



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 6

Commissioner: Honourable Justice Leo Barry

Wednesday

18 January 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry opened.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Good morning, everybody.

Before we start, I'm just going – I notice I have another speaker here now, so I'll be able to hear better, maybe a function of a head cold. But, Constable Smyth, I checked yesterday and, at times, I think there was some difficulty, at least within the hall, hearing your testimony. I think it's coming out well on the audio but people, places in the auditorium here are not able to pick it up. So if you could keep your voice up a bit, you'll get your answers out better anyhow.

CST. SMYTH: Yes, Sir.

THE COMMISSIONER: So Ms. Chaytor, you're ready to start?

MS. CHAYTOR: Commissioner, I would note that my learned friend, Mr. Kennedy, is not here.

THE COMMISSIONER: Oh –

MS. CHAYTOR: Perhaps we could just wait a moment for him to come.

UNIDENTIFIED MALE SPEAKER: He is present. He was just here. He must have just stepped out.

THE COMMISSIONER: Okay, just missing in action. All right, we'll wait a moment.

MS. CHAYTOR: Okay.

UNIDENTIFIED MALE SPEAKER: Here he comes.

THE COMMISSIONER: All right. I would have waited coming out, Mr. Kennedy; I didn't realize you weren't there.

Okay, go ahead.

MS. CHAYTOR: Good morning, Constable Smyth.

When we broke, we were talking about your interaction with Mr. Dunphy on April 5th and you had described how the conversation had basically deteriorated and his demeanour had changed towards you. And I'm wondering in terms of a little more detail about what was being discussed between you. Did you say anything to Mr. Dunphy about his mental health? When you expressed that you had concerns for him, did you mention anything about his mental health?

CST. SMYTH: No, I didn't.

MS. CHAYTOR: Okay.

And what about – I understand that the presence of the cats and the filth, as you described it in his home, did you mention about his cats, about the condition of his home, the filth of his home?

CST. SMYTH: I didn't make any reference to the cats to him. At times, I had made reference to the condition of the house, the garbage that was around the house. I believe there was open holes in the wall. I may have motioned towards that at one point in time when, you know, I referenced the living conditions.

MS. CHAYTOR: Okay.

And throughout your conversation with him, you said he became agitated. Did he stay seated throughout the whole time?

CST. SMYTH: He did stay seated, yes. He moved around a lot in the chair. He'd shift from one side to the other a couple of times, moving forward in the chair and back, but constantly to the right and to the left.

MS. CHAYTOR: And did he appear to get up at any point in time or attempt to try to stand?

CST. SMYTH: No. No, not until the point where I saw the firearm and he came forward in the chair. And I've never really been able to tell if he started to come up out of the chair or was just on the edge of the chair.

MS. CHAYTOR: Okay, so he was never fully upright?

CST. SMYTH: Never, no.

MS. CHAYTOR: All right.

So I'm going to ask you, then, to take us forward from there. The conversation has become – it's, it's deteriorated. Did you do anything to try and de-escalate the situation?

CST. SMYTH: Verbally, I had made comments to him trying to reassure him that I wasn't there to give him a hard time or to arrest him; I just wanted to have a discussion with him. And he was very bothered by the fact that I was looking around the house, looking out towards the hallway, looking – and when I was referencing the condition of the home, I was, I would be looking at the garbage or looking at the hole in the wall and – but I would also continue to look out towards the hallway.

As he became more and more agitated and irrational and coherent I – my concern for the potential for somebody else being in the home became a bit more heightened, so it was part of the reason I was looking out into the hallway.

That bothered him. He continued to ask me: What are you looking for? And he'd repeat that again and again: What are you looking for, what are you looking for, what are you looking around for?

MS. CHAYTOR: When you say you were looking out in the hallway, did you leave your position? You told us you were back by the mantel; did you ever leave your position and walk out towards the hallway and look around?

CST. SMYTH: No, just the movement of my head and my eyes. I'd walk just within probably within a two-foot radius. I did, you know, turn around at one point and look behind me down at the floor. And it was around that time that, you know, he – again, he was becoming agitated at me looking around, even when I turned around and looked down at the floor.

So it was around then that I made the decision to just look down at the paper and try to stop the movement of, of looking around the house, my head movement, my eye movement, because that was clearly agitating and bothering him.

MS. CHAYTOR: Okay. So at no point in time after you and Mr. Dunphy entered the living room did either of you leave the living room.

CST. SMYTH: No.

MS. CHAYTOR: Was Mr. Dunphy wearing his glasses during your discussion with him?

CST. SMYTH: I don't recall him wearing glasses, no.

MS. CHAYTOR: Did you observe his glasses anywhere in the room?

CST. SMYTH: I hadn't noticed them, no.

MS. CHAYTOR: Okay. And if they were found broken or damaged after the incident, do you have any knowledge as to how that may have happened?

CST. SMYTH: No. There was no interaction between him and I that would have resulted in that.

MS. CHAYTOR: Did, um – at any point in time with your discussion with Mr. Dunphy, did you become argumentative with him?

CST. SMYTH: No.

MS. CHAYTOR: Did you raise your voice to him?

CST. SMYTH: No, I did not.

MS. CHAYTOR: Did you get angry with him?

CST. SMYTH: No, I did not.

MS. CHAYTOR: And what about when he's calling you names, how did you respond to that?

CST. SMYTH: I tend to change the conversation. I didn't take insult to that. To me he was just; he seemed to be in a manic or a manic state, almost in crisis. There was nothing insulting about it.

MS. CHAYTOR: Okay. Nothing insulting about it?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And as a police officer are you use to that type of confrontation and name calling?

CST. SMYTH: Oh, very much so. That would be – that would be pretty light, I would think.

MS. CHAYTOR: And are you trained as to how to deal with that situation?

CST. SMYTH: Well, I think – yes, you are, but you also become very desensitized to being called personal insults, but I didn't even take that as a personal insult. He seemed to be continuing to air his grievance towards government while he unquestionably, at that point, saw me as – even as he put it, as an arm of government and a puppet of government, I didn't feel personally slighted by that. I know that of course not to be true and it just seemed to be, you know, him venting his grievance. I wasn't certainly insulted by that.

MS. CHAYTOR: Okay. And so what tone did you use with Mr. Dunphy?

CST. SMYTH: I think it would be pretty similar to what you are hearing from me now.

MS. CHAYTOR: Did it change at any point in time?

CST. SMYTH: When I saw the firearm my tone changed a bit, yeah.

MS. CHAYTOR: Okay. So prior to that did – for example, when Mr. Dunphy's demeanor changed, did your tone towards him change?

CST. SMYTH: It probably became a little more conciliatory. I withdrew a little bit and was trying to even de-escalate by my own body language and tone. Reassuring, trying to reassure him, I'm not here to give ya a hard time; I'm not here to arrest ya – were some phrases that I know I repeated a couple of times.

MS. CHAYTOR: Did Mr. Dunphy display any threat cues?

CST. SMYTH: I don't know if I would classify them –

MS. CHAYTOR: And you know what I mean by threat cues, what you are taught as a police officer to identify as threat cues?

CST. SMYTH: I'm not sure if I'd classify them as threat cues as much as perhaps some signs of agitation, you know the fidgeting movement. He had some build up on his lips as he started to become more and more agitated; the dried saliva on the corners of his lips. And that built up got to the point where, as he's talking, it's stretching between his upper and bottom lip. So I recognize that being a physiological sign of somebody who has gotten very agitated.

MS. CHAYTOR: All right. And I believe you've actually previously described that as frothing at the mouth.

CST. SMYTH: Yeah, I did.

MS. CHAYTOR: Okay. And you understood that to be a threat to you.

CST. SMYTH: I think that would be a matter of interpretation. I don't necessarily take that as a threat to you, per se. It's a sign of somebody being agitated, yes.

MS. CHAYTOR: Okay. And he's also agitated in terms of his squirming in the chair.

CST. SMYTH: Yes.

MS. CHAYTOR: In terms of his using curse words towards you.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. So what happens next?

CST. SMYTH: I looked down at the folder I had in my hand. I had a pen in one hand. He was in my peripheral vision and I sincerely don't recall if I was actually writing something or pretending to writing something, because it was just to make the point of, okay, stop looking around. He's bothered by that and that's not helping the situation. So just look down at your paper and try to engage in some conversation that way. It never, ever turned into any conversation. Within two, three, four, five seconds of looking down at the paper I noticed out of my peripheral vision that he is leaning down over to his right side. Again, he had done a lot of movement in the chair, so that within itself didn't cause me any great concern. But it was at that point that I did see – again, out of peripheral vision – something coming up in his hands.

THE COMMISSIONER: Sorry. Could you tell me again? When you started out you said you noticed him leaning to what side?

CST. SMYTH: To his right-hand side.

THE COMMISSIONER: To his right-hand side.

CST. SMYTH: And as he came back up I'd noticed something in his hands, something long. And of course that caught my attention out of my peripheral vision and as my eyes came up I focused on it being a firearm. It was a long-barrel firearm and it was very jarring and shocking to see the gun. And I immediately went from a relatively calm demeanour to a very high alert, high adrenaline mode. I just started to back away and turn away a little bit. By the time I fully focused on the firearm, it was actually pointed at me. And my instinct was, oddly enough, to raise my hand as if to block something being thrown at you. And in hindsight it doesn't make a whole lot of sense, but that was the instinct, was to raise your hand, you're about to be shot. And as I'm backing away, I move my jacket with my right hand and I immediately draw my firearm.

I'm very much thinking at this stage you're going to be shot. This is really – this is going to hurt and what I distinctively remember is almost feeling and getting ready for that impact, and I drew my firearm.

I – the only thing that came out of my mouth was: No. I remember my voice being very high pitched and I just said: No, no, no. It was a plea to not shot me. I really – I thought, you're done. You're about to be shot.

And I drew my firearm, I think, and as soon as I could get a shot off, I did. I think my first shot came down from probably fairly low and, at this point, I'm also trying to move away from the gun that was tracking me. I focused just strictly on the gun, is all I could see.

MS. CHAYTOR: Sorry, just saw that again.

CST. SMYTH: I focused solely on the gun. I've been asked –

MS. CHAYTOR: On your gun or on –

CST. SMYTH: On his gun.

MS. CHAYTOR: On Mr. Dunphy's gun. Okay.

CST. SMYTH: I've been asked: What was he saying? What was the look on his face? And there was, there was no face. I saw nothing other than that gun and it was pointed directly at me. And as I start to move towards the door, I started firing. And the second shot, my hand did come up

and I had – what we refer to as punching out your hand to get into a more proper shooting position, more stabilized position. I had fired a second shot – first and second shots, both being towards his centre mass. That seemed to have no impact on the position and tracking of the firearm – of his firearm. I still saw the gun pointed at me as I'm moving. I'm still thinking at any second you're going to be shot.

I have no idea if the two shots that I just fired had any – if they had made impact or if they'd gone into the floor or I didn't know. And as I'm exiting the room, I raised the firearm and I fired towards his head. I'm still focused on the gun and it's still present and it's still pointed at me. And the next shot is the only time I actually looked at him and I fired a fourth shot and I knew it hit 'cause I saw his head move from it. And another millisecond and I was out of the room.

MS. CHAYTOR: Okay. Okay, thank you.

I'm going to take you through now in some detail and I'll ask you some more questions about that. From the time that you looked down on your file folder and you said you were either writing or pretending to write until the rifle appeared, how much time passed?

CST. SMYTH: Just from the time I'm looking at the folder itself or inclusive of the time I'm looking around the house and the floor?

MS. CHAYTOR: I understood that you looked down in an effort to try and de-escalate, stop looking around, so you're trying to calm him from doing that, you looked down. From the time that you looked down until the rifle appeared in your peripheral vision, how much time passed?

CST. SMYTH: I hadn't been looking directly at him probably for several seconds which is part, I guess, of what aggravated him. I was looking around at the floor and looking at the garbage. I looked behind me at one point, so that was I think what led to the agitation and it went from – I think I had gone from looking behind me on the floor, down around my own feet. I had avoided any eye contact, just he was – because of that level of agitation, I didn't want that to be perceived as a potential intimidation, so I tried to not actually look directly at him.

I moved over and I looked at the folder, the time I was looking at the folder, you know, as low as two seconds, maybe as high as five, six seconds.

MS. CHAYTOR: Okay, and that's what I'm asking you. The immediate time period before when you looked down at your folder and then you see – because I understood you to say that you're looking down at your folder and writing or pretending to write, you can't remember now which it was, but at that point in time that's when you see the rifle coming up out of your peripheral vision.

CST. SMYTH: Right.

MS. CHAYTOR: So that time period, anywhere from two to five seconds, is that it?

CST. SMYTH: Yeah, it's probably closer to five, even six seconds because I'm seeing him move over to the right, but that hadn't caused me any concern at that stage. It wasn't until I saw something in his hands in my peripheral vision that I started to even move my eyes from being down at the folder to focus on him.

MS. CHAYTOR: Okay.

Constable Smyth, when we discussed this on December 22nd, do you recall telling me two seconds?

CST. SMYTH: I probably, I could have said –

MR. KENNEDY: Two to three.

MS. CHAYTOR: Two to three? Okay, two to three seconds.

CST. SMYTH: Yeah, I probably would have said that.

MS. CHAYTOR: Is there any reason why you're thinking it may have been longer now?

CST. SMYTH: Just to take into account I guess the fact that seeing him, or going through it, I guess in a bit more detail, seeing his actual, when he moved to his right, it could have been as much as five seconds. It could have been even more than that, I don't know.

MS. CHAYTOR: Constable Smyth, where did the rifle come from?

CST. SMYTH: Somewhere towards his right-hand side.

MS. CHAYTOR: Did you see it before it was actually in Mr. Dunphy's hands?

CST. SMYTH: No, I did not.

MS. CHAYTOR: And what does your training teach you in terms of watching the hands of a person of interest, and now you're dealing with a person who you've already identified as being in an agitated state, you've described it as being on higher alert. What does your training teach you in terms of keeping your eyes on the hands of a subject?

CST. SMYTH: You should watch their hands.

MS. CHAYTOR: So I take it you took your eyes off his hands long enough for him to be able to reposition himself, reach for a rifle, and retrieve a rifle?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: You're standing at this point in time, where?

CST. SMYTH: Over by the mantel, but his fireplace.

MS. CHAYTOR: Are you actually leaning on the mantel, or –

CST. SMYTH: I'm not sure if I was leaning on it at that point or not.

MS. CHAYTOR: Okay.

When you first saw the rifle, was it pointed at you?

CST. SMYTH: Yes.

MS. CHAYTOR: From the beginning, as soon as you saw it, it's pointed at you?

CST. SMYTH: By the time I focused on that firearm, it was pointed at me. I thought I was going to be shot.

MS. CHAYTOR: All right.

Did you observe Mr. Dunphy having to try and reposition the rifle in his hands –

CST. SMYTH: He seemed to be –

MS. CHAYTOR: – before he got it pointed at you?

CST. SMYTH: No, and while it was pointed at me he did seem to be moving his hands to, I don't know what he was doing, if he was trying to get a better grip on the gun or if he was moving the bolt, I don't know.

MS. CHAYTOR: Okay. So your evidence is that it's pointed at you. As soon as you see it, it's pointed at you?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. So we would like to bring up, please, P-0121. And this is a statement you gave to Grant Little from the Saskatoon Police Service. It's page 91 of that exhibit. Grant Little, Commissioner, is who did the internal review for the RNC.

And at the top of the page it says: And I just, he came up with a barrel and he started, he was moving his hands around I think to properly, it was almost like he picked it up and like he had to reposition his, his hands. And I immediately started thinking get the fuck out of here, get out, and but I'm also thinking oh my God, you're about to be shot, and my, like my hum-, my human instinct was, just put my hand up is what I did, and my hand up and the gun came out and I was now, I was still, it was pretty much pointed at me and I'm starting, I'm starting to move towards the door, like I got, this is all happening very slowly ... extremely slow, um, but ..." at the same time, so it wasn't.

So when I read that, where you're saying here: that it's almost like, he started moving his hands properly, "it was almost like he picked it up and like he had to reposition his hands." And then if we read on here, and it says, "... my hand up and the gun came out and it was now, it was still, it was pretty much pointed at me and I'm starting, I'm starting to move"

So Constable Smyth, when you say that when you first see it you're – he's repositioning it, and then as you're starting to move it's almost pretty much pointed at you. When you first saw it, is the gun in position, pointed at you, or did you actually observe Mr. Dunphy trying to reposition it so that it could be pointed at you, and you're actually starting to move before it's pointed at you?

CST. SMYTH: I don't think I say I believe he's repositioning it, as in the gun. I believe he's repositioning his hands.

MS. CHAYTOR: Okay. So when you first saw the rifle, was he still trying to reposition his hands on the rifle?

CST. SMYTH: When I focused on the gun, it was pointed at me and it seemed as if he was repositioning his hands, he was moving his hands on the gun. I wouldn't have taken him to have been in, what I would consider, a good shooting position. What we would perhaps refer to the point-and-shoulder. At no point in time did he have the firearm up to his shoulder and in a proper shooting position. It was more held at mid-chest level, with his left hand towards the front barrel end of the gun and his right hand towards the stock handle of the gun, but he was moving his hands in such a way that to me it seemed he was getting a better grip or moving the bolt or something of that nature. But it was pointed at me.

MS. CHAYTOR: Okay. If we could bring up, please, P-0217.

This is a statement that you gave September 14, 2015, and the specific point, or one of the things that was specifically going to be addressed in the statement was, I understand, to clarify when you saw the firearm. And if we could just start then, the very first page of this statement. Do you recall giving this statement, Constable Smyth?

CST. SMYTH: September 14 – yes, I do.

MS. CHAYTOR: Okay. And this is Corporal Burke asking you the questions. He says, “And I know from your first statement and the re-enactments that you provided with us that you gave a recollection of a series of what you did when you saw the firearm that was presented by Mr. Dunphy. And if I could ask you to give me a, from that point when you’re in the living room and you saw the firearm out of your peripheral vision, give me an account of your actions from that point.”

“So when I saw the firearm it was kind of out of my peripheral vision. I was stood up in the living room next to the fireplace mantel and was looking down at a file folder; I saw a firearm come up from Mr. Dunphy’s right side. He was in a seated position in the chair in the living room and he started to, also I guess, come up out of the chair. And it’s hard for me to say whether he was kind of gettin’ ready to stand up or just sittin’ up – upright in the chair.”

When I saw the firearm I dropped the file folder and I kind of immediately, instinctively, went into a defensive type of position. My left hand – I remember my left hand coming up and putting my hand out and the only words that came out of my mouth were no, like I was saying no, no, no. And then I started to kind of turn away and again I was just every ins – everything from there was very instinctive. I immediately started to think get towards the door. I was also in the process of drawing my firearm.

And I drew my firearm and as soon as I felt I was on target, I’m – I’m kind of – I’m almost turned away but I can still – I can still – looking towards him and the firearm – by the time I get my firearm on target his firearm is pointed at me.

So my question for you, Constable Smyth, is: Did you draw your firearm before the rifle was actually pointed at you?

CST. SMYTH: No.

MS. CHAYTOR: Okay. Can you explain what you’re saying here in this statement?

CST. SMYTH: I think the point is that it’s still pointed at me.

MS. CHAYTOR: I’m sorry?

CST. SMYTH: That’s – what I’m trying to say there is it’s still pointed at me.

MS. CHAYTOR: So when you say, I was just getting – preparing – sorry, right here: By the time I get my firearm on target his firearm is pointed at me, you’re saying what you meant was his firearm was still pointed at you.

CST. SMYTH: Yes.

MS. CHAYTOR: How long did it take you to get your firearm out of its holster?

CST. SMYTH: I don’t know. It was very quick, milliseconds.

MS. CHAYTOR: And how long would it have taken you to get on target?

CST. SMYTH: Milliseconds.

MS. CHAYTOR: And you weren't sure if you were on target afterwards because you said that you were shooting low, is that right?

CST. SMYTH: That's right. I felt I was on target. I was not shooting from a proper shooting position.

MS. CHAYTOR: Okay. And you also in your – and I won't bring to the transcript, unless of course you wish me to, but it's the December 22 interview with myself and Ms. O'Brien, at page 104.

In your inquiry interview you said: By the time I saw it, it was coming towards me and he seemed to be doing some adjustment with the gun in his hands. Do you recall telling us that?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And so what you're telling us in terms of the readjustment in his hands, you're seeing that, is that before you actually pull out your firearm?

CST. SMYTH: Yes, probably at the same time as well.

MS. CHAYTOR: Constable Smyth, did you have time to just get out of that room?

CST. SMYTH: I didn't feel like I did, no.

MS. CHAYTOR: Constable Smyth, how tall are you?

CST. SMYTH: Five feet, 10 inches.

MS. CHAYTOR: Okay. If we could bring up C 045, please.

MS. SHEEHAN: If counsel could arrange their monitors for the confidential exhibit, please.

THE COMMISSIONER: (Inaudible.)

MS. CHAYTOR: Yes, Photo 045, C –

THE COMMISSIONER: 045?

MS. CHAYTOR: 045, yes.

THE COMMISSIONER: Are the large monitors off?

MS. CHAYTOR: Is yours off?

CST. SMYTH: Mine is on.

UNIDENTIFIED FEMALE: Large monitors, sorry (inaudible).

MS. CHAYTOR: I said P-0010, C 045

Is it in front of you now, Constable Smyth?

CST. SMYTH: It's –

MS. CHAYTOR: Okay. And –

CST. SMYTH: – in front of me a little bit, yes.

MS. CHAYTOR: I believe this is one of the photos I also showed you yesterday showing the garbage and the objects on the desk.

THE COMMISSIONER: C-0001?

MS. CHAYTOR: C 045.

THE COMMISSIONER: Okay. It's Exhibit C-0001 and Photo 045.

MS. CHAYTOR: Correct.

THE COMMISSIONER: Right.

MS. CHAYTOR: Yes, correct. And I think that actually – yes, it's Exhibit C-0001, Photo 045.

Thank you. That's correct.

Okay. And so this picture, we understand, was taken by Chris Saunders, who was one of the forensic investigators who attended at the scene later that day. He told us that he's five feet, 10 inches; he took this photo from back by the mantel. And you can see – and I believe you also indicated to us yesterday yourself that you did see this garbage on the left around Mr. Dunphy's chair and the garbage can. So one of the theories if the rifle was on the floor by the side of the chair, how could it be that you didn't see it?

CST. SMYTH: I've asked myself that every day, every night for almost the past two years, and I don't know the answer to it. I don't know if it was on the floor. It could have been anywhere to his right. I don't know if it was covered in garbage. I don't know if it was leaned up against the wall. I don't know if it was tucked a little bit under the chair. I don't know if it was tucked into the pocket on the side of the chair. I don't know the answer to it.

MS. CHAYTOR: Constable Smyth, of course the rifle is here in the hearing room today; it's not a small object. Can you offer any explanation how that rifle could have escaped your attention if it's to the right side of Mr. Dunphy's chair?

CST. SMYTH: Not a good explanation, no. I don't feel like this picture is taken from where I was standing at the time when I first saw the rifle. I was – this picture, to me, is directly in front of him. I would have been more to his right but, at times, I was standing there.

MS. CHAYTOR: And you have told us yourself, though, that you did see the pile of garbage there?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay.

Do you recall you gave a statement to the RCMP, and I won't bring it up, but I'll direct everybody to – it's P-0122 and this is your August 26, 2015 statement. At page 5, when the RCMP asked you a similar line of questioning and you said: I should have noticed it, there was no great hiding spot and, basically, I don't have a good excuse.

Do you recall that's what you told the RCMP along a similar line of questioning?

CST. SMYTH: Yes, I do.

MS. CHAYTOR: Okay.

You were in the hearing room, Constable Smyth, when both Meghan Dunphy and Colin Dinn who visited Mr. Dunphy quite frequently, when they testified and you heard their evidence about him keeping a stick to the right side of his chair.

CST. SMYTH: Yes, I heard that.

MS. CHAYTOR: Okay. And we understand that to be the same stick that we also have here in the hearing room today and the stick that you observed on the floor. Is that right, the stick we have here is the stick that you –

CST. SMYTH: Yes, I believe it is, yes.

MS. CHAYTOR: – observed on the floor, and that's the one in the photographs?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. All right.

And Ms. Dunphy is questioning whether it's possible you mistook the stick for a gun. Now, based on your evidence, you first saw the object in your peripheral vision, and I understood what you've told us here today that you saw something in your peripheral vision. Is it possible that you mistook the stick for the barrel of a gun?

CST. SMYTH: No.

MS. CHAYTOR: At any –

CST. SMYTH: By the time I focused and lifted up my eyes, I was looking at a gun.

MS. CHAYTOR: At any point in time did you ever think the object you saw in your peripheral vision may have been a stick?

CST. SMYTH: I think in trying to describe to the RCMP how I was seeing in my peripheral vision that you see shapes and – more so than details; I could have made that reference. But when I see something coming up at that stage, I haven't made any judgement as to what it is. It's just literally milliseconds between the time I see that, to actually lifting up my eyes and focusing on, what was very clearly, a gun. I remember seeing a bolt. I remember seeing a – the barrel of the firearm and the stock of the firearm. It was not a stick.

MS. CHAYTOR: Okay. So, immediately, you're saying in milliseconds, you may not have been able to identify what it was, in that millisecond you may not have been able to identify but once you clearly focused, you're confident it was a gun.

CST. SMYTH: Yes, absolutely.

MS. CHAYTOR: Okay.

Could we look at P-0119, please? And this is the first statement you gave to the RCMP on April 6, 2015. And I'm going to be looking – we're going to need our monitors back on here. I'm going to be looking at page 34, Madam Clerk.

So, Constable Smyth, I take it from what you're telling us is that there's absolutely no doubt in your mind that it was a rifle that Mr. Dunphy presented you with in that moment.

CST. SMYTH: There is no doubt.

MS. CHAYTOR: And there's no chance it was a stick and that you somehow overreacted and thought it was a gun.

CST. SMYTH: There is no chance.

MS. CHAYTOR: Okay. And this is your statement the day after.

So Corporal Henstridge –

MR. SIMMONDS: Ms. Chaytor, can we – I'm sorry, it's Bob Simmonds. We can't get the –

MS. CHAYTOR: Oh, sorry.

MR. SIMMONDS: – monitors back on.

MS. CHAYTOR: Can we get some technical assistance, please?

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. SIMMONDS: Yep, it's on. Sorry about that.

MS. CHAYTOR: Here it comes, okay. All right, thank you, Ms. O'Brien.

So Corporal Henstridge says so you never – you didn't have an opportunity before that to kind of see what was going on in the right side – no – of the chair. It was only – it was all peripheral and he was doing lots of, lots of this and lots of moving around so it wouldn't – I didn't, I guess his moving wasn't drawing my attention. It wasn't until I saw – and I think I even might have thought like – my first – maybe like a broomstick or something. Right.

You know, like that was – you know what your peripheral vision is. You just get kind of shapes. But as soon as my eyes moved that, that little bit it was – gun. It was no question.

So in terms of the suggestion that at first, your first thought that it may be a broomstick, I'd like to offer you an opportunity to explain that and that ultimately you saw it and it was definitely a gun.

CST. SMYTH: Sure, I think it was the same explanation I offer here and just did in trying to articulate how you take in your peripheral vision. You don't take in detail, and it's largely just shapes. And knowing in my peripheral vision there was something in his hands, at that point, didn't cause me great alarm, just enough to see something that you need to look at. Stop looking

at your paper, move your eyes up to what it is he has in his hands. When I did that, it was a firearm. There is no question in my mind.

MS. CHAYTOR: Okay. And Constable Smyth, in the photographs and I won't bring you to it unless if there's an issue, obviously, if you wish me to bring you to it, but in the photographs – and in particular photo Scene 042, so P-0010, Scene 042 – there is a broomstick in the room and it's by your feet over by the mantel. Do you recall seeing that in the room that day?

CST. SMYTH: Yes, I do, yeah.

MS. CHAYTOR: Okay. You would have been standing next to the mantel and quite close proximity to the broomstick. Was that the object that came from the side of Mr. Dunphy's chair?

CST. SMYTH: No. That was on the floor the entire time, in that area.

MS. CHAYTOR: Ms. Dunphy also gave evidence that the last time she saw the rifle it was behind the couch in the living room. And do you recall in your first RCMP statement, you ask Corporal Henstridge whether he knew if the rifle came from the floor or the couch. And then because of that wording, you were asked to give another statement. Do you recall that?

CST. SMYTH: Yes, I do.

MS. CHAYTOR: Okay. And were you told the reason to have to give that further statement? And I believe that's your statement that you gave August 26, 2015. Do you recall the reason of why you would have to give another statement?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And what did they tell you? What did the RCMP tell you?

CST. SMYTH: I was told that the independent observer took issue with me using the word "couch" and suggested that it was potential that I was referring to something else.

MS. CHAYTOR: During your time in Mr. Dunphy's house did you ever see the rifle behind the couch?

CST. SMYTH: No.

MS. CHAYTOR: Did you see the rifle anywhere prior to the shooting? And prior to Mr. Dunphy picking it up, did you see it anywhere else in the house?

CST. SMYTH: No.

MS. CHAYTOR: Constable Smyth – and we'll get to this evidence as to what happens after the shooting but I understand you did somewhat of a clearing of the house, albeit perhaps not a full clearing, but you did do a clearing of the house after the shooting. Is that correct?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. Did you find the rifle after the shooting and place it where it ultimately ends up?

CST. SMYTH: No.

MS. CHAYTOR: So any suggestion that you staged the scene I would like you to have an opportunity to speak to that.

CST. SMYTH: It's to me, I guess, just a, an outlandish theory. I, I can't imagine how you can have that theory and be able to reasonably fill in all the other components of it, but people are going to have their theories.

I know what happened. What I'm saying happened is what happened.

When I first saw that gun, it was in his hands. It eventually dropped from his hands and it dropped onto the floor and it was leaned up against something. I never moved it; I never touched it.

MS. CHAYTOR: Okay. And I'm going to ask you some questions about where you observed the gun next.

Ms. Dunphy also said if you had asked her father, in answering questions from her own counsel I believe this was – if you had asked Mr. Dunphy if there was a firearm in the house, he would have produced it for you. Did that happen?

CST. SMYTH: I didn't ask him if he had a firearm.

MS. CHAYTOR: Okay. Did Mr. Dunphy, at any point in time during your discussion with him, tell you that he had a rifle? Regardless if you asked or not, did he ever tell you that he had a rifle and that the rifle was behind the couch?

CST. SMYTH: No.

MS. CHAYTOR: I'm going to ask you now about the, the writing in the yellow file folder and the contents of your yellow file folder. And we have this here in the hearing room; it's the exhibit. And my line of questioning for you around this, first of all, Constable Smyth, I think you acknowledged you weren't carrying your notebook that day.

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay.

And is this the – what we have in the yellow file folder, would that be the only documentation you had regarding your investigation of Mr. Dunphy?

CST. SMYTH: That's all I had with me, yes.

MS. CHAYTOR: Did you have anything anywhere else?

CST. SMYTH: There may have been some print-offs in my office. I don't recall. I think I printed off more material from social media, but I didn't have anything with me.

MS. CHAYTOR: Okay.

And if we could bring up, please, P-0030. This is the notebook policy of the RNC. Okay. And without going in any detail here, but basically it says that the notebook is one of the most important tools an investigator has at his or her disposal and it aids memory and can bring a guide when interviewing witnesses, victims and suspects. It should be used when writing reports and should be retained as a reference at court or other proceedings.

And it also states that note taking is a mandatory requirement for all police officers – that’s 1.4 – regardless of their level of involvement in a particular event or occurrence. So at the point of you visiting Mr. Dunphy, you had already done or requested to have done background checks on Mr. Dunphy – correct?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. You had discussions or communications with members of the Premier’s office, Donna Ivey?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And Heather MacLean I think you told us yesterday?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And you had a communications with Ralph Tucker?

CST. SMYTH: I believe yes. Yes.

MS. CHAYTOR: And Tom Mahoney?

CST. SMYTH: Correct.

MS. CHAYTOR: Okay. You had conducted ICAN searches including in the names of Paddy Daly and Ralph Tucker?

CST. SMYTH: Correct.

MS. CHAYTOR: You conducted other background checks that we spoke about. You contacted the RCMP, Constable Cox, and received information from him regarding Mr. Dunphy, including his contact information we believe?

CST. SMYTH: Correct.

MS. CHAYTOR: Okay.

And you’d already been to Mr. Dunphy’s house once and observed certain things and found him not to be at home. You had tried to call him six times and you had visited Dick and Debbie Dunphy for 20 minutes or thereabouts?

CST. SMYTH: Correct.

MS. CHAYTOR: Okay. None of this is recorded in your notebook?

CST. SMYTH: No.

MS. CHAYTOR: And you don’t even have your notebook with you?

CST. SMYTH: That’s right.

MS. CHAYTOR: Okay. So in terms of times, details or other information, will we find that in times and details, that type of detail, will we find any of that in the yellow folder?

CST. SMYTH: No.

MS. CHAYTOR: So, Constable Smyth, did you follow your policy with respect to police notebooks?

CST. SMYTH: Not explicitly, no. My normal practice in that type of investigation would be to make jot notes in a folder and usually, at the end of the day, or when I was prepared to draft a narrative, I would compile the electronic communication – the vast majority of communication would be largely electronic email. The background checks can all be printed and would form part of adding to that file. And once of person of interest profile was created, it would be inputted into that. And I would describe my actions and interactions with witnesses in the case in that form.

MS. CHAYTOR: Okay.

Constable Smyth, when you told us yesterday how you introduced yourself to Mr. Dunphy, you called yourself Joe Smyth.

CST. SMYTH: Yes.

MS. CHAYTOR: You didn't use your rank.

CST. SMYTH: No.

MS. CHAYTOR: Okay, why not?

CST. SMYTH: It just wasn't something I traditionally did in that setting. When trying to rapport built and set somebody at ease, rank doesn't lend to that process very well, I find.

MS. CHAYTOR: Okay.

And you're dressed in casual clothes, you're in an unmarked vehicle, you're carrying a yellow file folder, no official police notebook, do you think it's possible when Mr. Dunphy starts questioning who sent you and what are you doing there, that he is starting to question whether or not you are in fact a police officer?

CST. SMYTH: No.

MS. CHAYTOR: And why not?

CST. SMYTH: We had, had some conversation about policing, about the Constabulary. He had asked what the Constabulary were doing in RCMP jurisdiction. I didn't believe there was any confusion there whatsoever.

MS. CHAYTOR: Okay.

And I believe that occurred, though, first when you went in the door and you told us that he asked what's RNC doing in RCMP territory.

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay.

But at the point he'd become agitated and his demeanour has changed, as you've described, do you think at that point in time he's starting to question (a) whether you're in fact a police officer, or (b) whether you're in fact there in your capacity as a police officer?

CST. SMYTH: He didn't say anything or do anything to lead me to believe that. Other than that, I can't speculate as to what he might have been thinking.

MS. CHAYTOR: Even him calling you a puppet of the government?

CST. SMYTH: I never took that as a confusion of what my job was. I think he had seemed to feel that I was just as he described.

MS. CHAYTOR: Okay.

And so then, according to your account, Mr. Dunphy pulled a rifle on a police officer, without a doubt.

CST. SMYTH: Yes, yes.

MS. CHAYTOR: I just want to ask you, then, about whether or not you were actually writing in your folder at the time. I understood what you just, you said today that you were either writing or pretending to write. Is that right?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. All right.

And had you written anything in the folder during your time with Mr. Dunphy?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And what is written in the folder?

CST. SMYTH: I'd have to probably look to give you details, but I know I wrote down the names he provided me of the two dead MHAs he was referring to in the, in his original tweets.

MS. CHAYTOR: Okay. And did you write anything else?

CST. SMYTH: I don't recall.

MS. CHAYTOR: Okay. All right.

And do you recall where you wrote that on the folder?

CST. SMYTH: No.

MS. CHAYTOR: Okay. So we'll have a look at that in a minute. So if that's the only writing in the folder and you're writing at the time that the rifle appears, if that's the only writing it would be those entries with the names of the dead MHAs, is that right?

CST. SMYTH: When I viewed that during our deposition hearings in December, it refreshed my memory to think that I wrote that when the conversation was more cordial, when he, when I – he had first given me the information of who those MHAs were. And by looking at what was a bit neater writing, I don't think it would have been made at the time when he became agitated. If

there's – it'd be more likely if there's a scribble mark there somewhere that that's what I would have been doing at that point.

MS. CHAYTOR: Okay. So are you saying you were writing at the time the rifle comes up or you just don't know?

CST. SMYTH: I was either writing or pretending to write.

MS. CHAYTOR: Okay. And would your recollection on that have been clearer back when you gave your statement the day after on April 6?

CST. SMYTH: Probably so.

MS. CHAYTOR: Okay. So let's bring up, please, P-0119, page 14. Thank you.

Okay. So at the top of the page here, you're describing: I'm stood up, "I got the file folder in my hand and I'm doing this" – and we can see that on the video, but unfortunately not here – "and I was saying, Don – Don, I got real concerns for you. And he's over here and, you know, he got agitated by that. You could tell his body language changed again and – and he went back to all the other conversation around the tweets around dead MHAs and again you're an arm of the government. You're a fuckin' puppet. And, ah, and that's when I asked – I started to write something and I was – I was stood up and I saw – like I went peripheral vision. I saw like the barrel of a rifle and – and from there everything was just so fast and so instinctive."

So it appeared on April 6 that your recollection at that point is that you were – you had at least started to write something.

CST. SMYTH: I may have started to write something.

MS. CHAYTOR: Okay. And if we could bring up, please, P-0128.

And this is, Constable Smyth, an RNC narrative hard copy, and it's dated April 7, 2015. Perhaps you can explain to the Commissioner what this document is and why you would have prepared it?

CST. SMYTH: It's the original narrative that I prepared for the incident that was inputted into the RNC ICAN system.

MS. CHAYTOR: And it's page 3, I believe, of this document. Just give me a moment to find it.

Okay. That's okay, I got it. All right, and it's right here.

"He also had foam or dried saliva building up on his lips and in his mouth. I began to write on the folder I was carrying, partially in an effort to calm him as he was agitated from me looking around the room. Then out of my peripheral vision I saw the barrel of a rifle in Dunphy's hands that he seemed to pick up from his right. I immediately went for my firearm and put my left hand up in a "stop" motion."

So again, when you're preparing your narrative it appears that you are saying that you had began to write, at least on the folder.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And are you able to say what it is that you – are you – what you're saying is, though, that that might not have been or wasn't the information that is written on the file folder about the names of the dead MHAs?

CST. SMYTH: I think the names of the dead MHAs were written there before that. I may have at that point began to write something else or just a motion with the pen. It was strictly an effort to take his attention away from me looking around the room, not to actually make a particular note of anything.

MS. CHAYTOR: Okay. And was your folder open then when you're –

CST. SMYTH: I can't recall.

MS. CHAYTOR: Okay. And similar then, if we look at P-0121, and this is your statement again to Grant Little, your Grant Little statement. And I'm going to look at pages 89 and 90.

Okay. And you say: I'm kinda of hoping to bring him down a bit and see what I can do for him. I'm back by the fireplace, and I'm – I got an elbow I think on the mantel and then my file folder there, and I'd open the folder up and I'd say, stop looking around, because this is driving this guy bananas and I looked down at the folder and um, but I wasn't really looking at it, and but I was just kinda doing that to appease him and while it's there in my hand, it's kinda like now you know I'm looking at my hand and I can see you, see what you're doing and see how you're sitting and that's, and it wasn't necessarily on purpose, and that's when I saw he's sitting like this and he comes forward and he makes this type of movement and you know what it's like, it's out of your peripheral vision, you're not seeing exactly what he's doing and that's when I see the barrel of a gun come up.

So, Constable Smyth, is it that your file folder is open and you're writing at the time that that rifle appears?

CST. SMYTH: I don't know if the folder is open or closed.

MS. CHAYTOR: Okay. When you were writing, are you writing on the mantel or how is it that you're doing that? Do you have the folder in your hand?

CST. SMYTH: It was in my hand.

MS. CHAYTOR: Okay. So the folder is in your hand and you have a pen in your other hand?

CST. SMYTH: Yes.

MS. CHAYTOR: You're right-handed?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And so your hands are also then engaged in holding the file folder and the pen?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And what does your training teach you about that in terms of keeping your hands, your hands free?

CST. SMYTH: In relation to what type of scenario?

MS. CHAYTOR: Well, the scenario you found yourself in. You're in a situation where you're on heightened alert.

CST. SMYTH: If you're engaged in a conversation with somebody and your point of the conversation is to glean information, it's okay to hold paper and a pen.

MS. CHAYTOR: Okay. So at that point in time, in the situation that you were in in trying to de-escalate the situation, it was okay for your hands not to be free?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

CST. SMYTH: I think dropping, laying down my pen, laying down the paper, taking a type of defensive stance, wouldn't likely do anything to de-escalate an agitated individual.

MS. CHAYTOR: Okay.

At this point we're going to look at the physical exhibit, the file folder.

MR. KENNEDY: Could I have a look at that too, Commissioner? I haven't seen that. I've seen copies of it, obviously.

THE COMMISSIONER: The yellow file folder?

MS. CHAYTOR: Yes.

THE COMMISSIONER: Yes, show it to Mr. Kennedy first. Let him see it first and other counsel if they want to see it.

MR. SIMMONDS: We'd like to see it also, Mr. Commissioner.

THE COMMISSIONER: Okay.

(Viewing evidence.)

THE COMMISSIONER: Yeah, I am the same way, I am also by the way going to – just for the record, I'm going to lift the firearm while I'm there, while I'm doing this, since everybody is here, to save time, just to get an understanding of the weight of the firearm.

(Viewing evidence.)

MS. CHAYTOR: (Inaudible.)

CST. SMYTH: Do I need these kept on?

MS. CHAYTOR: (Inaudible.)

THE COMMISSIONER: Sorry, I didn't hear that?

CST. SMYTH: Do I need these kept on?

MS. CHAYTOR: Sorry? I may show you or hand you a piece if you can't see it. I think we have the physical photo for everyone else to be able to see, I think might be P-0214 – is that correct,

Commissioner? I believe this to be the contents of the file folder if anyone wishes to – not that page, though, the next page.

THE COMMISSIONER: So what, were there other loose sheets in the –

MS. CHAYTOR: Sorry?

THE COMMISSIONER: There were two loose sheets that you had –

MS. CHAYTOR: Yes. So that what we have are four loose sheets; so we have two pages of the Twitter account, starting with Sandy Collins's tweet, and then ending with – there's actually a tweet by an Andrew McCarthy, but it includes the tweet which Mr. – or Constable Smyth was investigating. So that's on the second page. So it's the chain of tweets that he was –

THE COMMISSIONER: Right. What are the other two pages?

MS. CHAYTOR: The other two pages, this one is actually like a stock-card page, Constable Smyth?

CST. SMYTH: Yes.

MS. CHAYTOR: And this has names of Don Dunphy, P.O. Box 270, Mount Carmel, postal code, date of birth in a different colour ink – it's black ink, the date of birth – a cellphone number and a home phone number. And then in different black ink another telephone number. The two numbers I would just say, I don't think there would be any controversy in this, but the two numbers written in blue ink are the numbers that would have been provided by Workers' Compensation. The number written in black would be the cellphone number and not provided by Workers' Compensation.

And then we have Tom Mahoney, WHSCC, and a telephone number. Then we have written in black, Honda 2003 grey, HGF 874. We have Route 93 Mitchells Brook, number 270-area and then Holyrood: Constable Cox and an arrow.

Oh, I'm sorry; it's up on the screen.

UNIDENTIFIED FEMALE SPEAKER: Yeah.

MS. CHAYTOR: I'm reading out to everyone. I'm sorry. That's okay. I'm sorry.

But I'm just giving you – it's probably helpful because I don't know if the different ink is picked up on the exhibit. Okay.

And so then there's a second page of paper. It's actually a printout and it's not shown in this, but the other side of that page is the actual email, including Donna Ivey's email of April 3, 2015, 10:21 a.m. And then it is Constable Smyth's reply, which we've already seen, where he said he's going to look into it ASAP.

And then we have, at the very top, Joe Browne's reply: "This guy seems to be an injured worker. His constant tweets are focused on that subject."

So we have a page of the email which isn't included in what we were provided by the RCMP in their file folder.

THE COMMISSIONER: So that, so there's, there's four pieces of paper but there's actually five pages with writing on it –

MS. CHAYTOR: There are four pages.

THE COMMISSIONER: – because one is front and back?

MS. CHAYTOR: Correct. And so on the back, then, of the email, we have a number of – there are four Donald Dunphys identified. And that's redacted, of course, except for the Donald Dunphy that we're dealing with in terms of our exhibit. But that's what's written on the back of the email page.

MR. KENNEDY: Commissioner, just for clarification it appears that there is – the, the emails are missing from the online exhibit. Am I correct on that, Ms. Chaytor?

MS. CHAYTOR: Yes, the email is not included on the online exhibit. And, Mr. Kennedy, I don't believe that this was – the online exhibit you have is the contents of the yellow file folder as indicated by John Galway of the RCMP to Steve Burke on July 8, 2015, where he says: "Hey Steve, Here are the contents of the yellow folder." So that's what we're, we were provided by the RCMP.

THE COMMISSIONER: That is in somewhere else though, is it not, that –

UNIDENTIFIED MALE SPEAKER: No.

THE COMMISSIONER: – that email?

MS. CHAYTOR: The email certainly is. Yes, we have this email but the fact that it was in Mr. – or Constable Smyth's yellow file folder that would not have been evident from what we had indicated in the yellow file folder. And I believe that's your question, right, Mr. Kennedy?

MR. KENNEDY: Yes, that's –

MS. CHAYTOR: Yes, that's his, that's his point. This, the fact that it was the email from the government or the Premier's office, that email being in his file folder was not –

MR. KENNEDY: Yeah.

MS. CHAYTOR: – not indicated in the document that we received from the RCMP. So it seems like this page was not photocopied is what the issue might be.

THE COMMISSIONER: Right. Just one, just the back of it and not the front or – yeah, it's the back of that one –

MS. CHAYTOR: Yes.

THE COMMISSIONER: – that has the –

MS. CHAYTOR: Yes, the other side of it certainly was photocopied and is in the file folder.

Okay

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. CHAYTOR: Right. Okay, yes. And I should indicate that page 7 of this exhibit, even though it's indicated to be his – and also the first page as well, of course. That's not the content of the yellow file folder, and page 7 is not in the yellow file folder. These are Constable John Galway's notes regarding the yellow file folder.

Okay. So everyone is clear on what we have in the yellow file folder. The only other thing then, Constable Smyth, this yellow file folder has no identification in terms of a name or an occurrence number, nothing like that.

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay. And I think we understood you to say that you had not yet opened a file folder, or a file or an occurrence number for Mr. Dunphy.

CST. SMYTH: At that stage I hadn't actually generated a file number in our internal ICAN system. No, I had not.

MS. CHAYTOR: Okay. And, in fact, when does the file number on Mr. Dunphy get opened in the ICAN system?

CST. SMYTH: I think it was probably the 7th of April.

MS. CHAYTOR: April 7?

CST. SMYTH: Yeah.

MS. CHAYTOR: Yes, and you opened the file then on April 7?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. All right. So two days afterwards.

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay.

And is a yellow file folder something that the police usually carry? Is this one of your –

CST. SMYTH: Yes.

MS. CHAYTOR: This is one of your office file folders?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. So this came from RNC Headquarters.

CST. SMYTH: Yes, it did.

MS. CHAYTOR: Okay. And are there certain colours for investigative files? Do you normally carry a yellow file folder?

CST. SMYTH: We used yellow file folders in Criminal Intelligence and PSU office largely for persons of interest files and sometimes certain operational plans, visits, that kind of thing.

MS. CHAYTOR: Okay. And in terms of the information that we have, the list of the Donald Dunphys, would this have been obtained from your communications with, I think it was Owen Todhunter when you asked for certain searches done, when you're trying to identify which Donald Dunphy. Is that when that page would have been generated?

CST. SMYTH: Yes, I believe so.

MS. CHAYTOR: Okay. And there's no date on it or source of the information, but you think that's where it came from.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

THE COMMISSIONER: That would have been the fourth or the fifth?

MS. CHAYTOR: That happened, I believe, on the fourth. Is that correct?

CST. SMYTH: That's correct.

MS. CHAYTOR: Yeah, that's right.

The two pages of tweets, where did these come from? Did you generate this yourself?

CST. SMYTH: I printed those off myself, yes.

MS. CHAYTOR: You printed those off. Where were you when you printed those off?

CST. SMYTH: At Confederation Building, in the PSU office.

MS. CHAYTOR: Okay. And they are printed off in what I will call the right order for how you would read them. So it starts off with the first tweet that Mr. Dunphy would have sent which was, "is that why u can't c problems of seniors & injured workers, the sun is in your eyes" – and continues on with the last one being, the one that got brought to your attention by Donna Ivey.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. So did you have to do some kind of a search for this to come out in this order as opposed to normally you go into someone's Twitter account and it's reversed. Did you do a search?

CST. SMYTH: No. Once you click on that particular conversation, it will reveal itself in proper chronological order when –

MS. CHAYTOR: It automatically does that for you?

CST. SMYTH: – each particular tweet was made.

MS. CHAYTOR: Okay. And if we see the icon – I don't know if you can see it there, but at the first page of the tweets, if we could see the icon here, and it's a little clearer, I can show you the exhibit if you wish, but it's a Newfoundland flag, basically.

CST. SMYTH: Uh-huh.

MS. CHAYTOR: Do you recognize that icon in terms of who might own that?

CST. SMYTH: Yeah, I had a number of different social media accounts that I utilized for work for the purpose of observations. I don't recall which one it was.

MS. CHAYTOR: So is that yours? Does that mean that's an icon you were using?

CST. SMYTH: Yes, yes.

MS. CHAYTOR: Okay. So that's the person – I would understand that's the person who would have had to have printed this or have done this search that would be their icon.

CST. SMYTH: Right.

MS. CHAYTOR: Okay. And so that's your icon.

CST. SMYTH: Yes.

MS. CHAYTOR: And is that a work icon, or are you a Twitter user?

CST. SMYTH: I had – I would periodically generate Twitter accounts and they might go inactive, unused for a period of time and I'd generate another one for the purposes of viewing these kinds of things.

MS. CHAYTOR: Okay. And then we have this piece of paper which is hard paper. It's not regular newspaper; it's more like card stock.

CST. SMYTH: Right.

MS. CHAYTOR: Do you recall where this paper would have come from?

CST. SMYTH: It came from the Confederation Building, in our office.

MS. CHAYTOR: Okay, all right.

So you're in your office when you're using and writing things here on this?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And it has – I've already taken you through it – Mr. Dunphy's name, address, telephone numbers; Mr. Mahoney's. It all seems to be written in the same colour ink. And then the extra phone number, date of birth and the description of the car, and Holyrood Constable Cox, those are all written in black ink. So did you write this at two different times?

CST. SMYTH: Yes, I think that black ink, in particular the lower phone number and probably the Mitchells Brook information was info that I had received from the RCMP and written at that time.

MS. CHAYTOR: Okay. So the day of April 5, it's a black pen that you have.

CST. SMYTH: Well, at that time I wrote that, yes.

MS. CHAYTOR: Black ink, a black ink pen, I should say.

CST. SMYTH: At the time I wrote that, yes, for sure.

MS. CHAYTOR: Okay. And is that the same pen that you had while you were inside the house?

CST. SMYTH: I don't know.

MS. CHAYTOR: Don't know, okay.

Now, the writing on the inside of the cover, we can see here is – and perhaps I'll get you to read that out for us. It's not there, the inside of the cover? All right, that may – okay, all right. I'll get you to read it out.

CST. SMYTH: It says, MHA, colon, Eric Gullage, hyphen, WHSCC appeals, Ed Maynard, there's an arrow, CEO of WHSCC.

MS. CHAYTOR: Okay. And that's your handwriting, Constable Smyth?

CST. SMYTH: Yes, it is.

MS. CHAYTOR: Okay. And was this written during your conversation with Mr. Dunphy that day?

CST. SMYTH: Yes, it was.

MS. CHAYTOR: Okay. And it's on the inside of the file folder about an inch down. Is that the only thing that you wrote while in his presence?

CST. SMYTH: I believe it is, yes.

MS. CHAYTOR: And that's the information, I take it, that he provided you as to who he was referring to in his tweets?

CST. SMYTH: Right.

MS. CHAYTOR: Okay. Yeah, I think maybe we could try P-0010, Photo 001 to 002 might be what I've just referred to.

Okay. So my question then for you, Constable Smyth, is this what you were writing when you looked down trying to de-escalate the situation? Is this what you were writing?

CST. SMYTH: No, he had provided me that information earlier in the conversation when things were a little more cordial.

MS. CHAYTOR: Okay. And what is it that you – now having your memory refreshed on this. What is it that you think you were writing at that time?

CST. SMYTH: I just noticed some scribble marks between a couple of the words here on the arrow. It's possible I was moving the pen over that.

MS. CHAYTOR: Okay. So you, that's, that's – so you were possibly –

THE COMMISSIONER: I'm sorry, where are the scribble marks that you referred to –

MS. CHAYTOR: I'm going to show you.

THE COMMISSIONER: – if I could just take a look at that.

MS. CHAYTOR: So I think you're referring to those scribble marks here?

CST. SMYTH: Yeah.

MS. CHAYTOR: Okay.

CST. SMYTH: Yes.

MS. CHAYTOR: All right, thank you.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MS. CHAYTOR: (Inaudible.)

THE COMMISSIONER: Let me see. So that is the record you're pointing to a scribble mark between Ed Maynard and CEO of WHSCC. And there's a sort of small mark between Gullage and in the first line WHSCC.

Okay, so we have that up on the screen now. Or we have the top of the – it looks like –

MS. CHAYTOR: Yes, Commissioner, you can't, you can't fully see it but you can see the –

THE COMMISSIONER: It was photocopied. I'll show you the, the tweet page was photocopied while in the folder by the looks of it.

MS. CHAYTOR: Right.

THE COMMISSIONER: I just picked up the full Gullage line but only part of Mr. Maynard's name. But it does pick up the scribble word here.

MS. CHAYTOR: Right, this is the scribble mark that Constable Smyth has indicated right here. Okay.

So, Constable Smyth, I understand that – are you able to say what happened to the folder?

CST. SMYTH: Well, I know now, but at the time I didn't know. I know I dropped it.

MS. CHAYTOR: You just knew you dropped it.

CST. SMYTH: Yes.

MS. CHAYTOR: In terms of where it landed –

CST. SMYTH: I had no idea.

MS. CHAYTOR: You had no idea.

CST. SMYTH: No.

MS. CHAYTOR: And even being in the house afterwards for those minutes after the shooting – and we're going to talk more about that in the aftermath of the shooting – you didn't notice your file folder.

CST. SMYTH: I never thought about that folder after that.

MS. CHAYTOR: Okay. And so I take it you didn't – wherever it dropped is where it was when the incident started to unfold and you, you drew your firearm.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. You didn't move it at any point in time.

CST. SMYTH: No, I didn't.

MS. CHAYTOR: Okay. Could we bring up, please, P-0010, Photo 095.

Okay, Constable Smyth, I'm just going to ask if you would please – do we not have that picture?

THE COMMISSIONER: What's the number?

MS. CHAYTOR: Photo Scene 095.

THE COMMISSIONER: It's Photo 095, is it? What's the exhibit number?

UNIDENTIFIED FEMALE SPEAKER: P-0010.

MS. CHAYTOR: P-0010 is the exhibit number –

THE COMMISSIONER: P-0010.

MS. CHAYTOR: – and scene –

MS. O'BRIEN: It's a confidential exhibit; it's C-0001.

MS. CHAYTOR: Oh.

MS. O'BRIEN: So just wait – wait (inaudible).

MS. CHAYTOR: Why would it be confidential? It's just a picture of the file folder on the table.

MS. O'BRIEN: I don't know, it's listed –

MR. KENNEDY: It could be confidential, Ms. Chaytor.

UNIDENTIFIED MALE SPEAKER: If there's (inaudible).

MS. CHAYTOR: Oh, okay.

Oh, I see. Okay.

MS. O'BRIEN: Okay.

MS. CHAYTOR: Okay, sorry –

MS. O'BRIEN: So that the monitors are off and I will get you a copy of it so that you –

MS. CHAYTOR: Okay, I think there's a better photo somewhere else that's not confidential as well then. But that's okay. If we – does counsel now have that picture up; is that up for you, Constable Smyth?

CST. SMYTH: Yes, it is.

MS. CHAYTOR: Okay. All right.

And so I realize that you didn't at the time, but the file folder, we're going to hear evidence that the file folder was found on the coffee table on the edge. Okay. I'm going to ask you, if you could please just stand with the file folder and the pen, the way you would have been at the time – okay, all right. And is this your recollection, you would have had your file folder open and making a mark on the inside cover?

CST. SMYTH: I think so.

MS. CHAYTOR: Okay. So based on that – and thank you Constable Smyth, that's fine. Are you – does it seem to you that your file folder would have fallen intact on the coffee table?

CST. SMYTH: Sorry, what's your question?

MS. CHAYTOR: Does it seem to you based on you having your file folder open, pen in hand, you're making notes on that arrow on the inside file folder, there are loose pages in your file folder, does it appear to you with the urgency of the situation you are faced with, you drop your file folder, that it would land on the coffee table intact with the papers inside?

CST. SMYTH: I'm sorry, what's the question: do I seem – what?

MS. CHAYTOR: Yes, does that, is – given the situation and the urgency that you were in, does it surprise you, then, let's put it that way –

CST. SMYTH: Yes, very much so.

MS. CHAYTOR: It surprised you very much so?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

UNIDENTIFIED FEMALE SPEAKER: Anybody else need to see?

MS. CHAYTOR: Constable Smyth, I'm going to now ask you some questions about the shooting itself, and you've described for the Commissioner your actions in pulling out your weapon. Do you recall how many shots you fired?

CST. SMYTH: Four.

MS. CHAYTOR: And how long did it take you from the time you first saw the rifle out of your peripheral vision until you had fired the four shots and were out of the room?

CST. SMYTH: It's very difficult to provide an exact time, but it happened very quickly in I could say probably no more than two, two-and-a-half seconds.

MS. CHAYTOR: Okay. And, I'm sorry two, two-and-a-half seconds? Okay.

And, Constable Smyth, when you fired your first shot, are you still standing by the mantel?

CST. SMYTH: I'm in that area, yes.

MS. CHAYTOR: Okay. So when you first fire, had you already started to move?

CST. SMYTH: I had certainly began that motion, yes.

MS. CHAYTOR: Okay.

And where were you when you fired the next three shots? Just tell the Commissioner how you exited that room, where you're standing as you fired those shots.

CST. SMYTH: I had moved towards the door between the coffee table and the couch.

MS. CHAYTOR: Okay.

And so when you – so you ran on the side of the table, between the table and the couch. And when I say ran, I take it you're exiting pretty quickly.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And I believe you actually drew a diagram of this for the RCMP, so maybe we can look at that; it's P-0213, please.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MS. CHAYTOR: P-0213? 213.

Here we go. Is this your diagram, Constable Smyth?

CST. SMYTH: Yes.

MS. CHAYTOR: And I understand you did this on April 6th during your first statement to the RCMP; is that correct?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And we have a star here which says "my position @ time of threat perceived." Okay. And then you have: "1-4 Approx of shots fired." Is that what that says?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. So you're first shot, second, third and fourth.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

We also have here – you've written here that's the bat; is that right?

CST. SMYTH: Correct.

MS. CHAYTOR: And this is a table.

CST. SMYTH: Um-hum.

MS. CHAYTOR: This, of course, is the coffee table. And does this say mantel?

CST. SMYTH: Yes.

MS. CHAYTOR: And this says TV, does it?

CST. SMYTH: Yes.

MS. CHAYTOR: Was the TV on?

CST. SMYTH: I believe it was. I believe it might have been on to a blue screen maybe, but I can't say for sure.

MS. CHAYTOR: And the couch is written here.

So you've written 1, 2, 3, 4. What's this mark here, Constable Smyth?

CST. SMYTH: I don't know.

MS. CHAYTOR: Not sure, okay.

And this says hallway and this is front door; is that right?

CST. SMYTH: Yes.

MS. CHAYTOR: And this says plywood cover? Is that right? Plywood cover and the kitchen is here?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And so here the plywood cover has been moved over here. Is that what you are indicating?

CST. SMYTH: Probably so.

MS. CHAYTOR: Okay. And at some point in time after the shooting did you do that? Did you move the plywood cover as part of your clearing of the house?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. So when you first went in the house it was covering the kitchen door, is that correct?

CST. SMYTH: That's correct.

MS. CHAYTOR: Al right. And then does this say – I'm not sure. Maybe you could help.

CST. SMYTH: Two rooms I think.

MS. CHAYTOR: Two rooms, okay, going this way. So the rest of the house. And I understood you to tell us that at no point prior to the shooting did you go in any other area the house. You came in the front door, turned into the living room, and stayed over around the mantel area between the middle towards the – this end of the mantel area. Is that correct?

CST. SMYTH: I think when we – when I first came in with Mr. Dunphy at one point in time we were out in the hallway for –

MS. CHAYTOR: Yes.

CST. SMYTH: – a few minutes and I did have opportunity to see in the hallway towards the rooms.

MS. CHAYTOR: And I take it then, Constable Smyth, though, in terms of your position, you stayed in the mantel area, I understood towards this end, closer to the couch, and how far along I thought you said was towards the middle would have been the furthest you went. Is that right?

CST. SMYTH: I made it over certainly to where I would have been directly across from Mr. Dunphy at times.

MS. CHAYTOR: Oh, okay. So you would have been over here further?

CST. SMYTH: Yeah, I'm not sure if the dimensions are perfect here.

MS. CHAYTOR: Okay, fair enough. But if you're talking to him that makes sense, that you would have been standing more straight on with him.

CST. SMYTH: At times yes.

MS. CHAYTOR: Yes, at times okay. All right.

Okay. And this is intended to be Mr. Dunphy, I take it, in the chair?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Did you draw the rifle in the picture?

CST. SMYTH: No.

MS. CHAYTOR: Why not?

CST. SMYTH: I don't believe I was asked to do so.

MS. CHAYTOR: Okay. Did the RCMP ask you to do anything other than draw your shots, from where you took your shots?

CST. SMYTH: I think that's what they were primarily looking for from that drawing.

MS. CHAYTOR: All right. And I'm also then going to ask you why you chose to put the bat in the diagram.

CST. SMYTH: I don't know. They may have asked me where the bat was.

MS. CHAYTOR: And do you believe that to be the case or – tell me what you recall about drawing this diagram. Do you recall being left – them asking you to draw whereabouts you would have been doing your shots and then leave it – they left the room, do you recall?

CST. SMYTH: I think one of them may have left the room perhaps. I think it's all in the transcript, but I don't remember specific questions around the bat or the positioning of the gun.

MS. CHAYTOR: Okay.

Okay. I want to ask you about the shots that you fire. The first one, and – did you feel you were on target on your first shot?

CST. SMYTH: I did.

MS. CHAYTOR: You felt you were. Okay. And the same for the second and the third?

CST. SMYTH: I didn't feel I was on target for the third.

MS. CHAYTOR: Not for the third?

CST. SMYTH: No.

MS. CHAYTOR: Okay. So the only one you didn't think you were on target for was the third?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And then the fourth one you said you definitely knew you hit Mr. Dunphy on the fourth shot.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And how close would you have been to Mr. Dunphy as you fired that fourth shot?

CST. SMYTH: I was very close.

MS. CHAYTOR: Okay. And can you tell the Commissioner what you mean in terms of feet?

CST. SMYTH: Three feet, perhaps.

MS. CHAYTOR: Okay.

CST. SMYTH: Four feet.

THE COMMISSIONER: And that's when you fired the fourth shot.

CST. SMYTH: The fourth shot, yes, Sir.

MS. CHAYTOR: Constable Smyth, in terms of the second shot, is it possible that you went over closer to the body in firing the second shot – or closer to Mr. Dunphy?

CST. SMYTH: Pardon? Do you think – sorry.

MS. CHAYTOR: Is it possible that you went closer to him in firing the second shot?

CST. SMYTH: I don't think so.

MS. CHAYTOR: And you never thought that at any point in time?

CST. SMYTH: No.

MS. CHAYTOR: Okay. I just wanted to ask you then to clarify something you did say in your April 6, 2015, statement. If we could have, please, P-0119. That's good.

Constable Smyth, when you said you were about three feet from him. Are you talking about where your feet would have been positioned or where – you're up in, with your arms extended at that point in time – or are you talking about three feet from where your weapon would have been?

CST. SMYTH: Probably from where my weapon would have been.

MS. CHAYTOR: And we need page 15 of this document. I'll just scroll down; hopefully it's the right page number.

CST. SMYTH: Maybe somewhere in between that, but – and maybe, like, where my weapon was and where my elbows were and my body was, is somewhere in that range.

MS. CHAYTOR: Okay. And this is towards the bottom of the page and onto the next page. Okay.

“So I start to move away and I draw my firearm and the gun is still coming at me and I'm going towards the door.”

So I just want to ask you about that, too, Constable Smyth. So at all times when you're shooting, did Mr. Dunphy keep the gun in his hands?

CST. SMYTH: Yes.

MS. CHAYTOR: And did he keep following you with the rifle?

CST. SMYTH: Yes.

MS. CHAYTOR: “And I – like there was never – there was never a point – the only thing I said was no. I said no, no, no. No, no, no, is what I was saying. And I just – I started firing. And I think – I think I still had my hand up” –and so that would have been your left hand, right?

CST. SMYTH: Yes.

MS. CHAYTOR: –“and I fired two shots in center mass. And I don't know – like I wasn't sure if it – if it connected, if it hit.” So you had two shots fired. “He was still moving and he still had – the weapon was still his hands and I kept moving towards the door. Like it was no – I'm describing this but I – it's very fluid and it's all – there was never a stoppage in the – in the shots being fired.”

So there was no stopping. You're just bang, bang, bang, bang, four shots, is that right?

CST. SMYTH: It was very quick.

MS. CHAYTOR: Okay, all right. And what does your course of fire teach you in terms of shooting in that situation?

CST. SMYTH: During our course of fire is two shots, center mass, reassess, and if the threat is still perceived, one shot to the head.

MS. CHAYTOR: Okay. Did you reassess after your first two shots?

CST. SMYTH: I was looking at a gun pointed at me the whole time. So I think that assessment in this particular situation started from the point I saw the firearm and never stopped until I was out of the room.

MS. CHAYTOR: Can you just explain for the Commissioner what it means to reassess? Are you supposed to take your gun down, are you supposed to take your fingers off the trigger? What is it that you're supposed to do to reassess?

CST. SMYTH: We're taught to fire two shots and reassess. Your firearm remains on target. It teaches you to take a breath and look around you, look side to side, and if your – and determine if your threat still exists.

MS. CHAYTOR: And you determined that the threat still existed because Mr. Dunphy was still holding the rifle, is that it?

CST. SMYTH: He's still pointing the gun at me, yes.

MS. CHAYTOR: And it says, "And I don't know if my hand stayed up or if I brought it together." So what is it that you mean by that, I don't know if my hand stayed up or if I brought it together?

CST. SMYTH: If I brought my left hand to meet my right hand for a proper shooting grip.

MS. CHAYTOR: "I'm not sure. And so I – I came over to the body and I – and I – I shot at his head and I don't know if I hit it. And as I'm still moving and I don't know if I hit his head and I – it's a second shot which I know connected. In the side of his head."

So I just want to ask you and give you an opportunity to explain that, Constable Smyth, because when I read it, it appeared to me that you're saying I came over to the body and that's where the first head shot occurred.

CST. SMYTH: I never moved closer than what that arc of getting out of the room was. I was closer by virtue of the exit also being close to him, but I hadn't made any extra movement towards him that didn't involve also getting out of the door.

I didn't believe that first head shot had been on target. I was looking at the gun and still very focused on that.

MS. CHAYTOR: Why did you fire a fourth shot?

CST. SMYTH: I still felt threatened.

MS. CHAYTOR: Did you not see the first wound to Mr. Dunphy's head?

CST. SMYTH: No, I didn't.

MS. CHAYTOR: And after the shooting, you went back into the living room.

CST. SMYTH: Yes, I did.

MS. CHAYTOR: And did you then observe the wound that the first shot caused to his head?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. It's a fairly significant wound, isn't it?

CST. SMYTH: Yes.

MS. CHAYTOR: And, in fact, that wound is towards the side front of his forehead and through his skull. It takes out a piece of his skull in the back and lands in the chair that we now understand that's what happened.

Can you explain how it is you didn't see the injury inflicted to Mr. Dunphy on that first shot?

CST. SMYTH: I was so focused on that gun. That's the only explanation I have.

MS. CHAYTOR: I'm sorry?

CST. SMYTH: I was focused on the gun. I was looking at the gun.

MS. CHAYTOR: On his gun?

CST. SMYTH: His gun.

MS. CHAYTOR: Okay.

Commissioner, this might be a good point to take the morning break, please.

THE COMMISSIONER: Uh-huh.

MR. AVIS: Commissioner, I do just have an observation.

UNIDENTIFIED SPEAKER: (Inaudible.)

MR. AVIS: Oh, sorry.

When Mr. Dunphy is being asked – sorry, forgive me – Mr. Smyth is being asked about the wound to Mr. Dunphy's head, the picture of the wound is later in time. We don't have a picture of what it looks like the instant it is shot. It's my understanding it's about the width of a bullet. What we have is a bleed out. And he is being asked why he didn't see this mark and bleeding out. We don't know that – are we advancing that it wouldn't have been there at the time he shot him?

THE COMMISSIONER: That's not the wound that Ms. Chaytor is referring to, is it?

MR. AVIS: Maybe I misunderstand.

THE COMMISSIONER: Is it the entrance wound or the exit wound there?

MS. CHAYTOR: It's the entrance wound and I understood that Constable Smyth did say that when he observed Mr. Dunphy after the shooting, it was quite a significant wound.

CST. SMYTH: Yes, it was.

MS. CHAYTOR: Whether it's exactly how it's depicted in the pictures by the time Chris Saunders takes those pictures, it may have been worse, but Constable Smyth is not denying that it's a very significant wound that you observed within minutes of the shooting.

CST. SMYTH: It was pretty shocking, yes.

MS. CHAYTOR: It was shocking –

THE COMMISSIONER: Okay, I have to confess I'm not completely following what your point is, Mr. Avis?

MR. AVIS: Well the point, my understanding is that the point of the question from inquiry counsel is, is that there would have been something to see the wound afterwards – has bled. It starts bleeding from the first time the bullet hits it, but we all know that if you get an, you know how, how much it had bled out.

So moments later when he looks, it had bled out. That's my point. The (inaudible) when the bullet, when you're first shooting, in a matter of seconds, less than a second, I don't – our position would be that it wasn't bleeding out. I guess that'll have to come from somebody else.

THE COMMISSIONER: Well, we'll need some expert evidence on that, Mr. Avis, unless you've been doing something on the side that I'm not aware of in terms of –

MR. AVIS: Well, with respect –

THE COMMISSIONER: – forensic medicine, but go ahead.

MR. AVIS: With respect, counsel is assuming that the time he looked at the wound after the shooting was what would have been visible at the time he pulled the trigger. And I'm suggesting counsel is making that assumption.

THE COMMISSIONER: Well, if that's an erroneous assumption, you're going to be able to raise that with an appropriate witness, I take it.

MR. AVIS: Thank you.

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

MS. SHEEHAN: All rise.

Recess

MS. SHEEHAN: All rise.

The Commission of Inquiry is now in session.

Please be seated.

THE COMMISSIONER: Now, I apologize, we broke our own rules about no more than 15 minutes, but we had something to discuss. Also it has been raised, somebody I think – a couple of counsel have wondered if it might be possible to sit on Friday. I have an appeal that's scheduled for all day tomorrow and probably Friday, but I won't know until late tomorrow whether it's likely to go over into Friday. So I'm willing if you wanted to chance waiting until Thursday to give you an indication, but it gets a little complicated.

MR. KENNEDY: Yes, Commissioner, from Constable Smyth's perspective, we'd certainly like to get this, his testimony finished as quickly as possible. If you knew late tomorrow afternoon, that would be fine with us in terms if we could utilize Friday. I don't know what that causes for other counsel, but it would be our preference to use whatever time we have.

THE COMMISSIONER: Any other counsel have a position on it?

Sorry, Mr. Simmonds is checking his book to see if he's booked something else.

MR. FLAHERTY: Mr. Commissioner, based on the schedule that we had, I've a root canal on Friday, so I cannot be here.

THE COMMISSIONER: Well, good luck.

Nobody else? Okay, I think that pretty well settles that. I think a slim chance that we're going to finish tomorrow, judging by the amount of paper that I've seen that's been deposited in my office.

Okay let's continue, Ms. Chaytor? The schedule will be – when we break today, we'll be resuming at 9:30 on Monday – sorry?

MR. SIMMONDS: No, that's fine.

MR. WILLIAMS: Is it possible just when we will have notice if we are to go on Friday? Can we set the –

THE COMMISSIONER: No, well, Mr. Flaherty has scheduled a dental appointment.

MR. WILLIAMS: Okay. So we'll (inaudible).

THE COMMISSIONER: It's not fair to override that.

MR. WILLIAMS: Okay.

THE COMMISSIONER: Go ahead.

MS. CHAYTOR: Thank you, Commissioner.

If I could have, please, Madam Clerk, P-0214. I just want to refer you back to a couple of pages.

This is the yellow file folder contents, Constable Smyth, in terms of what was written here. And when we were looking at it you indicated the Honda information. That would have been part of the information that you received from Mark Oram, the searches you asked him to do?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And there's no other indication here as to any other information you received from Mark Oram. For example, the fact that he told you not on file, that's not noted there?

CST. SMYTH: No.

MS. CHAYTOR: Okay. We have Constable Cox with an arrow but no indication in your notes as to what you obtained from Constable Cox, what information he may have provided you.

CST. SMYTH: I would have put the arrow there with the plans of a phone number to go after it. I think some of the information that's mixed in there was from Constable Cox, Route 93, Mitchells Brook.

MS. CHAYTOR: Okay.

CST. SMYTH: Number 270, I think, I believe, came from him.

MS. CHAYTOR: Yes, okay.

Fair enough. That's some of the contact information and the phone number perhaps up here which –

CST. SMYTH: Correct.

MS. CHAYTOR: – we had thought. Yes.

Okay, but nothing in terms of – you've indicated he did a PROS search for you, nothing in terms of the information that you would have received in the PROS search from him?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And perhaps this might be, then – and I, I just want to be clear, though, that the file content is everything. It's not a situation where there is something else in your file folder that's not there now.

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

MS. CHAYTOR: Okay. And there's also no notes of your discussions with Debbie and Dick Dunphy, nothing.

CST. SMYTH: No.

MS. CHAYTOR: Okay. Did you take any notes while you were speaking with them?

CST. SMYTH: No.

MS. CHAYTOR: Okay. All right.

So this would have been the complete –

CST. SMYTH: Yes.

MS. CHAYTOR: – your complete notes. Okay. All right.

And that might be a good point then, the PROS exhibit which we, we didn't refer to or couldn't refer to yesterday, if we could look at one quickly. This is P-0141. If we could just make it a little bigger, please.

And, Constable Smyth, I just wanted to bring this back up because we took it down yesterday. But this showed that Mr. Dunphy was a complainant in two situations and had been arrested. And the investigation was completed and Dunphy had a medicinal permit. So I understand that he had had been charged with production under Schedule II of cannabis, but then ultimately after the investigation he was – it was found that he had a medicinal permit for growing marijuana.

THE COMMISSIONER: Now, there is an implication in one of the documents that there was a conviction with a seven, seven-month conditional sentence for possession and production, or production and possession. That must have been another incident?

MS. CHAYTOR: That's correct. It's not this incident that you see here on the PROS search. I think that would have happened – this you'll see here is much more recent; this is 2012. My understanding on that conviction, it's 2001.

And in terms of the information, I'm just trying to clarify in terms of the information that you received from Constable Cox, because there was suggestion in what we looked at from his communications with the Communications Centre following the shooting, there was an indication of uttering threats. And you also had some indication, although you weren't sure if you heard that from Constable Cox or from Debbie Dunphy, that you understood he had been charged with uttering threats and it had resolved into a peace bond.

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay. So I'm just wondering if in terms of doing a PROS search we are led to understand this is the information that would have come up on Mr. Dunphy, and I'm wondering if this is consistent with what you recall Constable Cox having told you that basically he was a complainant in two situations, and the third was that he had been charged but it had, the investigation had been completed; he had a medicinal permit for marijuana.

CST. SMYTH: Yes, that sounds consistent.

MS. CHAYTOR: That sounds consistent?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay, all right.

And so not the issue of anything to do with him having been convicted of anything in the past, back in 2001, that wasn't told to you?

CST. SMYTH: No.

MS. CHAYTOR: And what about the uttering threats?

CST. SMYTH: I believe there had been some discussion around that, but that was mentioned the same time the mention of the peace bond.

MS. CHAYTOR: The peace bond? Okay.

CST. SMYTH: Yeah.

MS. CHAYTOR: And you believe Constable Cox did mention that to you?

CST. SMYTH: I believe he did, yes.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Are you saying that the peace bond related to the prior conviction?

CST. SMYTH: I believe Constable Cox had also mentioned that to me.

THE COMMISSIONER: The peace bond?

CST. SMYTH: The peace bond, yes.

THE COMMISSIONER: But did he mention anything about a conviction for purchasing or, sorry, producing marijuana or possessing marijuana?

CST. SMYTH: I don't think he got into –

THE COMMISSIONER: Because that wasn't – apart from the one that was dropped because there was a medicinal permit –

CST. SMYTH: Right, I –

THE COMMISSIONER: – it seems like there's an indication earlier on there was another conviction.

CST. SMYTH: Yes, I think he had made reference to both.

MS. CHAYTOR: And, Commissioner, you will hear further evidence on the conviction in 2001.

THE COMMISSIONER: Right.

MS. CHAYTOR: So the document that you saw yesterday, where it indicated – and this was in my line of questioning regarding what he learned from Mark Oram. The audit that was done indicated that it wasn't a criminal record but a CR was recommended; a criminal record check was recommended. And we didn't see – you haven't seen that document yet, but if you look – if then, the next step had been taken, and the criminal record check completed, then that's, I understand, where you would have seen the 2001 conviction and the reference to the uttering threats.

THE COMMISSIONER: Yeah.

MS. CHAYTOR: Okay. Constable Smyth, do you recall, I asked you about what happened to the file folder, but what happened to –

MR. KENNEDY: Excuse me one second, Commissioner. Before Ms. Chaytor goes on, there's a second page to that document. Could that just be brought up for a second? Oh, so it's only a couple of lines. Okay.

MS. CHAYTOR: That's it, yeah.

MR. KENNEDY: Thank you.

MS. CHAYTOR: Okay. It's just says in an unmarked car.

MR. KENNEDY: No, what –

MS. CHAYTOR: Sorry, is that okay? Any (inaudible).

MR. KENNEDY: Yeah, can I just see the previous page? I'm trying to get the context.

MS. CHAYTOR: This page?

MR. KENNEDY: Yeah, okay.

MS. CHAYTOR: Okay? Okay.

All right, I'm done with this exhibit. Are you done with it, Mr. Kennedy?

MR. KENNEDY: (Inaudible.)

MS. CHAYTOR: Okay.

Constable Cox, what happened to your pen? Do you have any recollection as to where the pen ended up or what happened –?

CST. SMYTH: No, I don't.

MS. CHAYTOR: Okay.

Commissioner, some of the questionings that I put to Constable Cox involved the Use of Force Training Manual and that document is in as an exhibit. It's P-0233, and it's pages 17 through to 22, would be the relevant pages where you will find the references that I mentioned in terms of, for example, threat cues, the one plus one rule, the tactical repositioning and keeping your hands free and watching the subjects hands.

So those were the references and – that I was referring to, but for the sake of time, I don't think I need to take you through that, Constable Smyth, unless – and obviously I don't expect you to be able to say, but for the sake of time, I don't think it's necessary, but those are, in fairness, these are the references. And for counsel who may have any questions on it, those were the references that I was referring to and that's where you can find them in the evidence.

CST. SMYTH: For clarification, the issue of keeping your hands free; it doesn't necessarily privy you from holding something if you can drop that item. It refers to: don't have your hands in your pockets, where it might slow your ability to respond to an incident (inaudible). That's the spirit behind that philosophy, is that your hands be in a position such that you can respond. So holding something is not necessarily prohibited as long as it's part of the duties that you're engaging in at that time.

MS. CHAYTOR: Okay. So that's your understanding.

CST. SMYTH: Yes.

MS. CHAYTOR: You can hold something but don't have your hands in your pockets.

CST. SMYTH: Don't have your hands jammed in your pockets or interlocked behind your back, that type of thing.

MS. CHAYTOR: Okay.

Okay. Now I want to move then, please, Constable Smyth, to tell us, how long were you in Mr. Dunphy's house after the shooting? And perhaps what you can do is just take us forward then from the time of the shooting, what happens next?

CST. SMYTH: As soon as the last shot was fired, I was immediately out of the room. I moved in behind Mr. Dunphy and I began speaking to him, telling him to drop the firearm, drop the firearm, and I immediately started to tactically re-enter the room. As I came round the corner in that, those tactical motions, the first thing I saw was the firearm on the ground and it was leaned up against a container. So I felt at that point, you know, the threat was no longer existent, and I continued to come around and I saw Mr. Dunphy propped back in the chair. His head was back and that's when I first noticed the entry wound on the side of his head.

MS. CHAYTOR: Okay. And I just want to ask you then, you said that you re-entered the room. Did you do that right away? Did you go back into the room? What did it mean by you tactically re-entered? Is that what you call cutting the pie, is that what you're doing?

CST. SMYTH: Correct, yeah. I guess the slang terminology would be cutting the pie, it's just a movement of quickly looking in and coming back, and then moving slightly further than you had the last time to take in more, a visual field. And you keep doing that until you can determine that the room is clear.

MS. CHAYTOR: And when you went back into the room did you then check on Mr. Dunphy?

CST. SMYTH: I got closer to him, I remember – to me, he immediately looked deceased. I didn't observe any signs of breathing, I believe, at that point. And I'm not sure if it was right at this stage or a minute or so later, I put my thumb on his neck and I didn't find any signs of life.

MS. CHAYTOR: Did you actually touch him?

CST. SMYTH: I honestly can't recall that. I remember thinking that I should do that. I got close to him to try to listen for breathing. I did also see then the entry wound on his forehead. There was no signs of life whatsoever.

MS. CHAYTOR: And what position was he in when you observed him immediately after the shooting?

CST. SMYTH: He was sat straight up in the chair, head slightly back.

MS. CHAYTOR: I'm sorry head?

CST. SMYTH: Slightly back.

MS. CHAYTOR: What do you mean by that? Can you perhaps just show us what you mean? Just slightly back, okay. All right. And did his position change at any point in time from the time you first observed him until you ultimately leave the house?

CST. SMYTH: No.

MS. CHAYTOR: And how long were you in the house after the shooting?

CST. SMYTH: For a total of probably 10 to 15 minutes.

MS. CHAYTOR: Okay. And how much time passed from the time you fired your last shot until you called the RCMP?

CST. SMYTH: It was a very short period of time. Maybe within a minute, maximum I would think two minutes or maybe maximum of three minutes, but I think that's starting to get pretty long.

MS. CHAYTOR: And we've looked at the timeline yesterday and the call to the RCMP was placed at 2:27 p.m.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Did you call anyone else?

CST. SMYTH: After I called the RCMP, I called our RNC Communication Centre.

MS. CHAYTOR: And what was your purpose in placing those calls?

CST. SMYTH: To notify police assistance, as well as medical assistance.

MS. CHAYTOR: And so from the time that you fired your last shot until you re-entered the room, how long a time period would that have been?

CST. SMYTH: Just probably 15, 30 seconds.

MS. CHAYTOR: Okay. And then until you phoned the RCMP would have been just another minute or two, is that what you said?

CST. SMYTH: Right. I did spend a period of time in the front porch still in, what I guess I'd refer to a high alert mode, not unsure if I'm potentially still dealing with somebody else in the house or maybe somebody coming from outside the house. I did a very cursory clearing of the house and, within that same period as when I called the RCMP.

MS. CHAYTOR: Okay. So you did –

CST. SMYTH: And then I spent a period of time after all that back at the front porch again looking outside.

MS. CHAYTOR: Okay. All right. So that's what I'm wondering, what it is exactly you did in the meantime between the last shot fired and then calling the RCMP. So is it your evidence that well you cut the room – you cut the pie, you go back into the room, you check on Mr. Dunphy, and is it before that happens – do you go back in the room before you're standing in the hallway area wondering if someone else is coming?

CST. SMYTH: No, that was – the first thing I did was go back into Mr. Dunphy's room and determine that the threat had been addressed. Then I went to the front porch, the front door, and spent a couple of seconds there I guess in essence catching my breath, observing over my shoulder and out the front.

MS. CHAYTOR: Okay. And what was your concern at that point in time?

CST. SMYTH: The concern, while probably not founded in any good reasoning, was that I could potentially still face another threat from either within the house or outside. I thought that

maybe somebody outside heard the gunshots and may come to the residence with a weapon of their own.

MS. CHAYTOR: Okay.

And were you concerned that his brother next door may have heard the shots and come over and pose another threat to you?

CST. SMYTH: It – the thought had crossed my mind, yes.

MS. CHAYTOR: What's your state of mind at that point in time, Constable Smyth?

CST. SMYTH: It's shock; it's extremely high alert, adrenalin is very high. Time is hard to, you know, piece together whether a sudden it was two seconds or 10 seconds. There are a lot of thoughts going through my head around, you know, family and stuff. But at the same time there's tactical considerations around whether or not I reload my firearm. I conduct a tactical and reloaded of my firearm. Consideration to the fact that I am shaking; I might drop the magazine and lose those rounds. So I'm trying to do simple math in my head, how many rounds I left in my firearm and whether or not that is sufficient to address another threat.

MS. CHAYTOR: Okay. And all of that is happening as you are in the hallway before you phone the RCMP?

CST. SMYTH: Yeah. This is going through my head in a matter of seconds.

MS. CHAYTOR: Okay. All right.

And in terms of the clearing of the house, and you told me earlier that you moved the plywood off the kitchen door –

CST. SMYTH: Yes.

MS. CHAYTOR: Did that happen before or after you phoned the RCMP?

CST. SMYTH: I believe I did that after I called the RCMP.

THE COMMISSIONER: So that, doing what, moving the plywood –

MS. CHAYTOR: The plywood that was across the kitchen door that was part of –

THE COMMISSIONER: Right.

MS. CHAYTOR: – the clearing of the house I understand, right, Constable Cox? Sorry, Constable Smyth.

CST. SMYTH: Yes.

MS. CHAYTOR: Yes.

CST. SMYTH: But it's really hard for me to piece that, those couple of minutes together 'cause I did, even when I was in the hallway looking over my shoulder, you know, I made a couple of points to look down the hallway while I hadn't removed the plywood at that point. And within that period is when I made the first phone call. I'm pretty sure after that first phone call is when I

removed the plywood and did the cursory house clearing which, again, was very, was very cursory. Look in a couple of rooms, stating verbally, police; anyone that's in the house, police.

I made it as far as the back porch where there was some marijuana plants. I think we saw pictures of it. And I came back from there and I went to the bedroom area, opened the door of the bedroom. And, actually, I can't even remember if that door was open or closed, but I looked in and it was clearly a bedroom. And then another room across that was, was another grow operation room. And then I was back to the front porch and I stayed there for probably another – it could have been as long as 10, maybe up towards 15 minutes.

MS. CHAYTOR: Okay. And so up to 15 minutes that you stayed in the house after. And so I just want to be clear, so what you just described in terms of the clearing of the house, that happens after you call the RCMP?

CST. SMYTH: I believe so, yes.

MS. CHAYTOR: Okay. You believe so. Okay.

And you're – what happened immediately after the shooting, you're in the porch for a few seconds – and correct me if I say anything that's not an accurate summary of what you're saying – a few seconds. At that point in time your adrenaline is high, you're contemplating whether or not you have to reload, is there another threat coming.

CST. SMYTH: Yes.

MS. CHAYTOR: And you cut the pie, you go back in the room, you check on Mr. Dunphy.

CST. SMYTH: Yes.

MS. CHAYTOR: And is there anything else you did before you then called the RCMP?

CST. SMYTH: No.

MS. CHAYTOR: So the suggestion in the, in the, in the timeline that was put to you yesterday from Wanda Richards that it would have been somewhere around 12 minutes or so before you phoned the RCMP. Did it take you 12 minutes to do the things that we've now described?

CST. SMYTH: No, absolutely not.

MS. CHAYTOR: Okay. And Constable Smyth, just one more document; it's P-0161. And I understand you completed a Use of Force Report regarding the incident. And there are two documents I'm going to show you: one is your Use of Force Report and one is the – the next one I'll show you is P-0128, which we had up earlier, which is your case summary the next day.

So on this document, this is your Use of Force Report that you filled out, I understand, regarding the incident and you've signed it here. And this indicates that the date was the 5th of April, 2015. The time the incident commenced was 2 p.m. and the time that it terminated was 2:15 p.m.

Do you think that that's accurate, that the incident – well, first of all, tell us, what do you mean by Time Incident Terminated?

CST. SMYTH: No, the time I don't, I don't believe those times to be accurate. And now, having some specific time references that we know, such as the last phone calls that I made to Mr.

Dunphy and the last phone call to the RCMP or the first phone call to the RCMP, I realized that that, those times are not accurate.

MS. CHAYTOR: Because this would put it, this would put it in the range of 12 minutes with which Wanda Richards suggests.

CST. SMYTH: Yes. Perhaps it would, yes.

MS. CHAYTOR: Okay. And if we could bring up then, please, P-0128. Constable Cox, do you remember when you completed that, when –

CST. SMYTH: Smyth.

MS. CHAYTOR: When did – Smyth, I'm sorry. I've done that twice now. I really apologize.

Constable Smyth, do you know when you completed your Use of Force Report.

CST. SMYTH: It was the same time I submitted – actually, no, that's not true. I think – I don't recall specifically. I thought I put it in the same time I did the case summary.

MS. CHAYTOR: Okay. And it would have been shortly after, I take it, anyhow – shortly after within a, within a day or two of the incident?

CST. SMYTH: Yes, within a couple of days for sure.

MS. CHAYTOR: Okay. And there wasn't a date on it, that's why I was asking. And this, this document is dated. It's dated April 7, 2015, 12:48. And is this the date that you actually, though, created this document or is this the date that it would have been inputted into the RNC system?

CST. SMYTH: That's the date it was actually inputted in the system.

MS. CHAYTOR: Okay. And when did you draft the content in this document?

CST. SMYTH: I drafted that the morning after. So it would have been the morning of the 6th.

MS. CHAYTOR: I just want to take you down here, then, to where the – just for the time, because I do have other questions for you on this document later. But you say here: "At approximately 1415hrs I again checked Don Dunphy's driveway and then observed a black jeep Cherokee parked there."

So according to the time you recorded on this, it's approximately 4:15 before you're even going back to see Mr. Dunphy. Does that seem like an accurate time, 4:15, to be going back to Mr. Dunphy's house?

CST. SMYTH: I think that's, again, the same references I made before. Probably more accurate based on what I know now having seen the phone records and the calls that were made after, this probably more accurate, but probably made in the, you know, a best guess at that time, the same way I did on the Use of Force Report.

MS. CHAYTOR: Okay. All right.

So then after the – after you've called the RCMP in the time period, approximately 15 minutes that you remained in the house, what did you do in that time period?

CST. SMYTH: Sorry, can you repeat that?

MS. CHAYTOR: Yes. After you phoned the RCMP and you've also phoned your RNC – you've also phoned the Comm Centre of RNC, I understand, as well, and you remained in the house you told us for a period of time, approximately 15 minutes. Is that right?

CST. SMYTH: It could've been that long. It could've been a lot shorter. I was in that front porch for a fairly lengthy period of time, just catching my breath, trying to stop shaking, continually to observe the front of the house for any potential threats, also keeping a look over my shoulder. And then once I felt I got to the point where I was a bit calmer, I re-holstered my firearm and exited the house.

MS. CHAYTOR: Okay.

CST. SMYTH: But I hadn't left that front porch.

MS. CHAYTOR: Okay. And is that the time period in which you then did your cursory clearing of the house? You moved the plywood. You've looked in some of the rooms. Is that –

CST. SMYTH: No, that was already done.

MS. CHAYTOR: Okay. All right. So I just want to be clear because I was asking about after you called the RCMP –

CST. SMYTH: Right, yes, sorry.

MS. CHAYTOR: – until you leave the house.

CST. SMYTH: Yes, I did that cursory clearing within a minute. It probably took me a minute and a half to do that.

MS. CHAYTOR: Yeah, it's not a very big house.

CST. SMYTH: No, and I didn't do a good, thorough clearing of any sort.

MS. CHAYTOR: Okay. And so what were you doing the remainder of the time that you're in the house?

CST. SMYTH: I was stood in that front porch.

MS. CHAYTOR: Did you move anything in the house after the shooting?

CST. SMYTH: No, other than that piece of plywood. And if I'd moved anything else it wouldn't have been intentional, just – like I said, I might have hit that stick with my foot when I was stood next to Mr. Dunphy. But I didn't go further into that room after that.

MS. CHAYTOR: How long did it take the RCMP until the first officer arrived on scene?

CST. SMYTH: Once I was outside?

MS. CHAYTOR: Well, from the time you placed the call; do you know how long it took them to get there?

CST. SMYTH: It felt like an eternity but it may have been 28, 25 minutes.

MS. CHAYTOR: I'm sorry?

CST. SMYTH: It could have been as low as 20, 25 minutes. It may have been upwards of 30.

MS. CHAYTOR: Okay. And at some point you leave the house.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And why did you do that and where did you go?

CST. SMYTH: I went to the vehicle. I got water out of the vehicle. While I was in the porch I remember – while I was in the house I remember my mouth getting very dry all of a sudden and just having that need for water. So I left the house, once I felt that the risk level was minimized. I went to my patrol vehicle and removed a bottle of water from the center console. And I stood outside the vehicle for the duration.

MS. CHAYTOR: Okay. So you stayed outside by your vehicle then?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: And did you activate the lights on your vehicle?

CST. SMYTH: After a few minutes I did, yes.

MS. CHAYTOR: Okay. And why did you do that?

CST. SMYTH: For two reasons; I wanted the RCMP to be able to quickly see the vehicle, to know where I was, and I'm still also thinking potential threat, that if somebody else came demanding to come in the house or demanding – or came with a firearm, that there would be no confusion as to who I was. I wanted them to immediately recognize that there was a police officer in the driveway.

MS. CHAYTOR: Okay. And did anybody come?

CST. SMYTH: No.

MS. CHAYTOR: Did anyone pass by?

CST. SMYTH: I did see a black vehicle very early on drive by and drive slowly; they went west.

MS. CHAYTOR: And did you have any sense of who was in that vehicle?

CST. SMYTH: I thought it might have been his brother and, and sister-in-law, but I wasn't sure.

MS. CHAYTOR: Did you retrieve anything from your car or did you put anything in your car?

CST. SMYTH: I retrieved a bottle of water, that's it.

MS. CHAYTOR: Other than that?

CST. SMYTH: No.

MS. CHAYTOR: That's it. Okay.

And the firearm, or the rifle you said, when you went back into the room it was on – it was on the floor? Or leaning up against –

CST. SMYTH: Yeah, it was leaning up against a container, yeah.

MS. CHAYTOR: – leaning against a container. Okay. And did you touch it?

CST. SMYTH: No.

MS. CHAYTOR: Did you move it in any way?

CST. SMYTH: No.

MS. CHAYTOR: Describe its position. Which position was it pointing?

CST. SMYTH: It was pointing towards the floor, back towards Mr. Dunphy.

MS. CHAYTOR: And was that the position the rifle was in when you last saw it, immediately – when you had last seen the rifle, while it's in Mr. Dunphy's hands, is that the position the rifle was in?

CST. SMYTH: Pardon me?

MS. CHAYTOR: Okay. So the position you saw it was that the barrel is pointed back at Mr. Dunphy. Is that the position it had been in when you had last seen it during the shooting?

CST. SMYTH: While it's in his hands? Do I think it's on the floor?

MS. CHAYTOR: Yes, while it's in his hands, when, when – yes.

CST. SMYTH: So –

MS. CHAYTOR: Is it in the same position? Is it, is it point – was it pointing towards Mr. Dunphy when he had it in his hands?

CST. SMYTH: No, it was pointed at me.

MS. CHAYTOR: Okay. So it's in, it's in the opposite position.

CST. SMYTH: Well, by the time it's pointed at – the last time it was pointed at me, it had moved, I guess, perhaps, you know, 90 degrees, 'cause I had moved and it had followed me.

MS. CHAYTOR: Okay.

CST. SMYTH: So I don't know if that means it's opposite.

MS. CHAYTOR: Okay. But it's no longer pointing out towards the room, it's pointing back towards Mr. Dunphy.

CST. SMYTH: Correct.

MS. CHAYTOR: Okay. Did you see the rifle leave Mr. Dunphy's hands?

CST. SMYTH: No.

MS. CHAYTOR: Are you able to offer any explanation in terms of the landing position of the rifle? Are you able to describe or explain how the rifle would have landed?

CST. SMYTH: I have no idea.

MS. CHAYTOR: Okay. And it's your evidence that – today, you're telling us that the rifle was leaning up against the container when you went back in the room.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Do you recall telling the RCMP in your first statement that you gave, April 6, 2015, that you saw the gun on the floor in front of the chair? And there's no mention of it leaning up against a container. It's on the floor in front of the chair. Do you recall telling them that the next day?

CST. SMYTH: I probably said that but I still consider the gun to be on the floor.

MS. CHAYTOR: Okay.

And perhaps then we can bring up P-0010, Photo 038. And the statement that I referred to was P-0119 and it's page 16, for the benefit of counsel and the Commissioner, in terms of the reference regarding the position of the gun.

Constable Smyth, this would be similar to the view you would have had when you came back into the room.

CST. SMYTH: Yes.

MS. CHAYTOR: Correct?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Would you describe – I see the gun and the blue container. Would you describe that as being on the floor?

CST. SMYTH: The gun is on the floor leaning against a container.

MS. CHAYTOR: Okay. And when you called the RCMP – and I won't take you to this but it's P-0125. And I'll ask again at any time do you want to be taken to it. But one of your first calls to the RCMP following the shooting, you state the firearm is on the ground here now. You used the word ground; the firearm is on the ground here now. That's one of your first calls into to the RCMP.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And is that what you meant in terms of describing where the firearm is, that it's leaned up against a container?

CST. SMYTH: Yes.

MS. CHAYTOR: Constable Smyth, I am going to take you through the re-enactment that you did on April 10, not right now but we'll see in the re-enactment on April 10 when you come back into the room and you say this Tupperware tub, this blue container doesn't look familiar to you.

And you're trying to – and we'll hear you exactly on it but you didn't think this Tupperware container looked familiar to you. Is this the container that the gun was up against when you came back in the room?

CST. SMYTH: I have the same recollection now as I did then, that it was on the floor leaning against a container. For some reason that particular container doesn't necessarily fill that void.

MS. CHAYTOR: It doesn't resonate with you?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And in your statement on September – your September statement, page 5 of that statement, which is P-0217, you stated: I didn't see the gun on the ground until I came back in. So you used on the ground again in that. But what you're saying is that you're confident this is the position of the gun when you went back into the room?

CST. SMYTH: Yes, I consider that to be on the ground.

MS. CHAYTOR: What happened after the RCMP arrived? Who was the first on the scene?

CST. SMYTH: I believe it was Adrian Cox.

MS. CHAYTOR: Okay. And did anyone else – you told me no one else passed by other than this one car, and no one else came to the scene. At any point in time did any RNC member come to the scene?

CST. SMYTH: No.

MS. CHAYTOR: Okay.

If you could then, take us forward after Adrian Cox arrived, what happens?

CST. SMYTH: When he pulled into the driveway – I think first he overshot the house a little bit and he reversed. He pulled into the driveway. I made a point to show him my badge that was on my belt so he knew who I was. He approached me. I told him quickly what happened and made sure he understood that I hadn't properly cleared the house, and that I hadn't properly cleared the gun.

MS. CHAYTOR: Okay.

And did – were you placed in a police car right away?

CST. SMYTH: No.

MS. CHAYTOR: Okay. Was any restriction placed on you in terms of your movements around the scene?

CST. SMYTH: I don't know if he – he might have said wait right here, but I didn't feel any restriction, per se, but I also understood that – in light of what just occurred – I wouldn't be going back into the house. I never made any motion back towards it either.

MS. CHAYTOR: Okay. So you didn't, at any point in time, go into the house with the RCMP –

CST. SMYTH: No, I didn't.

MS. CHAYTOR: – that evening?

CST. SMYTH: No.

MS. CHAYTOR: Okay.

And what about yourself in terms of medical attention. Did you receive any medical attention at the scene?

CST. SMYTH: The paramedics wanted to check my vitals, yeah.

MS. CHAYTOR: Okay. And how were you?

CST. SMYTH: My blood pressure was very high.

MS. CHAYTOR: Did you have other interactions with the RCMP at the scene? At some point in time did they seize your weapon or your use-of-force weapons?

CST. SMYTH: Yes.

MS. CHAYTOR: Yes? Okay.

And did they also take your vehicle keys?

CST. SMYTH: I think the vehicle keys were – I had already started the car; they were in the ignition.

MS. CHAYTOR: Okay. So when did you start the car?

CST. SMYTH: When I came out of Mr. Dunphy's house, when I went to turn the lights on. The car needed to be on in order to activate the lights.

MS. CHAYTOR: Okay.

And at what point in time after – how long after the first officer arrived on the scene was it before your use-of-force weapons were removed or taken from you?

CST. SMYTH: It doesn't feel like it was very long, maybe five or 10 minutes.

MS. CHAYTOR: Okay.

And how long did you remain on the scene after the RCMP arrived?

CST. SMYTH: It may have been 45 minutes.

MS. CHAYTOR: Okay.

And then where did you go and who took you?

CST. SMYTH: There was an officer who brought me back to the Holyrood detachment.

MS. CHAYTOR: Did you make any phone calls or message anyone else while you were still at the scene?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay, and who?

CST. SMYTH: I know I spoke to my wife. I think I exchanged some text messages with Warren Sullivan, I believe, another co-worker. A couple of co-workers at that point had, I guess, received news, information, as to what was happening and deducted that it was me involved. I did at one in time receive a call from the chief, I think, just as I was about to leave. And I did speak to, I believe, one of our duty officers. I can't recall if it was Staff Sergeant Adams or Tilley.

MS. CHAYTOR: Okay.

And the officer who transported you back to Holyrood, did you have any discussion with him?

CST. SMYTH: I don't recall any great discussion about what had occurred. I undoubtedly made some reference to it and some utterances, but –

MS. CHAYTOR: Any of the other officers or that you spoke with your co-workers, did you tell them what had happened?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: What did you tell them happened?

CST. SMYTH: The same thing I told you here today. Do you want me to repeat it, or?

MS. CHAYTOR: Okay, so did you tell them that Mr. Dunphy had pulled a rifle on you and that –

CST. SMYTH: Yes.

MS. CHAYTOR: – you responded?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And those were utterances you made at the scene shortly after this had happened?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And what happens when you get back to the RCMP detachment?

CST. SMYTH: I was brought upstairs to an office and remained there for a period of time. I think some of our RNC officers were there. They came into the room as well.

MS. CHAYTOR: I'm sorry; some RNC officers were there?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay, and tell the Commissioner who they were.

CST. SMYTH: I believe it was Staff Sergeant Mike Adams, Staff Sergeant Tilley, and also Warren Sullivan and another member from the association arrived there as well. I think it was (inaudible).

MS. CHAYTOR: Okay, and so they were there when you got brought back to Holyrood, and then what happened? You said you were brought upstairs?

CST. SMYTH: Yes.

MS. CHAYTOR: And did they meet in a room with them?

CST. SMYTH: With our members?

MS. CHAYTOR: Yes.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

What did you understand the purpose of Sergeant Tilley and Inspector Adams being there? Why were they there?

CST. SMYTH: They told me they were just there as a support, if I needed anything. It didn't seem to be anything more than that.

MS. CHAYTOR: Did you go through a Critical Incident Stress Debriefing with them at the RCMP detachment that night?

CST. SMYTH: I, I think they kind of indicated that, you know, they were, they were available for that if I had any issues or concerns with my own emotional state.

MS. CHAYTOR: Okay. And, and what did you respond? Did you go ahead with it with them?

CST. SMYTH: I had, I wanted to tell them what happened. They, they were reluctant for me to even speak about it, or at least said I didn't have to do that. They tried to make even small talk, I guess, if you will, change the conversation a bit. But of course I, I didn't have much else on my mind, so I did have that, that urge to, to tell them exactly what happened. I did walk them through what had occurred.

MS. CHAYTOR: Okay. And so you did give, then – you did tell them what happened?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. All right.

And so, though, in terms of that being in the context of a Critical Incident Stress Debriefing, did you understand that was what Inspector Adams was doing?

CST. SMYTH: I guess it was part of the reason. I don't know if that would be the exact process that you would normally follow for a, for a debriefing, but I think it was – the, the goal was to try to mitigate any impact that I was dealing with as a result.

MS. CHAYTOR: Okay. Did, did you at some point in time, then, go through a formal CISD?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. And when was that and with whom did you do that?

CST. SMYTH: It started the following day. It was with Marina Hewlett. She's a psychologist.

MS. CHAYTOR: Okay. So you didn't do that with any RNC officers?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And that was part of your EAP I take it, was it?

CST. SMYTH: Yes.

MS. CHAYTOR: Yes.

And what did you understand the purpose of Constable Sullivan – and, I believe, Constable Scott Harris was also at the RNC detachment that evening with you. What did you understand their purpose was to be at the RCMP detachment?

CST. SMYTH: I think it was much the same, the support, show support.

MS. CHAYTOR: And was Warren Sullivan – I think you mentioned a member of the association. Was he in an executive position in the association at the time?

CST. SMYTH: Yes. Both him and his cohort were. Scott Harris is the member that was with him. They were both on the executive. Warren is president.

MS. CHAYTOR: Okay. And is Warren Sullivan also a personal friend?

CST. SMYTH: I would consider him a friend, yes.

MS. CHAYTOR: Okay.

Did the RCMP ask you to provide a statement that evening?

CST. SMYTH: They asked me if I wanted to.

MS. CHAYTOR: And what did you say?

CST. SMYTH: I said I would like to, but recommendations being given to me is that I wait, sleep on it for a night, to better gather my thoughts and memory of the incident.

MS. CHAYTOR: And who made that recommendation?

CST. SMYTH: I think it was widely recommended from each of the RNC officers that were there and the RCMP members agreed with it.

MS. CHAYTOR: Okay. And why –

THE COMMISSIONER: Wait, who'd you say recommended –

CST. SMYTH: My co-workers, my RNC co-workers.

MS. CHAYTOR: So the four individuals were – all of them or one more so than the other? You're talking –

CST. SMYTH: I don't think it was one more so than any other, no.

MS. CHAYTOR: That was the recommendation of all four of them, for you to wait?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And why was that? Why are they asking you to wait before you gave your statement?

CST. SMYTH: Their understanding of critical incident stress scenarios is that your memory becomes clearer and you can provide a better account of details several hours after.

MS. CHAYTOR: And you said the RCMP agreed with that, to allow you to – or were okay with you not giving a statement that evening.

CST. SMYTH: Yes.

MS. CHAYTOR: Can you tell me which RMCP officers, one, two, how many? Who were they who said that?

CST. SMYTH: I don't recall specifically who it was. It was two or three officers there at that time and I explained to them that I was certainly willing and wanting, actually, to give a statement but felt I probably should follow the, the objective recommendations of others, and what their reasoning was, and they said, yes, that's probably a good idea.

MS. CHAYTOR: Okay. And, Constable Smyth, in terms of yourself, you wanted to give a statement, you're saying, or you were prepared to do so.

CST. SMYTH: Yes.

MS. CHAYTOR: But you followed the recommendations of others.

CST. SMYTH: Yes.

MS. CHAYTOR: Did you feel yourself that you were up to giving a statement?

CST. SMYTH: I felt I could.

MS. CHAYTOR: Okay. And in terms of the statements that you told to your four counterparts or co-workers that evening and how you described the incident to them, did you give them the same account that you gave the RCMP the next day?

CST. SMYTH: I don't think it would have been in near the detail, knowing that it wasn't an official statement. I fully acknowledge that it was a little more challenging to probably talk about it then because I'm still dealing with some, you know, emotional response from, from the incident itself.

MS. CHAYTOR: Okay. All right.

And in terms of your blood pressure, do you know if that had – was still elevated at this point in time?

CST. SMYTH: I don't think I took it again after, but I certainly felt like it.

MS. CHAYTOR: Okay. So that paramedics didn't follow up with you and do a second –

CST. SMYTH: No.

MS. CHAYTOR: – blood pressure check? Okay.

Did the RCMP seize your clothing that night?

CST. SMYTH: Yes.

MS. CHAYTOR: And what time did that occur?

CST. SMYTH: Maybe around 7 o'clock.

MS. CHAYTOR: Okay. And I think the records show about 18:50, so ten to seven. That seems about right for you?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. All right.

And did the RCMP ask you to provide a breath or a blood sample that night?

CST. SMYTH: No.

MS. CHAYTOR: Did they ask anything else of you?

CST. SMYTH: Not that I can specifically recall. Just that they would be in touch the following day for the statement or asked me to call them maybe.

MS. CHAYTOR: And I believe that the paramedics did do a second check on your blood pressure, but you don't remember that do you?

CST. SMYTH: I don't recall that, no.

MS. CHAYTOR: Okay.

So what happens next, is there anything else that happens – how long were you at the RCMP detachment that night and then where do you go?

CST. SMYTH: I think once another officer brought clothing for me, I turned over all my clothing to an RCMP officer and Constable Sullivan then drove me back to my residence.

MS. CHAYTOR: Okay, so Constable Sullivan did that? Anybody else in the vehicle with him?

CST. SMYTH: I believe Scott Harris was there as well.

MS. CHAYTOR: Okay.

So you went home. What time did you arrive home that night?

CST. SMYTH: I feel like maybe around maybe around 8:30.

MS. CHAYTOR: Okay.

Other than what we've already covered, did you have then any other communications that evening? Obviously you went home and spoke with your wife, so I don't mean that but in terms of anyone else – did you have any communications about the incident with anyone else the evening of April 5?

CST. SMYTH: I think I did speak to a few friends and family, like my parents, a couple of close co-workers maybe I spoke to. There was some text messages and emails at that point. Of course, as you know, I did receive a call from the premier at the time, Paul Davis.

MS. CHAYTOR: Okay, and tell us then about that discussion. Did he call you or did you call him?

CST. SMYTH: He called me.

MS. CHAYTOR: Okay, and what was discussed?

CST. SMYTH: There was no details of the incident discussed, just that he had heard what occurred, asked if I was okay, asked how the family was doing and that was basically it. It was a very brief conversation.

MS. CHAYTOR: Okay, and about how long did that last?

CST. SMYTH: Maybe four or five minutes.

MS. CHAYTOR: Okay, and that's the evening of April 5, is it?

CST. SMYTH: Yes.

MS. CHAYTOR: Did he ask you what happened?

CST. SMYTH: No.

MS. CHAYTOR: Okay. Did you tell him what happened?

CST. SMYTH: No.

MS. CHAYTOR: Did you tell him that, what you were investigating, why you had gone to Mr. Dunphy's house?

CST. SMYTH: I don't recall telling him that. I may have, but I don't recall telling him that.

MS. CHAYTOR: Well, you were there because someone in his office had sent you a tweet. That's what initiated everything.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay, so –

CST. SMYTH: I would've been I think of the assumption that he had probably received some semblance of a briefing as to what I was doing.

MS. CHAYTOR: And that was my other question. Did he already seem to know, then, about what had led you to be in Mitchells Brook?

CST. SMYTH: I remember him making the point to say, look, I'm just calling home to see you're okay, make sure you're all right, let us know if you need anything.

MS. CHAYTOR: Okay. All right.

And, Constable Smyth, you had a cellphone with you at the scene that day.

CST. SMYTH: Yes.

MS. CHAYTOR: Is that your RNC-issued cellphone?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And did the RCMP take that phone from you?

CST. SMYTH: At that time?

MS. CHAYTOR: Yes.

CST. SMYTH: No.

MS. CHAYTOR: Okay. And I believe that we do have in the records that you consented to them taking the phone and that was April 24 of 2015. Does that seem right?

CST. SMYTH: That seems right, yes.

MS. CHAYTOR: Okay. And so between April 5, 2015, and April 24, 2015, you continued to use that phone.

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. So any – did you have, did you have any other phone? Did you have a personal phone besides or was this what you used, this was your only phone?

CST. SMYTH: That's the only cellphone I used.

MS. CHAYTOR: Okay. So in terms of any communications you had by way of cellphone in that time period, from the date of the shooting until April 24, they would be on that phone.

CST. SMYTH: Yes, they would.

MS. CHAYTOR: Okay. And once you turned your phone over to the RCMP did you then get another phone?

CST. SMYTH: I got issued another phone through the RNC, yes.

MS. CHAYTOR: Okay. All right.

And even after you turned your phone over to the RCMP would you have been able to access the messages that were on that phone through your new phone or through a computer? Would you still be able to access your email and your messaging?

CST. SMYTH: I, I was still able to use text. I wasn't able to access what, what was on the, that particular device, no.

MS. CHAYTOR: Between April 5 and April 24, 2015, did you delete anything from your RNC-issued cellphone?

CST. SMYTH: I probably did but not with the purposes of hiding it. I would periodically delete, and still do, messages and emails from my phone for the sake of getting it off my screen or storage issues.

MS. CHAYTOR: Okay. Did you ultimately get that phone back?

CST. SMYTH: Yes.

MS. CHAYTOR: And do you know when that was? When did you get the phone back?

CST. SMYTH: I don't know. I never, ever used the phone or activated it again.

MS. CHAYTOR: Okay. Did you delete any email regarding this matter through – otherwise, then, through a computer or through other electronic device like an iPad or anything?

CST. SMYTH: No.

MS. CHAYTOR: If we could bring up, please, P-0134. And I'm going to ask, Madam Clerk, could you go, please, to page 7. Okay.

I'm just going to show you a couple of messages here, Constable Smyth. We have SMS message incoming, and this is April 5, 2015. And the time over here – this column here would be the Newfoundland time, so at 3:42 p.m. there's a message from Brian Marshall. Who is Brian Marshall?

CST. SMYTH: He's a co-worker.

MS. CHAYTOR: Okay. Okay. And he's asking do you need anything from the association now. I may need to let Sully know. Who's Sully?

CST. SMYTH: Sully would be Warren Sullivan, president of the association.

MS. CHAYTOR: Okay. And do you recall these messaging – this is 3:42 p.m. Are you still at the scene or are you in Holyrood at this point in time?

CST. SMYTH: I'm not sure.

MS. CHAYTOR: Okay. So if the shooting took place shortly before 2:30 and it took approximately 25 to 30 minutes for the RCMP to get there, and you remained on scene for another, I think you said approximately 45 minutes. Would you still be on scene when this communication is happening?

CST. SMYTH: I'm giving you approximate times, so I could have been still there or I could have been en route to Holyrood. I can't imagine I was back in Holyrood by that point.

MS. CHAYTOR: Okay. And this is happening within an hour, or an hour and 15 minutes of the shooting.

CST. SMYTH: There's a good chance I'm still there on the scene.

MS. CHAYTOR: These communications? Yes.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. All right.

And then the next communication we have here, it's a call, and it's an outgoing call. So I understand that to mean that you made a call. And that happened at 3:41 p.m. and we see some symbols here, but then it's Joe Browne. Do you recall – did you call Joe Browne from the scene?

CST. SMYTH: I almost called Joe Browne from the scene.

MS. CHAYTOR: And why is that?

CST. SMYTH: Well, I felt he should know what happened, but I didn't complete the call. I felt probably I wasn't the appropriate person to tell him.

MS. CHAYTOR: Okay. So while you're still at the scene you thought you would call him and you didn't complete the call?

CST. SMYTH: That's right.

MS. CHAYTOR: Okay. And you were going to tell him what happened. And why Joe Browne? Why would you contact Joe Browne to let him know?

CST. SMYTH: He's chief of staff of the Premier and I work under that office, so I felt it was prudent that he be aware.

MS. CHAYTOR: Okay. And what do you mean you work under that office?

CST. SMYTH: Well, that's – our mandate is to provide services to that office and the specific job I was doing that day was related to that office, so I felt it was prudent that the chief of staff be aware.

MS. CHAYTOR: Okay.

CST. SMYTH: I never made the call. The call never got completed.

MS. CHAYTOR: The call never went through?

CST. SMYTH: I stopped it. I ended it before it –

MS. CHAYTOR: Okay. And over here we see deleted. Did you at some point in time delete any reference to that call from your phone?

CST. SMYTH: I didn't think I did but I may have.

MR. KENNEDY: Commissioner, if I could just – I don't know if you have that actual exhibit in front of you as opposed to on the screen, but if you see it on the screen there are a bunch of symbols that appear to be Chinese symbols. I don't know if Ms. Chaytor has the actual exhibit there.

MS. CHAYTOR: Yes.

MR. KENNEDY: You don't get a good picture of it on the scene.

MS. CHAYTOR: Yes. And we have some questions about that. Constable Smyth, that's not something that you are able to explain, I understand, in the interview –

CST. SMYTH: No.

MS. CHAYTOR: – why those would be there.

CST. SMYTH: I have no idea.

MS. CHAYTOR: You didn't have Mr. Browne input it into your phone through the use of those symbols did you?

CST. SMYTH: I have no idea how to bring up those symbols on my phone.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Maybe we should check with somebody in the US.

MS. CHAYTOR: Okay. This might be a good place then for us to take a break please, Commissioner.

THE COMMISSIONER: Okay. Well, it's 12:30 just about, for lunch.

MS. CHAYTOR: Thank you.

THE COMMISSIONER: So we'll break here I think; return at 1:30.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Okay, ready to continue, Ms. Chaytor.

MS. CHAYTOR: Good afternoon, Constable Smyth.

Before I go back to your phone records, there's a couple of questions I just wanted to cover off with respect to the, the actual incident of the shooting. One is – and in answering about seeing the rifle, you said something about the bolt of the rifle. What is it that you exactly saw in terms of the bolt of the rifle when the rifle first appeared?

CST. SMYTH: I remember seeing the bolt on the rifle. I, I'm not sure how to further describe that –

MS. CHAYTOR: Okay, so you did that –

CST. SMYTH: I recognized it as being a bolt-action rifle.

MS. CHAYTOR: Okay. So that's how you were able to identify that it was, in fact, a rifle. And part of it was that you saw the bolt.

CST. SMYTH: I did see the bolt, yes.

MS. CHAYTOR: Okay.

CST. SMYTH: Yeah.

MS. CHAYTOR: Did you see whether or not the bolt was open?

CST. SMYTH: I couldn't tell that, no.

MS. CHAYTOR: Okay. Did you notice that after the shooting? When you went back into the room and you saw the rifle, did you notice whether or not the bolt was open?

CST. SMYTH: I, I think I may have seen that the action was open, yes.

MS. CHAYTOR: Okay. Also, what other use-of-force equipment were you carrying at the time?

CST. SMYTH: Pepper spray.

MS. CHAYTOR: Okay. Did it, at any point in time did you consider using your pepper spray?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And perhaps you can tell the Commissioner why not.

CST. SMYTH: I felt I was – well, having a firearm pointed at me was deadly force and pepper spray wouldn't be an appropriate answer to deadly force.

MS. CHAYTOR: Okay.

All right, if we could go back then, please, I'll continue on with the phone records. And we have exhibit P-0134, please. And page 7, please, of this document.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

THE COMMISSIONER: Now, is this the one that was going to be made C?

MS. CHAYTOR: No, these are P exhibits.

THE COMMISSIONER: They've been thoroughly redacted, have they?

MS. CHAYTOR: I have been advised by our staff that they have been thoroughly redacted.

THE COMMISSIONER: Okay, I'll just mention for the sake of the media that there are so many redactions in some of these records that it takes an awfully long time to ensure that they're all removed, and there's things that, whether it be the name of the spouse of a police officer or a police officer's or someone else's home number, the idea is just to avoid, I guess, harassing phone calls. So I'd appreciate if the media, if there's anything picked up which should not be out

there, they use their professional judgement in terms of what gets published. But we've done several runs at making sure that they're all out. But inevitably there's one or two missed.

Go ahead.

MS. CHAYTOR: Okay, thank you, Commissioner.

Okay, so page 7 of this document. And here we have, you have some communications happening here where somebody is contacting you and they say: just heard; tried calling you, went right to voicemail, don't know if you're out of cell coverage or not, you can call me if you want; anything you need, let me know, I'll try again in a bit. And then you respond: cell coverage is spotty.

And then if you come up here you see, Brian Marshall is saying, you in Mount Carmel? And then you reply, yes. And those messages are deleted, Constable Smyth. Did you delete those messages from your phone?

CST. SMYTH: I may have, I don't recall doing that.

MS. CHAYTOR: Okay.

CST. SMYTH: I wouldn't have any specific reason to do it other than, like I said, the standard – sometimes the practice of deleting what was on my screen because it gets very full.

MS. CHAYTOR: And if, and if you had done that, that would have happened before you passed your phone over to the RCMP on April 24? You didn't get the phone – you didn't use the phone or activate the phone afterwards?

CST. SMYTH: I think these are –

MS. CHAYTOR: And they have this in their records. This is their extraction report. So it had to have happened sometime between April 5 and April 24.

CST. SMYTH: I would think so, yes.

MS. CHAYTOR: And page 9 of this document; if we could find page 9, please.

MR. KENNEDY: Commissioner, again, I don't know if this is something I should be more appropriately be doing in re-examination, but if you – the suggestion there that there's a deletion of phone calls, then two or three – the next two or three above that are to the same guy, Brian Marshall.

MS. CHAYTOR: Yes. So there are some deleted and some not. Are you able, do you – can you offer any explanation for that, Constable Smyth?

CST. SMYTH: No, I can't. I don't recall deleting those specific messages and as I stated there was periodically, and I still have that habit of swiping and deleting messages just to get them off my screen, to create room or, in some cases, storage. There's – I mean, they're benign in their nature. And the rest of the conversation's there, I would have no nefarious reason to delete them.

MS. CHAYTOR: Okay. And we'll see that –

THE COMMISSIONER: Can I – can you clarify the two messages that, on the previous page there, are noted as deleted, the content is apparently set out there, is it not?

MS. CHAYTOR: It is, yes. So they're able to – when you delete your message but then it can be, even though it's deleted from your phone, when the RCMP does the extraction, they're able to still recover the messages, I understand, for a period of time.

THE COMMISSIONER: Right. So they're there whether –

MS. CHAYTOR: Yes.

THE COMMISSIONER: I'm not quite sure what the inference would be, that if Constable Smyth wanted them off for some reason, he overlooked the fact that the content could be brought back within a certain period of time or what –

MS. CHAYTOR: Well, would you know that, Constable Smyth, that the content could be brought back?

CST. SMYTH: Recovered from the device?

MS. CHAYTOR: Yes.

CST. SMYTH: Yes, absolutely.

MS. CHAYTOR: Okay.

CST. SMYTH: I've been involved in cellphone extractions myself where we've recovered deleted data, yeah, definitely.

MS. CHAYTOR: And there are a number of those, so I think that it's a question that when you see that certain records are deleted, I think that it's only appropriate that the witness have an opportunity to speak to that and not leave an inference that there's any reason why he would have deleted those in the immediate aftermath. And if it's that he's trying to make room on his phone, well that's the answer, but we wouldn't want it left out there that certain messages are deleted and was there any purpose for that.

THE COMMISSIONER: Well, if we assume that we don't accept the – it was to provide storage or free up the screen, I'd still be at a loss to figure out what I could infer from the deletion where the contents is still there.

MS. CHAYTOR: The content is there and if he understands that it's coming back or it can be retrieved –

THE COMMISSIONER: Yeah.

MS. CHAYTOR: – that's the answer. And that's the answer. So that someone looking at this shouldn't look at it and say, well, he's deliberately deleting these messages for some reason.

THE COMMISSIONER: Right.

MS. CHAYTOR: Other than freeing up your storage on your phone, is what you're saying.

CST. SMYTH: Yeah. Brian Marshall asks: You in Mount Carmel. My answer is: Yes. There is certainly no denial of being in Mount Carmel.

MS. CHAYTOR: Okay. Please, I need this – thank you. Okay.

And also then on this same exhibit and I – it's on page 9 of the exhibit. Again, same reason because – and this is the actual email that would have brought you – an email exchange here if we can find it. So I just want to make clear – if we could find page 9, please. Okay. Make it bigger. Okay.

Okay. And at the top here, Constable Smyth, there's the email. It's one of the email exchanges that led to you going to Mr. Dunphy's or notified you of the issue. And you'll see there's a number of those email here and one of those are deleted, but not the others. Okay.

So, again, in terms of deleting, okay, I'm familiar with this individual, we'll do some background work and move to speak with him, thanks. Is there any particular reason other than making storage on your phone for you to have deleted that message?

CST. SMYTH: No, it would be the same reasoning, especially with emails. They're, if I delete it from my device, it doesn't get deleted from our actual server or be able to access that from either me –

MS. CHAYTOR: Okay.

CST. SMYTH: – through my desktop or for our IT department to access it. They're not necessarily connected once I delete them. When I delete it from the device, it's not deleted from my actual email.

MS. CHAYTOR: Now this particular message, of course, would have been relevant to the RCMP in terms of the police investigation I would think.

THE COMMISSIONER: Which one are you referring to now?

MS. CHAYTOR: I'm right at the top, Commissioner, the very first one.

THE COMMISSIONER: Okay. Now where is it noted that it's deleted?

MS. CHAYTOR: Right over on the far right, over here.

THE COMMISSIONER: Oh yeah, okay, at the top there.

MS. CHAYTOR: Okay? Whereas the other emails in the chain are not.

THE COMMISSIONER: Yeah. Okay.

MS. CHAYTOR: Okay?

And this, at this point in time, of course, the matter would be under police investigation.

CST. SMYTH: Oh, I don't know. It doesn't say when it was deleted.

MS. CHAYTOR: Okay. But in terms of it had to have happened, I would think, between April 5 or the date of when this was made. Did you delete it before then going to Mr. Dunphy's? Is that what you're thinking?

CST. SMYTH: I don't know. I don't remember deleting the email.

MS. CHAYTOR: You don't remember deleting that one.

CST. SMYTH: No.

MS. CHAYTOR: Okay. So it would have either have to have been deleted after you received it – some point after April 3 when it was received until April 24 when you passed your phone over to the police.

CST. SMYTH: That's what I would infer from that, if that's indeed what that means.

MS. CHAYTOR: Okay. And you're not able to offer any explanation for that particular email.

CST. SMYTH: I think it would be the same reasoning but, again, any emails are saved on my server. And I'm fairly confident that that email, in particular, I later located following the shooting and actually saved it to a separate folder and provided to, I think, the RCMP in Saskatoon.

MS. CHAYTOR: Okay. All right then.

And if we could look then, please, at P-0131.

MR. KENNEDY: What number was that again?

MS. CHAYTOR: P-0131. And we need to make it a little bigger.

And if we, I'm going to go to page 3 in this exhibit, please. And these are your communications or your instant messaging with Warren Sullivan.

And if we could just make that a bit bigger. Okay.

Actually if you could, I'm just going to go back and start at the bottom of page 2. Okay, so here we are and this is with Sully who we understand to be Warren Sullivan. That's correct, Constable Smyth?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And this, he just – we saw this also in your other records where you're telling him cell coverage is spotty and – you okay? As good as can be he says. And these communications are taking place at 5:46 p.m. UTC. So if we back up 2½ hours, we can see that this is happening around, I guess, 3:10, 3:15, 3:16.

So – and these are the communications I think you said earlier that you recall you did have communications with Warren Sullivan at the scene.

CST. SMYTH: Yes.

MS. CHAYTOR: Would this be those communications?

CST. SMYTH: I believe so, yes.

MS. CHAYTOR: Okay.

Call me if you can. Okay. Were you talking to the chief – and this is you asking him. Yes, he didn't have much information. I'm calling him again now. And then you say – and I understand that you, yourself, you said, spoke to the chief. You recall speaking to the chief at the scene?

CST. SMYTH: Yes. I'm not sure if I had spoken to him by this time or not.

MS. CHAYTOR: Okay. And I think your records would show that you spoke to him at 3:57 p.m. so close to 4 o'clock.

CST. SMYTH: Okay.

MS. CHAYTOR: Does that seem right?

CST. SMYTH: Sure.

MS. CHAYTOR: Okay. And then you say: Maybe he should call Joe Browne, so meaning the chief should call Joe Browne?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And then you say: He is aware of the person. And what do you mean by that? Are you suggesting Joe Browne is aware of the person? And who is it that Joe Browne would be aware of?

CST. SMYTH: Joe Browne was aware of the original email exchange that happened on Friday so he would be aware of the individual that was a subject of the shooting.

MS. CHAYTOR: Okay. So would Joe Browne, though, he wasn't aware that you were actually going to Mount Carmel or Mitchells Brook?

CST. SMYTH: No, I hadn't provided the specific details I think, other than maybe to have made previous mention that I would attempt to speak to the person.

MS. CHAYTOR: Okay. And so you think he had enough information that he would have been able to piece together what's happened in Mitchells Brook with the conversation that you had, had by email.

CST. SMYTH: I think that would have been my thought process. I may have been incorrect but.

MS. CHAYTOR: Okay.

And he says: Okay, I'll pass it on. Thanks. And then there's some information being given to you here for another individual. And I understand this is to assist you, Constable Smyth, is that right? He said to assist you with speaking to someone who'd been through a similar experience?

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay.

And then if we come down, it's later in the night on – well, I guess it's just around midnight, so that evening. It's April 6 at midnight, UTC time, so a little bit earlier before midnight, around 10:30 Newfoundland time: I have some info – and I think that should be that – you may like to hear. Call me if you want. And that's Sully to you, so Warren Sullivan, again, to you.

And did you do that? Did you call him? And what was the information? If so, what information did he give you?

CST. SMYTH: Yeah, I believe I spoke to him that evening. It was in relation to a conversation that Mr. Dunphy's brother had, had with Mike Adams.

MS. CHAYTOR: Okay.

I'm sorry; I'm going to ask you to speak up a bit.

So Warren Sullivan had some information regarding a conversation that Mr. Dunphy's brother had with Mike Adams?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And Mr. Dunphy's brother being Dick Dunphy?

CST. SMYTH: Yes.

MS. CHAYTOR: And he had spoken to –

CST. SMYTH: Mike Adams.

MS. CHAYTOR: Mike Adams? And what was the information?

CST. SMYTH: Just that they had expressed some concern for me, I guess, and that there was also no hard feelings, I guess, at that time – and I'm paraphrasing. Also, that he had been aware that Mr. Dunphy would have been in possession of a firearm or could have been in possession of a firearm, and that he had neglected to tell me that and he wished he had of.

MS. CHAYTOR: Okay. And so you learned that the evening of April 5 –

CST. SMYTH: Yeah.

MS. CHAYTOR: – from Warren Sullivan?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Did – you had met with Mike Adams back at Holyrood detachment. He was one of the officers who came there to support you or provide support to you. Did he mention any relationship or, or connection to Dick Dunphy while he was meeting with you earlier that evening?

CST. SMYTH: I can't recall.

MS. CHAYTOR: Okay.

And then we're into the next day and you're still having a communication with, with Warren Sullivan. And you're referring to you're going to give a witness statement. And this is your statement I take it; you went later that day to the RCMP.

And you indicate that no caution to be read. And what did you, what – what did you understand that to mean, Constable Smyth? Why is it that you're pointing that out to Warren Sullivan and what did you understand from that, that no caution was to be read?

CST. SMYTH: I believe he had specifically asked me if it was going to be a caution statement. And I think when he originally asked me, I didn't know. I had spoken to the RCMP sometime that day to confirm the time to provide the statement and at that time they told me it wasn't to be a caution statement.

MS. CHAYTOR: And did that surprise you that it wasn't going to be a caution statement?

CST. SMYTH: I, I think a little bit, yeah.

MS. CHAYTOR: Okay. And why is that?

CST. SMYTH: Just given the nature of the investigation, I would have probably thought there would be a caution. But I think another part of me wasn't necessarily completely surprised either. I didn't believe they had any reason to believe a criminal offence had occurred so.

MS. CHAYTOR: And so if they were thinking that a criminal offence had occurred you would have expected to have a caution statement, is that what you're saying?

CST. SMYTH: Oh, I think I would have expected it either way to some degree.

MS. CHAYTOR: That they would have done a caution statement.

CST. SMYTH: Yes.

MS. CHAYTOR: Yeah.

Okay. All right.

And I think when I asked you that same line of questioning on December 22 you said: It's a homicide investigation and I'm the only human witness. So you would have expected a caution statement.

CST. SMYTH: That would play into part of that expectation, too, yes.

MS. CHAYTOR: Okay.

And if we continue on down more towards, I think, the bottom of the page, you're referring to a debrief now. Would that have been your debrief with Marina Hewlett?

CST. SMYTH: Yes, it was.

MS. CHAYTOR: Okay.

And now we're into the 7th. Unless there's anything else there, it just looks like you and Warren Sullivan are back and forth. I take it he was – he continued to provide support to you in the days immediately following the incident.

CST. SMYTH: Yes, much of – basically this kind of support, what you see, just checking in to see if I was okay. He had offered to go with me for the statement as you can – and I told him I was fine to go alone. So there was much of that conversation.

MS. CHAYTOR: And he asked you to call him a couple of times here on April 6 and again on April 7. Did it have anything to do with any detail of the incident? Anything to do with the shooting or it is just to provide you with moral support?

CST. SMYTH: I think was more support. He was very much wanting to ensure that I engaged in the debriefing process with Marina Hewlett and how I made out there, and I think just to express the importance of that. And even if I felt it wasn't important, that it was.

MS. CHAYTOR: Okay. And then on the bottom it says: Great press conference this afternoon. And this is him saying this to you: Public opinion is changing now.

Did you and Warren Sullivan have discussions about public opinion leading up to this?

CST. SMYTH: Yeah, he knew I was having a hard time with how the issue was being perceived publicly in the media. Undoubtedly, how it was likely being reported back to the family. He knew that I was having a hard time with it. So I think he was probably trying to just put a positive spin on something that really didn't have too many positive connotations to it. And I knew the reality of that probably wasn't even accurate.

MS. CHAYTOR: I'm sorry?

CST. SMYTH: And I realized the reality, the reality of what he was saying probably wasn't accurate anyway. I think he was just trying to lighten the mood.

MS. CHAYTOR: Okay. So public opinion wasn't changing, is what you're saying.

CST. SMYTH: I didn't gather that, no.

MS. CHAYTOR: You didn't think so. Okay. All right.

And do you know which press conference he's referring to? Is that the RCMP's press conference?

CST. SMYTH: I believe it was the RCMP one, yes.

MS. CHAYTOR: Okay. If we go then to the top of the next page, you say: For sure, that was good. And then –

CST. SMYTH: Yes.

MS. CHAYTOR: Sorry?

CST. SMYTH: Yes. Sorry, I'm just confirming it.

MS. CHAYTOR: Okay. And then the RCMP want you to go back to the scene for a recreation. And you talk about that and he thinks that's a good idea and that this other individual said that that might happen. And then Sully, Warren Sullivan, says to you: You got this nailed, nobody doubting a thing.

What did you understand him to mean by that?

CST. SMYTH: I think it was just more positive reinforcement that you, you did your job. You did what you had to do. Your co-workers aren't doubting you. So, you know, go through this process knowing that while this is not being perceived in any positive light in the media or anybody else, that there are those who support you.

MS. CHAYTOR: Okay. And then I'm just going to – unless there's anything else you wanted to point out there, Constable Smyth, in this messaging, I'm going to turn to the messaging with Ed Benoit and that's the next one here.

And perhaps then, I'm not sure if we already mentioned this, but Ed Benoit is someone who had worked with you at PSU, but wasn't a member of the PSU at the time. Is that correct?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And then I believe he gets assigned back in or does work after, after April 5.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And he's writing at 6:42, and again this is UTC time. So this would be about 4:13 I guess. Just heard of an incident and that you're out that way, not looking for details but are you all right? And you say yup, I'm good. POI file, he pulled a gun on me. So perhaps you could just explain what POI is. What's a POI, is that a person of interest file?

CST. SMYTH: Yes, it is.

MS. CHAYTOR: Okay. And he pulled a gun on me. So I take it that Ed Benoit would have understood what you're saying here, saying it's a POI file, because he'd been with the PSU.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And you tell him yup, I'm good. What did you mean by that?

CST. SMYTH: I wasn't shot, I was alive.

MS. CHAYTOR: Okay. And you're telling him, this is, this is within I guess an hour and a half, or two hours anyhow of the incident, you're telling Ed Benoit that he – meaning I take it Mr. Dunphy – pulled a gun on you.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. If we could have then Exhibit P-0131, please. Oh, I'm sorry, that was P-0131, we're just continuing on with it. I have my numbers mixed up. Okay. Now we're going to look at page 7, please.

Okay. All right. Just need to find my page here, sorry Commissioner. I think it's the bottom of page 7. Okay, I'm going to stop touching it. Do you want to find the bottom of page 7 for me?

Okay, here it is, yes. Okay. On the bottom of page 7 we have an exchange here with, between yourself and Joe Browne. And this is happening April 6, 2015: I understand some staff are shook up; I can come in and talk to anybody if you like.

So you're offering that the next day to Joe Browne?

CST. SMYTH: Yes.

MS. CHAYTOR: And I take it you mean the staff in the Premier's office?

CST. SMYTH: That's correct.

MS. CHAYTOR: And what had you heard about that?

CST. SMYTH: I had talked to Ed Benoit that day and I had asked him, knowing that he would have likely had contact with the staff there. Asked how everybody was doing and he told me they were pretty shook up.

MS. CHAYTOR: Okay. And then he responds: I think they're doing okay. How are you holding up? And then you tell him pretty good, I'm just headed into RCMP headquarters for your statement now.

So this is just before you're going to give your statement. And then you tell him: Let me know if you want the full details at any point. And he says: Okay, hang in there, and we'll do a chat soon.

So did you subsequently give the full details to Joe Browne?

CST. SMYTH: No, I didn't.

MS. CHAYTOR: And did he ask you anything else about the incident?

CST. SMYTH: No, he didn't.

MS. CHAYTOR: Okay.

Now I'll have P-0133, please. And I'm going to start at the, page 12. At the top of page 12, and there's a couple of messages here between you and a Cheryl. Are you able to tell us who that is?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And who is that?

CST. SMYTH: Cheryl Davis.

MS. CHAYTOR: Okay. And that's Paul Davis's wife?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

Hi Cheryl, you doing okay – and this again is the next day, April 6. And she says: I'm okay, I'm worried about you.

So you're reaching out to Cheryl Davis to see if she's okay. So what's this about, Constable Smyth?

CST. SMYTH: I know that Cheryl was somebody that was often impacted by security related issues. She often felt uneasy when there were concerns or threats directed towards Premier Davis. She was – often found herself home alone and was impacted by that fact, knowing that there was a sense of vulnerability. She was impacted by, you know, additional security measures that we often took for the residence. So I knew she was just generally impacted by security related issues and then this type of issue would undoubtedly have an emotional impact on her.

MS. CHAYTOR: Okay. And did you know her other than in your role as a member of the PSU? Was she a personal friend of yours?

CST. SMYTH: I knew her through Premier Davis beforehand, when he was with our association executive as well. I probably didn't get to know her well until I was, until Premier Davis was, became elected because I had more dealings with him through that job than I did through our association, or at least through Cheryl anyway.

MS. CHAYTOR: Okay. And then we go to the bottom of the next page, I believe it continues here. You say: I'm fine, a very unfortunate set of circumstances that I can't help feel could have been so much worse.

What did you mean by that?

CST. SMYTH: I think she's saying that to me.

MS. CHAYTOR: I'm sorry. Oh, this is to Cheryl. So it's outgoing to Cheryl?

CST. SMYTH: I think you have my name redacted.

MS. CHAYTOR: Oh, I'm sorry, I'm sorry. Okay, yes. I'm sorry. Yes, let's do it right.

Incoming – here we go, you're right: I'm okay, I'm still worried about you. And then she's saying I'm fine, you're right, thank you. A very unfortunate set of circumstances that can't help could have been so much worse. As long as you're not too shook up, we got your back. So that's her saying that to you.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. All right.

Okay. And did you have any communications with her other than what we're seeing here in your text messages? Do you understand what she meant by that: We got your back?

CST. SMYTH: I think just we're here to support you emotionally. I think I had a telephone conversation with her later that week.

MS. CHAYTOR: Okay. And again what was the nature of that telephone conversation, just checking in to see how you're doing?

CST. SMYTH: Much the same, yes.

MS. CHAYTOR: Okay.

Okay. And then if we look at page 2 of this document and I see some other entries here with her. And this is the same, same day.

And this time it is – is this, this is to her, from you: Just checking to see if you're doing okay. Please don't worry about this. This is why we're here and we do the work. I'm happy to chat if you need to. And she says: Thanks Joey, I'm fine as long as you are fine. You take good care of yourself. And you say: Thanks. Chat soon.

So – and then you think you had a discussion with her and, again, just checking in to see if you're doing okay.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

If we could have P-0134, please. And this is going to be the first two pages of this. Actually, I think it might begin on the second page, so I'll start there. And we have a communication here, an SMS message where you receive a message from James McLeod with *The Telegram*?

CST. SMYTH: Yes.

MS. CHAYTOR: I know you can't speak on the record about what happened in Mitchells Brook, but I'm trying to get a picture of what happened down there. And you come back to him and say – or he says, I'm sorry: Would you be willing to talk on background, no attribution, total amenity, no quotes or anything, just trying for some information about what happened. And you tell him: Would love to be able to that, James, but I really – and I think you mean can't?

CST. SMYTH: Yes.

MS. CHAYTOR: I wish so much that I could. Good luck. And he says: I totally understand. Thanks for replying all the same. And we see some of these messages again are deleted but, but not your full communication with him. So nothing more there than you are trying to clear out space on your phone?

CST. SMYTH: I don't know. I don't recall deleting them, so –

MS. CHAYTOR: Okay.

All right and if we come over then to the first page and we can compare the numbers, if you wish, but I understand this is James McLeod's number and you say: You should speak to the brother; lives next door to the deceased. And this again is April 6, Constable Smyth, and at this point in time, of course, the matter would be under active investigation. Did you know whether or not Dick Dunphy had yet been interviewed by the RCMP?

CST. SMYTH: No, I didn't.

MS. CHAYTOR: You didn't know that, okay. And I take it is, you're suggesting to James McLeod that he speak to Dick Dunphy?

CST. SMYTH: That was the suggestion, yep.

MS. CHAYTOR: Okay, and in terms of as a police officer if the matter is under active investigation, did you have any concern with asking him or directing him to somebody who might well be a witness in the investigation?

CST. SMYTH: Yeah, that wouldn't have been an appropriate contact.

MS. CHAYTOR: Okay. And can you offer any explanation as to why you would have done this on April 6?

CST. SMYTH: I think it was just out of perhaps some concern about how things were being portrayed in the media and had sincerely hoped that the media at some point in time would glean some facts, a more truer picture of what occurred. But I fully acknowledge it wasn't appropriate.

MS. CHAYTOR: Okay, and did you tell the RCMP that you had done this?

CST. SMYTH: I don't think so.

MS. CHAYTOR: Okay.

If we could look at P-0133 please. And I think I need page 7, please, in this document.

Okay. All right. And on page 7 here, and this, I believe is down, I'll scroll down towards the bottom. And you're having a communication with someone here, and we've blocked out the numbers. But I understand, Constable Smyth, this was a colleague, another RNC officer, is that right? Do you recall?

CST. SMYTH: I don't know who it is.

MS. CHAYTOR: Okay. I think, I think at the time it may have, at the time of your interview you may have been able to identify, because we hadn't redacted at that point. But my point here is to ask you, it says here that it's starting to set in for you that he tried to shoot you, especially when RCMP confirmed he had a round in the chamber. I just want to ask you about that.

What circumstances did the RCMP confirm to you that there was a round in the chamber?

CST. SMYTH: At what point?

MS. CHAYTOR: Yes.

CST. SMYTH: When they, when I first did the interview they confirmed that.

MS. CHAYTOR: Okay. And that was a question you posed to the RCMP at the time?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And they told you there was a round in the chamber?

CST. SMYTH: Yes.

MS. CHAYTOR: And did you have any concern about telling that information to somebody else, in terms of the ongoing investigation?

CST. SMYTH: Is this before or after the media release?

MS. CHAYTOR: I'm sorry, before or afterward?

CST. SMYTH: Is this before or after the RCMP issued their media release?

MS. CHAYTOR: This would be – is that in the media release? So the RCMP had already said that?

CST. SMYTH: Yes.

MS. CHAYTOR: That there was a round in the chamber?

CST. SMYTH: That it was a loaded rifle.

MS. CHAYTOR: Okay. And so this is that night. So it may very well be after their notification and the media is what you're saying?

CST. SMYTH: It may be and it may not be.

MS. CHAYTOR: So if it's public knowledge, it's no big deal, they've already told people?

CST. SMYTH: Yeah, but I'm not denying that I may have said that before it was released publicly. It was, you know, a very emotional week for me, and when I found that out I did tell some friends and family that it was loaded. So I don't know if the answer to that is if it was before or after their media release.

MS. CHAYTOR: Okay. All right.

CST. SMYTH: So I may have released that.

MS. CHAYTOR: Okay, all right, fair enough.

And you wanted me to ask (inaudible). Okay. And did the RCMP ever ask you during your interviews to keep the details confidential?

CST. SMYTH: I don't believe so.

MS. CHAYTOR: Okay, and –

CST. SMYTH: But, to their credit, I would know that as a police officer that I should do that.

MS. CHAYTOR: You would know to do that. Okay. All right.

So they might not necessarily have asked you to do that –

CST. SMYTH: They shouldn't have had to.

MS. CHAYTOR: They shouldn't have had to. Okay, fair enough. Okay. All right.

Okay. If we could have, then, page 2 of this exhibit.

And one other question while we're bringing up this exhibit, Constable Smyth. I noticed that Wanda Richards of the RCMP is in your contacts. Did you know Wanda Richards? And she's the, she's the analyst who did the work on your phone. Did you know her?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And are you able to explain why she would be in your contacts?

CST. SMYTH: It's probably in there as just an email contact, in so much that there's no other information. And whenever there's an email sent or received on my Blackberry or anywhere at the time, a lot of those contacts would be saved.

MS. CHAYTOR: Yeah. Okay.

CST. SMYTH: Just the email as a familiar address.

MS. CHAYTOR: Okay. Fair enough.

And Constable Smyth, again, these – what I'm showing you here in P-0133, it's redacted but we have Chris here and I understand – do you understand who this is you're communicating with here? If you just want to take a moment and look through.

CST. SMYTH: Yes, I believe I do.

MS. CHAYTOR: Okay. And would this be a friend of yours who's also an RCMP officer?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And he's asking you, if I look at the middle of the page here: Interview go okay? And this is the day you gave your interview. You said: Yup, very well. They were perfect actually and very supportive.

And who are you referring to in telling that to Chris?

CST. SMYTH: The officers who conducted the interview.

MS. CHAYTOR: And then he says: Excellent, very glad to hear. And then you said: Were very complimentary of how I did things, said it was by the book, was settling for sure.

And, again, is this what you understood from the RCMP after you gave your statement or during your statement given on April 6?

CST. SMYTH: It was undoubtedly some paraphrasing of them confirming that a lot of our policy and procedure was followed correctly.

MS. CHAYTOR: The RCMP were able to do that?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And that's perfect, no doubt in my mind anyway, he says. And you're thanking him for having called your wife with some insight.

And perhaps you can tell the Commissioner, what do you mean by that? What insight from Chris was he able to give your wife?

CST. SMYTH: I think he spoke to her in perhaps what to expect over the coming days, weeks, months, even years. Chris is an experienced use-of-force officer and was a member of the emergency response team so he had some experience and knowledge in that area. I think he just called her to, as a support as well.

MS. CHAYTOR: Okay. And it continues on: Proud of you, Buddy, I know many members who would not have walked out of that house, sadly. And you say: Thanks. And Monty confirmed that he had a round in the chamber too, pretty unsettling.

Who is Monty?

CST. SMYTH: Monty Henstridge.

MS. CHAYTOR: So that's the RCMP officer who took your statement?

CST. SMYTH: Yes.

MS. CHAYTOR: Or one of them. Yes. Okay.

And in terms of your communications here – and I understand Chris is a friend of yours. Throughout the investigation by the RCMP did he relay any information back or forth from you to the RCMP or vice versa?

CST. SMYTH: No.

MS. CHAYTOR: Okay.

Let's just turn then and I – just one second.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. CHAYTOR: Okay, so I just want to turn now then to the statement that you gave to the RCMP on April 6. And do you recall what time of the day you gave that statement?

CST. SMYTH: I believe I arrived, arrived down there around 3:30 in the afternoon.

MS. CHAYTOR: Okay. And, and you say arrived down there, so was it (inaudible).

CST. SMYTH: Sorry, RCMP headquarters in St. John's.

MS. CHAYTOR: RCMP headquarters, okay. And other than legal counsel, did you receive any advice from anyone prior to giving that statement?

CST. SMYTH: No.

MS. CHAYTOR: And we saw that you spoke or had numerous communications with various persons, but nobody else gave you any input in terms of your statement or anything along those lines.

CST. SMYTH: No.

MS. CHAYTOR: Okay. And did you intend – did you attend any meetings at RNC prior to giving the statement?

CST. SMYTH: No.

MS. CHAYTOR: And when we look at the video of your statement, Constable Smyth, I believe you do attend with notes. You do have notes with you.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And were you permitted to be able to refer to your notes?

CST. SMYTH: I don't recall. It was the narrative summary that I prepared that morning at home that was eventually uploaded into our ICAN system.

MS. CHAYTOR: Okay. So the summary that I, that we looked at earlier today.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And those, those notes then that you have on you that day that we can see in the video statement, those are the notes.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And so they were – were they prepared, they weren't prepared obviously before you went off your shift on April 5.

CST. SMYTH: No.

MS. CHAYTOR: So those are notes that you had prepared at some point before you gave your RCMP statement.

CST. SMYTH: Yes, it was that morning.

MS. CHAYTOR: Okay. And in terms of the drafting of those notes, did you have any advice or any input into what should go in those notes?

CST. SMYTH: No.

MS. CHAYTOR: Did you consult with anyone in drafting that document?

CST. SMYTH: I did send them to our legal counsel at their request.

MS. CHAYTOR: Okay.

During the statement with, with Corporal Henstridge you asked him whether or not the cameras were working. Why did you do that?

CST. SMYTH: I had hoped they were working.

MS. CHAYTOR: And why is that?

CST. SMYTH: Because I think it would have provided some valuable evidence.

MS. CHAYTOR: Okay.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. CHAYTOR: Yeah, okay.

And those are the security cameras that were outside of Mr. Dunphy's house. Is that the cameras you were referring to?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

How did you find, in terms of your statement that you gave that day, we have – how did you – we saw, we saw one communication there to your friend, Chris; that you found they were very complimentary and that you had done things by the book.

How did you find the statement went that day?

CST. SMYTH: I thought it went well and they were cordial, polite, professional.

MS. CHAYTOR: Okay.

And if we could bring up then – I'll just ask you some questions about your case summary and it's P-0128, please.

And these – so this is the Narrative Text Hardcopy it's called that we've been referring to.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

Can I also see, please, P-0092? And I just want you to clarify for me because it seems to be the same document, but it's called a General Occurrence Hardcopy and the other one is called Narrative Text Hardcopy.

Are you able to explain that and what the difference would be? It seems to certainly be the same information. And you'll see this one is called RNC General Occurrence Hardcopy.

CST. SMYTH: Yes. And sorry, what was the other one?

MS. CHAYTOR: Okay, we'll go back to the other one, 0128 please.

Too bad we can't do them side by side. Do we have that technology? No.

Okay, so let's go back to 0128. And this one is RNC Narrative Text Hardcopy.

CST. SMYTH: It, it's the same document contained within the same file. I think it's just how it's accessed through the ICAN system.

MS. CHAYTOR: Okay. And so – okay, so it would be in the ICAN system in a couple of different places, is it?

CST. SMYTH: No. I think the Narrative Text Hardcopy may refer to a printed copy. And it may be a better question for our IT expert.

MS. CHAYTOR: Okay.

All right, I'll wait, then, and ask that. So – and the number that we see here now GO# 2015-17896, is this the file that you opened with respect to Mr. Dunphy on April 7?

CST. SMYTH: Yes it is. GO stands for General Occurrence.

MS. CHAYTOR: General Occurrence number? Okay.

Okay. And I'm just going to take you through some of what you said here and there's a couple of things that I just had a few questions on. And I did ask you whether or not anyone gave you any assistance in drafting it. And I noticed that there is an email – and I won't spend the time to take you, you to it unless you wish.

But you did send an email to your superiors, Joe Gullage, Jason Sheppard, Jim Carroll, Chief Bill Janes and Ab Singleton, deputy chief, on the same date. And you had told them you had completed your case study and that you would add any additional information and documentation that they may require. Do you remember that email?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Did anyone give you any feedback? Did you – or ask you to amend or augment your statement in any way?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And were you asked to provide any additional information or documentation?

CST. SMYTH: Not that I recall. I was just ensuring that they're aware that I had now completed it and it was uploaded to our system.

MS. CHAYTOR: Okay. All right.

And when I read down through this – and, again, you completed this, you said, on April 6 sometime before your RCMP statement and then it's posted April 7. So it's prepared, for the most part, the day before I take it.

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay. All right.

And I didn't see any mention – you do speak about you're advised by Ms. Ivey. I didn't see any mention when I read down through to any of your contact or communications with Ralph Tucker. Is there any reason for that not to be included in your notes?

CST. SMYTH: There's no reason for it. I don't remember him giving any information that was, that provided any insight other than to introduce me to Mr. Mahoney.

MS. CHAYTOR: Okay. And the reference we've seen before here about Chapel's Cove that you were looking for a Don Dunphy in Chapel's Cove. Where did that come from?

CST. SMYTH: I'm not sure. I'm, I think that may just be a clerical error –

MS. CHAYTOR: I'm sorry?

CST. SMYTH: I think that may just be a clerical error.

MS. CHAYTOR: Clerical error?

CST. SMYTH: I'm not sure if Chapel's Cove is in that area or if I've just completely put the name in there wrongly.

MS. CHAYTOR: Okay.

And you refer to: CFRO checks confirm that Mr. Dunphy did not have a firearms licence or registered firearm. I didn't see here where you mention a, the CPIC checks that you did. Is there any reason for that?

CST. SMYTH: Can we just go to the next page?

MS. CHAYTOR: And – yes, you want to scroll down the next page?

CST. SMYTH: Yeah, I –

MS. CHAYTOR: And this – let me just take you down through. This is a total of three pages with your name on the bottom. And if you want to take your time and read down through, that's fine.

CST. SMYTH: No, I'm not sure why it's not mentioned there.

MS. CHAYTOR: Okay and what about your ICAN checks or searches that you did on April 4? I didn't see those in there either.

CST. SMYTH: Again, they didn't provide any relevant information to me at the time to – that directed how I move forward so.

MS. CHAYTOR: Okay.

MR. KENNEDY: Again, Mr. Commissioner, I just want to raise a point of clarification because my client has given numerous statements, as you are aware, in this matter. We have a statement here. It's the one that he refers to as his notes which is prepared the next morning. It's uploaded too.

I'm just wondering do I have to go through them, through all of his statements to show, well, did you say this at another point. Because my concern is, Commissioner, that an, an inference can be drawn or there's a request to draw an adverse inference because he didn't mention something in one statement. And that's going to be a very cumbersome process if, if I have to go through that.

The fact that the CPIC is not mentioned there, what does it mean? How is it relevant to the, to the procedure that we're engaging in here where there are numerous statements given on April 6. He does a re-creation on April 10. We have a statement on June 17 to Saskatoon police, August 26 to the RCMP, September 14 to the RCMP.

So that's the only concern I have, is to take a, a piece of information in isolation, it leaves the impression that somehow or other there's something left out or there should be more here. And if I've got to correct that through re-examination, it's going to take some time.

MS. CHAYTOR: Commissioner, if I may.

This is the first statement that Constable Cox gave. It's –

THE COMMISSIONER: Smyth.

MS. CHAYTOR: Sorry, Constable Smyth. I've done that again. I apologize – Constable Smyth gave.

This is what he had prepared before he gave his statement to the RCMP. There is certainly some issue as to communication, certain communications, so I think it's very important.

This is something he took the time to type up himself. It may be simply that he didn't have notes and this is – you know, so this is – what's there and not there. It may be simply that. But I think this is an important document in that this is his first account of what happened and he took the time to write this himself.

And these are from what you'll hear, this is – and Constable Smyth, maybe you could speak to this, but the Case Summary is what he would be required to do at the end of his shift regarding the incident. And so this is what he was required to provide to his employer.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: Oh sorry. Mr. Simmonds, go ahead.

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

Mr. Commissioner, I would think the consistency between any statements is a very common thing that we always look at in criminal matters. I mean, Mr. Kennedy –

MR. KENNEDY: (Inaudible.)

MR. SIMMONDS: With the greatest of respect, Mr. Kennedy, preliminary inquiries, statements given to the police – a preliminary inquiry, more importantly again if the statement is a statement under oath, that takes on a significant weight, and we always look for continuity between those, and if there is a difference in them, then that certainly goes to credibility. And depending upon how big you might determine the difference is, determines how much credibility or lack of credibility you will give to it.

That's not a new concept. If Mr. Kennedy feels he has to try and correct some of this on redirect, that, that's up to him, but it is a very, very important point.

THE COMMISSIONER: Yes, well, Mr. Kennedy will have a number of occasions to address that.

Mr. Kennedy, in your submissions you'll be able to indicate what weight, or little weight, I should give to a piece of evidence. You'll have an opportunity to cross-examine. But I'm not clear when you say there's a risk of adverse inference. Give me an example of – in terms of what we're talking about here.

MR. KENNEDY: Yes, it appears to be – a number of times today I've noticed, and as I pointed out a couple of days ago, that the Commission counsel is taking isolated statements and leaving them without going through a full examination of, of all of the statements or where there were comments made. The deleted tweets is a prime example or the deleted – excuse me, the deleted texts or emails is a prime example, Commissioner.

What we have here, this is not a –

THE COMMISSIONER: Well, wait now. What's that a prime example of?

MR. KENNEDY: She left, she just left it hanging. Commission counsel just left it hanging as if somehow or other my client had done something wrong without just going –

THE COMMISSIONER: No, no, no, I think you missed – I understood Ms. Chaytor to be saying she raised them to give Constable Smyth the opportunity to explain why they would have been deleted and to give him an opportunity to point out there's nothing nefarious or anything other than benign in the reason it was done. And I think I put to Ms. Chaytor that I'd have difficulty inferring there was a problem anyhow, or anything nefarious, when the content of the tweet is there and, you know, I can't see how –

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: – at this stage, anyhow, how that would be adverse to Constable Smyth. But I think if anything, Ms. Chaytor’s bending over backwards to be fair to your client.

And I can understand you may be sensitive. Constable Smyth at times, I think particularly yesterday, but not so much today, seemed to be a bit defensive thinking – in his responses. I got the impression that he was sort of being wary about somehow being trapped in inconsistent statements. And really the role of counsel, as I see it, and as I see it being performed quite well, was to give him an opportunity to explain. And I’m going to look at the evidence.

And, you know, I’ve had a bit of experience in terms of looking at consistent statements or inconsistent statements in order to assess credibility and I’ll, I, I really don’t see, at this stage, that there’s a problem. But I think the way to do is if, if you have a concern about how far you should go with respect to a particular point, ask me and I’ll try and tell you.

MR. KENNEDY: That’s fine.

THE COMMISSIONER: Thank you.

MS. CHAYTOR: Thank you, Commissioner.

CST. SMYTH: I will note that –

THE COMMISSIONER: Sorry?

CST. SMYTH: – I prepared this less than 24 hours after being involved in a fatal shooting. I fully recognize that there may be some inconsistencies in statements. I am happy to discuss any of them that are there.

MS. CHAYTOR: Okay.

CST. SMYTH: The CPIC check that you’re referring to was done. If it wasn’t mentioned here, it’s not because I was trying to leave it out for any particular reason.

My mindset in doing this is not that I need to write this because we’re going to have a public inquiry; it’s to cover all the facts for having just been involved in, in a shooting. So I recognize that, in hindsight, particular facts like those seem to matter significantly, but when writing it, it wasn’t of particular concern to me.

MS. CHAYTOR: Okay. All right. Thank you.

And, and I will just point out a few things, Constable Smyth, to give you an opportunity to try and explain in, in terms of this being your first statement.

One thing that, one thing that we refer to here is your discussion with Adrian Cox. And it’s – you’re saying that he returned his call and you advised him you would be driving to Chapel’s Cove in an effort to speak to Mr. Dunphy in relation to concerning comments he had made towards Premier Davis and Minister Collins. So that’s what you’re saying that you advised Constable Cox of at the time as to your purpose in going to see Mr. Dunphy.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And also it doesn’t say here that he provided you with any, any, any contact information for Mr. Dunphy but I understood you earlier to say that, yes, that’s where you would have got the Mitchells Cove and the street address and the other cellphone number.

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Mitchells Brook.

MS. CHAYTOR: Mitchells Brook, thank you. Yes, Mitchells Brook. Thank you.

And you do note here that he conducted some queries on PROS and advised that they have had limited contact with him, that he had been charged with uttering threats in 2005, but that it was withdrawn. He also noted that he was a complainant in a file. So that's the information from PROS that you recorded the next day –

CST. SMYTH: Yes

MS. CHAYTOR: – that the uttering threats was there, that he had told you that. Utter, uttering threats in 2005 but it had been withdrawn.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And then I think the timelines I took you through earlier, you indicate that you arrived at Mr. Dunphy's house approximately 1:30 and that it was approximately 1415 that you checked and saw the Jeep and went back. And I believe I took you through those earlier.

MR. KENNEDY: What page is that on –?

MS. CHAYTOR: That's on page 2 of the exhibits, Mr. Kennedy.

And I think I've also taken you to this before, but in here you said that you observed the rifle on the floor in front of Dunphy. Let's find that reference for you. I already brought you to this reference about writing on the folder. We talked about that earlier today.

I yelled for him to drop the gun, started cutting the pie to re-enter the room. I observed a long barrel rifle on the floor in front of Dunphy who was seated in the chair not moving.

And I'm not sure if I brought that reference to you before, but again these are your notes your drafting up that you saw it on the floor. I understand what your saying is that you didn't mean flat on the floor, it was leaned up against something?

CST. SMYTH: That's correct.

MS. CHAYTOR: Constable Smyth I see here where you say that you remained in a ready position at the entrance of the home for several minutes, for several minutes. So you can see here where you say: I immediately called the RCMP emergency communications. So you are saying, in writing this up, that you immediately called. There was no delaying you calling the RCMP?

CST. SMYTH: That's what I'm saying there, yes.

MS. CHAYTOR: That's correct. Okay.

And then you remain in a ready position at the entrance to home for several minutes. You were concerned the shots may have been alerted by family that reside next door and that I may be susceptible to additional threats. And I think you talked about that earlier in your evidence.

I don't see anywhere in here where you mentioned the clearing that you did of the house, but it's your recollection that you did clear the house and that would have been after you called the RCMP.

CST. SMYTH: That's correct.

MS. CHAYTOR: And then you say here that you were removed from the scene 45 minutes to 60 minutes later and brought to the detachment. So up to an hour that you were – anywhere from 45 minutes to an hour that you remained on the scene.

CST. SMYTH: It's possible, yes.

MS. CHAYTOR: Okay. All right.

Now, Constable Cox, is there anything else –

THE COMMISSIONER: Constable Smyth.

MS. CHAYTOR: Okay. What am I doing? I'm so sorry. That's three days.

THE COMMISSIONER: Go ahead.

MS. CHAYTOR: As soon as I see Constable Cox's name for some reason I just keep saying Cox. All right, so it's Constable Smyth.

So is there anything else in this document that – these were the points I wanted to point out, anything else in there that you would like to speak to?

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

MS. CHAYTOR: Okay.

Constable Smyth, then, I'm going to move on. And I understand that you attended two re-enactments, that there were two re-enactments in relation to the shooting?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And those occurred on April 8 and 10, is that correct?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Did you do anything to prepare for the re-enactments?

CST. SMYTH: No.

MS. CHAYTOR: Okay. And I understand that there was a problem that arose with the video recording of the first re-enactment.

CST. SMYTH: That's what I have been told, yes.

MS. CHAYTOR: Okay. And then you were asked to do another.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And did you co-operate fully in that process in doing those re-enactments?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. Was that a difficult process for you?

CST. SMYTH: Yes, it was.

MS. CHAYTOR: Okay. I'm going to ask if you – the first re-enactment you did on April 8, did somebody from the RNC attend with you?

CST. SMYTH: Yes.

MS. CHAYTOR: And who was that?

CST. SMYTH: Sergeant Bill James.

MS. CHAYTOR: Okay. And perhaps – and you're saying Sergeant Bill James. Yes, okay. And I understand he's your use-of-force instructor, is that right?

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay. And what was the purpose in him attending with you?

CST. SMYTH: They – it had been suggested to me that I could bring somebody. I thought it best I, at that time, I bring somebody that might be able to glean something from the process.

There's no real particular reason. He was my training officer. I had a great degree of respect for his opinion and that's it.

MS. CHAYTOR: And did he, after observing the re-enactment did Sergeant James have any feedback for you; for example, whether or not what he observed he felt was in compliance with your training?

CST. SMYTH: Nothing extensive, other than to say I don't see any issues with that.

MS. CHAYTOR: I'm sorry?

CST. SMYTH: Other than to say he didn't see any issues with it.

MS. CHAYTOR: Okay. And I understand, then, the following day, April 9 of 2015, you completed your annual firearms requalification. Is that right?

CST. SMYTH: That's correct.

MS. CHAYTOR: And, and your friend and co-worker, Tim Buckle, attended that with you?

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay. And was Sergeant James your instructor that day?

CST. SMYTH: Yes, he was.

MS. CHAYTOR: Okay. And was there any significance in terms of the timing for you to do your annual retraining the next day?

CST. SMYTH: I think I actually requested it. There was no significance of it. I was being reissued another firearm and that is done on our range and so I had – knowing that the ‘requal’ would have to be done in the near future anyway, I had thought that this would be a good opportunity to do it.

MS. CHAYTOR: Okay. And did you pass your requalification that day?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: And did you find that to be a difficult exercise to go through on April 9?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay.

And then I understand that the second re-enactment happened on April 10. Is that correct?

CST. SMYTH: Correct.

MS. CHAYTOR: So two days later. And who attended that with you, anyone else from the RNC?

CST. SMYTH: Yes. Staff Sergeant Tim Buckle did as well.

MS. CHAYTOR: So Tim Buckle went with you to that?

CST. SMYTH: Yes.

MS. CHAYTOR: So Sergeant James didn’t go back?

CST. SMYTH: No. I don’t think he was available.

MS. CHAYTOR: Commissioner, I thought it might be useful if we showed the re-enactment. Would that be okay with you, Constable Smyth? Do you have any issues with us showing the re-enactment?

CST. SMYTH: I have no issues, no.

MS. CHAYTOR: And I don’t know if other counsel might but I thought it might be useful.

THE COMMISSIONER: I’ll just check, I’ll just ask counsel’s opinion.

Mr. Simmonds.

MR. SIMMONDS: We certainly have no objection.

THE COMMISSIONER: All right.

And Ms. Breen, Mr. Flaherty.

MR. FLAHERTY: No issue, Commissioner.

THE COMMISSIONER: Thank you.

Mr. Freeman.

UNIDENTIFIED MALE SPEAKER: No.

THE COMMISSIONER: Mr. Avis.

UNIDENTIFIED MALE SPEAKER: No.

THE COMMISSIONER: Mr. Drover.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

THE COMMISSIONER: Oh –

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

THE COMMISSIONER: Okay. Mr. Kennedy. All right.

Mr. Williams.

Yeah, go ahead.

By the – while I think of it, you weren't sure this morning whether you'd put in the training manual. Do you want to do that before we forget about it?

MS. CHAYTOR: Oh, yes. All right, we can do that.

I'm not sure if I did this yesterday but if not I would ask, please, to have exhibit – thank you. I would ask, please, to have Exhibit P-0233 entered into evidence and that is the Use of Force Training Manual of the RNC.

Thank you, Commissioner.

THE COMMISSIONER: Sorry, the number again was –

MS. CHAYTOR: The P number is 0233.

THE COMMISSIONER: Thank you.

MS. CHAYTOR: And I referred to that in my questions earlier today. I didn't bring the witness to the document but we referred to portions of it.

Okay, so –

THE COMMISSIONER: Okay. It's ordered that be entered into evidence.

MS. CHAYTOR: Thank you.

And I'm just wondering, then, if, if you're ready to show the re-enactment? Okay. I'm assuming –

MR. KENNEDY: By my – excuse me, Commissioner – by my calculations, it's 47 minutes long. Does that sound right? It starts at 15:03 and then –

THE COMMISSIONER: I think we'll – yeah, we'll take the afternoon break first of all, but go ahead, sorry.

MR. KENNEDY: No, it indicates to me – my calculations is, is that 47 or 48 minutes long begins at 15:03 and ends at 15:51. Is that correct? Do I have the –

MS. CHAYTOR: I thought it was a little bit less than that but that could be. Do we want to only show – I mean we could show portions of it. We don't have to show the whole thing.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. CHAYTOR: Forty-eight. Yes, it's 48 minutes long.

MR. SIMMONDS: If we're going to show it we'd like – we would –

MS. CHAYTOR: See the whole thing?

MR. SIMMONDS: Yeah.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Yeah, I think it would be appropriate to, to see the whole thing. Now, maybe, we might get a fast-forward in places. Let's take our mid-afternoon break before we start it.

MS. SHEEHAN: All rise.

This Inquiry is now recessed.

Recess

MS. SHEEHAN: This Inquiry is now in session.

Commissioner Leo Barry presiding.

THE COMMISSIONER: Okay, so we're ready to do the re-enactment.

MR. SIMMONDS: Mr. Commissioner, I have one point. I raised this with counsel and co-counsel or fellow counsel at the table. I've been approached by one of the people, one of the audience who speaks for a number of them, and has said that they would like to see the confidential pictures. They have a job following this; they have a job following the significance of it.

I immediately, upon hearing that, spoke to Ms. Dunphy to see if that was any issue for her. And she said, no, it wasn't. She's aware that at some point these pictures are likely going to be, become public. I don't know, I think Mr. Kennedy is –

THE COMMISSIONER: Are they pictures of the deceased?

MR. SIMMONDS: They are, yes, yes.

THE COMMISSIONER: (Inaudible) re-enactment.

MR. SIMMONDS: I don't know if they're in the re-enactment, I don't think so.

UNIDENTIFIED FEMALE SPEAKER: No.

MR. SIMMONDS: But when we get to the other ones – he raised this with me lunchtime and I briefly – but I didn't get a chance to speak to Ms. Chaytor until we had the break just now.

THE COMMISSIONER: Okay, so what I'm not clear on, if there's nothing in the re-enactment –

MR. SIMMONDS: But there will be in the upcoming testimony. That's why I just raised it.

THE COMMISSIONER: Oh, okay.

I was asked to turn off the mic before the video went on.

So there's nothing in the video that they're concerned about, it's as we move on –

MR. SIMMONDS: Correct.

THE COMMISSIONER: – in terms of getting the –

MR. SIMMONDS: The full picture of –

THE COMMISSIONER: Being able to follow the –

MR. SIMMONDS: Exactly.

THE COMMISSIONER: Okay. May – I don't know if we should do this in a blanket sort of thing or whether there might be, you know, certain photos – we'll have counsel discuss this after we finish. We're not going to finish Constable Smyth today by the – I was just speaking with counsel during the break. So by the time we get the video – and I've got to be downtown for a meeting for tomorrow's case by, around 4:30, quarter to 5, so we're going to miss a few minutes.

But Monday, Ms. – I understand Ms. Chaytor will be in a position when she finishes to indicate the four or five main topics that she'll have left to do, which she thinks she'll be able to complete fairly quickly on Monday, and then we can go on to Mr. Kennedy. I'm not sure who'll be going – Mr. Simmonds going first and then Mr. Kennedy will be bringing up last, I guess. Okay. I think that something can be worked out.

So we'll see the video there now.

(Video shown.)

CPL BURKE: Today is 2015, April 10. The time is 1503. My name is Corporal Steve Burke. I'm with the RCMP Major Crime Unit in St. John's. I am presently in the community of Mitchells Brook, near Mount Carmel. We're in the – at the residence of Donald Dunphy. And I'm with Sergeant Joe Smyth with the RNC, and we're going to commence a re-enactment of the events that occurred on Sunday, April 5.

Sergeant Smyth, I just want to, you know, kind of open up the floor to you. I want you to start from the beginning and provide as much detail – I guess a re-enactment of the events that occurred on Sunday, and I'll open the floor to you.

CST. SMYTH: Okay. So Sunday, Sunday past, it was probably, I think originally, maybe around 2 p.m. that I arrived in Mitchells Brook. I had done a drive by check of Mr. Dunphy's residence. There was no vehicles in the driveway and had determined that there was nobody at home.

I'd actually gone to the neighbour's house at the time, not realizing or knowing that it was his brother, but learned that his brother and sister-in-law live there. I had a conversation with them about Mr. Dunphy and my reasoning for attending to speak with him. They gave me some family history in terms of issues they've had around land disputes and perhaps some other concerns.

That didn't bring me, certainly, any concern for safety or well-being, primarily maybe some concerns for his, his own health, physical health and living conditions. But nonetheless, at the time they didn't know where he was, said he was a bit reclusive, didn't really have any friends or family other than a, than a daughter that he saw periodically and could only perhaps suggest that he was with his daughter, given it was Easter Sunday. They had given me some information on the daughter and where she lived. My intentions then were to leave and go by the daughter's residence and see if Mr. Dunphy was there.

I, I left the adjacent residence and before I left I thought I should check back here again and when I did, the black Cherokee that is right in front of me was parked in the driveway facing up the driveway, almost to the top of the driveway. I pulled my vehicle, which is a black GMC Yukon, RNC vehicle unmarked, in behind this Jeep Cherokee.

CPL BURKE: I just wanted, I was just going for the recording – I'm going to introduce retired Justice David Riche. He's an independent observer and he's going to be accompanying the re-enactment.

CST. SMYTH: I pulled my police vehicle up behind the Cherokee. The Cherokee's back was probably, I'm going to say around here somewhere. I pulled the vehicle, the Yukon, up in this area and I – my driver's door would have been about here. This is about where I exited the vehicle.

I immediately just approached the residence with standard caution, I guess, you approach any residence. I came to this area first and just looked inside to see if I could see anybody. It wasn't a – it was an overcast day so I could actually see in a bit better than I can now, and just noticed a lot of garbage on the floor in the house. There was a lot of cats around the property.

I knocked just like this and immediately backed up to around here, again, where I could see the side of the residence and the front. Within probably 10, 15 seconds I heard the screen door open and somebody say hello or a greeting of some sort.

I walked over here; I removed my police ID and badge. I had my – my jacket was open and my police ID was in my inside pocket. I had, I think I actually had it removed as I was walking to the door. So I showed the – I don't know which hand I used, but I showed my ID and badge.

ID is the standard police ID with photograph and police in large letters, and the badge is our standard issue RNC wallet badge which is identical to our breast shield, which is substantial in size. I held that up and I asked if he was Mr. Dunphy. He said yes, or I asked if he was Don Dunphy. I told him I was Joe Smyth. I didn't use rank or anything of that nature. I didn't tell him

what section I was with, just Joe Smyth with the RNC, I wonder if I can come in and talk to you for a minute.

MR. RICHE: You were there?

CST. SMYTH: Yeah.

MR. RICHE: And he was?

CST. SMYTH: He was still standing in the door –

MR. RICHE: Oh, he's standing right –

CST. SMYTH: Yeah, so he just had the door open and –

MR. RICHE: So you were that far?

CST. SMYTH: He wasn't even outside. Yeah, so I wasn't, I was no closer than this and no further away than this, within these couple of feet.

I was looking directly at him and he was looking directly at me. And I asked if I could come in and speak to him. He said: Sure, come on in. He even told me to be careful here because of the steps, so I proceeded into the house. He held the door open and I walked directly into the home.

And, so we got, we got in this area of his home and he stood here for a minute and we had some chat. We had some, just made general small talk. He was asking, you know, what's the RNC doing out this way and I told him – I can't even remember exactly what I told him to that question. It was just general small talk about – it was a generic answer around, you know, we operate all over the province or something along those lines.

You know, he asked me where I was from. I asked him where he was from, out this way originally, and we got in talk of some of his work history. I told him I understood he was an injured worker. By this time we're moving into the residence. At some point in time, I made it about as far as here and just even made a point to look down the back of the house.

I was trying to take in a lot of what I was seeing around me 'cause the house was in such deplorable condition. This piece of plywood was over that door, so I didn't know what was behind here. You know, I guess I had some moderate concerns if there was anybody else here but, at this point, I was not even remotely concerned for my safety or my well-being. You know, I had done all the previous checks on Mr. Dunphy and I didn't feel I had anything to be concerned about.

The conversation remained cordial for some time. We didn't talk about much of anything specific. He did get in fairly lengthy discussion on his injury. He did tell me he had been crushed by a dump truck. I think he said in the 1980s. You know, he indicated this is why I live like this and, and –

MR. RICHE: You were both here?

CST. SMYTH: We were both in this region, it was, it was within a minute or so he said come on, come in, come in, come in, and when we got in around here, he immediately sat down in this chair. He went directly to that chair and sat down right there. Told me to come in, and I, I came in, just walked here, and he's telling me to sit down. He immediately told me to sit down. And, you know, I told him I'm fine, and I kind of came over to this region to, to carry on our

conversation. And this, you know at the onset, is pretty much right where I came, and for the most part stayed, within this couple feet.

And it's probably around now, and I've probably been in the house, I'm thinking, five, six, seven minutes max, which is a real guesstimate – and it's around this point that the conversation starts to turn and, you know, he kind of goes what's, you know, what's this all about anyway. And so I got immediately into, into the reasoning why I was here. And I had a folder with some information on him and some information from social media, some comments that he had made.

So I told him I was here to talk to him about some comments that he had made on social media that has caused some people some concern. And he kind of, he was kind of, almost laughed at that and, but at the same time was also beginning to get agitated and talked about, I'd read the comment. And he's, his demeanor continued to kind of go downhill from there. He was talking about fucking, saying fucking MHAs, fucking dead MHAs. There's been lots of dead MHAs. There'll be more dead MHAs. And, you know, I was asking him what he meant.

And, you know, the conversation from this point on is pretty disjointed with him. And there's a lot of repetition. So you know, excuse me if I, you know, seem a bit, that I'm not completely keeping things in order because it wasn't a completely orderly conversation. And I, again go back to why I'm here, ask him what he meant by those comments and he says I can say whatever I want, you know, I can speak out in social media – or he didn't say social media, Twitter he said – yeah, I say a lot of things in Twitter. I can say whatever the hell I want. And I didn't threaten anybody. You know, and again talking about fucking government and MHAs. Then he's asking me: Who sent you here anyway; who sent you? And I tell him nobody sent me, I'm here because of comments that you made and that we have some concerns.

And he says: Well, you're just a fucking arm of the government. He said that a number of times: You're an arm of the government. Who sent you he said a number of times. And he – what else was he said about, about that – oh, you fucking puppet. He muttered that a couple of times to say you fucking puppet and, you know, back to who sent you. And he talked a little bit more.

I, you know, tried to bring him back and reel in the conversation a bit around why I was here. I said, you know, these comments cause people some concern; they cause me some concern. And he said: Well, fucking dead MHAs, there's been lots of dead MHAs. And he named a couple of names and I think he was referring to perhaps some MHAs who have, in fact, died and you know. But – and then it's MHAs will die again and – but no, he wasn't threatening then, but now he's starting to get agitated.

And even looking at him, he's building up, you know, a lot of froth, dried up saliva on the corners of his mouth. And it was very – you know that was what struck me because it's not something I think unfamiliar to, to police when we're dealing with people who are agitated and to see that, that build up in their mouth. And when he's talking the saliva is connected to his bottom lip, his top lip and his teeth and when he opens his mouth, it's just a string of white.

And, you know, so I could see, you know, the physiological aspects of, of this, of him being agitated and stressed but, again, I still didn't feel, you know, threatened by any stretch. At one point in time I did point out that there was a bat or a large stick and it was down in this region here. And I believe it was red and it had some duct tape on it wrapped up.

And I was doing a lot of looking around. As he's getting more and more agitated, I'm constantly looking out into the hallway; I'm looking around the room. I'm mostly looking around kind of taking it and absorbing the state of, of his living conditions. And, I mean, my feelings for him at the time were, were just, they were empathy and on – I'm, it's almost a state of disbelief that somebody is living in, in these conditions.

And, you know, a lot of me is – and I and I was articulating a little bit, a little bit of this to him insomuch that I said I have, I have real concerns for him. And I don't know how he took that, it did agitate him, me saying that. And I don't know if he took that as I have concerns because I feel he's a security threat or if he was agitated because I had – I was pointing out the deplorable conditions. And, you know, and I pointed out the garbage and all the – and he said: Well, this is your fault. This is government and I live like this because of fucking government.

And, you know, I told him, I think a couple times, okay, well, look, I'm not, I'm not here – you're not under arrest. I'm not here to give you a hard time. I want to talk about these comments.

And I'm still looking around. And I again (inaudible) the bat, I had pointed that out. I say: Why did you have the bat there? And he said: Well, it's for protection and you don't know who's going to show up here. And I said: Okay. And I said: As long as it stays there. And he didn't really have any comments around that.

A couple times he muttered and mumbled some things that were incoherent and I didn't understand it and he was continually getting aggravated by me looking around. I'm looking around. I'm looking behind me and at the ceiling and at the floor. I'm moving things on the floor. There were some carpenters moving around here on the floor and I moved them around at one point in time and what are you looking at. He kept saying: What are you looking at? What are you looking for? What are you looking for?

And, you know, I didn't have any answer for it. I'm not looking for anything. I'm looking at the state of your living conditions, I said at one point in time and that's when he had said: Fucking, this is your fault. This is government and – so he's still in this chair and the whole time he's moving around from side to side. He puts weight on one side and weight on the other side, nothing that drew my attention to it. I remember that in hindsight, but nothing that I would think was out of the ordinary for someone that was uncomfortable or agitated for whatever reason.

And him being agitated by me looking around, looking around the residence, I – at this point I kind of back – I'm over in this area and I was even, every now and again, leaning on the mantel here and it was partially trying to get him at ease to not feel intimidated by me. And not that I think I gave him any reason to be intimidated by him, but clearly he was agitated.

And I had the folder in my hand and I started – at some point in time, I think I had a pen in this hand, and I started to look down at the folder but I wasn't really truly looking at it. I, I was just trying to stop looking around because it was agitating him. And, you know, this is probably exactly where I was standing because I feel like, while I'm looking here, there's enough of that chair in my peripheral vision that this is around where I, I saw, I first saw the gun and, and I don't know where it came from.

(Video paused.)

MR. KENNEDY: Excuse me, Commissioner. Could we stop that for one second?

I just noticed in the transcript: This is probably exactly where I was – the word says “thinking.” I heard the word “standing.” I don't know if anyone else heard that.

THE COMMISSIONER: But did you read –?

MR. KENNEDY: Pardon?

You'll see here in line 10 on page 10, it says: I'm just trying to stop looking around because it was agitating him and, you know, this is probably exactly what I was thinking. I thought I heard "where I was standing."

THE COMMISSIONER: What are you reading from?

MR. KENNEDY: Page 10 of the transcript of the re-enactment.

THE COMMISSIONER: Is this in the binder?

UNIDENTIFIED FEMALE SPEAKER: Yes, it is (inaudible).

MS. CHAYTOR: Your microphone, Commissioner.

THE COMMISSIONER: Sorry?

MS. CHAYTOR: Your microphone.

THE COMMISSIONER: Thank you. I want the tab number. I was just looking at the video; I wasn't following the transcript.

MS. CHAYTOR: Oh sorry, it's P-0120 and it's tab 3 of your binder, Commissioner.

THE COMMISSIONER: Tab 120?

MS. CHAYTOR: Yeah, the exhibit is P-0120 and it's tab 3 of your binder.

THE COMMISSIONER: Tab 3 of my binder?

MS. CHAYTOR: Correct.

And that's the transcript of the re-enactment. That's the transcript. These were, these are –

THE COMMISSIONER: Yep, okay, thank you. I've seen it before, but I haven't –

MS. CHAYTOR: Yeah, they were in the RCMP file.

THE COMMISSIONER: I didn't have it out this afternoon. Okay. So that's page?

MR. KENNEDY: Page 10, Commissioner.

THE COMMISSIONER: Okay. So why don't we wind it back, can we, just a little bit and we'll – and what was the line?

MR. KENNEDY: Line, I'm at around line 10.

MS. O'BRIEN: And it's page 11 of the exhibit, page 10 of the statement itself.

(Video resumed.)

CST. SMYTH: (Inaudible) again talking about fucking government.

(Video paused.)

MR. KENNEDY: 16:15.

THE COMMISSIONER: I'm sorry, are we back far enough?

MR. KENNEDY: You go to 16:15 on the tape.

THE COMMISSIONER: I'm not sure I'm getting the right page now. Anyhow I won't bother finding it on it right now; I'll get it later. Are we back far enough on the video and replay it again?

MR. KENNEDY: Yes, we are.

THE COMMISSIONER: Okay.

(Video resumed.)

CST. SMYTH: ... in this hand, and I started to look down at the folder but I wasn't really truly looking at it. I, I was just trying to stop looking around because it was agitating him. And, you know, this is probably exactly where I was standing because I feel like, while I'm looking here, there's enough of that chair in my peripheral vision that this is around where I, I saw, I first saw the gun and, and I don't know where it came from.

Other than that, I can say him seated there, it came from his right-hand side. It could have been jammed into the cushion. It could have been – you know, originally after I was trying to dissect this myself, after, I thought maybe it was fashioned to the side of the chair in some sort of holster, you know, and of course when I look at it, I can see that that's not the case unless he had it poked in that side pocket.

And I don't remember that garbage can being there. It may have, it may have been there and the firearm may have been down beside it. There was a lot of garbage, just like there is here now. I don't know if, if some things had been moved, but I don't know where that gun came from, other than to say that it came from his right, and I remember it coming up in such a way that the barrel to me – when I was standing here, it was a gun barrel. There was no question in my mind that there was a gun barrel coming towards me and it was just – it was completely, it was completely shocking to me that this conversation, albeit him being agitated, had escalated to the point where there's a gun coming at me.

And, you know, I'm probably, I think I am mostly facing, facing him and, at some point in time, I just, I drop the folder that's in my hand, the pen and I don't know if I – if the pen was there in my hand or if it was in the folder. I don't know where the pen was, if I dropped that or if it wasn't even in my hand. I don't know.

And so, you know, at this point, I thought I was getting shot. I was kind of preparing for a bullet and my instinct was to put my hand out, like a ball was coming at me. And in hindsight, it sounds so stupid because it's going to do nothing, but I did, I put my hand out like this and turned away. And then went – everything else from here for me is completely instinctual.

I drew my firearm – I went directly for my firearm but I'm also wanting to get out of the room, so I want to get out of here, but instinctively I'm also addressing the fact that there's a gun coming towards me, and I'm moving, basically, like this to come away from it.

And I don't have – I can't – it's really hard for me to remember how I accessed my firearm, if I drew my jacket back or if I lifted it up, and even unhasping – my holster is just a hasp and I don't

have great recollection of doing that because it was just, to me, one solid motion of, of drawing it.

And I drew my firearm and I'm – yet the gun is coming towards me and he's bringing it up like it's from his right, like this, and I still got my hand out and the only thing I could verbalize was: no. And I kept saying: No, no, no. And I felt like it was a plea for him not to shoot me. And I was – there was a lot of stuff, amazingly enough, I think, going through my mind but it was going to be the feeling of being shot. I felt like there's going to be – this is really going to hurt. There's a bullet's going to enter me and this is going to really fucking hurt.

And, and my hand is out, I drew the firearm. I think my, my first shot – and it was completely instinctive, there was no thought. There was you're going to be shot, you better start shooting back. And I think I pretty much fired maybe from here, I don't think I even had time to punch out. But, you know, whether it was here or here is really hard for me to say. And I would, I would venture to guess that my first shot probably from around here somewhere. And I don't know what I kept doing with this hand, if this hand eventually made it back to, to link up with my gun for a proper grip or if it stayed out.

And I – by this time I had punched out my, my shooting hand and my eyes were still pretty much on that, that gun. And I can see the gun still pointed at me, the – because this is milliseconds from that first – the first shot the gun was pointed at me. The second shot I still feel that gun pointed at me. And albeit we're talking through it, it was just instantaneous. There was no, there's no break, there's no – it's just, time is almost stopped at this point while also going very, very fast. And I don't know, even know how to properly explain that or make anyone understand it but – and I'm moving towards the door, I'm punched out and, you know, I've locked my arm out into a shooting position and I'm, I'm going for his centre mass and, and – but I'm looking at the firearm.

The second shot is fired. I – my hand is out here but I don't know if it was still out here or if it was here. I still feel there's a threat to me. I raise and I fire towards his head and I don't know if that shot hit. I felt like that shot was not on target, like I did not hit him. Like it hadn't – to me it hadn't had any impact. What I had done so far had done nothing. It was, he was there, he's still there and there was, I was still in, in imminent danger and that's – but while at the same time, this is all happening so, so fast.

And so that head shot to me missed. The centre mass shots I don't even, I don't, I don't know if, if they had connected or not. And I get to about here and I'm still punched out and I shot for his head again. I know that that shot connected because I, I can still see his head move from that shot. And within another instant, I'm out of the room. And it's – it's, it's that fast. It's under – like if that whole process, from the time, me seeing the gun to being out here, if that was any more than a second and a half to two seconds, I would be very surprised. And I immediately got out here, and still had the firearm in my hand and pretty much instantaneously started back into the room. I had – and I told him – I was now saying: Drop, drop the gun, drop the gun, drop the gun. I was actually further over here because I couldn't see. I couldn't see the couch; I couldn't see any, any aspect of him at all.

So I'm right here and I'm telling him to drop the weapon, drop the gun, drop the gun and I start coming back in the room. And I get about here and I see the firearm on the floor. The firearm is leaned up against – I'm guessing it's, it's this green case albeit I can't – if it was a box, if it was a Tupperware container, if it was something else, ice cream bucket, it was leaned up against something in that region. It was not on top of the coffee table and it wasn't laid on the floor, but that green bucket for some reason doesn't, doesn't completely resonate with me.

But the firearm was there, I saw it. It was a long-barrelled gun all – but also not a big gun. And – so I saw that there, settled a little bit more, to some extent, in, in that I thought the threat was now on the floor. So I came in here, I continued in here and I saw Mr. Dunphy had come back in the chair completely. And I noticed the, I could see an entry wound on the side of his head. And it was on this side of his head. And, to me, there was no signs of, of – at first look there was no signs of life.

But I didn't – I, I stayed in a very high alert mode at this point. My hearing is almost non-existent after I fired the first shot. There is very little I processed from an auditory perspective. Even my subsequent shots were, were almost completely silent. And my ears were ringing and there was a lot of smoke in the rooms with the smell of gunpowder.

And once I, I determined that the gun was down there, I didn't check the gun for some reason. I know that I should have, that I should have made that firearm clear. I don't know who else is in the house. I'm still thinking there's somebody else maybe in the house, there's still a threat here. So my instinct, then, is get to this back over here 'cause I'm, I'm – now I'm worried that the brother who I knew lived next door, granted he gave me no reason when I visited him to fear, I also – there was also just shots fired at his brother's home. So my thought is there's still potentially somebody in the house, there still might be somebody coming across the yard and I was in full, full threat mode.

And I'm, I'm looking out the window, I'm looking over my shoulder back here. And at – I'm even doing the math of how many rounds I'm carrying. I'm thinking – and should I do a tactical reload. I've got, I should have eight, eight rounds left in my gun. But I'm even questioning how many shots I fired, did you shot – did you fire four or did you fire more and maybe you should just reload and – because if you get into a firefight, you know, even, even the more I think about this since I was here on Wednesday I, I was thinking even to the point of, you know, you got to conserve your ammunition. If you get into a firefight here now with other residents you need to be very strategic about what you shoot.

Breathe, do not unload your weapon when somebody's 50 feet away 'cause you're not going to hit 'em and you're going to have nothing and you're going to be done. And do I do a tactical reload. And I'm shaking. I'm really, I'm noticeably, even to myself, like, I'm shaking a lot. Like don't attempt to reload because you're going to drop it, and you're, and then your threat is going to present itself and you're not going to be able to pick it up.

And eight rounds, eight rounds is, is significant to engage in another threat if you have to so keep that. And I, I checked even to make sure I had my magazine and – which I did. And I, I was, you know, from there it seemed like a really, really long time that I was here. And between here, because I – at some point in time I come back and I'm checking down the hallway.

Also, at some point in time, I come out and I take a better look at Mr. Dunphy. I'm still – well, actually, after a minute here is when I picked up the phone and called – my first call was the RCMP Communications and I hit their emergency line. I told them who I was and where I was. That I was, you know, the officer that was at a residence in Mitchells Brook and that I had shots fired and I needed police assistance and I needed the paramedics.

(Video paused.)

MR. KENNEDY: Excuse me, Commissioner?

Yeah, now, again, I, I, I heard something that's potentially important and I don't know if it's just me hearing these things.

THE COMMISSIONER: No. No, we're going to be able to correct these, Mr. Kennedy (inaudible).

MR. KENNEDY: Okay, well, we're at –

THE COMMISSIONER: – going to be able to make any corrections if there's a typo, you know, based upon discrepancy, but go ahead.

MR. KENNEDY: Yeah, there appears to be a point missing. Now, I don't know if I just heard this, Constable Smyth saying: Also, at some point in time, I come out and I take a better look at Mr. Dunphy, he was still – I heard after one minute, or after a minute –

THE COMMISSIONER: After a minute, yeah.

MR. KENNEDY: – but that's not in the transcript.

THE COMMISSIONER: Pardon?

MR. KENNEDY: That's not in the transcript.

MR. SIMMONDS: What page are you at?

MR. KENNEDY: Page 16, line 9 and 10; after a minute my first call was to the RCMP, or something along those lines.

THE COMMISSIONER: (Inaudible) going through it still.

MR. SIMMONDS: Could you play it back?

THE COMMISSIONER: Yeah, there seems to – that seem – there seems to be that part is missing there, yeah.

MR. KENNEDY: Yeah.

THE COMMISSIONER: From my transcript as well. If you just roll it back a bit.

(Video resumed.)

CST. SMYTH: – that and I was – I checked even to make sure I had my, my magazine and – which I did. And I, I was, you know, from there it seemed like a really, really long time that I was here and between here because I, at some point in time I come back and I'm checking down the hallway. Also, at some point in time I come out and I take a better look at Mr. Dunphy. I'm still – well, actually, after a minute here is when I picked up the phone and called – my first call was to RCMP Communications and I hit the emergency line –

(Video paused.)

THE COMMISSIONER: Okay, emergency.

(Video resumed.)

CST. SMYTH: – I told them who I was and where I was, that I was –

(Video paused.)

MR. KENNEDY: Stop it now.

THE COMMISSIONER: Yeah, there's a couple of unintelligibles there in that line –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – which is noted, which is not uncommon if the, if the transcriber can't make it out.

Sorry, go ahead.

MR. KENNEDY: But what I hear there, Mr. Commissioner –

THE COMMISSIONER: Yeah, I'm not, I'm not finished. Let's –

MR. KENNEDY: Oh, sorry.

THE COMMISSIONER: Let's let them – it may be back in the unintelligible, but I'm not sure yet. Just keep going.

MS CHAYTOR: (Inaudible.) Yeah, that's the line I think it is. It's in the unintelligible line.

THE COMMISSIONER: I think that's where – I think it's probably taken in but let's just make sure. Just wind it back a little bit again and play it again.

MS. O'BRIEN: I heard after a minute here is when I picked up the phone –

MR. KENNEDY: Yeah.

MS. O'BRIEN: – and called the RCMP.

(Video resumed.)

CST. SMYTH: Also, at some point in time I come out and I take a better look at Mr. Dunphy. I'm still – well actually, after a minute here is when I picked up the phone and called – my first call was to RCMP Communications and I hit the emergency line. And I told them who I was and where I was, that I was, you know –

(Video paused.)

THE COMMISSIONER: It seems to me that –

(Video resumed.)

CST. SMYTH: – the officer that was at a residence in Mitchells Brook and there were shots fired –

(Video paused.)

THE COMMISSIONER: Okay, let's just stop it there.

(Video resumed.)

CST. SMYTH: – and I needed police assistance and I needed paramedics. And they went through the process of what they were going to send and to stay calm and so on and so forth –

(Video paused.)

THE COMMISSIONER: Okay, just stop it again for a second, please.

(Video resumed.)

CST. SMYTH: – and I hung up the phone and then but –

(Video paused.)

THE COMMISSIONER: Okay. Now, we'll, we'll just note that there are omissions there and counsel can get together and see if they can agree in terms of what the, what has been said on the, on the tape. And I may – if you don't reach an agreement, I'll have to take a position on it after listening to it properly.

Just give me the previous reference again, Mr. Kennedy. I'm sorry I was having trouble finding it there, where the other omission was you think.

MR. KENNEDY: (Inaudible) this reference, Mr. Commissioner, was at –

MS. CHAYTOR: Page 10.

THE COMMISSIONER: Page 10 of 27?

MS. CHAYTOR: Yes.

THE COMMISSIONER: 10 on the bottom is it?

MS. CHAYTOR: Yes. Page 10, line 10.

MR. KENNEDY: Yes.

THE COMMISSIONER: 10 of 27.

MR. KENNEDY: It says: “this is probably exactly what I was thinking ...”

THE COMMISSIONER: Right.

MR. KENNEDY: What I heard is: This is probably exactly where I was standing.

THE COMMISSIONER: Yes, I think that sounded more like standing. And it makes more sense too, where I was standing.

MR. SIMMONDS: Mr. Commissioner, that's what I heard. And a little farther down there's also a word where it says: “I originally after I was tryin' to dissect this myself after I thought it was mashed...”

I think that word is fashioned.

THE COMMISSIONER: You thought it was what?

MR. SIMMONDS: Fashioned.

MR. KENNEDY: Where is that, Mr. Simmonds?

MR. SIMMONDS: Line 15, “after ... I was tryin’ to dissect this myself.”

MR. COMMISSIONER: Yeah, okay, we’ll check. I’ll let counsellor check on that one. But I know the other one, the word standing came to me rather than thinking.

So anyhow, with all these points, there’s three of them now – Counsel, at an appropriate time, get together and you can do it later on, after I leave this afternoon if you want. And bring it to me tomorrow if you haven’t reached agreement and I’ll deal with it.

So that’s – Mr. Simmonds thinks that should be fashioned. Okay. All right.

Well, this is not uncommon in terms of having some discrepancy because of either typographical error or an unintelligible.

Now, if you could, just roll it back just a little and play, and continue playing.

(Video resumed.)

CST. SMYTH: I told them who I was and where I was, that I was, you know, the officer that was at a residence in Mitchells Brook and that I had shots fired and I needed police assistance and I needed paramedics.

And they went through the process of what they were gonna send and to stay calm, and so on and so forth. And I hung up the phone on them, but then it was after the phone call that I started to think of clearing the house. And like, in hindsight, my clearing the house was poor. I came down here and looked down here, there was nothing here. This plywood was over this door, I remove this. I’m giving verbal commands at this point. I’m sayin’ police, police. I don’t think I said drop your weapons or anything like that. I think I was just saying police.

My firearm was still out. I’m checking down here – I got – I came out here and I looked in here. This was open, there was marijuana plants growing, like fresh marijuana plants in there. This is as far as I checked – which makes no sense to me at this point, because it was a poor, poor job.

I came back out here, I made it down here. I kinda did quick entries and clearing of the bathroom. This room here, door was not open, and I don’t know if I used the doorknob or if I just pushed it with my hand. There was one large marijuana plant in here. I checked in here. Again, I didn’t go any further than here.

I’m thinking this door was closed. I know when I was here on Wednesday that was open, but this to me looks like what it looked like on Sunday. I think it was just like that, and I didn’t go in there. I didn’t even open that door. I don’t know why I didn’t.

And I came back out here again. I’m still thinking that there’s potential threats that I got to deal with in the exterior. I had also called our communications centre after calling the RCMP communication centre. Although I had asked them to do it, I still did it. And I called them and told them what happened, notify duty officer.

At some point in time through this, I had checked Mr. Dunphy again for signs of life. And to me, he gave me every indication that he was deceased. That there was no breathing, there was no indication that he was alive.

At some point in time the RCMP communications centre called me back. I answer. I tell them that – they asked, they said the Health Sciences need to know if they need an airlift for the injured person. And it was that point in time I think I gave a closer examination of him. I see what I took to be a significant head wound. And, you know another look at him, there's no colour and there's no breathing. I don't know if I touched his neck or, I may have put my fingers against his neck and – but there was just zero sign of life in him. It was just – it was starting to hit me that this man is dead, and I told them that. And even when I was telling them, I was very much struggling with: Who the hell are you to deny this man of an airlift or of medical attention. But at the same time he was dead. He was – he was dead and it was – and I knew that. And I told them he was deceased.

And so, eventually I was probably 15 minutes in here moving in this area, or stood right in that corner looking out the front window at the berm in the trees and, you know, I did, at this point, I holster my weapon. I feel like the threat of anybody else coming is probably lessened and I start to kind of gather my composure and I make my way outside.

My mouth had gone instantaneously bone dry and just completely bone dry, and that was almost immediately when I exited that room after the shooting and I think when I was making the phone call, I was really having to try to generate saliva even to talk. And I, so at this point, I leave, I leave the house and –

CPL BURKE: Okay, just, Joe, just before we leave, and we'll continue it from here, I just want to go back in the living room here. A couple of questions; when you entered the front door to the time you arrived back here after the firearms are presented, can you give us a time frame of how long that was?

CST. SMYTH: From the time the firearm was presented to the time –

CPL BURKE: Well, from the time you entered the house and how long you were here in this, in the residence before the firearms were presented.

CST. SMYTH: It was no more than 15 minutes and I would say no less than 10 minutes, so between 10 and 15 minutes. You know, I think the first part – to me, the whole interaction is almost broken into two parts in that there was that cordial part of the conversation where it wasn't aggressive, he wasn't agitated and it was, you know, which is how I would always try to start that type of meeting, is a rapport-building phase to try to generate some comfort and that, from my perspective, had to be going relatively well and, you know, that was five to seven minutes for me.

You know, it might have been eight minutes, but it was in that range. And, you know, once I'm over, over here and we're talking, it gets and that agitated part of the conversation starts and it's very disjointed. There's not a lot of coherency to it, to the whole entirety of the conversation. It's back and forth between me talking about the reason in being here to him just kind of demanding to know who sent me and telling me I'm another arm of the government and to talking (inaudible) ... also lasted a similar amount of time, you know, five to seven minutes. It maybe a little bit shorter, it may be a little bit longer but that's really, that's a guesstimate.

And of course the last aspect of it is, I would say, no more than two seconds. Once the firearm – I saw that, to everything unfolding, from drawing my firearm to exiting the room and firing off rounds, it was two seconds. I'd stretch it to two-and-a-half seconds and I'd go as low as a second and a half. It was so unbelievably fast.

CPL BURKE: Uh–huh.

CST. SMYTH: And then the other portions of it were, I would suggest, I was in the house of another 15 minutes before – I mean, I – you know, I holstered my weapon and left the residence.

CPL BURKE: Okay.

Can you kind of explain for us the – where Mr. Dunphy was when you were interacting with him when you first came in and where he, he went in the residence and did you go anywhere else, basically?

CST. SMYTH: We were in, in the hallway, right in front of his door for a minute to two minutes, and he immediately came in here and went right to that chair. That heater was on and it was pointed in the direction it is. It wasn't pointed at him or the chair. It was pointed just like it is. I remember that was on because it was red, and he walked and he sat in that chair and never moved from that chair.

CPL BURKE: And when you moved from, say, the porch area to the fireplace, at what point did you do that?

CST. SMYTH: Pretty much about the same time he went into the chair.

CPL BURKE: Okay.

CST. SMYTH: I may have stayed out there for an extra 10 to 15 seconds. I think I slowly walked in here. I walked in here and I'm kind of looking around. He was telling me to sit down, I was looking at it – I looked down at the couch and, you know, I looked over here and I remember that printer and – but it was just a slow walk over here.

It was no concerted effort to get there quickly or it was – I wasn't looking back at him. I was not in fear of him at all. I – if he wanted to had shot me at that time, this would have been a good time to do it because I was walking – I stood here and I was pretty much back on to him and he could have shot me right here and I would never, ever (inaudible) I would have had no, nothing to do. I would had no response to it at all.

And it was just a few seconds to walk over here and then it was me pacing back and forth here –

CPL BURKE: Uh-huh.

CST. SMYTH: – for the rest of the interaction.

CPL BURKE: Okay.

CST. SMYTH: You know what I mean? Between here I never – I don't think I went beyond here. I don't think I even made it this – I never made it within this proximity to him. I was never any closer to him than this. And spent – that's it, back and forth there. That's where the rest of the conversation took place and that's right where I was when he showed the firearm.

CPL BURKE: So Mr. Dunphy was where in the living room during this –

CST. SMYTH: He sat right in that chair.

CPL BURKE: Uh-huh.

CST. SMYTH: He never moved from it. He moved around in it –

CPL BURKE: Right.

CST. SMYTH: You know, he sat up and sat back, and moved to one side and the other, but he never got out of it.

CPL BURKE: And when you, when you saw a firearm, can you kind of describe – can you come over by the chair and kind of describe to us where it came from or where you first saw it?

CST. SMYTH: You don't need me to sit down in the chair?

CPL BURKE: No, no, no, no, I just want you to try and point out where, where you think the firearm came from –

CST. SMYTH: He took it from his right.

CPL BURKE: Okay. So it would be over on this, this side?

CST. SMYTH: I don't know. He took it from his right-hand side.

CPL BURKE: Okay. Yep.

CST. SMYTH: And he's sat like this, he sat in the chair and he could have reached down; he could have brought it out from the side here; he could have reached down with one hand – all I remember is a barrel, a barrel coming up like this, towards me. So if he sat here and I'm over there, I see a barrel that comes up in this direction. It came from down here to here. His body at some point in time had been, you know, in this direction. Was it down here like this, or was it like this, or this, I don't know.

CPL BURKE: Okay.

And just while you're there can you kind of describe the way the gun was – I know you touched on it, but the way the gun was positioned after –

CST. SMYTH: It was, I'm going say it was this. It was leaned up, probably right here. If this hasn't moved, then I'm thinking the butt of the gun was on the floor and I'm pretty certain that the barrel was pointed up.

CPL BURKE: And a description of the gun, what are you, what are you seeing, what kind of –

CST. SMYTH: It's a rifle. I saw a bolt, so it's a bolt-action rifle; it didn't seem long to me. Like, it wasn't, it wasn't – I haven't got a tremendous familiarity with rifles I'm afraid, and it wasn't, say, a long rifle that you would use for hunting large game.

CPL BURKE: Can you describe the lighting conditions when you were here on that day –

CST. SMYTH: Exactly what they are right now.

CPL BURKE: Okay.

CST. SMYTH: You know, maybe, less shadows. But the light entering the hall was very similar to what it is now, a little bit flatter perhaps, but it was essentially what it is right now.

CPL BURKE: Okay.

Can you describe for me what Mr. Dunphy was wearing on that day?

CST. SMYTH: I don't think I can. He was (inaudible). I don't even (inaudible). He was dishevelled. I don't know. A sweater or a hoodie type of shirt and his pants, I wouldn't, I can't say with certainty.

CPL BURKE: Okay.

So you, you do the clearing of the residence and you, you're on the way out. Well, I guess we can continue from there.

Is there anything else you want to say about the interior of the residence before we leave? Any other points that you want to bring up? Anything that just came in your mind?

CST. SMYTH: I don't think so. Maybe if I was to sit here all day with you –

CPL BURKE: Sure.

CST. SMYTH: – and talk about what I'm feeling and, and what I – in terms of it being relevant or to have – I think the, the technical aspects of it are they are what they are (inaudible). I don't know. No, I don't think there's anything that's of relevance at all.

CPL BURKE: Okay.

MR. RICHE: (Inaudible.)

CST. SMYTH: He did not.

MR. RICHE: (Inaudible.)

CST. SMYTH: Before, before he drew the firearm? He did not speak.

MR. RICHE: Before you saw the firearm he didn't say –

CST. SMYTH: No.

MR. RICHE: You didn't hear him?

CST. SMYTH: No, he didn't say – (inaudible) You almost think he would. I would've thought you would, but there was no, it was – yeah, in, in hindsight it was the one point where he was, he was silent, where he hadn't said anything. Where if I wasn't talking, he, he wasn't talking. Not that it was for a long time. It was – but no, there was no words that preceded him drawing that firearm that would have given me any indication of even what he was feeling or what his intentions were.

CPL BURKE: Okay, continue on.

CST. SMYTH: (Inaudible) the home, I'm still, you know, cognizant of what's going on around me and I'm looking down here and I'm looking back over here, and my firearm is holstered. (Inaudible) I remember looking down through here, through these trees towards that berm. And I'd look up here towards the side of the residence. I didn't go back. I didn't go behind it. I didn't go all the way to that side of the residence. I went to my vehicle and I opened up the door. And I remember at one point in time putting my hands on my head and kind of standing by the vehicle like this, just trying to process everything that just happened.

And I got water out of the car. I drank water from the cup holder and, and I came back to here. I spent a bit of time probably right here in this spot. That's probably where I spent most of my time, between here and the driver's side door of the vehicle.

Within a couple of minutes I started the car and turned on the emergency lights on it. I wanted the officers responding to be able to see the lights of the vehicle to indicate (inaudible) stopping. It seemed like maybe another 10 minutes out here and an RCMP vehicle passed here, but he immediately saw it and stopped abruptly right in front and he backed up. And I came here – I stood out here. When he pulled up I was – I opened up my jacket so he could see my police – because I had another badge, my, aside from my badge in my wallet, a badge that sits on my belt. I had that there so I opened up my jacket to make sure he knew I was a police officer.

And he acknowledged that he saw that and, you know, asked if – we had some conversation, asked if I was okay. And I immediately told him what happened inside. I told him that the house wasn't properly cleared. I told him the firearm was still on the ground and that was about it.

A few more, more officers showed up, paramedics showed up. The paramedics came up here and I don't know, I told them as well that the house hadn't been properly cleared and that was it. Eventually, they went inside and determined that he, of course, he was deceased as – then I eventually got into one of the RCMP vehicles and spent the remainder of the time before they removed me from here in a vehicle.

CPL BURKE: Who was the first person you had contact with when you came outside?

CST. SMYTH: Adrian Cox, the officer. I did – there was a vehicle that drove, up back and forth, and it was a black, I think maybe like a newer model Impala or Chev product vehicle – a man and a woman; the man driving and a female passenger. They drove down slowly, looked up, but when they drove by I did have the lights on, on the vehicle. And I may have turned them on after they drove by the first time. You know, I wanted them to know too that if they came up here, if there was going to be an encounter that, you know, I was kind of trying to prepare myself to tell them that they can't come up and – I was thinking about what I was going to say, how you – I didn't want to say that there's been a shooting. There's a deceased person inside. But it never came to fruition anyway. They didn't come up here. They drove by it a couple time and (inaudible) Constable Cox arrived.

CPL BURKE: Okay. This is your opportunity now that if you left anything out or you wanted to add something to what you've presented here today –

CST. SMYTH: I don't think so. I think that's it.

CPL BURKE: Okay.

The time is 15:51. The date is still April 10, 2015. Just wanted to, for the record, this is the second re-enactment that took place. There was one on Wednesday that the video wasn't properly captured, and this is our second re-enactment.

The – just wanted to, you know, describe who was here in the video. It's myself Corporal Steve Burke and Sergeant Joe Smyth of the RNC and this is retired Justice David Riche, an independent observer. And there's also a second camera which is Corporal Monty Henstridge of the RCMP. And I think that's it and we'll end the re-enactment.

(Video ended.)

THE COMMISSIONER: Okay. Now, we'll have time, everybody is going to read and then compare; read the transcript and compare with the video.

I don't recall the rules, if the rules cover, the rules of evidence cover it, but it would seem to me the video is the better evidence. The video – the audio and video I should say on the video – the tape would be the best evidence. And if counsel can agree, Mr. Kennedy you'll presumably put to Constable Smyth at some point what he, what he understood himself to have said.

The exhibit will go in the way it is, but there'll be corrections of any errors or omissions that either counsel agree upon or that I might determine later.

So I have to leave shortly. It might be a good time now, while it's still fresh in your minds, for counsel to stay here after we adjourn and briefly see if you can work it out quickly. Well, I'm not going to tell you how to do your work if you – if anybody has problems doing it that way, then you know we'll adjourn and I'll work things out later.

Ms. Chaytor, do you have any comment?

MS. CHAYTOR: Yes. Commissioner, there are a couple of questions, though, that while it's –

THE COMMISSIONER: That follow from the video? Yes, that's fine.

MS. CHAYTOR: Yes, while it's fresh in our minds. So –

THE COMMISSIONER: Yeah, but I just want to see if the procedure is suitable to counsel before we move on.

Does everybody agree with that? When we adjourn – when I leave you'll remain for a while and see if you can work it out. There's two on the one page, and a third on another page. And there may be others for all I know, but I didn't pick anything up in the course of listening. I was paying more attention to watching the presentation than to reading the transcript. So I'm not saying that I am satisfied, but I know that everything else is correct.

Okay. Well, if you want to put some further questions to Constable Smyth.

MS. CHAYTOR: Thank you.

Just a couple of things; one thing was you indicated that Tim Buckle had attended with you. So this is the re-enactment on April 10 that Tim Buckle attended with you?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. I didn't see any – hear any mention of him or he wasn't –

CST. SMYTH: He wasn't –

THE COMMISSIONER: Not an official participant.

CST. SMYTH: No, he wasn't near the actual re-enactment. I think he was down by the vehicles the entire time.

MS. CHAYTOR: Was there anyone else in attendance that wasn't mentioned?

CST. SMYTH: I think maybe whoever was taking that video. I don't remember who it was.

MS. CHAYTOR: Okay, but nobody other than the people taking the videos.

CST. SMYTH: No.

MS. CHAYTOR: Okay. All right.

And Constable Smyth, you said in the video – this was a question that I had intended to ask you before – when the rifle appeared or shortly, I guess, leading up to the rifle appearing, Mr. Dunphy didn't say anything when he pulled out the rifle? He didn't say anything, he had fallen silent?

CST. SMYTH: That's correct.

MS. CHAYTOR: Okay. And did that stand out in terms, to you in terms of he'd been in somewhat of an incoherent state, I think you say at one point, incoherent in some of the things he's saying. He'd been repeating himself, on a little bit of a rant with you prior to that. So did it stand out when he fell silent?

MS. CHAYTOR: In hindsight, on reflection, perhaps yes. But at the time, it was a very brief period; we're talking seconds. I didn't immediately take that as an indication of impending violence. I think if anything, maybe I was perceiving that at the time, that maybe what I was doing was having the intended effect of – he was taking a break and starting to reel himself back in a bit, but I don't know if I'm applying –

MS. CHAYTOR: Okay. So nothing that caused you to –

CST. SMYTH: No.

MS. CHAYTOR: – look up and say why are you so quiet?

CST. SMYTH: – why do you stop talking –

MS. CHAYTOR: Why is he now quiet, nothing like that?

CST. SMYTH: No.

MS. CHAYTOR: Okay. All right. And in terms of the position of the gun afterwards, did I understand you to say in this re-enactment that the barrel was pointed up?

CST. SMYTH: I did say that there, yeah.

MS. CHAYTOR: Okay. And, and that was your recollection on April 10 when you –

CST. SMYTH: Clearly it was, yes.

MS. CHAYTOR: All right, okay. And you're – and of course you've seen the photographs that show the barrel pointed down?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And those were the photographs that are taken later –

CST. SMYTH: Yes.

MS. CHAYTOR: – by the forensic, forensic ID people. Okay.

The other thing that you –

THE COMMISSIONER: So do this – has Constable Smyth accepted that that was the correct position of the, the rifle after the shooting?

CST. SMYTH: Yeah. And when I see the photos of the firearm, I feel like it clarifies my recollection better, that that does appear to be how it was. It does seem to be an odd way for a firearm to land. I think my recollection at the time was perhaps based on knowing where the firearm was and that it was pointed up in the air, but that that would be the more natural way I would think it would fall. But my current recollection is as, as the pictures show.

MS. CHAYTOR: Okay.

Okay, and just to be clear. So that was – and your current recollection is as the pictures show, and that – has that helped by looking at the pictures, or at what point in time did you recall it to be as the pictures show?

CST. SMYTH: You know what, I can't pin that down. When I saw the –

MS. CHAYTOR: But was it before you saw the pictures?

CST. SMYTH: When I saw the pictures I didn't recall recollecting it in any other way. So it wasn't stark to me to look at the photo and say I don't remember that. It just – it made sense.

MS. CHAYTOR: Okay. And the other thing that you mention here, and you said yesterday we had some discussion about the background checks that were done. And you said in the re-enactment that you had done background checks, and I just want to allow you to, an opportunity to explain. When you say you did background checks, are you referring to you did them yourself or that –

CST. SMYTH: No, I had requested that they were done. I know we had, had some conversation about my contact with the RNC Communication Centre and requesting that that CPIC check be done. So while I recognize I didn't note it in my summary the following day, it was absolutely indeed done.

MS. CHAYTOR: Yes, okay. And I just want to point to, because this is in the little

MS. CHAYTOR: Okay. And I just want to point to, because this is in the Little report, which is P-006 in our exhibits. But in Grant Little's report, at page 3 of that report, he writes as well: he did background checks of that person on police databases which included – and then he lists RNC ICAN system, CPIC/CNI/CFRO systems, driver's licence/vehicle systems and RCMP PROS system. And Constable Smyth, I understand the RCMP PROS system, of course, you couldn't do that yourself.

CST. SMYTH: That's correct.

MS. CHAYTOR: That had to be done by the RCMP, and that's what Constable Cox did for you?

CST. SMYTH: Correct.

MS. CHAYTOR: Right, okay. And the RNC ICAN system you did do yourself?

CST. SMYTH: I had thought I did. I realized that there's perhaps no record of that search but I had always thought that I would have done that query.

MS. CHAYTOR: And I think we're going to hear evidence about that, Commissioner, that it may be if the person's name is not in the system, that it may not show up in the archive of the search. If the person's name is not there, and you'll hear other evidence on that. So that does not mean that you didn't do the search in Donald Dunphy's name.

CST. SMYTH: Okay.

MS. CHAYTOR: Okay. All right.

Then we have CPIC/CNI/CFRO systems, driver's licence/vehicle systems. And, so saying that the CPIC and the CNI was done, was it your understanding that that had been done by Mark Oram?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

CST. SMYTH: When we request a 10-29, a CPIC check, as long as I've been a police officer, the CNI is always inclusive of that. The CNI perhaps being the more important portion of it, those cautions and applicable histories.

MS. CHAYTOR: Okay. Thank you.

And, Commissioner, did you want me to continue on or what time do you have to leave?

THE COMMISSIONER: No, I'm fine for another 10 minutes or so.

MS. CHAYTOR: Okay. If we could bring up then P-0160.

MR. KENNEDY: Commissioner, there is one issue I need to raise with you before we break. It won't take long but I need some guidance.

THE COMMISSIONER: Do you want to do that now?

MR. KENNEDY: Well, it –

THE COMMISSIONER: Just in case, I don't want to get caught having to run late so –

MR. KENNEDY: Yes. Commissioner, Constable Smyth has been on the stand now, I guess Monday, so I haven't had any communication at all with Constable Smyth –

THE COMMISSIONER: Yes, that was mentioned to me and –

MR. KENNEDY: – since he has been on the stand –

THE COMMISSIONER: You're wondering whether you could speak with him and prepare for next week –

MR. KENNEDY: No, there's two – there's two particular issues I need instructions on. They have nothing to do with the evidence that he's given to date or the evidence that he will give, but they do relate to other witnesses. So I'm wondering –

THE COMMISSIONER: That's not a problem. Go ahead and interview your witness. And I have to rely upon your professional responsibilities, which you know in this regard. This has to do with – just for the record. Once a client is under examination by another party, the proper approach is for that party's own counsel to stay, not to communicate with the, with the witness in the meantime. And I know you know the way to act properly in that regard, Mr. Kennedy. So the courts have to rely upon counsel doing the right thing in this, in this type of situation.

Okay thank – and was it, you said – was there a second thing?

MR. KENNEDY: No, that would be it. That's it.

Thank you, Commissioner. That's it for me.

THE COMMISSIONER: Okay. Go ahead.

MS. CHAYTOR: Okay, P-0160, please.

Constable Smyth, this is your Use of Force Report and I – that is not your Use of Force Report, I apologize. We can come back to that.

I'll turn, then, instead to a different line. We can come back to that; I just had a few questions for you.

UNIDENTIFIED FEMALE SPEAKER: P-0161.

MS. CHAYTOR: Oh, it's P-0161, sorry.

And we looked at this earlier, Constable Smyth, and – only, though, in terms of the time. So I just wanted to take you through a couple of other questions regarding this. And, again, perhaps you can remind the Commissioner to whom did you submit this report?

CST. SMYTH: It would have been placed in a file folder. And I, I think I just passed it off to my direct supervisor. It may have been Inspector Gullage.

MS. CHAYTOR: Okay. And if we come down to the signatures on the bottom of the form we have yourself and do you recognize –

CST. SMYTH: Oh, Glenn Noseworthy, yeah. I believe that's who –

MS. CHAYTOR: Glenn Noseworthy.

CST. SMYTH: – I probably would have passed it to first.

MS. CHAYTOR: Okay and then Jason Sheppard? Okay.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And, in terms of filling in –

THE COMMISSIONER: Ms. Chaytor, did you say – is Mr. Gullage is –

MS. CHAYTOR: Mr. Gullage's name is not there, no.

THE COMMISSIONER: Not there.

MS. CHAYTOR: No, it's Mr. Noseworthy.

THE COMMISSIONER: Okay.

CST. SMYTH: That's correct. Yeah, Sergeant Glenn Noseworthy was the sergeant in charge of Criminal Intelligence Unit at the time.

MS. CHAYTOR: Okay, but you, you reported – your supervisor I thought was Mr. Gullage?

CST. SMYTH: While I was with PSU. Arguably at this time I'm no longer an acting sergeant nor am I assigned to PSU.

MS. CHAYTOR: Okay, so, so this is after the incident. So you've been taken out of the PSU unit and so that's why –

CST. SMYTH: Yes.

MS. CHAYTOR: – Mr. Noseworthy is signing and not Mr. Gullage.

CST. SMYTH: Correct.

MS. CHAYTOR: Okay.

And the type of incident, you indicate the type of assignment. You were doing an investigation. Type of incident isn't filled out here. Is there any reason why that wouldn't be completed?

CST. SMYTH: It just refers to more of a front-line policing issue that you're responding to an actual incident. In my particular case, I wasn't responding to an incident, it was strictly an investigation that I had initiated.

MS. CHAYTOR: Okay, an investigation that you initiated?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Alternative strategies used over here, and your choices would be verbal interaction, concealment, cover or other, and you didn't fill anything out there. What do you understand that to be asking you and why you didn't choose anything here?

CST. SMYTH: It refers to other potential alternatives that you could have utilized or attempted before having the use of force. Such as if you're faced with a, for example, a knife, did you engage subject with verbal commands to drop the weapon, identify yourself? Was there any conversation? Were you in a position that you could move to a position of concealment or cover in order to mitigate having to use force or any other methods.

In my situation, I don't feel I had that opportunity unless you want to include raising my hand as a method of cover. But I don't think that would constitute that.

MS. CHAYTOR: Okay. So it wouldn't be asking alternative strategies is not de-escalation. For example, you, you said that you did do some things to try and de-escalate the situation like not look around as much, to look down, to try and speak to him to tell him to calm down, that type of thing. That's not what's being asked here, is it?

CST. SMYTH: No. No, it's not what –

MS. CHAYTOR: That's not what you understand it to be asking you.

CST. SMYTH: Correct.

MS. CHAYTOR: Okay.

CST. SMYTH: This is – I think refers to the point in time where you're faced with a threat versus just an agitated person. Police being faced with an agitated person is a fairly routine scenario. This is specifically referring to use of force and when you're addressed with a threat. In my case, there was no opportunity for verbal interaction once the threat was present.

MS. CHAYTOR: Okay. And number of rounds fired by subject, I take it to mean that's Mr. Dunphy.

CST. SMYTH: Yes.

MS. CHAYTOR: And you say believed to be zero?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. So did you, did you think at any point in time that Mr. Dunphy had discharged his firearm?

CST. SMYTH: I didn't know.

MS. CHAYTOR: You didn't know?

CST. SMYTH: No, I didn't know. It, it was a point where I had, I wasn't processing any, anything in the way of audio. It was as if there was just rain or, or, or a blank sound. So at that point I wasn't sure if he had fired and missed or hadn't fired the gun at all. I didn't know.

MS. CHAYTOR: Okay. All right.

And then in terms of this form, it, it indicated that it had been reviewed by your supervisor. It doesn't say whether it's reviewed by training section. It does say that EAP is recommended and you were referred, I take it, for EAP.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And then, recommended for further training, that's not completed. After you submitted this form, did anybody in terms of you're in a supervisory capacity with the RNC speak to you about this form or the content or the circumstances in terms of your use of force?

CST. SMYTH: No.

MS. CHAYTOR: Okay, so you didn't get any feedback on this?

CST. SMYTH: On that particular form?

MS. CHAYTOR: Yes.

CST. SMYTH: No.

MS. CHAYTOR: Yes, and again, when we looked at these types of forms earlier on in your evidence, it wasn't a situation where you're signing it and reviewing it with your supervisor; you're not sat down together?

CST. SMYTH: No.

MS. CHAYTOR: You filled it out and signed it and passed it in.

CST. SMYTH: Correct.

MS. CHAYTOR: Okay and then you didn't – nobody came back to you with any questions about the form or any feedback.

CST. SMYTH: No.

MS. CHAYTOR: Okay.

THE COMMISSIONER: This might be a proper place to stop until 9:30 on Monday, but we'll take a few minutes if you would to indicate –

MS. CHAYTOR: Yes.

THE COMMISSIONER: – just the points that you have left to cover, Ms. Chaytor, and counsel can be aware –

MS. CHAYTOR: Yes.

THE COMMISSIONER: You think that you'd probably be able to finish your examination within an hour or less –

MS. CHAYTOR: Yes, I would hope so.

THE COMMISSIONER: – on Monday.

MS. CHAYTOR: I would hope so.

Where I have left to go, Constable Smyth, and, Commissioner, is largely communications pieces. I'm going to speak to Constable Smyth about an email that he sent on April 10, 2015. Also I'd like to ask, cover with him interactions that he had with the RCMP throughout the investigation, including Corporal Steve Burke.

Also, Constable Smyth has some evidence that I would like to cover with him regarding his perception of the public communications which were done surrounding this and, of course, that's one of the terms of reference that you have to address and Constable Smyth has some input to give on that.

And then there are some miscellaneous, three or four email that I would cover with him. So I wouldn't anticipate that would take any longer than maximum an hour. Of course, I'm only one side of the equation.

THE COMMISSIONER: Okay, so we'll adjourn now. I'm leaving it for counsel to meet. The official hearing will be adjourned, but you'll work behind the scenes to clarify the typos that were probably in that transcript that we looked at.

MS. CHAYTOR: Yes, and, Commissioner, I would point out that we had originally allotted three days for Constable Smyth's evidence but, of course, you'll recall that the first – we missed a half a day of the first day of his evidence, so I think we're still –

THE COMMISSIONER: We'll blame it on the snow.

MS. CHAYTOR: Yes, I think we're still doing pretty well and then we had an application, so we're not that far behind I hope.

THE COMMISSIONER: Right.

Okay, thank you, until 9:30 on Monday.