was intoxicated at the time of the robbery.

So according to the sergeant, he says that the account you gave was that you threw a pot at the suspects. Did you tell the sergeant that you intentionally caused damage to the school bus?

**CST. SMYTH:** That wasn't the initial responding officer. I don't recall exactly what I told him. I thought I would have told him the same thing.

**MS. CHAYTOR:** Constable Smyth, were you charged with damage to several vehicles, not just the school bus?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. Did you cause damage to several vehicles?

**CST. SMYTH:** There was other damage caused to other vehicles, yes.

**MS. CHAYTOR:** And did you intentionally cause damage to those vehicles?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. I'm going to read excerpts, then, from other witnesses, and you can tell me if it's an accurate account.

**MR. KENNEDY:** Commissioner, I hate to interrupt, but I have some concern about this line of questioning using statements made by people in another country. The role of Commission counsel is to be fair and objective in terms of the presentation of the evidence. We've seen through the last – the shoplifting with a syringe is an example, Commissioner. I would suggest Commission counsel is engaging in an adversarial type of cross-examination and what we have here is now referring to comments by people from another country. My client has admitted –

**THE COMMISSIONER:** I've seen two different types of statement – I might have missed the intent of it. I thought the reference to the use-of-force reports regarding the syringe was to establish when Constable Smyth may have drawn his firearm and/or pointed his firearm and Commission counsel is referring to the fact there had been no apparent review by superior officers and no follow-up with Constable Smyth.

I didn't see that as being put forward for – what I think is being referred to here, either rightfully or wrongfully, as a course of conduct, and I'll speak further on that in a moment, but I don't see the two in parallel. I'll address your point on this particular incident directly.

I do have a question with respect to how much should be made of it in terms of the date, how long, how much time has passed, but I do think that a question that might be addressed here is whether there's a course of conduct, shall we say, sufficiently well-established over a period of time to indicate that Sergeant Smyth might have been hot tempered or too quick to react in certain situations. Now he's given an explanation of intoxication, and up to this point anyhow I've only been referred to this one incident where there might be discipline. He seems to have had a good record. Other than that, I don't know what else Commission counsel has, but I'm not – I guess I'll cut it short by saying we should move on.

I'm not saying you shouldn't finish your questioning on it, Ms. Chaytor, but basically, if it's one of a chain that's one thing, but if there's a risk of it being regarded as showing a propensity and therefore – propensity in another case and therefore I should infer that he overreacted in the same fashion in this case. If that's the reason for it, I'm questioning whether I should draw that inference, whether it's not part of what they call the prohibited line of reasoning.

**MS. CHAYTOR:** Yes.

**THE COMMISSIONER:** So I don't know, am I correct in your purpose in putting it forward?

**MS. CHAYTOR:** A couple of purposes because this has been referred to, and this has been referred to in other reports that are before you.

**THE COMMISSIONER:** Right.

**MS. CHAYTOR:** And of course, my learned friend was aware and was happy to have this line of questioning addressed with Constable Smyth.

**MR. KENNEDY:** I wasn't happy. No, let's not use the word happy.

**MS. CHAYTOR:** You said – well, you certainly did say that, actually.

**THE COMMISSIONER:** On what?

**MS. CHAYTOR:** His refer was Constable Smyth to have an opportunity to speak to this document because this document has been referred to in the – in particular with respect to Judge Riche's report. So we're trying to give him an opportunity to speak to what happened.

There are two purposes here. One is – and by all means, I am certainly trying to be fair to the witness. I have taken him through things that he has been commended for in his police work. And to do a thorough job and a thorough background, this is an area that needs to be addressed.

My purpose is two-fold. One is to show that there was an incident in his background and to allow him an opportunity to speak to that. The second piece is that there seems to be discrepancies in how Constable Smyth described that to both his supervisor at the time and what is recorded from the sergeant at the time versus, and what is recorded by four witnesses at the time, who say that they watched him cause deliberate damage to other vehicles. So it also goes to Constable Smyth's credibility, and so that is part of my intent in this line of questioning.

I am certainly very aware of my role as Commission counsel to be fair to all of our witnesses and I do take my learned friend, Mr. Kennedy's point that this morning or earlier today – I'm sorry, this afternoon. It's been a long day, but I did refer to a shoplifting incident and I think in fairness to him, the point that he's bringing to your attention there is that because there was a syringe involved that that would not have been a shoplifting incident; that would have been classified as an armed robbery. And when I was speaking I did indeed say shoplifting.

So I did not say the right term which may have minimized the action that Constable Smyth was responding to. So I do apologize for that because I did use the word shoplifting and I certainly didn't mean any intent by that.

**THE COMMISSIONER:** Right. So, Mr. Kennedy, your objection is what? That it's being dwelled upon too much or what – yeah, well I think I'll have Ms. Chaytor just summarize. It's referred to in the statements. It'll come up in the course of the examination of Judge Riche I'm sure, and we'll just move on and get – finish your line of questioning on the point, Ms. Chaytor, and –

**CST. SMYTH:** Mr. Commissioner –

**THE COMMISSIONER:** Sorry.

**CST. SMYTH:** – if I may. Perhaps, if also we're going to review my discipline with this level of scrutiny, perhaps we can review my commendations and awards with a heightened level of scrutiny.

**THE COMMISSIONER:** Well, that's –

**CST. SMYTH:** If you think it would be used to judge my character.

**THE COMMISSIONER:** That's fine, but as Ms. Chaytor referred to, she did bring up the one life-saving award that you've had. And if there are any that's missed and haven't been – I thought there was another one that I read, but if it's not referred to, then Mr. Kennedy will have the opportunity to bring that out for you, I'm sure.

Is there, is there one that – another award that's, that was overlooked there?

**CST. SMYTH:** No, no, there's ample. There's a myriad of commendations and awards.

**THE COMMISSIONER:** Right.

**CST. SMYTH:** None, of course, that we reviewed in this level of detail. And not that I necessarily feel that need, but if we're going to, perhaps, judge my character on this incident then I, perhaps, ask maybe for a heightened level of scrutiny on (inaudible).

**THE COMMISSIONER:** Well, that's why I referred to – you had a, it seemed like apart from that incident, good behaviour noted. That's what I thought I saw on your record. And what date was that? What year was that?

**MS. CHAYTOR:** This is 2005, this is.

**THE COMMISSIONER:** 2005, again –

**MS. CHAYTOR:** It's 10 years before.

**THE COMMISSIONER:** Sorry?

**MS. CHAYTOR:** Ten years before the incident.

**THE COMMISSIONER:** Yeah.

So – but there's also, there's also the problem that – not the problem, the rule, that we don't, we don't judge people. We don't assume that they've done something wrong now because they're of a so-called bad character except when certain very specific factors are met.

And I don't think that that's what's being done here, other than to, to draw out all the facts regarding your – it's a fine line in terms of the difference – to draw out all the facts in terms of whether there is sufficient or any basis for inferring that you would have overreacted because of how you in the past acted, that you would overreact in regards to Donald Dunphy.

I have not been given any, any evidence up to now to indicate that, that would be the case. I'll hear what comes from other witnesses but, Mr. Kennedy, as I say, will bring out, I'm sure, any awards that go to

your character. But in the same way, I can't be overly influenced by the fact that you have a good behaviour record. That doesn't mean that you might not slip up in this case or another case.

So it's a fine line I've got to draw and I'll try and draw it fairly without breaking the rule of what they call the line of prohibited reasoning that I think used to go in rural Newfoundland: Your mother was no good, your father was no good and you're no good. Well, we don't reason on that basis.

We don't reason on the basis, draw inferences leading to negative inferences because of a certain character trait that's been established. We'll, we'll decide on the facts and not on, not on character one way or the other. But you are entitled to have the full, the full circumstances of your, your examples where – of situations where you received awards for life-saving or other matters. And I think counsel, is – was there the one, was there another award that I seem to recall reading?

**MS. CHAYTOR:** The life-saving one we referred to with the child for (inaudible).

**THE COMMISSIONER:** That's the Heimlich remove – manoeuvre.

**MS. CHAYTOR:** Right. And that was a couple of months – that was only a couple of months before the incident of April.

**THE COMMISSIONER:** Right.

**MS. CHAYTOR:** That happened in February and –

**THE COMMISSIONER:** Right.

**MS. CHAYTOR:** And, yeah, so I'm not aware. Were there other life-saving –

**CST. SMYTH:** Not other life-saving –

**MS. CHAYTOR:** No.

**CST. SMYTH:** – but there's a myriad of commendations that are outlined in my CV.

**MS. CHAYTOR:** And community service recognitions as well.

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** I think I, perhaps with this particular incident I share what my counsellor is referring to as some concern with maybe some difference in my version of events here and the witnesses that are going to be outlined. And we have no capacity to test their version of events and what their motives were as they're in a different part of the earth.

**THE COMMISSIONER:** Yeah, my understanding of that, of that incident is that you pay the fine, you paid damages and you question whether it was, whether you should have been paying as much as you did pay, but you were prepared to pay it to get home out of it. But –

**CST. SMYTH:** I fully acknowledge –

**THE COMMISSIONER:** Sorry?

**CST. SMYTH:** I fully acknowledge wrong doing in that incident, completely inappropriate behaviour.

**THE COMMISSIONER:** Yeah, but you did suggest, I think, at some point that there might have been some piling on to get a source of income from vehicle owners who weren't – who didn't really incur the amount of damage that was suggested. Am I, am I right there? Was that –?

**CST. SMYTH:** That had been suggested to me by a member of that police service.

**THE COMMISSIONER:** Okay.

**CST. SMYTH:** The event cost around \$30,000.

**THE COMMISSIONER:** Pardon?

**CST. SMYTH:** The whole event cost around \$30,000 in fines.

**THE COMMISSIONER:** All right.

All right, well let's, let's move on, Sir.

**MS. CHAYTOR:** Okay. All right.

And, Commissioner, just to be clear, so are you suggesting I continue this line of –

**THE COMMISSIONER:** Just finish her, yeah, but –

**MS. CHAYTOR:** – finish my line of questioning here –

**THE COMMISSIONER:** – without, without unduly –

**MS. CHAYTOR:** – because there are some statements in here that if I don't put it to Constable Smyth, I'm thinking others will, and I would like him to have an opportunity –

**THE COMMISSIONER:** Sure.

**MS. CHAYTOR:** – to respond.

**THE COMMISSIONER:** Go ahead.

**MS. CHAYTOR:** So there were four people, I believe, Constable Smyth, and we've been through this document together before. And there is the person here who says that at approximately 4 a.m. he heard banging and saw a white male beating on his vehicle and another vehicle with a stick and he approached the male who ran away.

So is that accurate that you beat on more than one vehicle?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay and the next page – sorry. The next witness said – all right, the next person here says that he owned a – or she owned a motor Jeep. And at approximately 4:45 she was in the market and her vehicle was parked in the area. She heard someone shouting in the area saying that the effers stole my badge. The male walked towards her car and began hitting it with a piece of 2 x 4.

Constable Smyth, did that happen?

**CST. SMYTH:** No.

**MS. CHAYTOR:** The next witness said that at approximately 4:30 a.m. “he saw a white male in the area of the Fire Station running like a mad man with a piece of 2 x 4 pounding it on the ground until it broke. He was shouting, ‘I’m goin to kill them, they stole my badge, I’m a Canadian police officer.’” And struck the bus with a piece of wood and broke some glass and gives a description. Did that happen?

**CST. SMYTH:** This one and the next one both refer to a bus. One of those is accurate.

**MS. CHAYTOR:** Okay. And then the last one is the person who owned the bus. He was notified around 5 a.m. It doesn’t appear that he saw it, saw what happened, but someone had done damage and the bus had four panels of glass broken. Did you break four panels of glass out of the bus?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. And so how much damage do you recall that you caused to that bus?

**CST. SMYTH:** I recall one pane of glass.

**MS. CHAYTOR:** Okay.

Okay. And so the idea that I’m going to kill them, they stole my badge; do you recall making any statements along those lines?

**CST. SMYTH:** I don’t recall saying I was going to kill anybody, no.

**MS. CHAYTOR:** Okay.

And Constable Smyth –

**CST. SMYTH:** I don’t recall saying I’m a Canadian police officer. It’s not something I would say.

**MS. CHAYTOR:** Okay.

You wouldn’t refer to yourself as a Canadian police officer?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. All right.

And Constable Smyth, you did indicate that you were disciplined by the RNC as a result of this incident.

**CST. SMYTH:** Yes, I was.

**MS. CHAYTOR:** And you’ve pled guilty in the British Virgin Islands.

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** And you took full ownership of your actions.

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay.

And in addition, you also pled guilty to having damaged multiple vehicles even though it was your position you had only damaged one vehicle?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. Thank you.

Have you ever been the subject of a complaint to the RNC Public Complaints Commission?

**CST. SMYTH:** Not that I can recall.

**MS. CHAYTOR:** I'm going to move on then, unless there's anything else I want – if there's anything else you would wish to say about the incident in the British Virgin Islands?

**CST. SMYTH:** No, other than just perhaps mention that I pled guilty so as not to endure any semblance of a trial.

**MS. CHAYTOR:** Okay. And in terms of your discipline, what discipline were you meted out here at in terms of work discipline?

**CST. SMYTH:** I was charged with conduct unbecoming of a police officer.

**MS. CHAYTOR:** Okay. And were you suspended without pay for a couple of months (inaudible)?

**CST. SMYTH:** Yes, I was.

**MS. CHAYTOR:** Okay. And since that happened in 2005, do you have – did you experience any issue in terms of discipline with the RNC?

**CST. SMYTH:** No, I have not.

**MS. CHAYTOR:** And in terms of any other record, criminal record, nothing else?

**CST. SMYTH:** No, I have not.

**MS. CHAYTOR:** Okay. And again I want to give you an opportunity, if there's anything else in terms of your community service that you have done in that 10-year space, is there anything else you would like to tell the Commissioner about?

**CST. SMYTH:** I think it's outlined on my CV so for the sake of the Commissioner, if you wish to review that again.

**MS. CHAYTOR:** Okay.

Okay, I'm going to turn now, then, to a line of questioning about the PSU. So prior to – we looked at a policy earlier today that you helped implement in 20 – or draft in 2013. And so prior to that policy coming, coming into effect, how was the protective service unit administered?

**CST. SMYTH:** Immediately prior to that it was very much operated in the same way. Leading up to 2011, I think it was a bit more of an ad hoc fashion, but I also wasn't directly assigned so I may not be the best person to, to give specific answers to how it was operated.

**MS. CHAYTOR:** Okay. And was, was a more – did a more formal administrative process come into effect when the policy was adopted in 2013?

**CST. SMYTH:** The process at that time in terms of how it was managed hadn't really changed. It was just the adoption, the official adoption of that policy, albeit it had been, for the most part, followed for the years preceding that.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** For approximately two years anyway, while I was assigned there.

**MS. CHAYTOR:** Okay. And was there – even though it's the Protective Services Unit, was there any one person who was the primary object of your protection?

**CST. SMYTH:** The premier tended to be the focus of our close protection, for sure.

**MS. CHAYTOR:** Okay. And so while you were there, how many different premiers would you have served?

**CST. SMYTH:** In a close protection capacity. I did a very limited with Premier Williams, full-time then once Kathy Dunderdale had started and then with Premier Marshall and Premier Davis.

**MS. CHAYTOR:** And so why would it be limited with Premier Williams? Is it basically at the discretion of the premier? Does he or she get to say how much services they want from your unit?

**CST. SMYTH:** At that time, I was in Criminal Intelligence and there was a separation during that period for the close protection component and the intelligence-based investigation. So I had undertook, or had been assigned, sorry, some of the threat assessments and intelligence investigations for the Premier's office at that time.

There was occasion – again, very limited – where I would have assisted the close protection component for Premier Williams. Usually for an advance viewing of a venue, that type of thing.

I did very – I didn't do any actually with Premier Williams, close protection, just assisting the close protection unit.

**MS. CHAYTOR:** Okay, and then you said there – that you were involved more with Premier Dunderdale. Is that correct?

**CST. SMYTH:** Yes, that's correct. That's when I transitioned full-time protective service duties.

**MS. CHAYTOR:** Okay, and who else – what other premiers did you provide services to?

**CST. SMYTH:** Premier Marshall and Premier Davis.

**MS. CHAYTOR:** Okay. And in terms of Premier Marshall, did he avail of the services of the unit very often or very much?

**CST. SMYTH:** Not in the full-time capacity that we previously had been. It was more event-specific.

**MS. CHAYTOR:** Over the course of these various premiers, was the unit expanded or contracted?

**CST. SMYTH:** Yes, it was.

**MS. CHAYTOR:** Okay, so perhaps you could tell the Commissioner about that.

**CST. SMYTH:** I think when the – we transitioned over to duties for Premier Marshall, at some point we reduced the number of members assigned full-time and that was maintained right into Premier Davis.

**MS. CHAYTOR:** Okay. So it had been more than under Premier Dunderdale?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. And how many were in your unit at that time?

**CST. SMYTH:** Under Premier Dunderdale, I think, at most, it was four full-time. We would periodically utilize other officers in a part-time capacity, depending on the event and ongoing threat assessments.

**MS. CHAYTOR:** Okay, and then it was reduced to two under Marshall?

**CST. SMYTH:** To two, yes.

**MS. CHAYTOR:** Okay, and why was that?

**CST. SMYTH:** Primarily, just based on the individual wants of the premier and how much full-time duties they were willing to accept.

**MS. CHAYTOR:** Okay. Then with respect to Premier Davis, it remained at two people.

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay.

Did you know Paul Davis before he become premier and through your role in the PSU?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay. And I think you said earlier, you had worked with him at the RNCA or on the executive.

**CST. SMYTH:** We had served together on the executive for a short period of time, yes.

**MS. CHAYTOR:** Okay. Did you ever police with him?

**CST. SMYTH:** I don't remember specifically. We may have been assigned to patrol duties in a similar time period, but I don't recall working closely with him.

**MS. CHAYTOR:** Okay. Did you have any personal connection to him?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. So just in terms of your professional capacity, that's how you knew him?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** And how about his chief of staff, Joe Browne, did you know him; did you serve under him when he was chief?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay. Did you ever police with him?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Did you have any personal connection to Joe Browne?

**CST. SMYTH:** No, I did not.

**MS. CHAYTOR:** When a new person came into the position of premier, what, if any, briefing did you give him or her, or his or her staff to explain the role what the protective service unit does?

**CST. SMYTH:** We would always attempt to provide some semblance of a briefing to an incoming premier. That happened in different ways depending on the availability of the premier and their staff.

**MS. CHAYTOR:** Okay, so was there any formal process that while a new person is coming in, we need to sit this person down and go through the policy and explain, find out what their needs are, find out what they're going to want from us – anything like that?

**CST. SMYTH:** There was a formal process that we wanted to do; we didn't always get to do that.

**MS. CHAYTOR:** Okay, and so with respect then to this happens, this incident happens with, while Premier Davis is the premier, was there any such briefing of him?

**CST. SMYTH:** Myself and Premier Davis did have an opportunity to sit down together and go over those components, but it was done in private. It was just him and I. I would have generally preferred that, to include some staff, but his schedule and the staff schedule just hadn't permitted it at that time.

**MS. CHAYTOR:** Okay. And so what was discussed at the meeting? Was it basically you explaining to him what the role of the PSU is, or was it him giving you instructions as to how he thought he might utilize the unit?

**CST. SMYTH:** No, it was me providing some policy mandate, some of our methods of operation, what we expected of him. Just to clarify, sometimes some confusion as to why we did certain things. Something, for example, as simple as opening the door.

A lot of the premiers didn't – they never wanted us opening the door, because they felt it had certain connotations to it. But for us, something as benign as opening the door just gave us control at a certain scene. If we had an advance officer on the scene, the advance officer was conducting examinations of that scene for any potential threats, and then opening the door was basically giving our principle the okay that it was okay to exit. Conversely, if they had their hand on the door or gave me a motion to keep driving, depending on what my role was, then I knew that that wasn't a safe place for us to exit the vehicle.

So to clarify some of our operational and tactical methods such as that, or even at what point we might enter a room ahead of the premier, because sometimes that could be perceived as being inappropriate or rude. But we would want to explain and make sure they understood that depending on the personnel we had, the advance inside, what opportunity we've had to evaluate a certain venue in seeing that we may want to actually enter ahead of them, just so they knew that.

**MS. CHAYTOR:** Okay. Did Premier Davis seem receptive to your suggestions and how you wanted to go about doing things?

**CST. SMYTH:** He was okay with it, yes.

**MS. CHAYTOR:** Okay. All right. And in terms of his use of the force, it stayed – or of the unit, sorry – it stayed at two people.

**CST. SMYTH:** Yes, it did.

**MS. CHAYTOR:** It didn't expand? Okay. All right.

And did he provide you any instructions as to what he would expect from you? For example, what he would expect from the unit in intelligence gathering. He's a police officer so he would have more background in those – in what it is police officers do. So did he have any ideas or provide you with any instructions as to how he expected you to go about doing your duties?

**CST. SMYTH:** No, he didn't.

**MS. CHAYTOR:** You mentioned, I think, that you didn't have an opportunity to sit down with him and his staff, that he was busy, basically. Did you have an opportunity to give any instructions or have a briefing with his staff otherwise?

**CST. SMYTH:** Yes, I did.

**MS. CHAYTOR:** Okay. And how did you go about doing that?

**CST. SMYTH:** I think all his staff were probably done one on one, when their schedules permitted. Those – briefings with them would have been somewhat similar but less involved of the detail around our tactical operations, but more for some instructions to them about what we would expect from them and what they can potentially expect to see us doing.

**MS. CHAYTOR:** Okay. And other than at the beginning when they would of come on – and if you could just remind us around when was this? When did the administration change? When did Premier Davis take over?

**CST. SMYTH:** It was the fall –

**MS. CHAYTOR:** Of 2014?

**CST. SMYTH:** – of 2014. Yeah.

**MS. CHAYTOR:** Okay. All right, so the fall of 2014. Okay.

Would you have then given them instructions from time to time, when things came to your attention, things that you think they needed to be alerted to or notified of? Would you then continue to communicate with them?

**CST. SMYTH:** Sorry, did I communicate to his staff –

**MS. CHAYTOR:** Yes, to the staff.

**CST. SMYTH:** – items that I felt they needed to be aware of?

**MS. CHAYTOR:** Yeah, if there were any security issues that came to your attention or any different way of approaching the issue of security to the Premier, would you continue to communicate with the staff?

**CST. SMYTH:** Yeah, I think it was a fairly open line of communication, both in person and electronically, yes.

**MS. CHAYTOR:** And where is the PSU located? Are you in RNC headquarters or where is your office located?

**CST. SMYTH:** At that time, we had an office in Confederation Building.

**MS. CHAYTOR:** Okay. And so would you have had daily contact with the Premier's office?

**CST. SMYTH:** When we were working, yes.

**MS. CHAYTOR:** Was your office on the same floor?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. I'm going to bring up a couple of emails that I know you've seen before and we've taken those through with Donna Ivey.

The first is P-0071, please, Madam Clerk. And this is a document that you sent, Constable Smyth, dated January 25, 2015. And you sent it to Premier Davis and people who we understand to be members of his staff. And you copied it to Doug Noel.

And who is Doug Noel?

**CST. SMYTH:** Doug Noel would have been my RCMP counterpart.

**MS. CHAYTOR:** Okay. So he's the other member of the PSU.

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. All right.

And this document originates – it originates with Andrew Boland on the bottom. We don't have the second page here but then it goes from Bill Janes to Joe Gullage. And Joe Gullage, I understand, would have been – would he have been the Inspector Joe Gullage of Criminal Intelligence at the time?

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay. And then we have Jason Sheppard and Ab – Deputy Chief Ab Singleton. And the subject is: Officer Awareness Bulletin: Islamic State of Iraq and talks about Lone Actor Attacks. And then Joe Gullage sends that and it looks like it's a video included. Please see video threat to Canada which may incite Lone Actor Attacks. And from Joe Gullage he sends it to: All Staff RNC Sworn Members. And I take it that's how you would have received it then, Constable Smyth.

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** Okay.

And then you forward it on to the Premier and members of his office and you say, "The attached document is intended for law enforcement personnel only; I am forward however in light of the fact that Premier Davis fits into a unique category of being a former police officer, and now public Government leader. Please do not distribute further."

So, first of all, I'm wondering why it is that you would send a document that was intended only for law enforcement personnel to these people.

**CST. SMYTH:** There wasn't an issue of classification or confidentiality with that document. Sometimes they say for law enforcement use only because they want to ensure that it's not meant for court settings. It's not evidence-based. Also, there's often jargon that's contained within there that may require further explanation.

**MS. CHAYTOR:** Okay. And what did you mean by Premier Davis is unique or fits into a unique category because of his former job as a police officer.

**CST. SMYTH:** Some of these emails and warnings came following some of the attacks that occurred in Ontario and Quebec and they were motivated by persons racialized by ISIS. Following those attacks, there were particular calls for lone wolf attackers to attack both public figures, uniformed police and uniformed military.

Given that Premier Davis arguably fit into two of those categories, we could infer that he might be at a higher risk for a specific target. A lone wolf attacker may see Premier Davis as being, if you will, high quality or high stakes target that ISIS could use to further their own propaganda.

This was partially issued too at the time, Premier Davis was travelling a lot to Ottawa around that time where some of these attacks were focused and where some of the concern was focused.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** It wasn't necessarily because we had a heightened level of concern in Newfoundland or had some belief that we were all of a sudden surrounded by ISIS supporters. While we didn't necessarily believe we were impervious to it, it wasn't because overnight we thought that St. John's or our province was incorrectly influenced by a larger number of ISIS supporters.

**MS. CHAYTOR:** Okay, fair enough. And then you go on the next paragraph and refer to the third page, to the attachment I take it, which had outlined some basic characteristics that you're telling them to look out for and you note that no circumstance is too small to bring to our attention. And I take it you mean yourself and Corporal Noel.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** To your attention. Okay. All right.

And you say this behavior is at the top for those who carry out acts of targeted violence and if they have any concerns about behavior or mere presence to please don't hesitate, let them know. Okay. And do you recall whether or not you did have any contact after you sent out this email from any of the recipients?

**CST. SMYTH:** I would have had contact. I don't recall discussing that email in any further detail, just to perhaps clarify the behavior that would be at the top of those who carry out acts of targeted violence.

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** But what I'm referring to is persons that might be examining residence or doing what we call security probing and breaching. That would be as we – in the threat assessment process, when we look at the pathway to violence, one of the last steps before an eminent attack are these behaviors.

The early parts of a threat assessment I haven't touched on here.

**MS. CHAYTOR:** Okay. And so you were – you're sending this in your role as – you see it as your job to protect the Premier.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay. All right.

And if we could bring up then P-0072. And this is the email of February 4, 2015 which you would have also – I believe you were present for Ms. Ivey’s testimony around this. This goes to people, again, in the Premier’s office and is copied to Paul Davis, MHA, and again your counterpart Doug Noel. And this is called: “2015 Threat Assessment Brief and Principal Movement Recommendations.”

And then you have a number of points for consideration related to the protective service unit ongoing assessment of risks and threats towards the Office of the Premier: “Please consider these points for any public movements and visits, including regional, Provincial, National and International.”

So perhaps you could just – what was the background in doing this? It’s called a 2015 Threat Assessment Brief. Did you prepare a threat assessment each year? Was it an annual thing?

**CST. SMYTH:** Not necessarily. I didn’t – as I noted there before, I didn’t get the explicit opportunity with Premier Davis. And while I recognize this is some months later, I never got the opportunity to sit down with him and staff. And usually I would want to do that with some of – more of our own staff than just me, and outline some of these points that I have here.

So it was probably partially motivated by some of the ongoing, ongoing current issues throughout the country, but it was also motivated by the fact that I hadn’t had that opportunity. And Premier Davis was also doing some travel that didn’t always involve us attending. So I think there was a – I felt a heightened onus, if you will, to ensure him and his staff were aware of some of these issues.

**MS. CHAYTOR:** Okay. And if we come down to the second bullet, you refer to Newfoundland undergoing a period of fiscal adversity and restraint. Persons whom already have “a grievance towards government can feel further justified in their actions or rhetoric based on a perceived sentiment of an apparent majority. The same perception can also cause an escalation in the number of persons of interest where herd mentality becomes a factor.” And in brackets you have – excuse me – (Regional/Provincial).

What did you mean by those comments?

**CST. SMYTH:** The particular brackets or the comments in general?

**MS. CHAYTOR:** Well, the comments in the whole bullet about Newfoundland going through a period of fiscal adversity and how that, if someone has a grievance, then – towards government, then they may feel justified in their actions. And the same perception, then, could cause an escalation, you say, in the number of persons and lead to a herd mentality.

What does the province’s financial situation have to do with it? What are you getting at?

**CST. SMYTH:** When the province undergoes periods, as I state here, of fiscal adversity and restraint whereby sometimes they’re cutting services, cutting jobs, even if the actual reduction in services doesn’t happen, the belief or the anticipation that they might happen often lends to a heightened level of public concern and chatter. And sometimes a – other persons that have already have a specific grievance related to their own issue feel that there’s been a specific injustice committed against them can create further discussion within broader groups and some persons who may not have been – felt previously grieved can be influenced and motivated by others who have been.

**MS. CHAYTOR:** Okay, so discussion increases, I get that, and political discussion and political commentary. Is there any research to suggest that security of the premier becomes – there becomes a greater risk to the security of the premier or government officials in difficult financial times?

**CST. SMYTH:** Well, if there are a larger number of persons inflamed by ongoing government cuts and reduction of services, then we can potentially infer from that that we could have a heightened risk assessment, yes.

**MS. CHAYTOR:** So, in this situation, we know of course that Mr. Dunphy clearly had a long-standing grievance towards the government. Was he the type of person that you would be considering when you wrote this?

**CST. SMYTH:** It's hard to say without perhaps giving his situation a little more scrutiny in totality, but he could potentially be somebody that could influence others. It wouldn't necessarily heighten the concern for somebody in Mr. Dunphy's situation, but because people may feel more broadly affected by cuts within government itself, they may latch on to somebody else's cause. So it could lend to influence by somebody in Mr. Dunphy's situation to somebody else who hadn't previously been an issue.

**MS. CHAYTOR:** Okay, and then the third bullet you speak about radicalization of individuals and you say that Newfoundland "has not historically experienced problems with radicalized individuals or groups. It is now widely accepted however that with the surge in social media use – by both individuals and groups who target/recruit disenfranchised individuals – no region or jurisdiction is impervious to these incidents. The likelihood of an act of targeted violence being carried out by a radicalized individual in previously low risk regions is now considered heightened, and while the gap is not closed, it remains a point of consideration."

And I'm wondering, what was your source of information to make that statement?

**CST. SMYTH:** It came from some of the readings that I had completed, some of the bulletins that we'd received from national law enforcement bodies. Also, various contemporary threat-assessment academic papers cover this topic. I will note that I'm not – there's no reference – Mr. Dunphy's case would not fit anywhere into what I'm talking about here.

**MS. CHAYTOR:** Okay. And why is that? Explain that then.

**CST. SMYTH:** This more refers to people that are radicalized, individuals who are radicalized by outside sources such as ISIS, that previous to the proliferation of social media, we hadn't had much concern of somebody in a particular rural area in Newfoundland having any access to that information, or at least not the broad and ease of access that they do now. So in light of that change and that increase in that exchange of information, we have to take that into consideration. This wouldn't have been a topic or an issue related to Mr. Dunphy's case.

**MS. CHAYTOR:** Would he not be considered a disenfranchised individual?

**CST. SMYTH:** I think you could consider him one, but it's not the spirit of what I'm writing here.

**MS. CHAYTOR:** Okay. So –

**CST. SMYTH:** I don't think Mr. – I have no reason to believe that Mr. Dunphy was looking to recruit other people to further a resolution to his grievance.

**MS. CHAYTOR:** Okay, but he might be someone who those people might try to target, though, as a disenfranchised individual.

**CST. SMYTH:** Wouldn't be the person I think that they would necessarily target because they're generally caught up in their own grievance. They have their own issue and injustice that they're focused on in dealing with. These groups tend to focus on broadly disenfranchised people that don't necessarily

feel they have a belonging or a cause. That's what they're looking for. They're looking to fill that void and provide a cause. I think Mr. Dunphy had a cause.

**MS. CHAYTOR:** And in terms of Newfoundland being traditionally, I guess, a low-risk region, were you – at the time you were writing this, did you have any research or indication that Newfoundland is no longer a low-risk region for this type of target?

**CST. SMYTH:** Just broadly based statements that we can't eliminate rural and underpopulated areas as now being accessible to groups that can influence those people. These types of influences in recruiting had historically happened in more urban centres, but because of the proliferation of social media, Internet, that access and those recruiting efforts and their methodology had changed and their access was much broader. Again, no correlation here to Mr. Dunphy's situation.

**MS. CHAYTOR:** Okay. And in the third bullet, the sub-bullet, you again referred to the threat assessment for Premier Davis being increased and again you're referencing him being a government official as well as his past work as a police officer.

**CST. SMYTH:** Right.

**MS. CHAYTOR:** And I think you've already spoke to that and what you meant by those comments.

Is there anything else you wanted to say on that?

**CST. SMYTH:** Well, perhaps just to maybe provide more separation between the two issues. Premier Davis, I felt, was at a higher level of, a higher target level, potentially, for radicalized persons to carry out the specific target to public figures and uniformed members, based on that radicalized ideology. Mr. Dunphy's case is completely different from that.

**MS. CHAYTOR:** Okay. And in February of 2015 when you're writing this, are you sensing a heightened concern in Newfoundland and specifically for the security of the premier?

**CST. SMYTH:** Not specifically in Newfoundland; I don't believe at any time we had received intelligence of any sort to suggest that there were specific individuals who were possibly radicalized, no.

**MS. CHAYTOR:** Okay. The idea however, though, of Newfoundland going through a fiscal adversity and restraint, that was certainly in, on your mind and part of what you were writing here.

**CST. SMYTH:** Yeah, and it's to heighten that level of awareness for staff that, you know, should they see disconcerting behaviour or commentary that, the reminder that – send it to us.

**MS. CHAYTOR:** All right. And that's it for this document, unless there's anything else you wish to say about it?

**CST. SMYTH:** I don't think so.

**MS. CHAYTOR:** Okay, if we could bring up please, P-0212. And I'm going to take you back a couple of years; this is back in April of 2013 and it's a Special Projects Operational Plan that you completed in your role at that time, and this is called Heightened Threat Assessment – Contingency Plan Protective Services.

And first of all, Constable Smyth, perhaps you could explain what a special projects operational plan is, and why you would be filling out such a plan.

**CST. SMYTH:** Any special project could – a special project could be any duty or project that is perhaps outside of the normal operational duties and expectations of any particular unit.

**MS. CHAYTOR:** Okay. So would you be looking for any particular funding, for example?

**CST. SMYTH:** Yes, in this case, I would have been looking for additional resources.

**MS. CHAYTOR:** Okay. And if I just go to the second, page three of the exhibit, the second page of the document and you note that the objective is to examine and consider heightened security concerns resulting from public reaction to the 2013 provincial government budget and associated reductions in public spending. To further implement additional security protocols for the premier of Newfoundland and Labrador and any other elected government official deemed necessary through the intelligence process and threat assessment.

So this appears – this is the reason you're putting together this project. And again, it's a issue of reaction to the budget which wasn't going over too well, I take it, at the time in 2013.

**CST. SMYTH:** That's correct. There were particular funding cuts and reduction in positions.

**MS. CHAYTOR:** Okay. All right.

And if we just look at page 4 of the document, which is also page 4 of the exhibit, so that helps. And in this paragraph here you talk about: Platforms such as Twitter and Facebook have provided a medium for individuals to voice legitimate concern, and for others to spread messages of hate, ignorance and some that border on criminal threats. Such messages are disconcerting within themselves; however, perhaps a broader point of concern is the potential impact the stream of commentary may have on inciting persons who – as a result of the aforementioned reductions – may be emotionally unstable or in a state of personal despair.

And I'm just wondering if perhaps you could explain, again, what you mean by that and any basis that you had for those comments.

**CST. SMYTH:** What the basis I think would be specific issues that we had received subsequent to that, that budget. And I think in that case even beforehand, even the lead up, the expectation of what was coming had created an increased number of investigations coming to our office for commentary that was received in various forms, whether it be via social media, I think some were by telephone call directly to various government departments, some were received via Crime Stoppers, third-party reports as having overheard potential threats, those kinds of things.

**MS. CHAYTOR:** Okay. And this is – you're writing this back in 2013. Up until April of 2015, did you remain concerned that social media could be used in a negative manner and cause this type of security concern?

**CST. SMYTH:** Sorry, can you repeat that?

**MS. CHAYTOR:** Okay, so this is 2013, so I'm wondering up until April of 2015, did you remain concerned about the use of social media, the negative manner which could increase or cause security concerns to government officials.

**CST. SMYTH:** I think that concern hadn't really changed after or even previous to this particular assessment and operational plan. This one was done because we had received a higher number of those types of investigations and there was a need for additional resources to address those.

So after that calm down, if you will, there was a return to kind of basic, normal operations. And that, that was maintained for a period of time and it would have been the same before this.

**MS. CHAYTOR:** Okay. And my question, though, in terms of your view of social media being able to be used to get out to a broader audience, if you wish, or also connect with other people, and people, you specifically say, who may be emotionally unstable or are in a state of personal despair. So did that remain a concern of yours up until April of 2015?

**CST. SMYTH:** Like a heightened concern?

**MS. CHAYTOR:** Well, was it a concern?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay.

And what you're telling me is that after this budget period, things settled down a bit –

**CST. SMYTH:** Sorry, I should correct that. I don't know if it was heightened concern as much as it was a recognition that that is a platform for those types of messages and comments to be shared.

**MS. CHAYTOR:** And is that part of the rationale then for following people in terms of their social media accounts?

**CST. SMYTH:** Sorry, is what the rationale?

**MS. CHAYTOR:** Would that be one of the reasons then in terms of an investigative tool to, or in terms of intelligence gathering, to follow people's social media accounts and what they're posting, whether it be on Facebook or Twitter?

**CST. SMYTH:** We didn't generally follow, broadly, people's social media. We didn't have the resources at the time to do that. If there was a certain concern brought to our attention, we would evaluate and examine the entirety of that person's social media feed as a means of furthering that intelligence gathering. But as a general rule, we didn't have anybody assigned to a computer and just surfing through social media commentary and finding these things.

**MS. CHAYTOR:** And was that true in 2013 as well?

**CST. SMYTH:** It was perhaps more true in 2013 because we had less resources.

**MS. CHAYTOR:** Okay.

I'm just going to take you to page 7: Criminal Intelligence – Threat Assessment, "Cst. Paul Roche has been assigned the task of assisting Protective Services with closely monitoring media, social media, open source information, human source information and anonymous tips as part of an Intelligence Led threat assessment that will remain ongoing during this operation. The intelligence process will be applied to information related to specific persons of interest, groups of interest, demonstrations and any other matter that may be cause for security concern. Members assigned to assist this operation will be regularly updated on any changes or additions to the threat assessment."

So what was Constable Paul Roche being assigned to do at this time, and was he a new member to your unit?

**CST. SMYTH:** He wasn't – he was never assigned specifically to the unit and he did assist during that period, and it was because of the vast number of issues that we had received. So whether it be threats or just disconcerting comments, the number had gotten to the point of being also overwhelming. So he was assigned to specifically manage those.

So he was doing much what I was doing with Mr. Dunphy, but for a larger number of complaints.

**MS. CHAYTOR:** Okay. And was there anyone specifically assigned to the roles of Constable Paul Roche or otherwise at the time of April 2015?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. So this is a measure that was put in place at that time in 2013?

**CST. SMYTH:** That's correct. I think it probably lasted for a period of about two months.

**MS. CHAYTOR:** So, Constable Smyth, part of your intelligence gathering aspect of the mandate includes, from what I can gather, carrying out threat assessments?

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay. And in your three or four years that you spent with the PSU, how many threat assessments would you have carried out?

**CST. SMYTH:** On individuals, on persons of interest?

**MS. CHAYTOR:** Yes, similar to what you were doing with Mr. Dunphy.

**CST. SMYTH:** I would probably make a guesstimate of around 20 to 30.

**MS. CHAYTOR:** Okay. So you averaged about 10 or less a year. Is that right?

**CST. SMYTH:** That would bear a specific resemblance to that, yes.

**MS. CHAYTOR:** And in some years were they higher, like in 2013 when you had specific concerns?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. So tell us how you go about actually doing a threat assessment. Is there a formal document? Is there a checklist? Are there guidelines? How is it that you go about doing a threat assessment in your role as an officer within the PSU?

**CST. SMYTH:** There's not necessarily a formal document or checklist that we need to follow. There certainly is a process and general philosophical approach that we have to take that I think we discussed a little bit earlier and reviewed in that managing targeted violence manual.

So you know the initial assessment would start with some level of complaint. It being brought to our attention through some medium or some individual and immediately evaluating, first of all, whether or not a grievance exists that would fall into the justification portion of the threat assessment. Does the person that we are evaluating feel that there's been an injustice? Whether that's perceived or actual, does that exist? Following that, then if we're looking specifically at the pathway to violence, we'll consider whether or not there's a ideology around violence.

**MS. CHAYTOR:** Sorry, whether there's a –?

**CST. SMYTH:** Violent ideology.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** Sometimes –

**MS. CHAYTOR:** And how do you go about assessing that?

**CST. SMYTH:** That could be through a number of forums: through personal interviews with the person, review of their background, open source information, close human source information such as neighbours, co-workers, employers, those kinds of things.

**MS. CHAYTOR:** You might just want to explain for those listening and perhaps the Commissioner, what do you mean by open source information?

**CST. SMYTH:** Sorry. Open source we would – perhaps in today’s context would largely be Internet-based information. Open source being – and it could be newspapers, even perhaps an examination of previous discussions in open line forums, such as open line talk shows, what they have said in that forum.

**MS. CHAYTOR:** So it’s public.

**CST. SMYTH:** Publicly accessible information, yeah. And closed or human source would be more akin to what we call informants.

**MS. CHAYTOR:** I’m sorry, can you –?

**CST. SMYTH:** Informants, human informants.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** Confidential informants. Now, in this particular method of investigation, the informant doesn’t tend to be as confidential. It’s more of a very overt means of trying to solicit information versus a surreptitious way of gathering info and protecting identity as we would perhaps do in an organized crime or drug investigation.

So ideology would form a part of the pathway to violence that we’re examining. After that, if we get deeper into the pathway to violence, we’d look at planning. Whether or not they have actually undertaken any process to plan out an act of targeted violence, but at this point we’re well into a threat assessment.

Before we even get there, we’re further examining, as I touched on before, the inhibitors. Whether inhibitors exist in a person’s life or don’t exist. Those inhibitors would be inclusive of current employment status, personal support networks, relationships with family, friends. Whether they exist or don’t exist, and perhaps even how strong they are. They would – their personal health. Somebody that’s very healthy would be considered an inhibitor. Somebody that’s not may not be.

Any of these things in silo are not concerning within themselves until you’re able to create the bigger picture. Following I guess justification, but we look at alternatives. Has this person considered any number of alternatives to carrying out an act of targeted violence? So if we determine that they have a particular grievance and they feel there’s an injustice committed against them, what alternatives do they have or have they identified that they would utilize other than carrying out an act of targeted violence? So that may be engaging with discussion or resolution efforts with whatever the source of their grievance is.

In this case, in Mr. Dunphy’s case it would be Workers’ – WorkplaceNL. Is he engaged in any process with them or government that seems to be yielding results or resolution to his particular grievance, or has

he got to the end of his rope as it relates to potential resolutions. Are his – his expected resolutions, are they reasonable within themselves? And can they be resolved, would be another point for us to examine. We may do that by discussing, hopefully discussing with both the subject and the source of the grievance. So if it's WorkplaceNL, we may learn what their expectations are and perhaps the group or person they feel aggrieved by may be able to give us some insight into whether or not there's potential for a resolution or to meet their needs.

Following an examination of alternatives, we'll look at consequences, whether or not that person of interest has considered the consequences to carry out an act of targeted violence. Do they feel that prison, jail or death is a justifiable option in their lives, or have they eliminated that? That no, I absolutely have a lot of things to live for.

And if I can use Mr. Dunphy's as an example, I would have, based on what I've heard since this time, there would be a lot of things in his life that I would say he has a lot of things to live for, and I would have classified him at a lower risk to carry out an act of targeted violence. That would be both an inhibitor and perhaps a recognition of consequences. This person has led friends and family to believe that he doesn't have a desire to die. So that which would also feed into ideology.

And then we would examine ability. Does this person have the ability to carry out an act of targeted violence? And that could be inclusive of physical ability, the cognitive ability. Physical and so much of constraints around his living conditions – and by living conditions I mean his, perhaps his – where he lives geographically. For example, if we're to just apply a pragmatic and common sense approach to conducting the threat assessment in terms of the ability portion, we may get a very defined threat and hold, through an assessment on one person, and determine them to be a high level, to carry out – or to determine that their threat is high, but that person might be incarcerated.

So just simply based on their ability we can lower them, make them a lower risk; or geographically, they may have challenges to carry out their act of targeted violence, if that person is in another part of the province or another part of the country that will play a role into their ability. It may be a point of consideration if our principle is travelling to that region, that we may recommend increased security measures for that particular piece of travel, or we may look to brief other police services, law enforcement agencies of protective details on the particular individual.

**MS. CHAYTOR:** Okay. All right, well, thank you for that very lengthy explanation. I'm just going to ask you a few questions coming out of that. And one thing is in terms of the idea of whether or not his grievance could be resolved. Did Mr. Mahoney say or provide you with any information to enable you to make that assessment as to whether or not the long-standing grievance that Mr. Dunphy had with Workers' Compensation, whether or not there was any resolution to that?

**CST. SMYTH:** No, we didn't have any discussion around that. That would have likely been something that could have played out later in the assessment, but I could have just as easily concluded my assessment the day that I spoke to Mr. Dunphy. So it may have been a factor at a later date, but it was not a factor during that stage of the assessment.

**MS. CHAYTOR:** Okay. Just explain that. So you didn't ask Mr. Mahoney about that, whether or not this was a question of entitlement versus benefits, anything like that –

**CST. SMYTH:** No.

**MS. CHAYTOR:** So you didn't have that discussion with him. Okay.

**CST. SMYTH:** Not the specifics of Mr. Dunphy's case, no, I didn't.

**MS. CHAYTOR:** Okay. All right.

And in terms of then – and I'm going, of course, to have a lot of questions for you around your discussion with Mr. Dunphy that day, but you're saying that you've learned about him since, he had a lot to live for.

Did you ask Mr. Dunphy at any point in time about his family, about his daughter, about his desire to live?

**CST. SMYTH:** We hadn't gotten that far in our conversation.

**MS. CHAYTOR:** Okay. All right.

And in terms of the explanation that you gave me in some detail, Constable Smyth, you had been doing this job for three or four years up to this point in time, so is this knowledge that you had and could just do your job, or was it articulated anywhere in a procedure or protocol the various steps that you had to take in doing the type of assessment that you were doing with respect to Mr. Dunphy?

**CST. SMYTH:** Sorry, can you clarify what the question is?

**MS. CHAYTOR:** Was there a policy or protocol in place by which you were carrying out your assessment of Mr. Dunphy?

**CST. SMYTH:** Well, it was contained within our mandate to carry out threat assessments on persons of interest.

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** That process, however, wasn't outlined within our policy. It was gleaned through our training.

**MS. CHAYTOR:** So how you went about doing that aspect of your job wasn't actually set out in any procedure, policy or protocol.

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay. And so there was no manual, as such, that you would follow?

**CST. SMYTH:** Well, I would utilize that managing targeted violence manual – you know, I think you heard me, what my base level of knowledge is – I would, as I got into that process, I would surely refer to that manual and other sources online and make sure I've covered off all avenues of threat assessment.

**MS. CHAYTOR:** Okay. Well, let's just bring that up again, please, P-0218, Madam Clerk? And I'm going to go far into the document; I've written down page one seven – one hundred and fifteen; it'll probably be a bit beyond that. It's Module 7. Okay, so it's a bit beyond this; it's Module 7.

I'll just scroll it down; here we go. And this is Module 7, is Documentation. A Threat Assessment Worksheet – did you have a Threat Assessment Worksheet, or this type of a document, that you were using in carrying out your threat assessment?

**CST. SMYTH:** I wouldn't have used a specific worksheet such as that. I would have used something like that, probably that very one that exists within that training, as a reference tool, as a quick reference to, you know, check off, you know, what I've covered, what I've discussed and it would be then captured within a narrative of a threat assessment. I didn't utilize that particular worksheet.

**MS. CHAYTOR:** Okay. So you didn't utilize this particular one, but did you utilize anything in terms of a document similar to this in carrying out your assessment of Mr. Dunphy?

**CST. SMYTH:** I had not got to that point with Mr. Dunphy, no.

**MS. CHAYTOR:** So just explain that, because I'm not sure I understand that. You hadn't gotten to that point. Are you not doing a threat assessment? Isn't that what you're doing?

**CST. SMYTH:** I am, yes. But when I first meet, in his case, I'm using my, my own personal knowledge experience to conduct that interview, not a check sheet. I would, as I get into the process, and I've started to complete my narrative, I've perhaps had discussions with witnesses or other sources of information, I may refer to that check sheet as a reminder, say, to confirm whether or not I've covered off everything that I should.

**MS. CHAYTOR:** So when you go about doing your threat assessments on, you know, Mr. Dunphy or any person who's brought to your attention, you don't have standard form document such as we're looking at here that you utilize?

**CST. SMYTH:** No, we don't, no.

**MS. CHAYTOR:** So there's nothing like that –

**CST. SMYTH:** No.

**MS. CHAYTOR:** – in terms of a protocol? Okay.

And I think when we come to look at the documentation that you had in your yellow file folder that day, there's certainly nothing at all similar to what we're seeing here on the screen.

**CST. SMYTH:** No.

**MS. CHAYTOR:** Nothing in terms of a formal assessment sheet or anything like that.

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay.

So once you've (inaudible) notified that there's been a complaint, does that person then become, I think you used the term in answering some of my questions, person of interest – do they become a person of interest at that point in time?

**CST. SMYTH:** I guess arguably they become a person of interest unofficially just by virtue of the fact of having that initial complaint forwarded to me. They may not have become an official person of interest until you can glean enough information to determine that there is some level of threat.

**MS. CHAYTOR:** Okay. And does a file get open on everyone? If you get a complaint forwarded to you and you look at it and you think – and we heard Mr. Mahoney talk about, you know, sometimes people will identify something, he'll do a review and think that's not a threat or that's not anything to be concerned of. If you do something similar and decide, well, I don't really need to follow-up, is there any record kept that there had been a complaint forwarded to your unit?

**CST. SMYTH:** There may not be, no.

**MS. CHAYTOR:** Okay. And so at what point is there a record kept? What point does that person become someone who has a file on them within the PSU?

**CST. SMYTH:** If there's any information that we learn through that process, whether that's even a very cursory assessment, by some database checks, and the complaint – coupled with the complaint, if I feel there's anything in that that somebody coming into my role, or a new member of protective services, they can be in receipt of that information without having to speak to me personally.

**MS. CHAYTOR:** So then you have a document trail, basically, that they can follow and pick up where you left off.

**CST. SMYTH:** Right.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** Conversely, if we would periodically get similar complaints that you saw I received from Ms. Ivey, similar matters brought to my attention that I can very quickly determine that there is no element of concern. I can make a few phone calls, I can examine, you know, broader, what else this person has to say or in context what is involved in the comment and determine that there is no concern here and there's no relevance to any future concerns. So it may not be documented at all.

It would – and if you want to perhaps draw, you know, a comparison to more familiar areas of, of policing, it could be similar to a patrol officer being flagged down and being told that there's two suspicious males underneath a bridge. And that person may go speak to them and it turns out it's the property owner. It might be – it mightn't be documented anywhere because it's determined to be completely benign. That would perhaps be, you know, the comparator for front-line policing, if you will.

**MS. CHAYTOR:** Okay. So in your situation, by the time you get a complaint, you look at it, you do some basic research on the person. You have searches, for example, in Mr. Dunphy's case, and we'll talk about some of the searches that you did. But you looked to have some background checks done on him, that you try to review, I understand, some of his Twitter account. You made the determination you should pay him a visit.

In that circumstance, is that someone that there would be a file opened on?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. And at the time that you visited Mr. Dunphy on April 5, 2015, had you opened a file on him?

**CST. SMYTH:** I had not generated the actual file.

**MS. CHAYTOR:** Okay. All right.

And I'll ask you some more questions about that later, but that's the type of – you would – that's enough of a, enough background checking that has to happen that, that person would have a file open, a person-of-interest file in your office.

**CST. SMYTH:** By the time, with Mr. Dunphy, I had reviewed his social media feed. I had spent, I think, that Saturday, probably about an hour or so going through about a year's worth of commentary. Based on what I had seen there I would have generated a file, based on that information at some point in time.

Whether that had been the next day when I spoke to him or the next opportunity I had, I – at that point I had pretty much made a decision there would be a file generated on this person. That if somebody was to come into my job without receiving any formal verbalized briefing from me, they would be able to open up my persons-of-interest list and document and be able to quickly reference Mr. Dunphy as somebody

that had a long-standing unresolved grievance that had elements contained within it that were possibly not contained in reality.

**MS. CHAYTOR:** Okay. And so he would have been someone who a file would be generated for?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** And at the time that you left the PSU in 2015, are you able to tell me about how many person-of-interest files were open in the PSU?

**CST. SMYTH:** Sorry, for the entire duration?

**MS. CHAYTOR:** Well, yeah.

**CST. SMYTH:** While I was there?

**MS. CHAYTOR:** Well, you told me that you'd probably do threat assessments about approximately 10 or less per year. But in terms of actually opening up files, how many current files, or do they get opened and they just stay open? Is that what you're telling me?

**CST. SMYTH:** Well, yes and no.

When we open a file within our database, our internal RNC – we call it ICAN, the Integrated Constabulary Automated Network, there's a diary date assigned to those files that they have to be concluded by a certain time.

And while they are concluded from that end, they wouldn't necessarily be a closed file from our end. It may still be a person that we would consider to be contained within our broader persons-of-interest files, depending on what level of threat we've assigned to them, or level of activity, region.

You know, one person, a certain individual may not be there at all because they're very low risk, but if we find ourselves in that particular region or jurisdiction, they may come back onto that list just because of geographically where we, where we might be at a given time.

**MS. CHAYTOR:** Okay. So in terms of a diary date, that's the date by which you have to conclude your investigation of a person, is that what that is?

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay. And then –

**CST. SMYTH:** But we may still monitor and feed that file.

**MS. CHAYTOR:** Okay. And if you've made the conclusion, though, that this person – there's no risk, would that file be then closed permanently?

**CST. SMYTH:** The file itself would very likely be closed permanently. Their information may remain on our list of persons of interest for a period of time that might be longer than that diary date. There may be no active investigation or active file open on that person, but from an information perspective they may remain there for a period of time.

**MS. CHAYTOR:** Okay, so if I go back to your analogy about the people under the bridge and you determine that it's basically a mistake, there's nothing at all threatening by these people, why does the file stay open in the PSU?

**CST. SMYTH:** Okay, I think we're probably confusing two different situations. I was – the comparison I was drawing there is that we might have a complaint made to us and, and a file never gets opened –

**MS. CHAYTOR:** Right.

**CST. SMYTH:** – never documented.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** What I'm trying to refer to is a situation where the file is generated, there is an assessment done and this person is contained within a persons-of-interest file so that we can quickly reference who is contained and we can brief other officers, if need be, on who's contained within that list. And while the investigation itself is concluded, that person may remain on that list of persons of interest for a period of time.

**MS. CHAYTOR:** Okay.

And so when you left in April of 2015, left the unit, are you able to tell me approximately how many files were still open on persons of interest in the unit?

**CST. SMYTH:** I don't know.

**MS. CHAYTOR:** Okay. Prior to April 5, 2015, had you ever visited a person of interest at home as part of your threat assessment for the PSU?

**CST. SMYTH:** Yes, I have.

**MS. CHAYTOR:** Okay. And how often would that happen?

**CST. SMYTH:** Did I do it personally?

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** I would think that I've probably done that upwards of 15 times during my assignment to PSU.

**MS. CHAYTOR:** 15 times?

**CST. SMYTH:** As a guesstimate, yes.

**MS. CHAYTOR:** Okay. All right. And was there any procedure or protocol in place in terms of when you would conduct a home visit? So when a home visit would be warranted and how you would go about doing that home visit.

**CST. SMYTH:** No. There is no particular policy or procedure in place related to that, no.

**MS. CHAYTOR:** Okay. And how do you make that determination? Is that just based on your knowledge as a police officer and how to investigate? Is that what you're relying on?

**CST. SMYTH:** Yes, I think coupled with some added experience in the actual protective policing field and conducting threat assessments, and evaluation of perhaps that individual. There may be a determination that more information may be learned by a home visit, or it may be determined that we could potentially aggravate the situation further and we already may have a vast amount of information on this person that a home visit may not necessarily yield anything new.

**MS. CHAYTOR:** Okay. And was there any policy or procedure as to whether or not you would conduct a home visit by yourself as opposed to bringing along another officer?

**CST. SMYTH:** No, there isn't.

**MS. CHAYTOR:** Okay. And again then, how do you make that determination?

**CST. SMYTH:** Well, I think that would be a combination of factors. Resources available would be one, risk factor to the officer or officers would be another and the impact of a multiple officer interview on that particular person, whether or not that could have a negative impact or positive impact.

**MS. CHAYTOR:** So prior to April 5, 2015, had you visited individuals at home by yourself while you were with the PSU?

**CST. SMYTH:** Yes, I have.

**MS. CHAYTOR:** Okay. And can you give us an estimate of how often that would have happened?

**CST. SMYTH:** I would say half of my total visits were done alone.

**MS. CHAYTOR:** So half of the 15 times?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** And was that more common for you than others in the PSU?

**CST. SMYTH:** I think it may have been, yes.

**MS. CHAYTOR:** And why is that?

**CST. SMYTH:** I think a lot of the complaints came to me first because I was the supervisor there and generally the point of contact. I may have had more of an inclination to assume those duties more often than I would assign them.

**MS. CHAYTOR:** Okay. To go alone to a home you mean? You'd be more inclined for yourself to do that than ask someone else to do it. Is that what you're saying?

**CST. SMYTH:** No, I'd be more inclined to do the threat assessment, to do the investigation itself versus assigning it to other people. While it did get assigned – they did get assigned to other people on a regular occurrence, I may have taken more. And I haven't actually examined the stats associated to that, but I think I probably did more than the other officers in the unit.

**MS. CHAYTOR:** Okay. So I just want to be clear, are you saying that you did more threat assessments, more home visits or more home visits alone?

**CST. SMYTH:** All of the above.

**MS. CHAYTOR:** All of the above, okay. So all of it, okay. Well, I guess if you're doing more home visits it makes sense that if you're doing more, you're going to go alone more.

And tell me how you make that – you told me that you would look at, well, resources. So if there's someone available to go with you, I'd take it you go, you would bring someone along.

**CST. SMYTH:** Not always. It would depend on who that was and what their availability was.

**MS. CHAYTOR:** Okay. And you did mention impact on the person in terms of having multiple officers. So that might deter you from bringing someone. And what do you mean by that?

**CST. SMYTH:** Depending on the person and what, you know, their particular state of mind is or their grievance is, multiple officers showing up in their home, their workplace or anywhere else, may not have the calming effect that I would hope to achieve.

**MS. CHAYTOR:** The fact that you had two people in the unit in April of 2015, was resources an issue for you that day in determining to go alone? Did resources factor into this at all?

**CST. SMYTH:** Yes and no. He wasn't assigned to work that day.

**MS. CHAYTOR:** Meaning Corporal Noel.

**CST. SMYTH:** Corporal Noel. So if he had have been working and there was no chance of any other duties or responsibilities for us that day, then he very likely would have attended with me.

I didn't determine there to be any heightened risk where I would justify having Corporal Noel come in on overtime, which was always a consideration, primarily for officer burnout. I tried to refrain from – because there was a lot of overtime required in that unit. So if I didn't absolutely have to call somebody in, I wouldn't. And not that I was ever given any restrictions on that.

**MS. CHAYTOR:** Okay. But what about an officer who – would you have access to other officers who were working that day in Criminal Intelligence? Would you have – would you be able to call up someone else or call upon someone else?

**CST. SMYTH:** If I felt there was a specific need for it, I could have done that.

**MS. CHAYTOR:** Okay. All right, so you could have if you wanted and that wouldn't have been –

**CST. SMYTH:** I could have, but that would require taking officers from their assigned duties that day, which usually for a weekend is fairly high. There's a limited number of Criminal Investigation Division officers working on a weekend and they have to oversee any Criminal Investigation Division files that are received over the weekend. So having been there, I know that their duties are usually pretty full. So unless I've got a really good reason to want to take them along, I wouldn't have asked them, no.

**MS. CHAYTOR:** And had you done that on other occasions where you called upon someone else from the Criminal Intelligence Unit to go along with you?

**CST. SMYTH:** Not specifically the Criminal Intelligence Unit, but I would if they were available, but I have gone to other plain clothes units and requested officers to attend with me, yes.

**MS. CHAYTOR:** Okay. And what was the difference in those situations?

**CST. SMYTH:** In the one that I'm thinking about there was a heightened concern for officer safety.

**MS. CHAYTOR:** And how did you make that determination?

**CST. SMYTH:** Based on this person's commentary at the time to the staff of Child, Youth and Family Services, it was ripe with a lot of anger, volatility and unpredictability.

**MS. CHAYTOR:** So in that situation you, while you didn't call on an officer in the PSU, you had another officer attend with you?

**CST. SMYTH:** Yes, and another, and perhaps even more important reason in this one was going there with reasonable probable grounds to arrest the person. While it wasn't our goal or our intention to arrest that person, we did have the grounds to do so and based on what we learned from that interview, an arrest could have happened in which case I would want another officer present.

**MS. CHAYTOR:** And who was your concern – you said it was Child, Youth and Family Services, so that wasn't the Premier's office at that time that there was a concern about. It was a minister, was it?

**CST. SMYTH:** That's right. Originally that person of interest had originated with Minister Charlene Johnson and it was coincidentally Paul Davis who took over that portfolio.

**MS. CHAYTOR:** Okay, so it was Paul Davis at the time that you did that –

**CST. SMYTH:** Yes, it was.

**MS. CHAYTOR:** Okay.

So around when was that, Constable Smyth?

**CST. SMYTH:** I believe it was probably 2014. I think Premier Marshall was premier at the time.

**MS. CHAYTOR:** Okay, so the commentary that you saw that day was of a higher concern to you in terms of your own personal safety than what you thought you were investigating with respect to Mr. Dunphy?

**CST. SMYTH:** Yes, I did. It was more extensive and it was more direct. It was directed at specific individuals, mostly via email to various staff members of CYFS and the various ministers.

**MS. CHAYTOR:** Okay. And is this the – who was the officer that went along with you that day?

**CST. SMYTH:** It was Constable Ed Benoit.

**MS. CHAYTOR:** Ed Benoit, okay, all right. And how did that situation turn out with that individual?

**CST. SMYTH:** He was interviewed and we basically outlined our concerns. We articulated the grounds for criminal harassment at the time, and it was explained to him that we believed he was committing criminal harassment and that the victims in the case did not want criminal charges laid, while if the behaviour continued then we would have to consider that.

**MS. CHAYTOR:** Okay, and the victims in the case being staff at the Child, Youth and Family Services, and the minister, I take it –

**CST. SMYTH:** That's correct.

**MS. CHAYTOR:** – Paul Davis.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** I just want to ask you then, about you and Corporal Noel and how you divided up your duties. Did you overlap –?

**THE COMMISSIONER:** We have about five minutes of –

**MS. CHAYTOR:** All right, we're going to a new area, so if you wish we can end here. Well, not a new area, I'm still on protective service unit, but it's a good place to break.

**THE COMMISSIONER:** Thank you, Constable.

**CST. SMYTH:** Thank you.

**THE COMMISSIONER:** We'll start again at 9:30, is it, tomorrow morning?

**MS. CHAYTOR:** 9:30 it is, yes, Commissioner.

**THE COMMISSIONER:** 9:30, okay, thank you.

We'll recess till then.

**MS. CHAYTOR:** Thank you.

**MS. SHEEHAN:** All rise (inaudible).