



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 7

Commissioner: Honourable Justice Leo Barry

Monday

23 January 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry opened.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Good morning. I hope everybody got dug out properly.

We're now to continue with the examination of Constable Smyth. I understand from counsel there might be some questions of law that I'm going to have to deal with. I don't know if they've been resolved yet or – I don't intend to deal with them now. What I was going to suggest is if there's an appropriate time either just before the mid-morning break or just before the lunch break that you could leave it with me to give me a few extra minutes to consider it. I don't want to get involved with having to adjourn in the middle of a session to contemplate a particular rule of evidence but that may become necessary.

I think we saw a couple days ago how time can be eaten up very quickly when we get into these sometimes hypothetical discussions, but – counsel ready to go, Ms. Chaytor?

MS. CHAYTOR: Yes. Good morning, Commissioner.

Good morning, Constable Smyth.

CST. SMYTH: Good morning.

MS. CHAYTOR: If I could have, please, P-0191, Madam Clerk. Constable Smyth, this is the email that you sent to your colleagues and others on April 10, 2015, and I have a series of questions for you regarding this email. First of all, perhaps you can tell the Commissioner, and you'll see here that this went to "All Staff Royal Newfoundland Constabulary." So would that have included civilian staff as well as officers?

CST. SMYTH: Yes, it would have.

MS. CHAYTOR: Okay. And so in terms of numbers, this would have been distributed to in excess of 400 people?

CST. SMYTH: Yes, for sure.

MS. CHAYTOR: Okay. And perhaps you could tell then the Commissioner, what was your purpose in writing and sending this email?

CST. SMYTH: Well, it followed a very emotional week whereby I had received a number of messages from friends, colleagues, family, many of which were done in person or text, email, telephone. And I think within that I'd found, you know, a common theme and the suggestion was to constantly not watch the media, keep your face out of social media. There's nothing positive to be found in there. That was much more challenging than the suggestion was.

I did find myself diving into social media, into the various media outlets, traditional media outlets if you will, and some of it was tough to read. It was hard to hear and I found myself sharing some of the frustrations that were being voiced to me in that a lot of the questions were hard to hear. I think following just a tough week, having gone through some of the recreations,

other internal issues at work, I did get to a state where I was very frustrated at that, at media, at the community for a lot of their reactions.

I didn't like the way I was feeling and I didn't like the way I was hearing some of my colleagues were feeling. And I arrived at the conclusion that, after I thought long and hard about that, that it was completely inappropriate for me to be frustrated at that. It made no sense because the questions that were being asked were completely normal. They were acceptable and they were – I understood why they were being asked and I felt somebody needed to speak to our staff, my colleagues, and express those sentiments and articulate that, you know, we have no place to be frustrated at this. If anything, we need to seize that as an opportunity to speak to the community and educate them when that opportunity arises. I wanted them, to let them know that I guess I was okay and to move forward in doing that. That was primarily the impetus to doing it.

MS. CHAYTOR Okay. And Constable Smyth, did anybody help you draft this or is this entirely your own creation?

CST. SMYTH: Entirely my own.

MS. CHAYTOR Okay. Did you seek advice from anyone prior to sending this?

CST. SMYTH: I drafted it at home. I – you know I remember the evening I did it. It was the evening before I had actually sent it. I – after I wrote it I asked my wife to look at it. I told her I wanted to send it to colleagues to express some of those feelings, and I'd sent it to two friends as well.

MS. CHAYTOR: I'm sorry?

CST. SMYTH: I had sent it to two friends as well.

MS. CHAYTOR: Okay. And I believe the records show that you sent it to Warren Sullivan and Tim Buckle. Is that right?

CST. SMYTH: That's correct.

MS. CHAYTOR: And did either of those two colleagues have any advice for you prior to you sending it?

CST. SMYTH: No, I never heard back from Warren before I had sent it. He got back to me the following morning and I think echoed how Tim and my wife had – what they had said as well. Was like, look, if you're feeling that way and you want to say that to your friends and colleagues, by all means you should.

MS. CHAYTOR: Okay. And Constable Smyth, I'm not going to take you through the entire email but there are a couple of sections that I want to point out, and in particular towards the end of a section which Ms. Dunphy has indicated was particularly difficult for her. And this is on April 10 that this is sent out. Did you realize that was also going to be the date of Mr. Dunphy's funeral?

CST. SMYTH: I had no idea.

MS. CHAYTOR: Okay.

CST. SMYTH: That – this was never written with the thought that that would ever be leaked to the media. Now in hindsight, even the day that it was leaked, it's one of those – when I found

that out, it's one of those situations that you'll never forget where you were at the time, 'cause I was almost sick to my stomach. And I immediately thought of his family and of how some of these comments were going to be construed.

I couldn't even remember exactly what I had said. I had indeed written it with the lens of this is going to a broad spectrum of personalities, even internally within our organization, but certainly not for it to go to the broader community at large. And the first thing I thought of when I received that call from our media relations officer was, you know, this is such bad timing for the family too, to be exposed to that. I was sick to my stomach.

MS. CHAYTOR: Okay. And the fact that you sent it to such a mass audience, did it occur to you, though, that there would be a likelihood that it could be leaked publicly?

CST. SMYTH: At that time I hadn't thought of that, no.

MS. CHAYTOR: Okay. And in hindsight I guess, it's something that obviously did happen, and the likelihood when you send it out to such a mass audience, the likelihood of that happening of course is certainly increased by the number of people who – the sheer number of people who received it.

CST. SMYTH: Absolutely it is, and I think just the heightened level of attention in the media and the community, I should have had that foresight as well.

MS. CHAYTOR: And did you also send this email outside of the RNC?

CST. SMYTH: Yes, I did. I sent it to some of our veterans and I sent it to some RCMP colleagues as well.

MS. CHAYTOR: Okay. Did you also send it to the lead investigator on your case, Steve Burke?

CST. SMYTH: Yes, I believe I did.

MS. CHAYTOR: Okay. And what was your purpose in sending it to him?

CST. SMYTH: The same purpose as I sent it to everybody else.

MS. CHAYTOR: Okay. And did you think that was an appropriate thing to do, to send this to the person who is investigating the shooting?

CST. SMYTH: Perceivably not. You know, I didn't see it as being a conflict. I didn't see anything in there that would interfere or have an impact on an investigation.

MS. CHAYTOR: Okay.

And again, I'm not going to take you through the whole email but there are a couple of paragraphs, or a couple of sentences that I would like you to have an opportunity to speak to. The first is in the second paragraph where it says: "It is very easy for us to become frustrated at what appears to be prolific ignorance prevailing in our society (something I have had to reconcile myself); but we didn't choose to become police officers because it was easy."

Constable Smyth, what did you mean by the prolific ignorance prevailing in our society?

CST. SMYTH: Well, I think the key word in that sentence is "what appears." And that very sentence has been misread by the media as well. I'm not saying there is prolific ignorance, what

I'm saying is that there, at times, can have that appearance but it's not ignorance, it's a lack of understanding. And that's our fault, not the public or our community.

MS. CHAYTOR: Okay. So is it you are saying prolific ignorance regarding what it is that you do as a police officer, or what police officers do in general?

CST. SMYTH: I think it was a generalized statement, but, you know, certainly it was geared towards this particular incident, in particular the elements around intelligence-led policing, proactive policing. It's just a field of policing that I think few have a full appreciation for the methodology behind it, but it's not ignorance and that's the point of that sentence. Don't confuse those questions with ignorance. It's because the police and other community groups have failed to educate people on it.

MS. CHAYTOR: Okay. In that same paragraph your last sentence is: "For Mr. Dunphy, we were simply too late – but that doesn't mean we stop forging ahead into hopelessness, anguish and despair with the view of creating betterment, safety and wellbeing for the citizens we serve."

And, Constable Smyth, what do you mean that – first of all, who is the we? We were simply too late; are you saying that the police were too late for Mr. Dunphy?

CST. SMYTH: Well, I think that you could probably take that in a number of different ways. That's what I was thinking when I wrote it at the time, yes.

MS. CHAYTOR: Okay. Well then, what do you mean by it? How is it that the police were too late for Mr. Dunphy?

CST. SMYTH: Well, I've got a hard time looking at this particular incident and not think that maybe if I had of had him brought to my attention a year before, maybe before he had gotten to a level of crisis that he was, that the outcome could have been much different. That we could have engaged in a conversation that may have yielded more results and it was too late because of how it ended.

MS. CHAYTOR: Okay. And there is evidence, of course, that Mr. Dunphy was on the radar of other people within government and Workers' Compensation and so those individuals, there was some evidence that those individuals were interacting with Mr. Dunphy. So how is it that the police, you believe, could have had a more positive outcome with Mr. Dunphy than others who had tried to engage him?

CST. SMYTH: Well, I think anything is more positive than somebody dying, but I would like to think that, you know, if he hadn't reached a tipping point in his life and we were to have that conversation at an earlier stage in his life, then maybe there could have been other avenues discussed or explored.

MS. CHAYTOR: And what it is that you see as the tipping point in his life?

CST. SMYTH: I don't know exactly what the tipping point was. For me, it was when he picked up the gun and pointed it at me.

MS. CHAYTOR: I'm just gonna skip down then to paragraph 5 which begins with protective policing. Then here you write about: Protective Policing – is predicated on intelligence light investigations. Most will inherently view police work as something that is reactive. i.e. Somebody is threatened and we respond accordingly. Intelligence based policing is proactive, and in the case of protective services, attempts to identify potential concerns and disconcerting

behavior, and through a risk analysis endeavors to assign threat levels and implement corrective measures before an act of targeted violence occurs.”

Constable Smyth, in writing this, if your intended audience is the police force why would you need to explain that to them? Why would you need to educate your own police force or members, your colleagues, as to what it means to do proactive policing?

CST. SMYTH: Well, I think you identified part of the reason already insomuch that the audience is broad, even within our own organization. Secondly, it’s just a discussion point to make the final point itself. That’s not necessarily in effort to educate; it’s to talk about exactly what it is I’m referring to.

MS. CHAYTOR: Constable Smyth, when you wrote this, was it your intention that this email have a broader audience than the police?

CST. SMYTH: Absolutely not.

MS. CHAYTOR: And under the last paragraph you write about security for elected officials. You say that it “is sadly a topic of public debate. Newfoundland and Labrador is an amazing place to live and work. We are however not impervious to singular acts of violence.”

I just want to stop you there for a minute and ask you whether or not that you are referring to Mr. Dunphy in talking about singular acts of violence?

CST. SMYTH: Yes and no. I think I’m more, however, in that context referring to that we can’t feel that just because we’re in a smaller jurisdiction, lower populations, that we don’t have people within that community capable of acting out violently. Whether that be towards police, towards elected officials or towards anybody else.

MS. CHAYTOR: You go on to write: “Our elected officials make great sacrifices to carry out important work, and they suffer a level of public exposure and scrutiny like no other group I am aware of. They are charged with managing public funds and our social programs. This leads to individuals and groups who will be disgruntled, and when desperation and instability is added to the mix you will have security concerns.”

And in writing that, did you have Mr. Dunphy in mind?

CST. SMYTH: Not specifically; it’s the broader-based issue itself.

MS. CHAYTOR: And what’s that?

CST. SMYTH: That I think, you know, through the job we did, it was exposed to exactly what it is elected officials are often subjected to, which is horrendous levels of personal attacks that absolutely impact their ability to live and carry out their jobs. And I think it’s unfortunate that that’s often not given very much credence or credit by our community.

MS. CHAYTOR: Okay, and the paragraph – I won’t take you through it all but if there’s anything in there that puts the following sentence into context, by all means, direct us to it. But you come down towards the end and you say that, “Society has eroded many of the comforts and standard amenities that should come with being an elected” – office – “– all in the name of politics.”

And I’m just wondering whether or not – what it is you’re referring to there and whether or not any of that had any relevance in terms of the situation that unfolded with respect to Mr. Dunphy.

CST. SMYTH: No, I wasn't referring to, specific Mr. Dunphy there. I think I was referring to a lot of the public commentary that my colleagues were receiving around even the need for security for elected officials. You know, the sentiment that you should have never been there in the first place, they have no, no business even carrying out the duty they are. That's what that was directed towards. You know, that level of politics has, has indeed eroded the need to have that position there. I always felt that politicians were often very reluctant to have us visible because they felt it carried a negative connotation of consuming public resources, because that was often the, some of the comments that they would hear as feedback.

MS. CHAYTOR: Okay. And we come to the, towards the end of your email, the second-last paragraph, and you say, "While there are many people who are and will be impacted by this, make no mistake that at the core of this matter, there is a family that no longer has a father and a brother. I sincerely appreciate the tremendous support you have shown me and my family, but we must also bear in mind that we have a community who is confused, scared, hurt and grieving. We must also help them heal."

And obviously that's intended towards Mr. Dunphy's family and the greater community, I take it. What – and I guess it's obvious in terms of the hurt and grieving. What is it that at this point in time, five days after the shooting, led you to believe that the community is confused and scared?

CST. SMYTH: Just from hearing a lot of the media coverage, open line conversations, social media conversations. And some of that fear was directed towards the police and this is, in essence, a summary to what the intent of the message was, is that that's the reality of what's going on in our community right now and we have to remember what it is our job is and why we're here to do it. And it's not to react in a manner that shows frustration with that. We have to be empathetic and understand why it is this has caused fear and that we have a role to do in mitigating that.

MS. CHAYTOR: And then the last paragraph, "Although I cannot regret my actions last Sunday, I unequivocally wish I could have visited Mr. Dunphy at a point in his life where another level of intervention may have been possible. Our lives can change or end in the blink of an eye. Please seize any opportunity to help those who need it."

"Thanks again

"Joey."

And of course you were in the hearing room and you heard Meghan Dunphy say how hard it was to read that and the sentiment that you could not regret your actions. Perhaps you could explain what it is you meant by writing that?

CST. SMYTH: Yeah, that would be brutal for her to read. And the insinuation that I would have written that email and sent out publicly with that type of comment in there, I know how that gets perceived. But regretting my actions and remorse for the situation and for someone's death are two different things.

I'm saying here to my colleagues I cannot regret the actions that I took to come home to my family, but at the same time, it's not a reflection of a lack of remorse. Do I have remorse for Mr. Dunphy's death? Absolutely. That's not what that sentence is referring to.

MS. CHAYTOR: Okay. And again you, the same sentiment about wishing you could have visited Mr. Dunphy at a point in his life when another level of intervention may have been possible. And I take it that's similar to what you said earlier in terms of having met with him before. I think you described it as before the tipping point in his life.

CST. SMYTH: Yes.

MS. CHAYTOR: And are you suggesting that if there had been an earlier attempt by you to visit Mr. Dunphy, are you suggesting that he might still be alive?

CST. SMYTH: I think that's a hope more than it is a suggestion.

MS. CHAYTOR: Is there anything that you would have done different at an earlier stage?

CST. SMYTH: Am I armed with the same information I have now – sorry, that's a tough question to ask.

MS. CHAYTOR: Okay, I'm just wondering what it is in terms of what other level of intervention might have been possible.

CST. SMYTH: Well, I think if the same circumstances had of unfolded whereby Mr. Dunphy never brandished a firearm, I would like to think the very least we could have had some valuable dialogue around exactly what his issues were and I could have hopefully offered some suggestions as to where he might go to appropriately vent.

And if it was determined that he was indeed getting to a point of crisis, then I would have suggested other social support or resources, whether it be a social worker or whether it be mental health treatment, or even reaching out to his, to other support structures for support around his home and those kinds of things.

This is not unfamiliar territory to police it's – to walk into somebody's home where they're in a condition or a state whereby we need to reach out to other community contacts to assist that person, I've done that personally and I've witnessed it done by other officers on numerous occasions, whether it be food banks, social work –

MS. CHAYTOR: Okay.

CST. SMYTH: – or any number of others.

MS. CHAYTOR: Okay.

Constable Smyth, this ultimately was leaked, we're told, to the media; that there was a leak. Do you have any knowledge as to how the media ended up with your email?

CST. SMYTH: No, I don't.

MS. CHAYTOR: Okay. Did you, subsequent to the leak to the media, have any discussions or communications with the members of the media regarding this email?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. And perhaps you could tell us who that was. And who did you have those discussions with and why?

CST. SMYTH: I had a conversation with David Cochrane. He had – I believe he had texted me. And I had – normally the parliamentary media staff, I had most of the contact information from working in that realm. He had texted me and basically, I think he was, in essence, apologizing for releasing the email and trying to express that, you know, it wasn't personal, he was just doing his job.

MS. CHAYTOR: Okay.

And Madam Clerk, perhaps we could bring up P-0134, please. And we'll look at the top of page 4 and then back to the bottom of page 3. And this is a series of, I believe, SMS messages with a DC. Is that – in your phone there's a capital letter D, capital letter C. Is that how David Cochrane was inputted into your phone?

CST. SMYTH: I think so, yes.

MS. CHAYTOR: Okay. Is there any reason why he was in by his initials and not his name?

CST. SMYTH: No, I did that with a lot of different contacts.

MS. CHAYTOR: I'm sorry?

CST. SMYTH: I did that with a lot of different contacts

MS. CHAYTOR: Okay. And there's a series of messages, then, if this is the right – we're on page 4, please, of the exhibit – page 4 of the exhibit. And how would, how would you know to SMS or message with David Cochrane? Was he someone who was already in your messages?

CST. SMYTH: Yes.

MS. CHAYTOR: Or in your contacts, I should say.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. All right.

And I believe this might be the – yes, sorry. Yes, here we go, about the top of page 4.

So it starts here, I believe, Constable Smyth. And then if we go back to the bottom of page 3, there's a series of messages with DC, this whole page here, the bottom half of page 3 of the exhibit. And the timing of those I believe to be happening on April 10 – April 11, sorry, the day after the email.

So are those the extent of your communications with David Cochrane around that email?

CST. SMYTH: I believe so.

MS. CHAYTOR: Okay. And I noticed in this exchange that you provide him with your Gmail account.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. Did you continue to communicate with him by Gmail?

CST. SMYTH: No, I didn't.

MS. CHAYTOR: Okay.

Constable Smyth, I want to turn now and ask you about questions regarding your interactions with the RCMP throughout the investigation.

First of all, I asked you earlier, when we first began this last week, in terms of your knowledge of the investigator, the lead investigator, and other interactions you'd had with RCMP, did you also train at any point in time with RCMP officers over the course of your career?

CST. SMYTH: Yes, I have.

MS. CHAYTOR: Okay. And perhaps you could tell the Commissioner about that.

CST. SMYTH: I might have to refer to specific training logs to see which courses. There was a lot of courses that we did that involved both agencies or a number of agencies for that matter, especially around criminal intelligence.

I had done criminal intelligence training in Nova Scotia that was both provincial/municipal – or municipal outside of Newfoundland anyway – and RCMP officers that attended that training, a lot of source informant handling courses.

MS. CHAYTOR: Okay. And so in terms of the course of your career there, it wasn't uncommon for you, when you attended training sessions, that there would also be RCMP officers in attendance?

CST. SMYTH: No, that was very normal.

MS. CHAYTOR: Very common.

Okay. All right.

How did you find the RCMP treated you during this investigation? And did that change over the course of the investigation?

CST. SMYTH: No, I thought they always treated me professionally and with respect.

MS. CHAYTOR: Okay. And you had no problems with that in terms of – that didn't change, you felt that they treated you that way throughout.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And ASIRT, in its report at pages 4 and 5, identified that the interviews with you were very informal, they thought, for a homicide investigation. And they noted the importance of modelling independence and objectivity.

Did you agree with that characterization of your interviews with the RCMP as being rather informal given the gravity of the situation being investigated?

CST. SMYTH: I recognize that they would seem informal, yes.

MS. CHAYTOR: Okay.

And if we could have, please, P-0133. And, again, this is a section of your phone records. And it's April 7, 2015, the reference I'm going to take you to. On page 1 of this exhibit there a messaging between you and Deputy Chief Ab Singleton, if I could just find that.

Right here, let's see. Here it's April 7 to Ab Singleton: "Had a good interview with the RCMP yesterday and they were very supportive and complimentary."

And I believe that you sent similar messages to other people who also asked you about how your interview went. And perhaps you could tell us how it is that they were supportive and complimentary during your interview of April 6?

CST. SMYTH: I don't know if they were so much complimentary during the interview. And again, that was meant to be a very paraphrased summary of my overall sentiments of the whole process.

I think they were – I'm not sure if, you know, complimentary is even the appropriate term but supportive around, you know, ensuring that I had received the necessary supports. And, I think, complimentary more towards the process leading up to that, being so much there had been a lot of protocol and procedure followed correctly.

MS. CHAYTOR: In other messages that you sent along the same lines like to your friend Chris, the RCMP officer, you also told him that you found the interview went perfect, they were very supportive. And in that instance you said that they said it went – was by the book.

Do you recall telling that to your friend, Chris?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. So the RCMP said words to that effect to you?

CST. SMYTH: I don't think they said those words, no. I don't recall them saying those specific words, but I probably paraphrased, again, some of their commentary towards me, yeah.

MS. CHAYTOR: Okay.

And so that's what you took away from whatever way they phrased it. You took away from what they're saying that they thought your actions with respect to the shooting had been by the book.

CST. SMYTH: I felt based on the information they had at that time they felt that I had acted appropriately.

MS. CHAYTOR: And this was April 6 that you did your interview.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And if we could look at page 8 of this same exhibit, please, P-0133. Same exhibit, please, page 8.

And this is a similar message that you sent to a person by the name of David. And, again, you're saying to him that the – you're appreciating his support. I met with the RCMP this afternoon and the interview went very well. They were complimentary of the process and tactics. They expect a short investigation.

So was that the sentiments that the RCMP left you with during your interview process?

CST. SMYTH: For the most part, yes.

MS. CHAYTOR: Okay.

If we could have then please P-0258. This is an email on April 14, 2015 where you reached out to somebody by the name, who's an RCMP officer, it appears, Rodney Cannon. Could you tell us who is Rodney Cannon?

CST. SMYTH: He was an officer that I had – he had done use-of-force training with me at the Atlantic Police Academy.

MS. CHAYTOR: Okay. And why on April 14 are you are reaching out to Rodney Cannon?

CST. SMYTH: I had simply wanted to speak to him, to talk about the incident.

MS. CHAYTOR: Okay, so you wanted to talk to him about the incident?

CST. SMYTH: Yeah.

MS. CHAYTOR: You say he had taught you at the Atlantic Police Academy?

CST. SMYTH: Yes.

MS. CHAYTOR: And he had taught you use of force?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And what – and did you ultimately get to speak to, I don't know if it's Constable Cannon, Sergeant Cannon – did you get to speak with him?

CST. SMYTH: No, I didn't.

MS. CHAYTOR: Okay. And so why exactly where you reaching out to him, what is it about your use-of-force training that you wanted to discuss with him?

CST. SMYTH: I don't think it was even particularly the use-of-force training, but he had just been a good resource and a good support, and I think I was just looking to talk to him and let him know what had happened and – I was appreciative of a lot of things he had to say, a lot of the training he had provided.

MS. CHAYTOR: Were you –

CST. SMYTH: I remembered one particular piece of training whereby he was discussing the importance of weapons and recognizing weapons before they came visible and I just wanted to have a discussion with him about what happened. I never ever spoke to him.

MS. CHAYTOR: Okay. So he –

CST. SMYTH: How do I know if he's still with the RCMP?

MS. CHAYTOR: Okay, so he's someone who would have trained you back at this point it was how many years before?

CST. SMYTH: Fifteen years.

MS. CHAYTOR: Fourteen, 15 years before?

CST. SMYTH: Yes.

MS. CHAYTOR: Had you had ongoing communications with him over the years?

CST. SMYTH: No.

MS. CHAYTOR: Okay.

All right, so there was a piece of your training that you're hoping to discuss with him regarding recognizing weapons?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And so do I take it from that you're talking about recognizing or having not recognized that the rifle was in the room before it was presented? Was that your concern?

CST. SMYTH: Yeah. Yes, I had done one particular scenario with him where there was a video-simulated scenario and they were – the weapon was presented quickly. And we had just had a lengthy – and after the scenario was complete, we had had a lengthy discussion about that, that, you know, these things can present themselves quickly and you have to be ready. So I was, I guess, in essence looking to lament on that particular issue.

MS. CHAYTOR: Okay. And other than your training that you received at the Atlantic Police Academy, had you received any other training in the intervening 15 years which would have been of assistance to you in that respect?

CST. SMYTH: Oh yes, for sure. And it was just that I had, I thought, a bit of a personal connection with him. He was you know – with him for a lot of months and he was someone I just related to.

MS. CHAYTOR: Okay.

CST. SMYTH: But, yes, I've had ample use-of-force training since that time.

MS. CHAYTOR: Okay. You had – and the records would show that you had throughout the course of the investigation you had communications with the lead investigator, Steven Burke. That's correct?

CST. SMYTH: Yes.

MS. CHAYTOR: Yes, okay.

And what was overall the purpose of those communications other than trying, him contacting you to get further information or further statements? What was the main purpose when you would reach out to Corporal Burke?

CST. SMYTH: I was usually looking for updates and his status as to when this might be brought to some semblance of a conclusion.

MS. CHAYTOR: Okay.

And we see – and I won't necessarily bring it up but for the record it's P-0197, there was an email that you sent to him on June 9, 2015. And at that point in time you were seeking a copy of your statement from him. Do you remember that?

CST. SMYTH: I believe so, yes.

MS. CHAYTOR: Okay. And why would you be looking for a copy of your statement?

CST. SMYTH: I think I was looking to give it to the Saskatoon investigator.

MS. CHAYTOR: Okay. So were you aware that the RNC had a liaison, Jason Sheppard in place for the purpose of exchanging documentation with the RCMP?

CST. SMYTH: I don't know if I was told at that point or not.

MS. CHAYTOR: Okay, so did anyone within management of the RNC ask you to obtain your statement yourself, directly through Steve Burke for the purpose of providing it to Grant Little.

CST. SMYTH: No, I had had a discussion with Grant Little beforehand. I can't remember if it was before I gave him a statement or after, but he was looking for all documentation that I could provide and inclusive of any statements that I had given in particular, I guess notes that I had written myself – the ones that were uploaded to our ICAN system. I don't – I think he may have asked for that specifically if I had it, but I don't recall.

MS. CHAYTOR: Okay.

And I'm going to bring up, please, P-0199, and this is another email to Steve Burke on July 28, 2015. It ends up July 29 at 3:43 a.m., but it begins with July 28, if we could just scroll down here.

And you recall this email exchange with Corporal Burke?

CST. SMYTH: Yes, I do.

MS. CHAYTOR: And it looks like at this stage there's some further delay because lab work, is that right?

CST. SMYTH: That's what I was led to believe, yes.

MS. CHAYTOR: Okay. And did you have any reason to think there was something else?

CST. SMYTH: No, no.

MS. CHAYTOR: Okay. So the lab has been extended, he tells you, until September 15.

And you reply here with: Thanks Steve; In light of the fact that the lab analysis will inevitably continue to be delayed as long as higher-priority investigations are submitted, is there any reason your findings to date cannot be discussed with the chief of police? I continue to exist in a state of professional limbo, and it would be very much appreciated to have some sense of a definitive conclusion.

And what did you mean by a state of professional limbo? What is the problem at this point in time?

CST. SMYTH: I was assigned to doing arbitrary administrative work.

MS. CHAYTOR: And then he came back with a reply to you: Hey Joe; I appreciate your desire to have this matter resolved. Until the lab analysis is completed along with the other investigative steps, it would be inappropriate for him to discuss the ongoing investigation.

And I take it as a police officer you appreciated that?

CST. SMYTH: The lab analysis?

MS. CHAYTOR: The fact that he would not be able to – the investigation is ongoing, so he would not be able to discuss –

CST. SMYTH: Oh yes, I understood that.

MS. CHAYTOR: Yes, okay, all right.

And then you reply with, at 2:11 p.m. that day, you thank him: "... should I assume it is moot to ask what 'other investigative steps' is referring to? Forgive my queries, this is new territory for me, and I honestly do not know what my status is. I know what I would be telling the subject of an investigation, but I don't know if that is what I am classified as."

And, Constable Smyth, did you have any question – or why is it that you don't know what your status is? Did you not understand that you are the subject of an investigation?

CST. SMYTH: No, I did understand that. That wasn't a fair comment.

But whether or not, you know, there was any reason for them to believe there was a change in jeopardy, I think, was more of what, what I was seeking, looking for. I was honestly at a point where I just couldn't understand why this was continuing to be delayed without any, seemingly, understandable reason, so.

MS. CHAYTOR: And did you expect Corporal Burke to be able to tell you what other investigative steps he would be taking?

CST. SMYTH: I guess I'd hoped he would, yeah.

MS. CHAYTOR: And did you think that that would be an appropriate thing for him to do?

CST. SMYTH: In hindsight probably not, no.

MS. CHAYTOR: And then we can just scroll up here.

At 3:43 a.m. that morning, you send him another email and this time you identify him as Corporal Burke. And it seems to take a little more of a formal tone: "I would sincerely appreciate an update on your investigation. There have been times where the RCMP have referred to me as 'another victim' in this case and investigation; if that is the situation, then I would like to think I should be privy some semblance of an update, or perhaps explanation as to what 'other investigative steps' refers to, given we are now four months out from the incident."

And my question to you, Constable Smyth, is: In what context during the investigation did the RCMP refer to you as another victim in this matter?

CST. SMYTH: I think that was told to me very early on, that while I was indeed the subject of the investigation, there were elements of that that they would consider me another victim, yes.

MS. CHAYTOR: And who said that to you?

CST. SMYTH: I don't remember who said it specifically.

MS. CHAYTOR: So it would have been one of the officers who were investigating you?

CST. SMYTH: Yes.

MS. CHAYTOR: So Corporal Steve Burke?

CST. SMYTH: Probably so. Yes.

MS. CHAYTOR: Constable Smyth, you're sending this email quite early in the morning. Why is that? What's happening here at this point in time for you?

CST. SMYTH: Why that hour in the morning?

MS. CHAYTOR: Yes.

CST. SMYTH: Because I'm lying wide awake, as I did many nights since then and continue to do so, thinking about it.

MS. CHAYTOR: So this wasn't uncommon for you, to be lying awake at night troubled by what was happening?

CST. SMYTH: It's not uncommon at all, no.

MS. CHAYTOR: And that still persists today?

CST. SMYTH: Yes.

MS. CHAYTOR: And if we could have, please, P-0202.

And, again, I'm still dealing with interactions with the RCMP during the course of the investigation. This one is November 17, 2015. And I understand this to have been sent to an RCMP officer in New Brunswick, is that right, Constable Smyth?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And what – and this, you were, I understand if we scroll down, he – there had been some contact looking for your contacts with the OPP. Is that how this communication originated?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

And then you also alerted him to a person who it appears had – was causing stress for your family. And you give him information about that particular individual.

CST. SMYTH: Yes.

MS. CHAYTOR: And so what's this about? Why did you do this?

CST. SMYTH: It was an individual that was considering and, I guess, still considering filing a criminal complaint for criminal harassment. They were posting pictures of me, my five-year-old son, my family, making wanted posters, reference to being an assassin, a killer, these kinds of things. And there was also, you know, a lot of misinformation, fabrication within that as well and I was passing that information on to him.

MS. CHAYTOR: Okay.

And, Constable Smyth, I note the date, November 17, 2015. This is around the time that you took your sick leave from work, is that correct?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And so you're actually off on leave at this point in time.

CST. SMYTH: I'm not sure if I was off on that date or not.

MS. CHAYTOR: Okay, so around this point.

CST. SMYTH: It was close to it.

MS. CHAYTOR: Okay.

If we could bring up, please, P-0203. And this is a communication, then, you have March 18, 2016, with Corporal Steve Burke.

And you're looking for a time frame again or a timeline from ASIRT: "I hate to pester you, but my options for returning to work are continued to be restricted. It is increasingly hard to not feel like an" – and in quotation marks – "accused" in this matter."

And I'd like you to speak to that and what you meant by that.

CST. SMYTH: I think it's just frustration around the time it was taking to conclude the matter.

MS. CHAYTOR: Okay. And, Constable Smyth, do you think this is an appropriate comment to make to the lead investigator that you are finding it increasingly hard not to feel like an accused?

CST. SMYTH: I didn't feel it inappropriate.

MS. CHAYTOR: Okay. And do you now?

CST. SMYTH: I could see how it would be perceived inappropriate now that it's out for public consumption.

MS. CHAYTOR: We can look at P-0205, please.

Actually, before we look at that one, I just want to ask you then about ultimately when the ASIRT review is presented and the investigation is concluded, did you meet with the RCMP at that point in time?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. And were you provided with a briefing?

CST. SMYTH: Some form of one, yes.

MS. CHAYTOR: Okay. So who did you meet with?

CST. SMYTH: Monty Henstridge.

MS. CHAYTOR: Mon – sorry?

CST. SMYTH: Monty Henstridge.

MS. CHAYTOR: Okay. Anyone else in attendance?

CST. SMYTH: Legal counsel and my wife.

MS. CHAYTOR: Okay. At any point in time did you meet with Staff Sergeant Kent Osmond?

CST. SMYTH: Oh, sorry, maybe it was Kent Osmond, my apologies.

MS. CHAYTOR: Okay. So is that the – so you didn't meet with Monty, it was with –

CST. SMYTH: Correct, yes.

MS. CHAYTOR: – Staff Sergeant Osmond.

Okay. All right.

And I take it from your comment that you didn't feel it was a full briefing or a complete briefing or to your satisfaction. Is that fair?

CST. SMYTH: Well, I didn't get any details on the findings or the ASIRT investigation, no.

MS. CHAYTOR: Okay. So – and were you upset during that meeting? Were you –?

CST. SMYTH: I was definitely frustrated at that fact, yeah. That could have been done over – could have been done with a cellphone call to call me and say we're done and there's not going to be charges laid. That was all I learned from that.

MS. CHAYTOR: Okay. And so what was – what more was it that you were hoping that could have been communicated to you by that point in time?

CST. SMYTH: I was hoping they were going to be prepared to release all the findings of their report with detail, similar to what was released publicly just recently in November through the Commission.

MS. CHAYTOR: Okay. Did you have any other communications or did they come back to you after that meeting to try and address any of your concerns?

CST. SMYTH: Not that I recall.

MS. CHAYTOR: Okay.

CST. SMYTH: There might have been some explanation as to why they couldn't or why they weren't, but I didn't get any more details.

MS. CHAYTOR: Okay. All right. And I don't think we necessarily need, then, to go to that exhibit.

If we could bring up, though, P-0204; and this is on the same date. This is September 13, 2016, which is also – would have been the same date of the, the other one that I was referring to in terms of your meeting with the RCMP.

Okay. And this is an email that you, that you sent to Mark Quinn, I understand, of the CBC. Is that right?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And this is at 4:09 p.m., September 13, 2016. And you write that you would like to provide, "I would like to provide you with a lengthy statement to answer all the necessary and valid questions, but pending an inquiry, I unfortunately cannot."

And Constable Smyth, before you sent this to the, to Mark Quinn, I understand that you did seek permission and did have communications internally with management of the RNC. Is that correct?

CST. SMYTH: Yes, I did. I spoke to the chief of police.

MS. CHAYTOR: Okay. And you do write, "I do however feel it necessary to clarify an important misunderstanding. At no point did I or members of the RNC interpret any of Mr. Dunphy's social media commentary as threats – as has been indicated time and time again by both traditional and social media platforms."

And my question for you there, Constable Smyth, I understand how you've told us how you interpreted his social media commentary, but did any other members of the RNC interpret Mr. Dunphy's social media commentary?

CST. SMYTH: No.

MS. CHAYTOR: Okay. So who are you referring to in saying that?

CST. SMYTH: I think it's just perhaps using hyperbole to drive home the point that I, nor any other police officer, confused those comments as threats, as the media continually like to report.

MS. CHAYTOR: Okay. And if we come down to the second paragraph you talk about, "The Protective Services Unit works to pro-actively identify concerning behavior through intelligence driven methodology. In this case, there were a number of factors taken into consideration before a personal meeting – a normal practice – was determined to be the next course of action."

And my question for you is, what were the factors that you took into consideration before the personal meeting with Mr. Dunphy?

CST. SMYTH: Well, it was much of what we discussed here last week around considering the inhibitors, justification, the long-standing grievance, all those components that would under the threat assessment.

MS. CHAYTOR: Okay. And then you continue on to say that, “The goal of this meeting was to build a rapport with Dunphy, and to identify if there was a reasonable solution to his grievance.”

Was that the goal of your meeting to identify a reasonable solution to Mr. Dunphy’s grievance?

CST. SMYTH: Well, I want to determine if he feels there’s a reasonable solution to his grievance, not necessarily for me to provide him with one. What are his expectations to that grievance? Are they founded in reality? If they’re so outlandish to the point that I can reasonably suggest that, okay, he’s not going to get a resolution then my determination, from a threat assessment perspective, is to endeavour to determine what are his next steps if he’s not going to get a resolution.

MS. CHAYTOR: Are you trained to identify a reasonable solution to a grievance of an injured worker?

CST. SMYTH: No, but I can identify whether or not they’re founded in reality. If they – if his expectation is somewhere that is in a grey enough area that I don’t understand, then I would simply solicit input from the persons that can, such as workplace health and compensation professionals.

MS. CHAYTOR: And I take it as a police officer hired to provide protective services to the Premier and elected officials, that’s not within your mandate to determine a reasonable solution to Mr. Dunphy’s grievance?

CST. SMYTH: No, but that’s not what I’m saying here. I’m not sure if I’ve explained it clearly enough.

MS. CHAYTOR: Okay. Well, did you tell Mr. Dunphy that that’s why you were there, to try and identify a reasonable solution to his grievance?

CST. SMYTH: No, no. I would never even use that verbiage to sort through that component of the conversation.

MS. CHAYTOR: And the reason that you were there was to do what?

CST. SMYTH: To conduct a threat assessment.

MS. CHAYTOR: Yes.

Constable Smyth, I also understand that you had exchanges around this time period, September 21, 2016, and further into the fall of, in October of 2016, and communications with the chief regarding communications of the RNC in terms of public communications. And one exchange, we have an email in evidence. It’s P-0206, September 21, 2016. And we can go to it if you wish but it’s an email exchange with the chief, and you’re particularly upset with – there’s been some commentary in the media by Judge Riche.

And I would like to offer you an opportunity to speak to that and why that was upsetting from your point of view and what you expected the chief to be able to do to address that situation.

MR. KENNEDY: Commissioner, if I may – excuse me, if I may, Commissioner. A concern I have here is retired Justice Riche has been sitting in the room for the last two weeks, and now my client is being asked to comment on what retired Justice Riche said. This certainly causes me

concern where this individual, who will be testifying, has been sitting in the room. I don't think it's – excuse me.

THE COMMISSIONER: You've got to be more precise, Mr. Kennedy. What's your concern? I've already pointed out that if Justice Riche is sitting in the courtroom listening, or in the inquiry room listening, to other witnesses, this may lead to the weight of his testimony being reduced. That's pointed out as a problem for situations where witnesses are in the courtroom while other witnesses are testifying.

It's common in court actions that counsel will see that proposed witnesses will not sit in the inquiry room or request that the court direct that they exclude themselves. So that hasn't been done here. But I do note your concern. There's a reason for your concern. I've pointed out, and Justice Riche was present when I pointed out the fact that his testimony may lose some of its force by the fact that he is in the inquiry room. And I'm not sure what more I can say at this stage.

Justice Riche will be, as I understand, called as a witness. I'm not sure what day he's down for, but he is on the witness list, is he not?

MS. CHAYTOR: Right, he is, yes, and it's sometime down the road.

THE COMMISSIONER: Okay, so he will be questioned. Mr. Kennedy, you will have the opportunity to question him. I will ask counsel, is there, what is gained by having Constable Smyth comment other than to give Constable Smyth the opportunity to give his side of the points made? But presumably that can be drawn out by Mr. Kennedy in the course of his re-examination of Mr. Smyth, which is, I guess, the way the process will proceed when Constable Smyth – when you're finished with Constable Smyth, I would understand it would be Mr. Simmonds, Ms. Breen, and then other counsel in the so-called default order, and then Mr. Kennedy at the end.

So is there some specific reason why you believe anything is added by having him comment now as opposed to ultimately when he's –

MS. CHAYTOR: Well, I can certainly wait.

THE COMMISSIONER: Sorry?

MS. CHAYTOR: It can certainly wait if Mr. Kennedy would rather address it, but I don't understand that to be Mr. Kennedy's objection. But I certainly want to offer Constable Smyth an opportunity to speak to that, but if that's better off coming out through his own counsel, that's fine as well.

THE COMMISSIONER: Yeah, that's what – Mr. Kennedy, I don't know if there's anything more than what I've said. It would seem to me that it only makes sense –

MR. KENNEDY: He can deal with –

THE COMMISSIONER: – it only makes sense to give Constable Smyth the opportunity to –

MR. KENNEDY: He can deal with it now.

THE COMMISSIONER: – to deal with the point so – sorry?

MR. KENNEDY: No, he can deal with it now, that's fine. I just, my concern is on the record and you're obviously aware of it, Mr. Commissioner.

THE COMMISSIONER: Right.

Okay, you go ahead Ms. Chaytor –

MR. SIMMONDS: Mr. Commissioner, excuse me.

MR. RICHE: Excuse me, Mr. Commissioner –

THE COMMISSIONER: No, Mr. –

MR. RICHE: (Inaudible.)

THE COMMISSIONER: No, Mr. Riche, you have no entitlement – sorry?

MR. RICHE: No, I'm prepared to not attend anymore.

THE COMMISSIONER: It's up to you, Sir, what you do. You're going to be called as a witness and what takes place –

MR. RICHE: I didn't want anyone upset (inaudible) –

THE COMMISSIONER: It may, it might be a bit too late for that. But in any event, you're going to be called as a witness; you'll be answering to your report dealing with it at that time. But I cannot take any comment from you at this stage in the course of the examination of a witness.

All right. Carry on, Ms. Chaytor.

MR. SIMMONDS: One moment –

MS. CHAYTOR: I think you have – I think Mr. Simmonds is on his feet.

THE COMMISSIONER: Sorry, Mr. Simmonds.

MR. SIMMONDS: No problem. Mr. Commissioner, one of the issues that Judge Riche raised in the letter, or in his report, was he believed that Constable Smyth was parked on the side of the road. Constable Smyth in this exchange states: I believe Riche should formally correct that inaccurate information. Riche said that when Smyth arrived at Dunphy's house there was nobody home so he waited outside the car until – in the car until Dunphy got home.

In fact, we've now heard that he did wait in the car for some period of time. So I think this is a fair area of questioning by Commission counsel to determine what, where did the disconnect come on.

THE COMMISSIONER: Mr. Simmonds, what's – why can't you ask that question if you feel that it's –

MR. SIMMONDS: Because Commission counsel has already started down that road and I'd like to see what the answers are. Is that inappropriate, Mr. Commissioner?

THE COMMISSIONER: It may not be inappropriate but it's unnecessary, Mr. Simmonds –

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: – as far as I can see. I don't know if I'm missing something here today. It must be the alternate-fact situation that we've been hearing about that's confusing me. Just for the record, as I understood what you just said, and it's a while since I've read Judge Riche's report, but it seemed to me when I was reading it and again as you reported it, that whatever Constable Smyth has testified to in terms of waiting by the side of the road he didn't wait there by the side of the road where he's making calls for Mr. Dunphy to return home.

Am I missing something?

MR. SIMMONDS: He waited by the side of the road. He made a number of phone calls and then he determined that indeed I will probably go to the next door neighbour before I go back home. That is the kind of inference that I understood Judge Riche took. That is the place that I thought Commission counsel was going.

The first time we heard –

THE COMMISSIONER: Wait now, what is the inference you're saying?

MR. SIMMONDS: That Justice Riche is right. That he did indeed wait on the side of the road until –

THE COMMISSIONER: Until Mr. –

MR. SIMMONDS: No, not –

THE COMMISSIONER: Well, that's what seems to be a significant misinterpretation of the facts, isn't it, that's being put forth?

MR. SIMMONDS: No, not when he says he waited on the side of the road, which he did and we didn't hear about before –

THE COMMISSIONER: You've got to finish the statements. You just read out that, as I understand what was said in the report, that he waited by the side of the road until Mr. Dunphy came home.

MR. SIMMONDS: Riche said that when Smyth arrived at Dunphy's house, there was nobody home so he waited outside in the car until Dunphy came home. That's the full statement.

THE COMMISSIONER: But that's not correct, is it?

MR. SIMMONDS: It's in part correct that he did wait on the side of the road. It's in part correct that he hadn't told us this before. Mr. Commissioner, I don't see why you seem so upset that this is an issue. Your counsel was going down that road, I think it is a fair question and it's a fair question how come we didn't hear about this waiting by the side of the road before.

THE COMMISSIONER: It's waiting by the side of the road until Mr. Dunphy came home seems to me to be the total context in what's said there. Mr. Simmonds, in any event, if I'm sounding frustrated, I am because I'm not understanding what you're saying when you're taking part of what's set out there in the report and not going on to link it to the until Mr. Dunphy came home.

MR. SIMMONDS: And I am doing that, but what I am saying is we never heard before about waiting on the side of the road. This is the first we heard of it was when the officer gave testimony that he parked on the side of the road for some period of time and made a number of phone calls. In that part Justice Riche, whatever other mistakes he may or may not have made, in that part he is at least correct.

THE COMMISSIONER: The waiting by the side of the road was that not recoverable from the information that was in the phone logs, the – wouldn't counsel have had that information?

MS. CHAYTOR: Yes, that came out during our review of the documents and Constable Smyth was questioned on that during his interview.

THE COMMISSIONER: Right. And didn't Mr. Simmonds and Ms. Breen, as well as other counsel, have those documents?

MS. CHAYTOR: Yes, all, all other counsel had that information and knew that it would have come out at that stage.

THE COMMISSIONER: All right.

Now, Mr. Simmonds, I'm going to leave it to Commission counsel, as I thought I'd done previously, as to whether or not she decides that she need go down that line, in light of Mr. Kennedy's objection or expression of concern, whatever it is.

I'm not sure why you believe that I'm preventing counsel from going down that road. What I said as I recall, correct me if I'm wrong, that is there any reason why she should do it as opposed to leaving it to counsel, including yourself, and/or Mr. Kennedy to get into it. Isn't that what – the position where I left it?

MR. SIMMONDS: That is where we left it.

THE COMMISSIONER: You seem to be asking that I give counsel a direction that she continue with that?

MR. SIMMONDS: No, I am not – as I understood, counsel had further questions in this area that they were going to ask, but counsel said if it's appropriate, if you feel it's appropriate, she will leave those questions to Mr. Kennedy or myself.

THE COMMISSIONER: Okay.

MR. SIMMONDS: That's your decision.

THE COMMISSIONER: Okay, so is there – is there something wrong with that?

MR. SIMMONDS: No, if – I think she should – I've already stated what –

THE COMMISSIONER: Yeah, you think she should go, go on. And you seem to be – the only reason you seem to be standing up is to have me direct her to go on in this regard –

MR. SIMMONDS: She was, she was –

THE COMMISSIONER: – and I'm leaving it completely to her.

MR. SIMMONDS: She was going to go on, unless I misunderstood it, but perhaps I'm wrong.

THE COMMISSIONER: The, the – Ms. Chaytor.

MS. CHAYTOR: Yes.

THE COMMISSIONER: The – I am at a loss to understand why, if right now, the, those questions should be put by you as opposed to Mr. Kennedy or other counsel as I mentioned. But if you believe there is a reason for doing it, go right ahead.

MS. CHAYTOR: Okay.

Commissioner, I'm getting concerned about our time here and there are questions that no doubt will be picked up on. And rather –

THE COMMISSIONER: We have as much time as it takes –

MS. CHAYTOR: Okay.

THE COMMISSIONER: – to see that this is done thoroughly. Go head.

MS. CHAYTOR: Okay. All right.

So in terms of the – and I had referenced P-06 as being – P-0206 as being one of the documents in which Constable Smyth expresses his concerns in terms of Judge Riche's comments. And that's the document I believe that Mr. Simmonds is referring to.

My question, however, was more general to Constable Smyth to tell us what exactly it is about Judge Riche's comments in the media that he found problematic. Now, if it's helpful, Constable Smyth, we can certainly bring up P-0206, because in that document you did outline certain things that you found to be troublesome to you.

THE COMMISSIONER: Okay, now before we go further, I'm going to have – Mr. Kennedy, are you satisfied with Ms. Chaytor proceeding in that regard?

MR. KENNEDY: I think at this point there's no – we have no choice but to consider – but to proceed. I had no problem with him. My concern was Justice Riche being in the room while my client was going to make less than complimentary comments.

MS. CHAYTOR: That's what I understood to be the –

MR. KENNEDY: That's all I was –

MS. CHAYTOR: – the objection.

THE COMMISSIONER: What's the problem with making, listening to the uncomplimentary comments directly to his face? That's what this process is all about.

MR. KENNEDY: That's a fair –

THE COMMISSIONER: That's – sorry?

MR. KENNEDY: That's a very fair comment, sorry. I didn't realize we were going to go down this road or I would have kept quiet.

THE COMMISSIONER: Again, what road are we down? I'm missing – I'm not understanding your comment.

MR. KENNEDY: Oh, no, again, I'm sorry, Commissioner. I – my comment was simply that retired Justice Riche being present. I was not going to get into how Commission counsel should do their job, what they should do; the only concern was his presence. You addressed that –

THE COMMISSIONER: All right. Now, just for the record, I believe he's left the room, is that correct?

MS. CHAYTOR: Yes. Yes, he's left –

THE COMMISSIONER: I don't see, I can't see around corners but I don't see him anyhow. Okay.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

THE COMMISSIONER: Mr. Simmonds – okay, all right, now – do you have any problem with Ms. Chaytor proceeding? Okay, go ahead Ms. Chaytor.

MR. SIMMONDS: No.

MS. CHAYTOR: Okay.

All right, so we've now brought up P-0206. And this is your communication to Chief Janes as well as others in management at the RNC. And I note that you also copied Mr. Drover, or Mr. Drover is included in the recipients of this email.

And this is what I wanted you to have an opportunity to speak to, Constable Smyth, because obviously at this point in time this has been particularly difficult on you. You're telling your superiors that you can't talk to anyone right now but you wanted them to know that this is breaking you.

So I would like you to have an opportunity to speak about how you found his comments to be inflammatory, accusatory and that you think he outright lied.

CST. SMYTH: It may be easier if I had his report to go through. I find the majority of the report is not founded on any factual information; it's just largely speculation and his own opinions. It would certainly be easier if I had that to go through it piece by piece.

MS. CHAYTOR: And his report will certainly, Commissioner, be done in quite detail. It will be reviewed with him and it will be reviewed in detail.

So, Constable Smyth, is there anything in particular that sticks out in your mind right now in terms of his report without us taking the time to go through, in detail, the report.

CST. SMYTH: I know the comment that Mr. Simmonds was referring to and that wasn't – to me, when he made the statement that Mr. Simmonds just read out, it was to leave the inference that some sort of predator waiting outside of his house the entire time, when in actuality there's a process that's ongoing during that time.

Yes, there was a period in time where I'm parked down the road. That's not directly in front of his house. What Riche had stated was: Just waited there. There's stuff happening during that

period. That's not a situation where I'm, you know, hiding in the trees and waiting for my prey to come home, which is what the inference, I believe, Riche left with some of his readers.

The entire document is full of problematic comments and information that has, to me, had no foundation in fact.

MS. CHAYTOR: Okay. And if we could have, please, P-0207.

THE COMMISSIONER: Sorry, what was the – this is –

MS. CHAYTOR: This is P-0206 –

THE COMMISSIONER: P-0206 we just dealt with, was it?

MS. CHAYTOR: Yes. That's P-0206.

THE COMMISSIONER: Thank you.

MS. CHAYTOR: And P-0207 is also an email; it's October 7, 2016, to Chief Janes. And at this point in time you're expressing your disappointment in his handling of the situation and you're looking for him to speak out and defend yourself in light of Judge Riche's comments.

You remember this email, Constable Smyth?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And –

CST. SMYTH: The point of that email, I guess, even to reflect on what the Commissioner just said, was to say it to his face. These were feelings I had and commentary that I was seeing through other people. And I don't subscribe to saying these kinds of things unless I've had the opportunity to say it directly to someone's face.

MS. CHAYTOR: And –

CST. SMYTH: And this is why I sent that email to the chief.

MS. CHAYTOR: And the chief offers to meet with you? Did you meet with the chief?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: Okay. And what was discussed in that meeting?

CST. SMYTH: The email. He was – I think he found, you know, the email tough to read or tough to receive the information. But he just expressed to me, I guess, some of the challenges he felt that he was, that he had in perhaps developing an appropriate communications plan.

MS. CHAYTOR: Okay.

And throughout the investigation did you also have similar concerns, that you thought there were times when the RNC could have and should have spoken out and didn't?

CST. SMYTH: Yes.

MS. CHAYTOR: Okay. And what – and you understand, of course, that there would be restrictions under the *Royal Newfoundland Constabulary Act* in terms of what they could say during an ongoing investigation?

CST. SMYTH: Of course.

MS. CHAYTOR: Of course.

CST. SMYTH: I never felt that there was any need to speak to the intricacies or even the specifics of this investigation itself. To me, there was the vast majority of the questions weren't specific to this case and could have been answered by having an open, transparent conversation on many of the issues at hand.

Some of the questions were very simple, they're legitimate questions and why they went unanswered is, to this day, beyond me. Questions of why did he go there on Easter Sunday, why didn't he shoot him in the knee so to be able to have a full discussion around use-of-force protocol, when an officer finds themselves in a position to use deadly force.

And you need to have that full, frank discussion about the use-of-force continuum, the steps of use of force, to give people the opportunity to digest that information. You don't need to speak to this specific incident. If anything, I think the right person would be better off having that conversation without having knowledge of any of the facts and they still would have been able to answer, I believe, the majority of those questions.

MS. CHAYTOR: Okay.

So without speaking to the investigation, or the details of the incident itself I should say, that there were issues that arose that you felt that the chief could have spoken to, to educate the public on certain issues such as – such as use-of-force training, why you didn't shoot in the knee, other issues in terms of the fact that you went there on Easter Sunday.

What about in terms of proactive policing or the role of the PSU? Did you think that that could have been spoken to?

CST. SMYTH: Absolutely. You know, one of the questions that have seemingly gone unanswered is why did he go there, why did he go there in the first place. And it's – that is answerable through a discussion around the threat-assessment process, intelligence-led policing methodology and exactly why we do those things. And it's not necessarily one that can be achieved through a sound bite, but through full, frank discussion it could have happened.

It's – you know and I realize there's some, you know, there's some harsh words in that email, but I stand by those. I think we had a higher responsibility to our community and, in turn, to our organization to carry out that or fill that communications gap.

When people have questions we owe them the answers. I don't think we live in a day and age where no comment is an acceptable response from a police service in a, in such a critical incident. It speaks to the ability for the community to have confidence in their police service. And when we don't speak and speak frankly, honestly and openly, that confidence is eroded. And when community confidence is eroded, so is the ability for internally our officers to carry out their own duties and have, you know, the heightened level of morale that you want to have a capable and efficient police service. Those two elements are so closely tied together, and communication is key to building both of them.

MS. CHAYTOR: Okay, thank you.

Constable Smyth, did you also have concerns about the RCMP in terms of either the investigation or the fact that it was the RCMP who was the police force conducting the investigation? Was that of concern to you?

CST. SMYTH: From an optics perspective or from an actual investigative perspective?

MS. CHAYTOR: Well, let's do from the optics perspective first.

CST. SMYTH: I think from an optics perspective, yes, I understood the concern. From a, you know, from a capability, they're obviously as capable as or arguably more capable than any police service in the country.

I had no qualms about the RCMP's ability to carry out an unbiased and full comprehensive investigation, but having a police service who we interact with on a daily basis, in particular our unit is integrated to carry out this investigation, it just, it fuels public contempt and adds to that divisiveness between our community and policing which is the exact thing we don't want to fuel or add to. We want to mitigate whenever we have the opportunity. So if calling in an outside police service to assist that process, and I feel it would have helped that.

MS. CHAYTOR: Can you –

THE COMMISSIONER: Mr. Smyth – sorry – I've seen this recommendation before, this concern being raised before. Just enlighten me in terms of the practicalities of and the logistics of bringing in an outside police force in this type of situation. You have the police moving in with the body still in the home. How would that work if you were to bring in another police force, presumably there'd have to be a period of time when the proper police force was selected and they agreed to get in.

I assume the investigation couldn't just stop until that other police force came in, could it? And the body would have to be removed but before that was done there had to be forensic measuring and so forth. Just tell me a little bit about what you'd see as logistics.

CST. SMYTH: Sure. The RNC actually has a memorandum of understanding with the Ontario Provincial Police –

THE COMMISSIONER: So that would be settled right away, would it, just a matter of a phone call?

CST. SMYTH: Sure – for this very incident. They can mobilize an initial response team very quickly. There would absolutely have to be some initial overlap. You can't avoid that, because you need that immediate response.

THE COMMISSIONER: Right.

CST. SMYTH: You need forensics there immediately. You need scene security. You can't interfere with that, but having the OPP or another capable police service of similar size and resources engage at an earlier point in the investigation –

THE COMMISSIONER: Practically, so how long would you think it would take to have – you know, from the time the call is made until the other police force is on the scene, how long would that likely be?

CST. SMYTH: Two days.

THE COMMISSIONER: Right. Okay.

And in the meantime, there would have to be measures taken with respect to the preservation of the scene and dealing with the body, measurements and so forth before the body was moved.

CST. SMYTH: Correct. And such an outside entity may continue to solicit such specialized services as – forensics for example, they would probably have so many forensic steps already taken but they would provide oversight and that added level of transparency.

THE COMMISSIONER: Right. Okay.

Sorry, Ms. Chaytor, go ahead.

MS. CHAYTOR: (Inaudible.) Thank you.

In answering the Commissioner's questions you referenced the MOU with the OPP, between the RNC and the OPP. Did you understand, though, Constable Smyth, that that would – you said that was for this very incident. But did you understand that would pertain when the incident happened within the RNC jurisdiction. This particular incident happened, of course, in the RCMP jurisdiction.

CST. SMYTH: Yeah, there's no doubt that adds to the complexity of the situation but I don't think it would remove the protocols of it that are already available there to utilize.

MS. CHAYTOR: Okay. Did you understand that the RNC had any control over who was going to do an investigation in the RCMP jurisdiction?

CST. SMYTH: I don't know the answer to that.

MS. CHAYTOR: Okay.

If we – I'm just going to move on to a couple of other communications and then that'll be it for my questions unless Constable Smyth has anything else that he thinks we didn't cover.

So should I continue on, Commissioner, continue on?

THE COMMISSIONER: How long do you think this line of questioning will be?

MS. CHAYTOR: Probably no more than five, 10 minutes, I would think.

THE COMMISSIONER: No, go ahead. Unless counsel is –

MS. CHAYTOR: Okay. If we could have P-0223, please.

And, Constable Smyth, this is an email chain of April 6, 2015, and it involves Andrew Abbass who identified himself to the Commission. He had applied for standing.

And there's a caution that went out about Mr. Abbass by Tim Buckle. And Tim Buckle, we understand, would have been in Corner Brook at this point in time on April 6, 2015, 7:54 p.m. And this goes out to all staff, Royal Newfoundland Constabulary advising that Andrew Abbass has been active on his "Twitter account since the death of Don Dunphy in Mitchell's Brook yesterday. Members in Corner Brook are probably familiar with Abbass due to his complaints filed against Prime Minister Stephen Harper for advocating genocide ..." and it goes on from there.

And then you forwarded that email to Doug Noel and then Doug Noel sends that to Joe Browne, the chief of staff in the Premier's office. And in forwarding that email to Doug Noel, it's written here: "Same thing brother."

And what did you mean by that, that comment: "Same thing brother."

CST. SMYTH: I think I had forwarded that email so he had the information, but it was – but I was also responding to a previous message from Doug. I think it was just a message of support, hope you're doing well, that kind of thing; we're here if you need anything.

MS. CHAYTOR: Okay. And if we could bring up, then, please – so you're not saying that this communication from Andrew Abbass, that you're comparing that to, for example, Mr. Dunphy's

CST. SMYTH: No.

MS. CHAYTOR: – communications and you're saying: "Same thing brother."

CST. SMYTH: No, no. No, absolutely not.

MS. CHAYTOR: That's not what's happening there?

CST. SMYTH: No.

MS. CHAYTOR: Okay.

If we could bring up, please, P-0133 and page 8 of that document. And this is your phone records where we also see the email being forwarded.

THE COMMISSIONER: I recall there's some confusion about the timing of these.

MS. CHAYTOR: Yes, and this will straighten it out.

THE COMMISSIONER: Has that ever been resolved?

MS. CHAYTOR: Yes, this will straight it out, the email.

The timing on that looks after, but what we've learned through many questions along the way is that the timing that shows in Doug Noel's email is an hour and a half in the difference because that would be Ottawa time. Often you'll see that with RCMP, their communications are on Ottawa time.

So that explains the difference and that's why I wanted to show you this in terms of the record here where you'll see it going to Doug Noel and then the timing is correct, 10:46. So it would have been received by – it would have been received to all staff including, of course, Constable Smyth at 10:24 p.m. and, again, this is UTC time. And then it goes out 10:46 so it does – so it is subsequent in this chain.

THE COMMISSIONER: Okay.

MS. CHAYTOR: And so you're saying, Constable Smyth, that there would have been an earlier message come from Doug Noel wishing you well, and in forwarding this on you're saying "Same thing brother" in that context?

CST. SMYTH: I believe so, otherwise I can't – that's the kind of thing I would, the kind of words I would use in response to that. I don't see it correlated to the actual email. I think it just happened to be part of that message because I wanted to ensure he had been privy to the original message from Staff Sergeant Buckle.

MS. CHAYTOR: Constable Smyth, at any point in time following this incident did you ask the RNC permission for you to be armed at home while you were not on duty?

CST. SMYTH: Yes, I did.

MS. CHAYTOR: And what were the circumstances giving rise to that?

CST. SMYTH: It was around the time when I was originally subject to a lot of social media backlash, there was pictures of, you know, my children – or my child at the time – me, my wife, a lot of very – comments to me that were there just to instill fear in me and potentially motivate or have an impact on other people who could actually carry out an act of violence towards us. That was a concern.

MS. CHAYTOR: If we could bring up, please, P-0201.

And this is an email exchange, and it's October 27, 2015. At that point in time, this is again – this is shortly before you went on your sick leave, isn't it, Constable Smyth?

CST. SMYTH: What date, sorry?

MS. CHAYTOR: This is October 27, 2015; so the fall of 2015.

CST. SMYTH: Yes.

MS. CHAYTOR: Okay.

Had you received –in terms of the messaging and what you were finding difficult, had you actually received any threats?

CST. SMYTH: Not specific threats, in terms of the *Criminal Code* definition, but there were comments, pictures of me and making reference to he should be executed, you know, we should take matters into our own hands, these types of commentary.

MS. CHAYTOR: Okay. And, Constable, as of October 27, 2015, were you still in a non-operational position?

CST. SMYTH: I was in an administrative position, yes.

MS. CHAYTOR: Okay.

And we can see here that the request was made to your superior, Joe Gullage, and then he on November 2, 2015, says to Jason Sheppard, "Forgot to forward" this to you. "I have given permission subject to review this week."

So you were given permission to be armed at home –

CST. SMYTH: Yes.

MS. CHAYTOR: – while off duty.

CST. SMYTH: Yes.

MS. CHAYTOR: Did you actually take your firearm home?

CST. SMYTH: No.

MS. CHAYTOR: And why not?

CST. SMYTH: I think a firearm at home potentially adds more trouble than it alleviates.

MS. CHAYTOR: What questions did Joe Gullage ask you prior to giving you permission to take your firearm home?

CST. SMYTH: I don't recall.

MS. CHAYTOR: Constable Smyth, those are the questions I intended for you, but I'm sure this incident has played out in your mind many times. You've discussed here today or mentioned the fact that you still lie awake thinking about this over and over. So looking back on everything, is there anything in hindsight that you feel you could have done differently?

CST. SMYTH: A thing that I could have did differently?

MS. CHAYTOR: Yes.

CST. SMYTH: I could have not went there.

MS. CHAYTOR: Okay.

Constable Smyth, is there anything else that you would like to add? Is there anything else that I haven't covered with you that you think we should cover?

CST. SMYTH: I don't think so.

MS. CHAYTOR: Okay.

So those are all my questions. I'm sure my learned friends will have questions for you, as well the Commissioner.

So thank you very much. I know this has been a tedious and long process.

Thank you.

CST. SMYTH: Thank you.

THE COMMISSIONER: Thank you, Ms. Chaytor.

Now, we're going to break before we continue with the examination. If I got – it's almost 12 noon, is it? Is that correct?

UNIDENTIFIED MALE SPEAKER: Ten after 11.

THE COMMISSIONER: Eleven, sorry, yes. I was wondering where the time went.

Do you have anything to raise, Mr. Simmonds, before the break? It may be before the lunch break, if you want. I understood you had, you had some –

MR. SIMMONDS: Yes, there is an issue that –

THE COMMISSIONER: (Inaudible) point?

MR. SIMMONDS: There is an issue that I have reviewed with Commission counsel and I understand they've given you some knowledge of. Before we make a determination as to whether I want, I want – there would be a name that we would be asking to have held confidential. And I understand that it's not likely that that application would succeed, so I have to go back to that person –

THE COMMISSIONER: Well, I'll keep an open mind in that –

MR. SIMMONDS: No, no, I understand.

THE COMMISSIONER: – if you can give me some authority on it.

MR. SIMMONDS: I understand.

THE COMMISSIONER: But from what I see, if this inquiry is to be an open inquiry –

MR. SIMMONDS: I understand.

THE COMMISSIONER: – I'd have to be given some pretty good reason, along the lines of the *Criminal Code* provisions, I think, as an analogy, not that the *Criminal Code* applies. But for a witness to testify in camera there has – there's often a doctor's note or, you know, similar type thing as to why it couldn't happen.

MR. SIMMONDS: And I don't, I don't take issue with that, Mr. Commissioner. But I feel that I have certainly got an obligation to go back to that person –

THE COMMISSIONER: I understand.

MR. SIMMONDS: – and tell her that.

THE COMMISSIONER: Right.

MR. SIMMONDS: And that will determine whether we utilize it or not.

So it would be premature until I speak with her because it may not be an issue at all, if she says no.

THE COMMISSIONER: Sure. So do you want to leave that until after lunch or –

MR. SIMMONDS: If we could leave it until just before lunch or something. We'll get a hold of her over the break now, or attempt to get a hold of her over the break now.

THE COMMISSIONER: Right. Does other counsel understand the, where the line of questioning is going and what it relates to?

MR. SIMMONDS: Well, it relates to the incident at Emmanuel House and the documentation has been provided as an exhibit. I can give you the exhibit number.

MS. CHAYTOR: I think that should be Stella's Circle – Stella's Circle.

MR. SIMMONDS: Well, Stella's Circle. I call it Emmanuel House, yes. It's the same facility.

What – I would want to talk to her.

THE COMMISSIONER: No, I understand. But what I'm asking, do you –

MR. SIMMONDS: No, I have not reviewed it with other counsel here.

THE COMMISSIONER: Okay.

MR. SIMMONDS: Outside of those documents being part of the record, they are exhibited number –

THE COMMISSIONER: Right.

MR. SIMMONDS: – and they were sent in about – perhaps Commission counsel can help me, but I figure about two weeks ago.

THE COMMISSIONER: Maybe longer than that.

Okay. Anything other counsel have before we take our mid-morning break?

MR. KENNEDY: Yes, the only point I would make, Commissioner, I'm aware of these documents. They've never been reviewed with Constable Smyth.

Once I was told Commission counsel weren't – once I was told Commission counsel weren't referring to them, they've never been reviewed with Constable Smyth.

THE COMMISSIONER: Right. Okay.

Well, we'll break and you'll seek the information from the potential witness. And I guess it's all theoretical until we hear back from you on that point.

Will that – will you be able to get that information before lunch or do you know?

MR. SIMMONDS: I'm hoping to get it over the break –

THE COMMISSIONER: Over the break, yeah. Okay.

MR. SIMMONDS: – Mr. Commissioner.

THE COMMISSIONER: If you need a few more, few extra minutes, let us know.

Okay. We'll break now for 15 minutes.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now in recess.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Okay, go ahead when you're ready.

MS. CHAYTOR: Commissioner, before we turn things over for the cross-examination, I've been told I've been remiss in not entering new exhibits this morning. So if I may, they are exhibits P-0249, P-0250, P-02 –

THE COMMISSIONER: Sorry, P-0249.

MS. CHAYTOR: P-0249.

THE COMMISSIONER: 0250.

MS. CHAYTOR: 0250, 0257, 0258, 0290, 0292 and 0300. And some of those – those include exhibits that Commission Counsel put into evidence as well as requests we had from other counsel.

THE COMMISSIONER: Okay, hearing no objection, it's so ordered.

MS. CHAYTOR: Thank you.

MR. SIMMONDS: Ms. Chaytor, do we have the drawing, the diagram – you had it on a plaque board?

MS. CHAYTOR: Oh, yes, we could bring that in, yes.

MR. SIMMONDS: Could we have that?

MS. CHAYTOR: Yes, we can have that brought in.

MR. SIMMONDS: Yeah.

MS. CHAYTOR: Okay.

MR. SIMMONDS: I saw it when we did the question.

MS. CHAYTOR: It might just take, it might just take the staff a few minutes to bring it, but –

MR. SIMMONDS: No, that, that's fine –

THE COMMISSIONER: You need (inaudible).

MR. SIMMONDS: – we don't need to delay because of it.

THE COMMISSIONER: Okay, you're ready to go without that –

MS. CHAYTOR: Okay.

THE COMMISSIONER: – okay, go ahead, Mr. Simmonds, when you're ready –

MR. SIMMONDS: First –

THE COMMISSIONER: – or Ms. Breen, I’m sorry, I’m just assuming because Mr. Simmonds is making all the standing motions, Ms. Breen. I’m not ignoring you. You let me know if you’re going first before Mr. Simmonds, in any case.

MR. SIMMONDS: That’s fine, that’s fine, Mr. Commissioner.

The issue that we spoke of before the break –

THE COMMISSIONER: Right.

MR. SIMMONDS: – is no longer an issue. The lady has concerns and so we’ll not proceed with it.

THE COMMISSIONER: Okay. Okay.

Go ahead when you’re ready.

MR. SIMMONDS: Thank you.

Good morning, Constable Smyth. Bob Simmonds.

Constable Smyth, you were a police officer from, going back 2001 to date, correct?

CST. SMYTH: Correct.

MR. SIMMONDS: Okay. And you’re going to have to speak up so that –

CST. SMYTH: Correct, yes.

MR. SIMMONDS: It’s really hard to hear back here and in the audience.

And I understand you took significant courses and were a fairly well-trained police officer?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

You started off as a constable from 2001 to 2007, correct?

CST. SMYTH: I remained constable in 2007.

MR. SIMMONDS: Well, street patrol, pardon me. I’m sorry.

And then you were coordinator/investigator with the graffiti management project for a period of a couple of years?

CST. SMYTH: Yes.

MR. SIMMONDS: Then you went as an investigator with Criminal Intelligence.

CST. SMYTH: Yes.

MR. SIMMONDS: And then your final before this incident, or at the time of the incident, was your – the officer in charge of the Protective Services Unit.

CST. SMYTH: I was a supervisory acting sergeant there, yes.

MR. SIMMONDS: Okay.

I understand you've taken a number of courses as part of your training, Sergeant Smyth.

CST. SMYTH: Constable, yes.

MR. SIMMONDS: Thank you very much, yeah, that – you can just lay it there. Is that okay?
Thank you.

You took a course in – police protection specialists course in 2012?

CST. SMYTH: Yes.

MR. SIMMONDS: And what did that generally entail?

CST. SMYTH: The course involved a lot of theory and tactics around the protection of publicly elected officials.

MR. SIMMONDS: Publicly elected officials.

CST. SMYTH: Yes.

MR. SIMMONDS: To assist you in the job that you had gone into?

CST. SMYTH: That's correct.

MR. SIMMONDS: Okay. And I understand you also took the course, Managing Targeted Violence, in 2012 and that the first course was done in Ontario but this one was done here in St. John's by a British Columbia instructor?

CST. SMYTH: Correct.

MR. SIMMONDS: Okay. And that again, there's a manual in relation to that that sets out the processes that you go through in assessing risk and things of that nature – correct?

CST. SMYTH: Correct. The focus of that course was contemporary threat management.

MR. SIMMONDS: Contemporary threat management.

And then you did another course in 2013, RNC Media Relations course?

CST. SMYTH: Yes.

MR. SIMMONDS: What did that entail?

CST. SMYTH: That was through my role with social media, carried out as a coordinator role for the RNC Facebook page for a period of time. And it was again just theory in appropriately dealing with media.

MR. SIMMONDS: Did it give you any kind of substantive understanding as to how to deal with the media, any dos and don'ts and things of that nature?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And was that a detailed course, or how long did that course run for?

CST. SMYTH: I believe it was five days.

MR. SIMMONDS: Five days. Okay.

So then in 2011, you went in through the Protective Services Unit which was the protection of the premier and elected officials?

CST. SMYTH: Correct.

MR. SIMMONDS: Okay.

And I understand that you were the acting person in charge? You told us that already again this morning.

CST. SMYTH: Not immediately, but –

MR. SIMMONDS: Somewhere down the –

CST. SMYTH: – a few years after.

MR. SIMMONDS: – period of time that you were there?

CST. SMYTH: Yes.

MR. SIMMONDS: And the manpower/person power of that force varied between four, at a maximum, down to two at the time of this incident?

CST. SMYTH: Full-time personnel, yes.

MR. SIMMONDS: Full time personnel.

And did I understand you to say that the actual mandate, you assisted in the drafting of this, the policy and procedures manual?

CST. SMYTH: Yes, I did assist with that.

MR. SIMMONDS: You did assist in the drafting of that?

CST. SMYTH: Yes, I did.

MR. SIMMONDS: So you obviously would know it very well?

CST. SMYTH: Yes.

MR. SIMMONDS: That's Exhibit P-0031.

THE COMMISSIONER: Do you want that brought up?

MR. SIMMONDS: Yes, if we could.

And I'm interested in particularly in the first – it is seven pages, but pages one and two. On page one, 3.2: To gather intelligence on persons and groups of (inaudible) – interest, pardon me, demonstrations and any other matter that could potentially cause direct or indirect harm to the premier or the Office of the Premier or to any other elected government officials.

We're talking about physical harm there – correct?

CST. SMYTH: Well, I think that in the indirect harm wouldn't necessarily refer to physical; it could refer to threatening behaviours.

MR. SIMMONDS: But the thrust of this is ultimate physical harm to either the premier or other elected officials?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

We go to the next page under 4.1, “d. conduct investigations, in conjunction with the applicable unit of the RNC Criminal Investigation Division, into people or groups who pose a potential threat to the Premier, Office of the Premier or other elected Government Official.”

Again, the thrust of that, I put to you, is physical harm?

CST. SMYTH: We do get into aspects of criminal harassment, stalking, these types of issues.

MR. SIMMONDS: Which could ultimately physical – harassment/stalking can ultimately result in physical harm?

CST. SMYTH: It certainly could, yes.

MR. SIMMONDS: Yep.

And the next one, and the last one I intend to refer to, is: e. gather intelligence on persons and groups of interest, demonstrations and any other matters that could potentially cause direct or indirect harm to the premier or the Office of the Premier, or other elected officials. Again, worried about end result: physical harm.

CST. SMYTH: That's correct.

MR. SIMMONDS: Okay.

THE COMMISSIONER: What was the last one –?

MR. SIMMONDS: E, Mr. Commissioner.

THE COMMISSIONER: E?

MR. SIMMONDS: E.

THE COMMISSIONER: E, got it.

MR. SIMMONDS: Gather intelligence on persons and groups of interest, as opposed to the one before it was to conduct investigations. That's the difference in the two is it not, Constable Smyth?

CST. SMYTH: Sorry, you have to repeat that.

MR. SIMMONDS: The difference in the two, d and e, is one is to conduct investigations and the other is to gather intelligence.

CST. SMYTH: Correct, so d. might refer to actual criminal investigations such as criminal harassment, an actual threats investigation. The intelligence component maybe more akin to I guess what we've been talking about here for the past couple of days.

MR. SIMMONDS: So you knew that very well. You, in fact, assisted in the drafting of those segments of the police policy manual which goes in a bigger manual that all officers utilize in their practice – correct?

CST. SMYTH: That's correct.

MR. SIMMONDS: And from 2011 you moved along the scale to becoming the acting sergeant in the section.

CST. SMYTH: Yes.

MR. SIMMONDS: And by the time events of April 5, 2015 you had worked under four premiers – correct?

CST. SMYTH: Yes.

MR. SIMMONDS: You had worked under Premier Williams. You had worked under Premier Dunderdale. You had worked under Premier Marshall and now you had worked under Premier Davis.

CST. SMYTH: Mostly correct. What I had done with Premier Williams would have been primarily limited to the intelligence component.

MR. SIMMONDS: But you worked under four different personalities with perhaps different styles and different demands for security training –

CST. SMYTH: Yes.

MR. SIMMONDS: – for security services.

CST. SMYTH: Yes.

MR. SIMMONDS: Now, this series of events starts off on Good Friday, April 3; am I correct?

CST. SMYTH: Yes.

MR. SIMMONDS: I understand it started off at about 10:21, and I'm referring now to Exhibit P-0079.

If we read from the bottom up, because that's the way they would flow, it started off from Friday, the 3rd, at about 10:21.

CST. SMYTH: Yes.

MR. SIMMONDS: You receive an email – and you’ll have to forgive me because I’m probably going to get tweets and emails mixed up as we go along here. But this is indeed an email. This was posted to the Premier’s account by Donahue2DonDunphy. It was sent to Collins, Sandy Collins, the Premier and Sherman Downey, “won’t mention names this time, 2 prick dead MHAs might have good family members I may hurt.”

And this was from Donna Ivey, who we’ve heard from, and she classified it as a tweet of concern. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: The next – you reply on that date back to her, which is the next email above it?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

Donna, do you know what the context is of this? May take a little time, but I will look into it ASAP. As soon as possible, I take that to mean.

CST. SMYTH: Correct.

MR. SIMMONDS: Okay.

“Although we’ve had some success in identifying some users, twitter can often be a dead end when proper effort has been made to conceal identity.” And again you state, “I’ll advise asap if I have any success.”

So in both places in this, you set out as soon as possible.

CST. SMYTH: Yes.

MR. SIMMONDS: The next one is, Joe Browne joins in and sends an email to yourself, Donna Ivey, Doug Noel. “This guy seems to be an injured worker. His constant tweets are focused on that subject.” Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: He didn’t provide you any more information than he’s an injured worker but you now had that component.

CST. SMYTH: Correct.

MR. SIMMONDS: And then you go to Heather MacLean and ask, “... do you have the ability to obtain transcripts without knowing the exact dates and times?”

That’s obviously going to take some time. That’s not something you can do right away.

CST. SMYTH: Correct.

MR. SIMMONDS: Right?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

CST. SMYTH: In some cases. In some cases they've come back with that very quickly.

MR. SIMMONDS: Very quickly.

CST. SMYTH: Yes.

MR. SIMMONDS: But in his situation where you didn't have the exact dates, they're not likely to come back very quickly. On the Saturday I think this one was, on the Saturday of a long weekend.

CST. SMYTH: I don't know how they do their searches. So –

MR. SIMMONDS: Oh, but to be fair now, Constable Smyth, this is Saturday. You've just told her, you don't know the exact dates, you didn't expect to get them back within a day or two, now did you?

CST. SMYTH: I didn't have that expectation, no.

MR. SIMMONDS: No.

Did I understand – I was a little confused at this. Your regular shift was the Saturday and Sunday. You were supposed to be off on the Friday? But you received these emails and replied to them nonetheless.

CST. SMYTH: Correct. While I was off, yes. Is that what you're asking?

MR. SIMMONDS: Pardon me?

CST. SMYTH: Are you asking, did I reply to the emails while I was –

MS. SIMMONDS: Oh, no, I know you replied to them but it was your day off.

CST. SMYTH: Yes.

MR. SIMMONDS: Can I have Exhibit P-0152, please.

I understand this to be Resource Utilization System, Employee Attendance Report and it sets out the dates there of – and I believe it's read year/month/day. So for April 3, Investigative Division, IOC, DAY, 12 hours – which is Good Friday I believe. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: What did it mean by 18 hours overtime? It has you working 12 hours but it also shows that you were on overtime that day, because I suppose it's a statutory holiday and you're working 18 hours, or being credited for 18 hours' worth of work.

CST. SMYTH: I don't know. I wouldn't have submitted my attendance that week as I normally had. So you'd have to speak to –

MR. SIMMONDS: But it has everything else correct, doesn't it Officer Smyth? You're working on the next two days, the fourth and the fifth, Criminal Investigation Division. It has in, that you

signed in at noon on one of these days, which is about the time you told us in your direct evidence so far. Am I mistaken?

CST. SMYTH: I don't know what that means A/Noon. I don't know.

MR. SIMMONDS: That doesn't mean you signed in at about noon –

CST. SMYTH: No.

MR. SIMMONDS: – which is what I thought you said you had done.

CST. SMYTH: Yeah, there wouldn't be a correlation between the time I sign on and the times that would be indicated in a –

MR. SIMMONDS: But you – I'm sorry; I don't mean to cut you off.

CST. SMYTH: There wouldn't be a correlation between the times that I sign on to our communications centre and the times that are inputted for our actual attendance. I can work, hypothetically, weeks on end without ever actually signing on and it wouldn't impact that.

MR. SIMMONDS: But do you have any understanding or any explanation as to how it can show you working 12 hours and getting 18 hours credit because it is a statutory holiday?

CST. SMYTH: No, I don't have any idea. I didn't do the attendance. Normally I would do the attendance for that unit and submit it, you know, the following week or week after. Of course, things didn't go as they normally would that week. I never, ever did the attendance for it. So I don't know, you'd have to speak to the person who actually inputted that information.

MR. SIMMONDS: You wouldn't have put in for the 18 hours?

CST. SMYTH: No, absolutely not, no.

MR. SIMMONDS: You wouldn't do that?

CST. SMYTH: No, there would be a corresponding overtime form. I can't put overtime in for a day that I was supposed to be working and then took annual leave for.

MR. SIMMONDS: So on – it wasn't Friday then, it was Saturday that you came into the office and you reviewed Don Dunphy's tweets, I understand you told the Commission.

CST. SMYTH: Correct.

MR. SIMMONDS: And I think you said you went back about a year and it took you about an hour or so.

CST. SMYTH: I spent about an hour going back through about a year's worth. Now, a lot of that is – there are thousands of tweets so –

MR. SIMMONDS: And that's what I was just going to say. There are thousands. In fact, in the exhibit that we have, 0008, I think it's 299 pages and it covers a six-day span in which there are 384 retweets and 248 of his own tweets. So for you to go back a year in an hour would mean you would have had at best an amazingly superficial view of his tweets.

CST. SMYTH: I would spend some time and skip over anything that didn't draw my attention to it. Items where he had tagged elected officials or appeared to have stronger language I might spend a moment on, but for the most part, I never said it wasn't superficial.

MR. SIMMONDS: That's what I say, it had to be an amazingly superficial if in six days, it's 299 pages. In a year, it must – I think you said thousands, and I would tend to concur with you that it would be thousands of pages.

CST. SMYTH: I said thousands of tweets.

MR. SIMMONDS: Well thousands of tweets then. So any review was very superficial, very quick.

CST. SMYTH: It was fairly quick, yeah, over a period of an hour, yeah.

MR. SIMMONDS: In your superficial review of his tweets, as opposed to the pages, did you in fact see any that contemplated or encouraged violence?

CST. SMYTH: I think there was some I would classify as ideation, referring to workers' health compensation being the causation of people's death.

MR. SIMMONDS: But what I'm saying to you, did it – that may be the subject matter of it, but did it ever encourage or request, suggest, promote, asked for violence? I put to you it did not, none of them did.

CST. SMYTH: I'm referring to ideation. So there were a number of tweets that referenced death.

MR. SIMMONDS: Referenced death.

CST. SMYTH: That Workers' Compensation was responsible for death.

MR. SIMMONDS: But that's not my question, Officer Smyth. My question –

MR. KENNEDY: Mr. – can Constable Smyth be allowed to answer, Commissioner?

THE COMMISSIONER: Well, he might have been a little bit cut off but I think he pretty well, pretty well answered.

Go ahead, Mr. Simmonds.

MR. SIMMONDS: I'm sorry –

THE COMMISSIONER: It's a matter of he's going a bit too quickly for the witness to fully answer.

MR. SIMMONDS: Constable Smyth, if I cut you off, please – I'll attempt not to do that. Could you finish your answer?

CST. SMYTH: I was referring to what we're looking for is ideation. I, at no point in time, made allegations that Mr. Dunphy had made particular threats towards anybody –

MR. SIMMONDS: And that's what –

CST. SMYTH: – or had particularly made reference to calls for acts of violence or trying to incite other people to be violent. The ideation might be in reference to believing that Workers' Compensation was responsible for his death might be – which he had made reference to, and had made reference to it being responsible for others, other people's death. He had made reference to it being responsible for his wife's death.

MR. SIMMONDS: And he made no bones about that; that was clear. But what I'm asking you, and you have now answered it, is that there was nowhere he was promoting, requesting, or suggesting violence be undertaken.

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

MR. SIMMONDS: Did you look at some of the other tweets and retweets he had? And this is Exhibit P-0008.

Did you, Constable Smyth, look at the subject matter of other tweets, retweets that he had on there?

CST. SMYTH: I looked at a lot of material, you know.

MR. SIMMONDS: Because in the six days from this exhibit we have the subject of retweets being injured workers' rights in Canada, international politics, social justice, animal rights, hockey and marijuana. We have quotes from Nelson Mandela, Oscar Wilde and the Dalai Lama. We have inspirational quotes, "A dream is a wish your heart makes." Salvation Army, "Every person is worthy of respect and compassion." Then he's got a quote from the Dalai Lama, a quote from Einstein, and then a quote, "No one really knows anyone just by their tweets."

Did you see a number of those type of tweet?

CST. SMYTH: I saw a lot of different tweets on different topics, no question.

MR. SIMMONDS: And, you know, he was critical of Stephen Harper – can't imagine he was the only one that was critical of Stephen Harper. He was critical of corporate greed, the Catholic Church, RNC, Paul Davis. He was somewhat anti-police and he was critical of Steve Kent.

CST. SMYTH: Yes.

MR. SIMMONDS: There was a quote, one of the quotes he had from Einstein, I think was very clear in his tweets, "I have no special talents. I am only passionately #curious."

And another quote there: "The supreme art of war is to subdue the enemy *without* fighting."

"Blessed is the man who suspects nothing for he will never be disappointed."

Were there quite a number of those type of quotes throughout his many, many, many tweets and retweets?

CST. SMYTH: It sounds accurate, yes.

MR. SIMMONDS: Certainly they don't give you any idea of a propensity, any propensity whatsoever for the promotion or the undertaking, the execution of violence, do they?

CST. SMYTH: No

MR. SIMMONDS: He actually had popes – tweets there from the Pope, Obama – none of those. How far – so you would have gone back to certainly the December of the previous year, December 14, 2014.

CST. SMYTH: In his tweets?

MR. SIMMONDS: Yes.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And one thing you learn later in the day is his concerns with the way he's been treated by Workers' Comp. And I'll call it Workers' Comp for the purposes of a short term. You know who I mean?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And did you see the tweet on the 19th of December 2014, on where Dunphy – or Donahue2DonDunphy – Gullage laughed at injured workers when he was a commissioner at Workers' Health and Safety Compensation Commission, but he never got to his pension. Maynard did the same.

Did you see that tweet?

CST. SMYTH: I did see that tweet; I don't recall to be honest if I saw it before or after the incident. But I have seen that, yes.

MR. SIMMONDS: And it is, indeed, an exhibit in these – I don't have the exact number; Commission counsel do you have the number for that exhibit? If you don't that's fine, I can move on. But it is, indeed –

MS. CHAYTOR: Is that in P-0008? Is it P-0008?

MR. SIMMONDS: We ask that it be added to the –

MS. CHAYTOR: Okay.

MR. SIMMONDS: But, in any event, you did see it. You believe you may have even seen it on that date.

CST. SMYTH: It's possible, yes.

MR. SIMMONDS: So if you saw it on that date, then the two names that you eventually got when you were down there, you had before.

CST. SMYTH: I could have potentially seen them, yes, but correlating the two, I hadn't necessarily made it, no.

MS. O'BRIEN: Sorry, it is P-0224 I believe.

MR. SIMMONDS: P-0224, could we bring that up?

Because that lays out very clearly who were the two MHAs he's referring to 'cause both have passed away. Eric Gullage was an appeals commissioner and Mr. Maynard was the CEO for a time of Workers' Comp.

CST. SMYTH: Okay.

MR. SIMMONDS: Well, not okay, I mean it –

CST. SMYTH: I don't know. I don't know, Sir.

MR. SIMMONDS: You didn't know.

CST. SMYTH: I didn't know who they were.

MR. SIMMONDS: You didn't know at the time who either one of these were?

CST. SMYTH: No.

MR. SIMMONDS: Well, when you saw that, and he was referring to MHAs, did you go and check and see who they were? 'Cause that would have seemed to have been a good place to start.

CST. SMYTH: So what I'm saying is I hadn't made the connection of who he was referring to at that time. I believed he was referring to two MHAs who had indeed passed away –

MR. SIMMONDS: Right.

CST. SMYTH: – but you know, again back to the reasoning to go speak to him, to get directly who it is he is referring to.

MR. SIMMONDS: Well, you're checking his tweets to see if there's anything would give you some assistance. The quote is two dead prick MHAs. You come across this and it's in relation to their pension, when you read the full tweet that he sent that day. It's in relation to their pension. This is in relation to their pension. They are two people associated with Worker's Comp.; one is an appeals commissioner and the other is the CEO. You didn't make the connection that these were the two he was talking about who are indeed passed away?

CST. SMYTH: How – I don't know they're passed away.

MR. SIMMONDS: You didn't check it?

CST. SMYTH: Did I – I'm sorry are you asking –

MR. SIMMONDS: You did not check when you came across this to see if this could be the two people he was talking about?

CST. SMYTH: Did I check if Gullage and Maynard (inaudible) –

MR. SIMMONDS: No, I don't mean you check with Gullage or Maynard. I mean, you may have checked with Tom Mahoney or any number of other sources; you did not check it. You saw this tweet, you believe, at that time –

CST. SMYTH: Believed – sorry, believe what time?

MR. SIMMONDS: You saw the tweet when you were reviewing for the year, the year of tweets that he had on that Saturday – correct?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. This was one that you would have seen, it's one that refers to dead MHAs and two that are related to Workers' Compensation. You did not make the connection –

CST. SMYTH: Is the email that's in front of me refer to two dead MHAs, is that what you're saying?

MR. SIMMONDS: You did not make the connection; that's what I'm asking. You saw these names, but didn't make the connection.

CST. SMYTH: No I didn't, I saw a lot of names. There's – I didn't check every name that was mentioned in his thousands of tweets to see who deceased and who wasn't –

MR. SIMMONDS: Well, what's the point – if you were going through his tweets, you were trying to determine whether this tweet, tweet of concern, it refers to two MHAs, this is on in December, it has the same subject matter: the pensions. It refers to two of them at Workers' Comp, which you know to be his issue, because Joe Browne has told you that.

CST. SMYTH: Joe Browne told me what, Sir?

MR. SIMMONDS: In the email, Officer Smyth. Did he not say it was an injured worker?

CST. SMYTH: Okay sorry, I thought we were beyond that.

MR. SIMMONDS: Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: I thought – I don't think my questions are complex here.

So, as a result of that, what you have at this point in time is just the tweet. You go in, you go back through his emails or his tweets and retweets, do a very cursory check – agreed?

CST. SMYTH: Yes.

MR. SIMMONDS: And then you decide you'd get the number for Ralph Tucker who is the chair of the board from Donna Ivey. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: And you call Ralph Tucker on a Saturday.

CST. SMYTH: Yes.

MR. SIMMONDS: And you say to him, and this is Exhibit 0185, "Sorry to bother you on a long weekend; however, I'm looking to speak..." with "Mr Don DUNPHY as soon as possible and I suspect your office may be able to assist me in confirming who the individual is. Mr Dunphy has made some disconcerting comments via social media directed towards elected officials."

What was the disconcerting comment? It might be described as vulgar, but what was the disconcerting comment? He never threatened any injury there. He never threatened any violence. He never threatened any activity that's illegal. What was the disconcerting comment there?

CST. SMYTH: Well, when you get into language that is strong and makes references to dead people, it does become disconcerting. And that may indeed be up for interpretation. If you don't

feel it's disconcerting to you, then it might never become an issue, but when it's brought to my attention that somebody feels it's disconcerting, causes them fear or whatever the case may be, then that engages the onus for me to look into it further.

MR. SIMMONDS: But there was nothing in it. Again, your job is to protect the Premier and his ministers. There was nothing in it that promoted any violence in relation to any of that group. Correct?

CST. SMYTH: I took those tweets as indeed being disconcerting. If they were directed towards me personally, I would have been concerned about them.

MR. SIMMONDS: You wouldn't like them, but they don't threaten any violence towards you. They don't promote any physical harm to you, do they?

CST. SMYTH: Well, I never made the suggestion that they did, but if they were made towards me personally, they would indeed cause me concern.

MR. SIMMONDS: My question is, do they promote – your job is to protect. Do they promote any violence, inappropriate activity in relation to the Premier or any of his ministers?

CST. SMYTH: As I've always said, no.

MR. SIMMONDS: No.

So you clearly leave the impression with Ralph Tucker you need this information as soon as possible, because that's exactly what you said.

CST. SMYTH: Yes.

MR. SIMMONDS: Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: Mr. Tucker comes back to you – Exhibit 0186 – with the reply from Mr. Tucker. "Joe I have been speaking with Tom Mahoney Ex. Dir." Now this is on a Saturday. You've called the chair of the board. He gets back to you on that Saturday. "... Ex. Dir with the Commission and he is procuring the information for you and will be in contact with you asap."

So you've certainly left the impression with him that this is urgent. Would you agree, Constable Smyth?

CST. SMYTH: He may have interpreted it to be urgent, sure.

MR. SIMMONDS: What interpretation is there for ASAP outside of something needing to be dealt with immediately?

CST. SMYTH: As soon as possible is the –

MR. SIMMONDS: As soon as possible –

CST. SMYTH: – interpretation.

MR. SIMMONDS: – is the interpretation. And it is used, is it not, to indicate urgency? Or is that not your understanding? Because if it is, that's fine.

CST. SMYTH: I use the words urgency and emergency, for such connotations I use ASAP –

MR. SIMMONDS: Okay.

CST. SMYTH: – when I would like something –

MR. SIMMONDS: Okay

CST. SMYTH: – adhered to as soon as possible.

MR. SIMMONDS: And you go back, “Thanks All! Appreciate the help.”

So you are now waiting for contact with the executive director on Saturday.

CST. SMYTH: Yes.

MR. SIMMONDS: Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: You speak with Tom Mahoney, Exhibit P-0081. He gave a statement to Monty Henstridge in relation to his dealings with you that day.

Page 3, it might – yes, page 3 is the exhibit page, page 3 at the very bottom. Mahoney, “And what that was, was a request from, ah, Joe SMYTH ... ahm, that they were inquiring about my knowledge of a gentleman named Mr. Don Dunphy, ahm, and they wanted to know would I be aware of any threats or any issues at the Commission and would I be aware of this individual and I told the chair of the Board, Mr. Tucker, at that point that as Chair the Board, I can’t go through him to the police, that he is not to be involved in operational issues so the best thing that he could do would be to get me in direct contact with, ah, Officer Joe Smyth.”

There were no threats. Where did they get that opinion? There were no threats. You’ve told us already, you’ve told us in numerous statements, you’ve said it here again this morning, there were no threats. Where did Mr. Mahoney get that impression?

CST. SMYTH: Well, what Mr. Mahoney is saying here is that they wanted to know would I be aware of any threats or any issues at the Commission and would I be aware of this individual and I told the chair, and he goes on. He is –

MR. SIMMONDS: So you don’t think you left him with the impression that there were any threats?

CST. SMYTH: He’s very clear in what he’s saying here.

UNIDENTIFIED MALE SPEAKER: He is, here –

MR. SIMMONDS: What I’m asking you, is you don’t think you left the impression with Mr. Mahoney that you were investigating threats?

CST. SMYTH: Sorry, are we still talking about this particular –

MR. SIMMONDS: We’re talking about, my question to you is, did you leave the impression with Mr. Mahoney that you were investigating threats?

CST. SMYTH: I don't believe ever saying those words, no.

MR. SIMMONDS: You don't believe –?

CST. SMYTH: I ever said those words, no.

MR. SIMMONDS: Okay.

On the next page, page 4: Ralph Tucker and just speaking really to me 'cause when he was talking he said Joe, I've been speaking with Tom Mahoney, Executive Director with the Commission and he's procuring the information for you and will contact you asap. Please let me know if there's anything else I can do, ahm, that an email here. What he was advising earlier on in the thread there was a good afternoon Mr. Tucker from Joe Smyth and he said sorry to bother you on a long weekend; however, I'm looking to speak with Mr. Dunphy as soon as possible.

That, again, a fair recitation of what happened?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

If you go to page 6: "And our legal counsel, Anne Martin, to read some of these Tweets and there's nothing threatening in them so we couldn't take any action so all I asked staff to do was to continue to monitor the Twitter space and if you see any escalation in tone, in content or language, ahm, bring it to my attention and up to the moment I spoke to Joe on Saturday, we had no indication that anything had changed."

So you got no information from Workers' Comp that Mr. Dunphy was promoting any threats or violence towards them?

CST. SMYTH: No.

MR. SIMMONDS: Okay.

"... so he said, you know, the worst thing about these situations is these guys you know tend to be in their house, they tend to feel the freedom to say what they like and they don't realize that there are consequences for these statements."

What did you mean by that? What are the consequences for Mr. Dunphy's statements?

CST. SMYTH: Sir, where did I say this?

MR. SIMMONDS: We'll start again at line 143 on page 6. And our legal counsel –this is Mahoney saying what you said. And our legal counsel, Anne Martin, read some of these tweets and there's nothing threatening in them so we couldn't take any action. So all I asked staff to do was continue to monitor the Twitter space and if you see any escalation in tone, in content or language, bring it to my attention and up to the moment I spoke to Joe – and that would be you – on Saturday, we had no indication that anything had changed. So they had no indication of any threats by Mr. Dunphy to anybody.

So he said you said – that would be you. So he said, you know, the worst thing about these situations is these guys, you know, tend to be in their house and they tend to feel the freedom to say what they like and they don't realize that there are consequences for these statements.

My question to you is: What are the consequences for these statements? I make statements like this; I didn't realize there is legal consequences. Are you saying there are legal consequences for what he said?

CST. SMYTH: Well, I wasn't referring to – I don't recall actually saying that specifically to Mr. Mahoney.

MR. SIMMONDS: No, hold on, just stop there, Officer Smyth –

CST. SMYTH: Can I finish?

MR. SIMMONDS: This is what he says. Are you attempting to say you didn't say that because if it is, then we'll take measures to make sure this is accurate, or are you saying you made it?

CST. SMYTH: No, I said I can't remember saying that specific language. However –

MR. SIMMONDS: Do you want us –

CST. SMYTH: – that, you know, it is something that I would say, but it would be –

MR. SIMMONDS: So it is something – firstly, I want to get through the issue of whether this is indeed an accurate reflection of what you said. If you say it's not an accurate reflection, then we'll either get Mr. Mahoney back or we'll get a tape of what he said in a meeting to ensure that it is accurate.

CST. SMYTH: Right. So yes, this is language that I would use and say –

MR. SIMMONDS: Okay.

CST. SMYTH: – but we got to put the context into place. What I would refer to there would be people often believing that they have anonymity. This is a general conversation that Mr. Mahoney and I would have been having at that point in time. So if a person is making specific threats or their commentary is starting to lend towards actual criminal harassment, they do sometimes think that the anonymity or perceived anonymity of social media platforms makes any potential consequences null and void.

MR. SIMMONDS: With the greatest of respect, and it doesn't matter what I accept or don't accept, but I don't accept that interpretation of that paragraph. That paragraph is very clear. Mr. Mahoney is saying you got in contact with him. He thought you were investigating something along the line of threats, threatening language, and then he said you said to him the worst thing about these situations, the situation you are dealing with at that time, in relation to Don Dunphy speaking to him to get information on, is that these guys, these Don Dunphys of the world, tend to be in their house, they tend to feel the freedom to say what they like and they don't realize that there are consequences for these statements. And I know of no such consequences; I understood it to be the right to free speech in our country.

CST. SMYTH: Well if we go back, it says “these situations,” so by making the statement “these situations” it's broadening it well beyond this situation, which will be very specific to the case of Mr. Dunphy.

MR. SIMMONDS: Within these, would be this situation, would you not agree?

CST. SMYTH: By saying “these situations,” it speaks to the generality of the conversation.

MR. SIMMONDS: You were referring to situations in which the one your investigation was included, and I'm asking you what are the consequences that a citizen is likely to have for making such statements. I know of none criminally or otherwise.

CST. SMYTH: In the absence of a criminal act, I agree with you.

MR. SIMMONDS: So then this statement here is apparently, I would think, actually a mean statement, but it has no foundation. You have no foundation to make that statement.

CST. SMYTH: Well, I just – do you me to explain it again? I certainly can.

MR. SIMMONDS: Fair enough, Officer Smyth, that's your evidence.

So now you've got the tweet, you had spoke to Ralph Tucker, you've now spoke to Mr. Mahoney; does what we've heard so far in the Commission hearings encompass all the information that you got from Mr. Mahoney, the bulk of the information, the pith and substance of the information, if you will?

CST. SMYTH: From Mr. Mahoney?

MR. SIMMONDS: Yep.

CST. SMYTH: I believe so, yes.

MR. SIMMONDS: Okay.

So then you turn to your own Comm Centre and you ask him to do a number of checks, 27, 28, 29 which are basically any criminal record, is there any open files on him, does he have a firearm, those kind of checks.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

I'm sorry, there was something else I meant to raise with you in that last exhibit and I do apologize: P-0081. Just to make sure I'm not operating under a misunderstanding, it's on page 11.

Do you remember one of the concerns that Mr. Mahoney quite rightly had was that he's talking to the real McCoy, he wants to be sure that he's not giving out evidence to someone because there is an exemption under the ATIPP Act for him to be able to assist the police in an ongoing investigation, things of that nature.

Do you remember that?

CST. SMYTH: Yes, I do.

MR. SIMMONDS: And he says on page 11 at lines 268 down, "**MAHONEY:** And Royal Newfoundland Constabulary and it was the Protective Services Unit and he did identify to me in that e-mail that it was about threats made towards elected government officials so I was able" ... "to get a great level of comfort without seeing the individual"

So he clearly was under the understanding, from what he got from you, that it was threats and threats have consequences. That's a fair interpretation of that, isn't it?

CST. SMYTH: It's certainly what he's saying, but I believe we've also seen that email.

MR. SIMMONDS: Pardon me?

CST. SMYTH: It's a fair interpretation of what he's saying.

MR. SIMMONDS: Yes.

CST. SMYTH: But we've also seen the email he's referencing, which does not reference any threats.

MR. SIMMONDS: But he told the police – the email didn't have it all in it. He told the police: Your Protective Services Unit – and you identified to him that email, threats made towards elected government officials. He didn't just imagine that. He had no reason to invent that. So you did leave him with the impression you were investigating threats in relation to government officials.

CST. SMYTH: Well, I think it speaks to what I spoke to very early on in my original testimony is he often – the confusion that comes from saying you are investigating comments, disconcerting comments, something somebody said, there's often that inherent belief that you must be investigating actual threats. And that sometimes is the impression that's left without ever saying the words.

I think this is probably case in point because he's referring to an email that we've seen and that is an exhibit where there's no comment made towards threats.

MR. SIMMONDS: Officer Smyth, I believe I will be able to show you somewhere else where someone else took the same impression that you were investigating threats made in relation to government officials. So it seems to be all of these people are making a jump that you had no part or it wasn't your language; is that what you're saying?

CST. SMYTH: No, actually, I've said here and given testimony that it is sometimes my language. I'm speaking specifically about Mr. Mahoney, but I have indeed used that language to summarize sometimes what it is we're doing.

MR. SIMMONDS: But you clearly left – okay. Let's move on. Thank you, Madam Clerk.

So you talked to your Comm Centre and they did the checks that I spoke of. Were there any checks I left out that you wanted to add into?

CST. SMYTH: Not that I'm aware of.

MR. SIMMONDS: Okay.

And then you speak with Adrian Cox, RCMP officer in Holyrood.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And you do that to get information from him, asking him – you're trying to eliminate which Don Dunphy it is, and do they know this Don Dunphy, and do they have any open files on him and do they have any concerns about him. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: Exhibit P-0175. Now this is a trained – I don't want to demote him. Do you know if his rank is Constable or Corporal? Constable, Constable Cox. This is what he puts in his Supplementary Occurrence Report, printed –

MS. O'BRIEN: I think he called for P-0105.

MR. SIMMONDS: P-0175, or have I got it – 0175. And I'm going to go to page 2 of – or page 1, page 2 of the document, even though it's the first page; the banner page is the first page. This is a trained police officer who you spoke with. To use your phrase, you articulated to him what the information you were looking for and what you required. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: And he says on the above date and time, et cetera, et cetera, Sergeant Joe Smyth of the RNC in St. John's reported that he had fired multiple shots.

Then he goes down to the next paragraph, "Please note that prior to Sgt. SMYTH attending this residence he called the Holyrood Detachment and spoke to Cst. COX. He informed Cst. COX that he was going to the residence of Donald DUNPHY ... of #270 Main Road, Mitchells Brook, NL. He asked Cst. COX if the RCMP had any files on their system relating to DUNPHY as he had to speak to him about threats that he made against the Premier."

Now this is another trained police officer putting down in his notes, which I'm sure when he comes here he's gonna tell us he believes to be accurate, that you told him you were investigating threats in relation to the Premier. The same thing that Mr. Mahoney says.

CST. SMYTH: Sorry, where did Mr. Mahoney say that?

MR. SIMMONDS: Mr. Mahoney indicated, as I've already taken you to, that you use the word threats or he was left with that impression.

CST. SMYTH: Right.

MR. SIMMONDS: I'm now taking you to this exhibit, do you see it there?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. As he speaks to him about threats that he made against the Premier. So you obviously left the impression and told Officer Cox that you were investigating threats against the Premier.

CST. SMYTH: I very well may have left him with that impression, yes.

MR. SIMMONDS: You very – is it possible you said that to him?

CST. SMYTH: I could have, yes.

MR. SIMMONDS: You could have said that to him. That's not true, though.

CST. SMYTH: No.

MR. SIMMONDS: You weren't investigating threats against the Premier.

CST. SMYTH: No.

MR. SIMMONDS: And you certainly weren't investigating threats against the Premier made by Don Dunphy.

CST. SMYTH: No.

MR. SIMMONDS: You know that there were three files associated with Dunphy, none of which were in relation to violence. Cox informed Smyth of this and asked Smyth if he wanted Cox to attend the residence with him. Smyth stated that he did not think he needed Cox to attend and stated that he thought the marked police car and police uniform might set Dunphy off.

Can you explain that to the Commission, where you had any basis to make an allegation that if a police car hauls up in front of Don Dunphy's home, that might be enough to set him off. And I'm going to go so far as to say set him off means that he would act out, shoot or attempt to injure someone. Am I wrong Officer Smyth?

CST. SMYTH: Yes. Firstly, I don't remember saying: Set him off.

MR. SIMMONDS: Okay. Now, I'm going to –

CST. SMYTH: So he may be, he may be –

MR. SIMMONDS: I'm going to stop you here, because the first thing we want to be sure of is that these are correct. Now if you're saying they're not correct, that's an issue that we've got to deal with very quickly and get Officer Cox here to make sure that that's – that he wrote down what he believes, or what is written down. Are you saying you didn't say that to him?

CST. SMYTH: I don't recall saying –

MR. SIMMONDS: You don't recall.

CST. SMYTH: – the words: Set him off. If I had of said set him off, it would have been in the context of having a conversation with him. It wouldn't be some belief that he might open fire on us.

If I had any semblance of a belief that he would open fire on us and we'd set him off by a police presence, then I would go, I wouldn't even go there. I would send a tactical team and multiple uniformed units, not go there by myself unmarked. So –

MR. SIMMONDS: Office Smyth –

CST. SMYTH: – this is, the set him off comment –

MR. SIMMONDS: Okay.

CST. SMYTH: – if I used those exact words, and I just don't recall, I may have.

MR. SIMMONDS: You may have.

CST. SMYTH: The context would have been around conversation, a uniform presence being often taken as a symbol of authority, a police vehicle being a symbol of authority that somebody who is perhaps already disenfranchised with government, that doesn't like to go –

MR. SIMMONDS: You don't know that he's disenfranchised with the government. That's an assumption you've come to and we can deal with that down the road. But you don't know that he's disenfranchised with the government, he has a complaint.

CST. SMYTH: Right, I said may.

MR. SIMMONDS: Yeah, but –

CST. SMYTH: May be disenfranchised with government.

MR. SIMMONDS: – would you believe that Officer Cox is a professional enough to record accurately what you would have said?

CST. SMYTH: Yes, I –

MR. SIMMONDS: You say you don't recall it.

CST. SMYTH: Yes.

MR. SIMMONDS: But you believe he is professional enough that he would have recorded it accurately.

CST. SMYTH: Yes, I do.

MR. SIMMONDS: So he's recorded that you did tell him about threats, said it was threats to the Premier, number one; and number two, that going there with a uniformed officer or police car is somehow going to inflame or enrage Don Dunphy.

On what basis do you make that? Please tell the Commission where your information that day –

CST. SMYTH: I don't recall, as I said, saying the comment: Set him off. I certainly didn't make the comments inflame or enrage.

MR. SIMMONDS: You say, set him off. Okay.

Where's your basis – we'll go with your wording, not my interpretation of your wording, we'll go with your wording. Where is the basis for that comment?

CST. SMYTH: Okay, I'll –

MR. SIMMONDS: What information did you have that day?

CST. SMYTH: Okay, I'll explain it again.

MR. SIMMONDS: No, I got your explanation the first time.

THE COMMISSIONER: (Inaudible) let the witness finish. Now you're again moving a bit too quickly, Mr. Simmonds, and –

MR. SIMMONDS: I appreciate it, Mr. Commissioner.

Thank you.

THE COMMISSIONER: – you're cutting off the witness before he has a chance to complete his statement.

Now, at the same time, Constable Smyth, rather than engaging in a monologue, you want to keep your questions fairly brief but I – that's not with reference to your last statement which was fine, but you do have a tendency at times to go on a bit more than the question put to you would warrant.

Okay. So you'll go a bit more slowly, Mr. Simmonds.

MR. SIMMONDS: I will. I will.

THE COMMISSIONER: I think it will avoid Constable Smyth being cut off.

Go ahead.

MR. SIMMONDS: So where – to rephrase my question in a shorter form: Where do you get the basis for making the statement, whatever it means, that going there in a marked police car with a police officer in uniform might set Dunphy off?

CST. SMYTH: In reviewing Mr. Dunphy's social media profile –

MR. SIMMONDS: Uh-huh.

CST. SMYTH: – there was a lot of comments in reference to disgust with government in general.

MR. SIMMONDS: Uh-huh.

CST. SMYTH: I take the police uniform, police vehicle as what can be considered quite often a symbol of authority. My fear was that that presence would slow or prohibit my ability to have an open dialogue with Mr. Dunphy, perhaps even so much that he might see it and not ever permit us in the home or just not want to talk at all. That was the fear.

So setting him off, if I said that, would be in reference to verbally perhaps. No, I'm not having a conversation with you, I'm done; close the door. I had no reason to believe at that time that Mr. Dunphy would act out violently, based on that.

MR. SIMMONDS: Correct. You had no reason to believe that and you had no reason to believe – you have nothing, no rational basis for making the statement that he would be curt, inappropriate, inaccessible to you at the door. You had no basis to make that set-off statement, none whatsoever. Is that not a fair position, Office Smyth?

CST. SMYTH: Well, again, as I've just mentioned –

MR. SIMMONDS: You've already explained what – and I'm putting to you, do you have any concrete basis like a prior incident, information from the police, information from someone else that's gone there in authority, information from Workers' Comp that they ever attended at the door and the fact that they were in uniform or in a marked government car, would set him off? Did you possess any such information?

CST. SMYTH: Nothing as concrete as that, no, no.

THE COMMISSIONER: I didn't hear that.

CST. SMYTH: Nothing concrete as he would suggest, no.

MR. SIMMONDS: Nothing concrete?

THE COMMISSIONER: The note I have is that Constable Smyth referred to comments of Mr. Dunphy in his social media file that would, that expressed disgust towards the police, and from that, as I understand it, Constable Smyth inferred that the presence of a marked vehicle or a uniformed police officer might prevent your establishing the rapport that you referred to before with Mr. Dunphy –

CST. SMYTH: Yes, Sir –

THE COMMISSIONER: – is that your –

CST. SMYTH: – that’s the concern, yes.

THE COMMISSIONER: – to briefly summarize what you’ve said.

CST. SMYTH: Yes, it is.

MR. SIMMONDS: Mr. Commissioner, where’s his basis for that? You seemed to sum up for him here, where’s his basis for that, that –

THE COMMISSIONER: I’m just giving you what Constable Smyth said and the basis that he referred to, not what I referred to, what he referred to was in his review of Mr. Dunphy’s social media he saw references to expressions of disgust concerning the police.

MR. SIMMONDS: And nowhere in his social media or any other information he had that day do I see anything that indicates Mr. Dunphy ever acted out in any such manner with respect to anyone from either government or the police.

THE COMMISSIONER: I didn’t hear Constable Smyth say that that, in fact, had happened.

MR. SIMMONDS: So I’m asking him –

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: I’m asking in that case what is the rational basis for it, and I take it that’s the rational basis that you just indicated.

THE COMMISSIONER: Well, that’s what I understood Constable Smyth to say, yeah.

MR. SIMMONDS: You told us on January 17, and this is in the transcript if you – I don’t know if we have them online – on January 17 at pages –

THE COMMISSIONER: Oh, I see; Mr. Simmonds, we only have three or four minutes if you’re going to start another –

MR. SIMMONDS: Okay, I’ll close it off with this question.

THE COMMISSIONER: – if you’re starting another, yeah, go ahead.

MR. SIMMONDS: You told us on January 17 in your testimony that, in fact, when you got to the house, or when you gathered all the information, you had no grounds to believe he had any

propensity for violence whatsoever. Page 77 at the bottom, “MS. CHAYTOR: Okay.” And are other officers sometimes – pardon me. “And are officers sometimes – are officers sometimes reluctant to make the call ahead of time because there could be a tipoff? Is that a concern?”

You answer: “I don’t think it would be a concern in this situation because we still haven’t determined that there’s some propensity for violence or history of extensive violence.”

You hadn’t determined whatsoever, you had no basis at all, zero, to believe that Mr. Dunphy would be violent, act out, do anything but be appropriate with you – correct?

CST. SMYTH: I had no information to suggest he had – he would violent; yes, you’re right.

MR. SIMMONDS: You had no information to suggest he would be anything but appropriate with you; I put to you, Officer Smyth.

CST. SMYTH: Okay.

MR. SIMMONDS: Do you agree?

CST. SMYTH: By looking at some of his social media commentary and perhaps even after talking to Dick and Debbie Dunphy did I anticipate some inappropriate language or conversation, perhaps –

MR. SIMMONDS: Perhaps.

CST. SMYTH: – but that didn’t necessarily give me rise for concern. I’m not –

MR. SIMMONDS: There was no concern, nothing had led you – you had no information in any way to substantiate any acts of violence or any impropriety down there.

CST. SMYTH: That’s correct, yes.

MR. SIMMONDS: Thank you.

It’s a good place to break.

THE COMMISSIONER: Thank you, Mr. Simmonds.

Okay, we’ll break for an hour for lunch.

MS. SHEEHAN: All rise.

The Commission of Inquiry is recessed.

Recess

MS. SHEEHAN: (Inaudible.)

Please be seated.

THE COMMISSIONER: Go ahead when you’re ready.

MR. SIMMONDS: Constable Smyth, when we left off this morning, you had confirmed (inaudible) – thank you. That you had indicated you stated into this Commission that you hadn't determined any propensity for violence whatsoever.

CST. SMYTH: That's correct.

MR. SIMMONDS: That's correct? And yet Mr. Tucker, Mr. Mahoney and Constable Cox were left with the belief that you were investigating threats in relation to the premier.

CST. SMYTH: It would appear that they perceived that, yes.

MR. SIMMONDS: Okay.

Now they also, I think it's fair to say, perceived that this was urgent. Certainly you went back to Ms. Ivey and said ASAP. Ralph Tucker was under the belief that it was as soon as possible, ASAP. And Mr. Mahoney, in fact, I believe said on the stand he was left with the belief that this was urgent and you had to deal with it right away. Did you leave that – intentionally leave that impression with them?

CST. SMYTH: I said ASAP, which means exactly what it means.

MR. SIMMONDS: As soon as possible.

CST. SMYTH: Yes. If I felt it was urgent –

MR. SIMMONDS: So –

CST. SMYTH: – or emergent, I would have used those words.

MR. SIMMONDS: I'm sorry; I do have a little problem hearing.

CST. SMYTH: If I felt it was urgent or emergent, I would have perhaps used that specific language.

MR. SIMMONDS: Well, the language you did use left them with the impression that there was a degree of urgency to it.

CST. SMYTH: Okay.

MR. SIMMONDS: Would you agree with that?

CST. SMYTH: I could have, yes.

MR. SIMMONDS: Okay. So this is Easter weekend, you contact them on a Saturday, you determine on the Sunday that you're going to go out to Mitchells Brook – correct?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. You don't phone first, you don't – you go alone, you don't take another person with you, and it appears everyone that was left in your trail, and I mean by that the people you had contact with were clearly of the belief – that was my mistake, I'm sorry – were clearly of the belief that this was something that had to be done right away.

CST. SMYTH: Yes.

MR. SIMMONDS: What was the urgency of going out there, Officer Smyth?

CST. SMYTH: Well, I never classified it as urgent. My request for information was as soon as possible. I would classify the duty I was carrying out as something that should be done as soon as practicable, but not urgent.

MR. SIMMONDS: Well, you certainly left the impression with them and added to that, it is a Sunday, it is a long weekend and, in fact, when you arrived there, it's Easter Sunday dinner hour when you go to the man's house, unannounced. And this is over something that's not a threat. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: Okay. So to anybody viewing this it would appear that you certainly had a degree of urgency. And I'm asking you why would you leave that impression when there was no urgency whatsoever? It wasn't a threat.

CST. SMYTH: If my request for information left somebody with the impression that it was urgent, I'm not sure if I can particularly help that. My request for information is as soon as possible, and I do absolutely want that information as soon as possible. Once I'm seized with that type of information, we begin our follow-up. It is inherent and incumbent on us, sorry, to follow-up on that as soon as practicable.

Now I'm working, that's my regular shift, Easter Sunday, the holiday, or particular religious connotations associated to it; I can't be impacted by that. I have to carry out my duties and my roles regardless of that.

MR. SIMMONDS: With the greatest respect, Officer Smyth, you spoke on your direct testimony about the things you did with your children or your child that day on Easter Sunday before you came back to town, the things that you had to do. It's only normal to believe that the average Newfoundland family will be doing something along the same.

You have left professional people, all who are articulate, capable, educated people, with the impression that this had a significant degree of urgency, and yet you're simply saying to us no, it really didn't have any degree of urgency. I was just gathering information and this was my normal work day, so I went out there.

CST. SMYTH: As soon as practicable.

MR. SIMMONDS: We have no threat. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: We had no imminent concern in relation to any harm being done by Mr. Dunphy. Correct?

CST. SMYTH: Well, that's part of the reason for going out there. In doing that as soon as practicable you –

MR. SIMMONDS: Officer Smyth, on the information you had, you had nothing to ground any concern that there was anything imminent with respect to actions by Mr. Dunphy.

CST. SMYTH: No, Sir.

MR. SIMMONDS: You did not – correct?

CST. SMYTH: No, I did not.

MR. SIMMONDS: But yet you chose to go unannounced to a person's home on Easter Sunday, dinner hour. You don't think that that in itself is perhaps inappropriate action?

CST. SMYTH: No, I absolutely do not.

MR. SIMMONDS: You would not think it inappropriate if someone was to come to your home when you're having family dinner, on an Easter Sunday with your children and your wife and perhaps some friends and interrupt you unannounced completely to ask you questions about something you've said? You don't think that that's unreasonable, inappropriate, because that's what you're saying, I understand.

CST. SMYTH: Are we reversing the roles exactly? Have I said the exact same things Mr. Dunphy has said and then –

MR. SIMMONDS: No, no, Officer Smyth –

CST. SMYTH: I don't understand your question, sorry.

MR. SIMMONDS: Well, with the greatest respect, I think you do understand my question. If you had said, if you had made any comments and someone called you to ask you – comments that are not criminal, comments that quite arguably are not even inappropriate when you're espousing your political views, comes to your house on a Sunday, Easter, dinnertime when you're probably having dinner with your family, children and friends. Would you not – to come and question you unannounced about that, you would not think that's inappropriate?

CST. SMYTH: Was there – have I made all the previous commentary as well?

MR. SIMMONDS: Officer Smyth, he made no wrong comments. Mr. Dunphy had every right – just as I do, as you do, as anyone in this room does – to make the comments he made. You had no basis to scold, scorn or confront him with that.

CST. SMYTH: I did nothing of the sort. I'd neither scolded him, scorned him –

MR. SIMMONDS: You did confront him with it on Easter Sunday at dinner hour, at his home, unannounced.

CST. SMYTH: I spoke to him about it.

MR. SIMMONDS: You went to his home unannounced on Easter Sunday, dinner hour. Did you not, Officer Smyth?

CST. SMYTH: Yes I did, but there was no confrontation.

MR. SIMMONDS: You did. Okay.

And what was it all over, Officer Smyth? What was all of this over?

CST. SMYTH: What was all what over, sorry?

MR. SIMMONDS: This was over Exhibit P-0009. And I'm reading it back to front in the order that it was meant to be, and I'm sure if you reviewed it as you said you had done you would have assessed it in that manner as well. Would you not have, Constable Smyth?

CST. SMYTH: Sorry, what is it we're looking at right now? What are we looking at?

MR. SIMMONDS: We're looking at the trained –

THE COMMISSIONER: It's not brought up yet, so. You're looking for Exhibit P-0009.

MR. SIMMONDS: Three zeros and a nine, Mr. Commissioner.

And I'm reading back to front on this. So I take it in the sequential order that they would have been received. It starts off, Sandy Collins says: "Traveled with @PremierOfNL in his car today...guess what CD was playing? @ShermanDowney The Sun in Your Eyes."

Mr. Dunphy replies: "... is that why u can't c problems of seniors & injured workers, the sun is in your eyes, put on sun glasses & take out the ear plugs u might c & hear ppl crying for help, but why would u care after putting in hard time getting that poor mans MHA pension, I hope there is a God, I think I c him work on two garbage MHAs who laughed at poor ppl he got them before they got to enjoy the pension they didn't deserve, i won't mention names this time, 2 prick dead MHAs might have good family members I may hurt."

Now, you please explain to me how anyone could take from that, that it is a threat, a dangerous statement, a concerning statement, an inappropriate statement, one that is in any ways illegal or subject to state intervention. Can you please explain that to me, Constable Dunphy – Constable Smyth?

CST. SMYTH: I've never classified it as a threat. I do absolutely believe it's disconcerting and strong language when you direct that towards an individual, an elected official who you don't know –

MR. SIMMONDS: What was the word – did you use the word threat just then, when you threaten something –

CST. SMYTH: I said I did not use the word threat.

MR. SIMMONDS: And then after that, what did you say? I'm sorry –?

CST. SMYTH: I said I would absolutely classify it as a disconcerting comment, or one that would cause concern for sure.

MR. SIMMONDS: It's a disconcerting comment that shows a level of frustration with an institution. That is our right in Canadian society isn't it –

CST. SMYTH: Sure.

MR. SIMMONDS: – to voice those concerns?

CST. SMYTH: Yes.

MR. SIMMONDS: Am I going to be subject, if I voice my concerns to you or someone in your position attending at my door unannounced to interrupt family functions, is that what I'm going to be subject to in a free country?

CST. SMYTH: I think if –

MR. SIMMONDS: No, but that's what you did.

CST. SMYTH: If your commentary is directed towards public officials and has a number of other potentially concerning commentary built within it, then yeah, you would, you would be subject to –

MR. SIMMONDS: Where's the other concerning commentary built within this?

CST. SMYTH: I'm talking about the entirety of his social media feed.

MR. SIMMONDS: He has a right to voice his opinions.

CST. SMYTH: Yes.

MR. SIMMONDS: None of his opinions – Workers' Comp looked at it, Tom Mahoney looked at it. He said, no, there's nothing we can do, there's nothing inappropriate about it. We don't like it, just like any elected official doesn't like to be scolded, brought on to *Open Line* or have their conduct reviewed.

CST. SMYTH: (Inaudible.)

MR. SIMMONDS: What gives you the right to go out to this person's house unannounced over something that when they're exercising their right to free speech? What gives you that right, officer?

CST. SMYTH: I was never looking to interfere with his right to free speech.

MR. SIMMONDS: Oh, with the greatest of respect, officer, that's exactly what you were doing. You wanted him to provide you with an explanation as to why he said this, and I know of no onus, unless you can point it out, why he should entertain you, listen to your questions, or even be subject to your questions.

CST. SMYTH: He doesn't have to.

MR. SIMMONDS: Unfortunately he was.

CST. SMYTH: He – it was his choice to open that door. I've been in certain situations where I've asked similar questions of people and have been told polite– very politely where to go.

MR. SIMMONDS: Officer Smyth, let's call a spade a spade here. You left the impression with everybody that it was urgent. You left the impression that it had to be dealt with right away. You go out there on a long weekend in Newfoundland. You go out there on a Sunday and it's lunchtime. You don't call first. And you don't see anything inappropriate about that because the man exercised his right to free speech.

CST. SMYTH: No, I don't see anything inappropriate about it.

MR. SIMMONDS: Okay. I was going to take you to a portion of the transcript, but you've admitted it on April 6, in one of your statements, one of the first statements you gave you indicated that this – it's Exhibit 0119, page 3 of that exhibit – of the statement. It might actually be page 4 of the exhibit because there's probably a banner page on it.

The next page, Madam. Thank you.

The last paragraph down, about 50 per cent of the way through: But it was – again, it was ambiguous. There was no – certainly no criminal threat by any stretch, but enough in light of his previous history and social media history which was constant, you know, commentary about his issues with government, and in particular Workers' Compensation.

That's his right. That's his right under Canadian society to make comments about these things, to express his views, to demonstrate and indeed cause inconvenience to elected officials, it would appear, through demonstrations.

CST. SMYTH: I agree.

MR. SIMMONDS: And yet you're –

CST. SMYTH: I agree wholeheartedly.

MR. SIMMONDS: Then what basis had you to go down and interrupt this man as you did?

CST. SMYTH: As I've stated here earlier on in this hearing, there's a duty and an expectation when you identify certain behaviours to follow up on those behaviours –

MR. SIMMONDS: What behaviours?

CST. SMYTH: – and conduct –

MR. SIMMONDS: Let me stop you there, what behaviours? What behaviours did you identify that fall on anywhere in your mandate which we read to you which could be imminent or in any ways ground a potential harm to the Premier or government officials?

CST. SMYTH: Persons who may be engaging on a pathway to violence, which starts with a specific grievance, unresolved grievance that may or may not be founded in reality.

MR. SIMMONDS: His grievance with Workers' Comp had gone on for a significant period of time. It was well documented by Workers' Comp which you saw before you went out there. They determined, through their legal counsel, that there was no grounds to do anything.

You had that before you left and you knew by your own admission it was not a threat or anything of that nature. And yet you chose to take the action leaving everybody with the impression it was urgent, going out and doing what you did at a time when this man could say: What are you doing here? Why wouldn't you call first? Why wouldn't – you didn't do that.

CST. SMYTH: I'm sorry, what's – is there a question there?

MR. SIMMONDS: You didn't do any of those things.

CST. SMYTH: Which things?

MR. SIMMONDS: Call first, attempt to engage –

CST. SMYTH: No.

MR. SIMMONDS: – in a conversation –

CST. SMYTH: No. No call –

MR. SIMMONDS: – set up an appointment to see him, ask if he could come into St. John’s to see you. Tell him you’d provide the transportation.

CST. SMYTH: No.

MR. SIMMONDS: Set up a time to go out in the next few weeks or the next day or so when it’s not Sunday.

CST. SMYTH: No.

MR. SIMMONDS: Not lunch time.

CST. SMYTH: There’d be specific –

MR. SIMMONDS: You didn’t do any of those things.

CST. SMYTH: There’d be specific reasoning for that.

MR. SIMMONDS: There was nothing imminent in anything he had written that caused you to believe anything was going to happen in the next few days. If there is, please point it to me, Constable Smyth.

CST. SMYTH: I am sorry, are we still talking about not making the phone call? Did you want me to finish talking about that or –

MR. SIMMONDS: Constable Smyth, is there anything there that made it imminent to you that falls under the mandate as set out that you had to deal with Mr. Dunphy as you did?

CST. SMYTH: There is nothing in our mandate that’s set out that we must follow up on something that is imminent. That is the purpose of intelligence-led policing is to identify behaviours and problems before they become imminent.

MR. SIMMONDS: Okay. Well, let’s talk about – what as the phrase you just used? What was the phrase you just used, Mr. Smyth, Officer Smyth?

CST. SMYTH: Sorry, which phrase?

MR. SIMMONDS: Intelligent-led policing?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

Exhibit P-0218, Managing Targeted Violence. Now, I can go back over it again, but I hope it’s not going to be necessary. You agree that there was nothing here that gave any indication of targeted violence by Mr. Dunphy in relation to anybody, let alone the premier or any government officials?

CST. SMYTH: Nothing anywhere, where?

MR. SIMMONDS: Nothing in the information you had, Officer Smyth, that gave any indication that there was any targeted violence by Mr. Dunphy in relation to the premier or any government officials?

CST. SMYTH: Well, there are components within his social media commentary that absolutely do fill a number of the different factors considered in this very training. Yes, there are.

MR. SIMMONDS: There were things in his past where he expressed disconcert, disagreement, anger and frustration with government, which is his right. Correct?

CST. SMYTH: Sure it is, yes.

MR. SIMMONDS: Okay.

If we go to page 18 of the exhibit, Protective Intelligence Gathering Principles: investigative skills, corroboration and common sense. Down a little farther on the bottom: "Protective intelligence investigations should be approached with the inquisitiveness and skepticism that are hallmarks of other investigations."

So you should be skeptical. Is that – you weren't being skeptical here. You were saying these are tweets I got to deal with right away.

CST. SMYTH: No, I don't agree with that.

MR. SIMMONDS: Okay.

CST. SMYTH: I was giving Mr. Dunphy the opportunity to provide –

MR. SIMMONDS: Why does he –

CST. SMYTH: – his explanation that –

MR. SIMMONDS: Why does he owe you an opportunity? There's where I think we have this continual impasse. Why does he owe you any opportunity at all?

CST. SMYTH: I never said that, Sir. I never said he owed me an opportunity.

MR. SIMMONDS: You said to provide him with the opportunity.

CST. SMYTH: That's not a suggestion that he owes me one. It's affording him the opportunity to provide context and insight versus just making my own irresponsible interpretation that might not necessarily be based on anything other than what I'm seeing.

MR. SIMMONDS: I'm going to get to the other parts of your manual it says exactly what you could have done as opposed to confronting him. Corroboration: "The second component of protective intelligence work is corroboration. Significant facts of the case, including the statements of an individual who may pose a threat, should be corroborated whenever possible."

You'd spoke to Workers' Comp; they didn't consider it a threat. You spoke to the RCMP; they said they had no files that were considered a threat. You did the checks from your own police system; nothing there revealed a threat. Correct?

CST. SMYTH: Yeah. You're – this is a very broad description of the fundamentals of protective intelligence work, that corroboration is vital in that process insomuch that information within and

of itself doesn't necessarily constitute intelligence. You have to take information, apply it through a process; it needs to be collated, verified and corroborated. This is what that is referring to –

MR. SIMMONDS: And what we've heard all the information you had that day and none of it produced any indices of a threat, imminent threat, nothing of that nature. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: The last one is common sense. "Protective intelligence investigations, by their nature, involve considerable discretion and judgement on the part of the investigator." So it's up to you to try and corroborate, to make sure you do a full investigation, and make sure you utilize your common sense which I would arguably put forward would be this is probably not a good time to go down and interrupt someone. Without being announced, to show up on their doorstep on Easter Sunday lunch hour. Would that be an inappropriate consideration?

CST. SMYTH: I don't agree with that. I understand what you're saying, but –

MR. SIMMONDS: Okay. You don't agree with that, that's fine. If we go to page 88 of that manual, Circumstances and Context: message intent; previous inappropriate communications. Well, what do we know about Don Dunphy? We know his intent was to try and resolve his issues with Workers' Comp. It had been ongoing for a long period of time, a long period of time.

CST. SMYTH: You bring up a really valid point. When you're talking about the intent is another reason for affording the opportunity to somebody in this situation, the opportunity to speak about it is to determine their intent. Such a comment as the ones we refer to would arguably have little to do with a grievance resolution. So could the intent be to harass or cause fear in the persons that he's referenced in that message. I don't know the answer to that and of course that's part of the reason (inaudible).

MR. SIMMONDS: Constable Smyth, isn't one of the backbones of history, that history is usually indicative of the future. When they study medical, or pardon me, military history, they look at how battles have taken place in the past to utilize that as a strategy in the future. So you could look at using the same kind of rule of thumb, you could look at Mr. Dunphy's past, his statements, his involvements with Workers' Comp and get a read from that, just as the next – on page 90 says :previous inappropriate comments. "Subjects who have communicated in the past but have not taken any steps to cause harm are normally a low risk. Past behaviour is the best indicator of future behaviour. Subjects who habitually threaten do not normally escalate to violence." Well, he never habitually threatened anybody. He never threatened anybody, period.

CST. SMYTH: Right. The point of that comment is just that; that we can't rely or wait for somebody to stand idly by, or we shouldn't stand idly by until somebody makes an overt or criminal threat because an examination of past behaviour, historical behaviour, is indeed, as you suggested, the best indicator for future behaviour and the significant portion of persons who have carried out active targeted violence have, indeed, not specifically threatened their target.

MR. SIMMONDS: I'm not – with the greatest respect, I understand – I believe you understand what I'm saying here. I'm saying to you very clearly that you had no foundation, period. You had checked out all of these things, police, RCMP, Workers' Comp. You had no foundation from any of that that there was any escalation of any kind of violence here. In fact, there was no kind of violence, no kind of threat.

You left the impression that it was urgent and had to be dealt with right away and his course of conduct and commentary had been something that had been going on for a long period of time,

saying the very same things. So there was no imminent need for you to take the steps and go down there that day at a very inconvenient time, which is what you did.

CST. SMYTH: Yes. I believe you're wrong. I understand the interpretation you're applying to it, but it's not correct.

MR. SIMMONDS: Well, I'm going to take you to the next one on page 95 and see if this is correct.

Threat Management Strategies: "The management strategies are divided into two categories: confrontational and non-confrontational. They start with least intrusive and escalate to the most invasive."

Why would you utilize the most invasive at a man's home, on a holiday, on a Sunday, at a lunch hour? Why would you do that when you could have exercised many other strategies and been equally as prepared? Why would you do that? What was the necessity that it be done in the way it was?

CST. SMYTH: Sir, which strategies are you referring to?

MR. SIMMONDS: Pardon me. Page 95 of the exhibit, page 92 of the document, and it's a blurb or diagram 80.

It states: "The management strategies are divided into two categories: confrontational and non-confrontational. They start with least intrusive and escalate to the most invasive."

You took the most invasive. You went directly to his house to confront the man without being announced. Did you not?

CST. SMYTH: I went there to have a conversation with him. I didn't go there to have this confrontation that (inaudible).

MR. SIMMONDS: You went there – let me take you back to the statement. "... the worst thing about these situations is these guys you know tend to be in their house, they tend to feel the freedom to say what they like and they don't realize that there are consequences for these statements" That's Exhibit P-0081.

That's what you said.

CST. SMYTH: This is what I said.

MR. SIMMONDS: That's what you said. That's what you said to Tom Mahoney.

CST. SMYTH: Right –

MR. SIMMONDS: So you were going down to confront him because this was one of these situations where he, in his anonymity at his home, had said something that you felt had consequences.

CST. SMYTH: Again, back to that conversation with Tom Mahoney. I think the statement you just referenced was Tom Mahoney's words; you're saying they're my words.

MR. SIMMONDS: He's saying they're your words.

CST. SMYTH: Right. That was a broader part of our conversation around situations like these.

MR. SIMMONDS: With the greatest of respect, and it doesn't matter what I accept, this is what the Commissioner accepts. You spoke to him about a very narrow situation that day. You spoke to him about Don Dunphy. You asked if they had any information on him and then you made this comment, that these guys, being he – one of these guys, that would have consequences from what he said. And I'm still at a loss as to what the consequences are in a free country.

CST. SMYTH: Well, the potential consequences to situations like those could be those that are subject to criminal investigations or criminal threats. But again, that was a –

MR. SIMMONDS: There's no threat here.

CST. SMYTH: – broad-based conversation.

MR. SIMMONDS: There was no threat here. You told us that.

CST. SMYTH: I know. I –

MR. SIMMONDS: So you're going to do this to everybody on the Internet. Do you get, do you get every tweet by everybody and see if they said anything nasty about government and do you make calls on them?

I put it to you that that's ridiculous. Of course you don't and it couldn't be done.

CST. SMYTH: You're correct.

MR. SIMMONDS: So you had nothing here to give any propensity that he was going to move on, correct?

CST. SMYTH: Sorry?

MR. SIMMONDS: What does your strategy say?

CST. SMYTH: Sorry, can you repeat your question?

MR. SIMMONDS: I said you had nothing here to prove that there was any more greater risk or propensity that he was going to do anything. And I'm now going to ask and take you –

CST. SMYTH: Well, as –

MR. SIMMONDS: Go ahead.

CST. SMYTH: I'll answer your question, which I already have but I'll answer it again. There was a number of elements and components within his social media commentary that do indeed lend to somebody that is following that pathway to violence.

Yes is the answer.

MR. SIMMONDS: I put to you, Officer Smyth, that Workers' Comp had reviewed this thoroughly. He told you that their determination was there was nothing there that was actionable. You had not received anything recently that was actionable, correct?

CST. SMYTH: From Workers' Compensation?

MR. SIMMONDS: From Donna Ivey, Workers' Compensation, Ralph Tucker or Tom Mahoney.

CST. SMYTH: No, those items were actionable.

MR. SIMMONDS: You received nothing from Adrian Cox that was actionable.

CST. SMYTH: Actionable from Adrian Cox in what way?

MR. SIMMONDS: Criminal investigation, something of that nature.

CST. SMYTH: No.

MR. SIMMONDS: If you go to page 97 of the exhibit, non-confrontational strategies: no threat identified; initial report erroneous or overly exaggerated. So we have for sure, by your own admission, no threat identified, correct?

CST. SMYTH: No criminal threat but –

MR. SIMMONDS: No –

CST. SMYTH: – but this is –

MR. SIMMONDS: No, no, no, no odds, no threat. Please, if there was a threat, take me to where the threat is to.

CST. SMYTH: That's what the process is. The process is to try and determine if there is a threat.

MR. SIMMONDS: No, you –

CST. SMYTH: Not specific to those comments. I realize there was no threats in those. What they're referring to here is that there has been a threat assessment conducted and at the determination, the end of that threat assessment, they determined that there was no threat. If I had have had the opportunity to complete a threat assessment with Mr. Dunphy, I may very well have arrived at that very same conclusion.

MR. SIMMONDS: Officer Smyth, this is under the non-confrontational strategies which would mean – this is under the strategies of not going down and confronting him. And it says, "No threat identified." So what you had was no threat identified under the category of not going to confront him and it is possible that the reports are overly exaggerated, or in this case misread. Correct?

CST. SMYTH: I didn't misread them.

MR. SIMMONDS: Is this not one of the things that's dictated by your manual, that if there's no threat –

CST. SMYTH: No, Sir. You're taking one piece of a long training manual and applying it to –

MR. SIMMONDS: But I'm going to take you to some more of it. Page 99, Watch and Wait: open files and monitor situation; not an intervention strategy; monitor subjects without their knowledge; approach may be passive of active.

Why wouldn't you have utilized that strategy?

CST. SMYTH: I didn't feel it felt that, fell into that criteria. I have done that; utilize that strategy for sure on many occasions. But Mr. –

MR. SIMMONDS: Why didn't you use it here?

CST. SMYTH: Because Mr. Dunphy's situation to me dictated speaking to him personally.

MR. SIMMONDS: What in Mr. Dunphy's situation dictated that you had to go speak to him personally at the time, date you did?

CST. SMYTH: A long history of making inappropriate communications to public officials, many of which were not found in reality.

MR. SIMMONDS: Those are by your definition inappropriate. By our standard of free speech they are not inappropriate. People make statements like that continuously and I don't understand them to be subject to criminal review or investigation by the police force.

CST. SMYTH: It wasn't a criminal investigation.

MR. SIMMONDS: You go to page 101. You on page 101?

Watch and Wait: when to use. "If unsure or if further information is required." Wasn't this clearly a case where further information, at the best scenario, where further information is required? The last part of information you got was from Dick and Debbie which was over 10 years old. That was the most current information you had in reality?

CST. SMYTH: No, the most current information I had would have been from his postings and from Workers' Compensation.

MR. SIMMONDS: Your investigation, those were up, easy to see from your investigation going behind the scenes looking at things, speaking to his next door neighbours who was his brother and sister-in-law – the information they provided was over 10 years old, correct?

CST. SMYTH: Parts of it were, yes.

MR. SIMMONDS: You go to page 104: Subject Interviews. Now, this is what you had maintained that you went down after hearing everything to assist, determine if there was some possible solution to his grievances. Is that not what you said?

CST. SMYTH: To try and determine if he felt there was a reasonable resolution to his grievance.

MR. SIMMONDS: Well, why didn't you determine from Mr. Mahoney exactly the specifics of his grievances before you went down? You didn't determine that.

CST. SMYTH: No, I didn't.

MR. SIMMONDS: Why didn't you do that, because that's one of the things again set out in your mandate. If you're going to go for the interview, then get as much information as you can.

CST. SMYTH: I think depending on what Mr. Dunphy had to say, I could very easily go back to Mr. Mahoney in an effort to glean that information, for sure, to corroborate.

MR. SIMMONDS: Mr., or Officer Smyth, if you go to page 105, I put to you that you fall within the category as set out there; Disadvantage of Interview for Information Gathering: interviewer may not be fully prepared.

You had not done a thorough investigation of any type in relation to him; you had not tried to get anything current, for instance, by going and speaking to his daughter.

CST. SMYTH: I didn't know his daughter existed up until that point.

MR. SIMMONDS: You did after you spoke to Dick and Debbie.

CST. SMYTH: Yes, I did.

MR. SIMMONDS: You could have utilized that, gone and had a conversation with her, received current information about that, before you barge in –

CST. SMYTH: I didn't barge in.

MR. SIMMONDS: You went to his house unannounced. With the greatest of respect, I would call that barging in.

CST. SMYTH: I didn't barge in.

MR. SIMMONDS: Okay, Officer Smyth. You go to his house; no one is home – correct?

CST. SMYTH: That's correct.

MR. SIMMONDS: And the first thing that meets your eye, I'll put it to you, is probably the sign that was there?

CST. SMYTH: Yes.

MR. SIMMONDS: Warning – and this is Exhibit P-0065. WARNING: This is a Worker' Compensation poverty house since 1984. So since 1984 he's been making these complaints; it's now 2015, about 30 years, 29 years. Enter at own risk. Political people not welcome unless you're going fix; Workers' Comp. Is that what it said?

CST. SMYTH: Yes.

MR. SIMMONDS: Am I reading it correctly.

CST. SMYTH: Close, yes.

MR. SIMMONDS: Okay.

So that clearly tells you're not welcome here.

CST. SMYTH: I'm not a political person.

MR. SIMMONDS: You work with the Protective Services Unit of the premier's staff, correct?

CST. SMYTH: I worked with the Protective Services Unit of the Royal Newfoundland Constabulary.

MR. SIMMONDS: Who are the premier's staff, correct?

CST. SMYTH: That is our mandate, yes.

MR. SIMMONDS: Then you go talk to the neighbours. You go talk to, you – and I'm not sure, you haul out of the driveway, you don't immediately go to the neighbours. You've told us that you went up the road, turned around pulled in, made some calls, stayed there for some period of time.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

But the first time that came up was when you gave the information to Ms. Chaytor in the interviews you're saying.

CST. SMYTH: Yes.

MR. SIMMONDS: But you didn't think it was relevant before that you had tried to call Mr. Dunphy a number of times.

CST. SMYTH: No, I just didn't recall it.

MR. SIMMONDS: You don't wait to reach him by telephone; you decide you're going to go and visit with his neighbours.

CST. SMYTH: Yes.

MR. SIMMONDS: You at that point in time had no idea who his neighbours were.

CST. SMYTH: No.

MR. SIMMONDS: And you didn't think that might be in appropriate that, you know, there may be more subtle, appropriate ways of gathering information as opposed to going to a person's neighbours and basically making an allegation that, you know, we're concerned about his conduct, we're concerned about what he's saying. Would you – I take it you would not like someone to do that, to go to your neighbours and say anything like that.

CST. SMYTH: I wouldn't like it, no.

MR. SIMMONDS: Okay. So did that ever cross your mind that maybe this is an impropriety for me to do this?

CST. SMYTH: No.

MR. SIMMONDS: Or a violation of his privacy?

CST. SMYTH: No.

MR. SIMMONDS: That never dawned on you.

CST. SMYTH: No.

MR. SIMMONDS: Now, you'd asked the Comm Centre, your Comm Centre and I take it also the RCMP – I believe we've got the portion there – did Mr. Dunphy have a firearms registration certificate.

CST. SMYTH: Yes.

MR. SIMMONDS: And you asked Constable Cox did they know of any instance or did they know if he had a firearms – correct?

CST. SMYTH: I don't know if I asked Constable Cox that specific question.

MR. SIMMONDS: You don't know whether you asked, you didn't ask Constable Cox if they had anything in relation to violence or a firearm or anything of that nature?

CST. SMYTH: I asked about violence. I asked about violence, yes.

MR. SIMMONDS: Okay. And you had done a check with the Comm Centre which would be the same check the RCMP would do, I take it?

CST. SMYTH: Yes.

MR. SIMMONDS: If there was a firearms and you were told there wasn't?

CST. SMYTH: Correct.

MR. SIMMONDS: Okay. One of the first questions that you asked Dick and Debbie was does he have a firearm.

CST. SMYTH: I think it was one of the last questions, but yes.

MR. SIMMONDS: You asked the question in the process of the interview with them, you're saying it was towards the last part.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. But you did clearly ask them if he had a firearm and any ammunition?

CST. SMYTH: I don't think I asked about ammunition. Ammunition without a firearm wouldn't necessarily be of concern. I asked about a firearm.

MR. SIMMONDS: You asked about the firearm. Okay. Then you go back to Don Dunphy's house.

CST. SMYTH: Yes.

MR. SIMMONDS: Pretty much immediately.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And we know that at 1:39 you were on the telephone making a call to try – making one of the calls you made while you were parked on the side of the road. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: And you say you were anywhere – that was in the middle of the call as I think you said, so you might have been there another period of four or five minutes, something of that nature?

CST. SMYTH: Sorry, what was in the middle of the calls?

MR. SIMMONDS: The middle of – the call at 1:39 was in the middle group of the calls that you were making.

CST. SMYTH: No, I think that was the last call.

MR. SIMMONDS: It was the last call. So at 1:39 then you go shortly after that.

CST. SMYTH: It would have been shortly after that, yes, for sure.

MR. SIMMONDS: And you go to Dick and Debbie.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. We know that Mr. Dunphy texts Colin Dinn at about 1:45, 1:46 to come up to his house for a toke. That's been the evidence. There was a text between –

CST. SMYTH: Yes, I don't know the time; I don't know the specific time.

MR. SIMMONDS: Well, that's what the time was.

CST. SMYTH: Okay.

MR. SIMMONDS: Okay. So if you moved – there must have been, you must have been a minute apart without banging into each other. If he's –

CST. SMYTH: (Inaudible.)

MR. SIMMONDS: – almost home at 1:46 and you're already left shortly after 1:39, it is fairly amazing that you didn't actually come face to face or vehicle to vehicle as you were hauling up into the driveway of his next door neighbours.

CST. SMYTH: Okay.

MR. SIMMONDS: Would you agree with that?

CST. SMYTH: Well, I don't know where he was when he sent that text. So I don't know.

MR. SIMMONDS: He was passing by Colin Dinn's which is just – or at home we believe after he had just passed by Colin Dinn's which is no distance down the road from his home.

CST. SMYTH: Okay.

MR. SIMMONDS: Okay?

CST. SMYTH: Yes.

MR. SIMMONDS: So you would have been virtually running into each other.

CST. SMYTH: Okay.

MR. SIMMONDS: On your timing.

CST. SMYTH: That sounds like it.

MR. SIMMONDS: Okay.

CST. SMYTH: It works, yes.

MR. SIMMONDS: So this man is just coming back from the Woodstock for Easter dinner. He's just emailed or text – I will confuse the two, texted a friend and said come up. Someone he'd passed on the road in fact and waved to was the evidence. You heard that evidence.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And within minutes of that, would have had to be minutes of that, you go and knock on his window.

CST. SMYTH: Well, I was at Dick and Debbie Dunphy's for an extended period of time.

MR. SIMMONDS: Right. But you say you left there somewhere around 2 to 2:05, 2:10 at the very latest.

CST. SMYTH: Yes.

MR. SIMMONDS: And if you left at 1:39 from where you were to, it's only less than a minutes' drive to go to their house. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: If you were there 15 minutes, that would be 1:40, you would have been out of there at 1:55, even before 2 o'clock. Correct?

CST. SMYTH: No, I think you're leaving some potential times out.

MR. SIMMONDS: No, I – with the greatest respect, I asked you if the 1:39 call was in the middle of the group of calls which I thought was the evidence you had given. You have just said now: no, indeed, it was one of the last calls I made. So within a minute or so of that last call at 1:39 you left and went to Dick and Debbie's. I put to you their house is within 30 seconds drive, if that. So you would have been at their house at 1:40, 1:41.

CST. SMYTH: What I had said regarding phone calls, was that the group of phone calls was probably in the middle of the period of time that I had spent on the side of the road insomuch that I didn't hang up at 1:39 and immediately put the car in drive and drive right up to Dick and Debbie (inaudible).

MR. SIMMONDS: You said to me, unless my hearing is going and maybe I've got it wrong –

THE COMMISSIONER: Well, you can clarify. You know I think it might have been –

MR. SIMMONDS: I under –

THE COMMISSIONER: There might have been some confusion there –

MR. SIMMONDS: I understood you to say, when I said 1:39 you said, no, that was the last of the calls. And I said you left shortly after, or used a phrase like that, and you said, yes, I did.

CST. SMYTH: Well, shortly after, yes. Well, so –

MR. SIMMONDS: Okay.

CST. SMYTH: Okay, if we're going to –

MR. SIMMONDS: And I said –

CST. SMYTH: – keep it within, to a timeline then we should pin down what shortly thereafter is.

MR. SIMMONDS: I also think I said 9:40 – or, pardon me, 1:40, 1:41.

CST. SMYTH: Okay.

MR. SIMMONDS: So you left within a couple of minutes of that. So if that's the case and you were at their house for 15, even 20 minutes, you would have left Dick and Debbie's before 2 o'clock or at about 2 o'clock.

CST. SMYTH: It could have been upwards of 25 minutes that I was at Dick and Debbie's.

MR. SIMMONDS: I thought your estimates were that it could have been as low as 15 (inaudible).

CST. SMYTH: In my first statement I gave to the RCMP I said 20 to 25 minutes. I have said as low as 15, I believe, in my deposition hearing.

MR. SIMMONDS: So it could have been that indeed at five to two you left Dick and Debbie's and went over to Mr. Dunphy's.

CST. SMYTH: I don't see it being that early, knowing now what the end timeline is. It's more likely I spent more time in the vehicle than –

MR. SIMMONDS: Okay, okay. So you go over to his house –

THE COMMISSIONER: Sorry, so let me get this straight. You're saying that it might have been later before you left for Dick and Debbie's house?

CST. SMYTH: Yeah, knowing when the final call was made to the RCMP communications centre, you know, working back from that –

THE COMMISSIONER: What are we talking about here, 1:39? Working back from 1:39?

CST. SMYTH: Working back from 2:27.

THE COMMISSIONER: Oh, from 2:27, okay.

CST. SMYTH: Yeah. It would make it closer to 2:05, 2:10 before I ever made it to Don Dunphy's for the second time.

THE COMMISSIONER: And you're getting that from there being, you think, roughly 15 minutes had passed from when you went into –

CST. SMYTH: Dick and Debbie's?

THE COMMISSIONER: Yeah. No, when you went into Mr. Dunphy's?

CST. SMYTH: Right, correct.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: I take you back to the interview of December 22, 2016, given to Ms. Chaytor and Ms. O'Brien, page 12. Okay, Constable Smyth. I looked at that file which was challenging even to get into, and I was, it was opened and I saw it there, I was thinking a thousand pages of material and I did a very cursory scroll through some of the pages and I closed it, I didn't look, I didn't look at any detail, no. Ms. Chaytor: So what you're saying is after you placed the call to Mr. Dunphy you then would have went within minutes directly to Debbie and Dick's place. CST. Smyth: That's right. Ms. Chaytor: How long were you in their house? I feel there maybe 15, 20 minutes.

Now I understand that to be, with your counsel present, in front of Ms. Chaytor, that you've said you left within minutes and that it was 15 to 20 minutes and not 25 minutes.

CST. SMYTH: Yes, that's what I just said to you. I said –

MR. SIMMONDS: No, that's not what you just said to me, with the greatest respect.

CST. SMYTH: It is. In my hearing, deposition hearing I had said as low as 15 to 20 minutes. In my original statement to the RCMP I said 20 to 25 minutes.

MR. SIMMONDS: In this hearing you didn't say maximums. What you said, and I repeat, that's right. Question, point blank, straight question: How long were you in their house? I feel like maybe 15, 20 minutes. That was your answer.

THE COMMISSIONER: I have a further note right after that. I'll check the transcript when it comes out, but my further note was maybe up to 25 minutes.

MR. SIMMONDS: Which page are you at, Mr. Commissioner?

THE COMMISSIONER: Right were you were then. So you were at Dick and Debbie's 15 to 20 minutes –

MR. SIMMONDS: And you stood up in the porch the whole time? Yes.

THE COMMISSIONER: It might be up to – no, no, sorry. I'm not referring to the transcript now. I'm referring to my notes from what Constable Smyth said this morning – or said just then, which seems to be contrary to –

MR. SIMMONDS: That's' what I –

THE COMMISSIONER: You said 15 to 20 minutes. I have a note that he went on maybe up to 25 minutes.

MR. SIMMONDS: He did say that.

THE COMMISSIONER: He just say – said that.

MR. SIMMONDS: Yes, he did say that.

MR. COMMISSIONER: Okay.

MR. SIMMONDS: He did say that.

THE COMMISSIONER: And he said: In my RCMP statement I said 20 to 25 minutes.

MR. SIMMONDS: And what I'm saying –

THE COMMISSIONER: And now you're referring him to the transcript. He said later, I said it could be as little as 15 minutes and then you're – and he got that from working back from the 2:27. And then after a couple of other questions – after the call to or attempted called, I guess, it was to Mr. Dunphy, then he went to Dick and Debbie's and he was there maybe 15 to 20 minutes.

Now, you're challenging the reference to the 25 minutes are you with –?

MR. SIMMONDS: I'm putting to him that he said in this interview where he had ample time to qualify –

THE COMMISSIONER: – with Ms. Chaytor there, his counsel, (inaudible).

MR. SIMMONDS: Chaytor there, his counsel there, it was a straightforward question. After many months to reflect on it, after ample time to be able to give his answer, it's relatively at the start of the interview on the 22nd, on page 12, and he point blankly answers 15 to 20 minutes.

The reason this becomes particularly important is how much time was he in the house after Mr. Dunphy was shot, before he called the matter in. And I believe the recent testimony is a couple of minutes and I thought from other places it could have been as much as seven, eight, nine minutes. So that's why this is important but – at page 12, agreed you went – you agreed you went to Dick and Debbie's within minutes of making the 1:39 call.

Within minutes I would take to be a couple of minutes, which is what I understood you to say here today?

CST. SMYTH: From Dick and Debbie's to Donald's?

MR. SIMMONDS: To Dick and Debbie's.

No, you made the call at 1:39. You agreed you went to Dick and Debbie's within minutes of making the call at 1:39. So within – at 1:40, 1:41 you were leaving to go to Dick and Debbie's which is less than 15, 20 seconds drive from where you were parked.

CST. SMYTH: I'm not sure how many seconds drive it was, but within minutes.

MR. SIMMONDS: Right.

CST. SMYTH: It could have been a little bit longer; it could have been a little bit less. It absolutely could have been two to three minutes, for sure.

MR. SIMMONDS: Well, the question put to you again by Ms. Chaytor: So did you visit – this is page 19 of the transcript.

MR. KENNEDY: (Inaudible.)

MR. SIMMONDS: The same one Mr. Kennedy, December 22, page 19.

So did you visit Dick and Debbie Dunphy? Did you visit them before or after you made those calls? After. All right; so around – sometime around 1:40. Answer: yes. Within minutes of making these calls. Answer: right. And you were with them, you told me about 15 to 20 minutes. That's a guess but it would remain within that range. And then you went directly back to Don Dunphy's. That's right. So that puts you at Don Dunphy's around 2 p.m. I would think so, yes.

So you're at the Dunphy home, Don Dunphy's home at 2 p.m. That's what you told in this transcript, you were with your counsel, under questioning by Ms. Chaytor and had ample time to either modify it, clarify it or add to it.

CST. SMYTH: And you can use the same time guestimates and give it up to 2:10 p.m. So whichever one you want to go with.

MR. SIMMONDS: Pardon me?

CST. SMYTH: You can use the same guestimates of time and extend that to around 2:10 p.m.

MR. SIMMONDS: I'm not using any guestimates of time. That's not my job, Officer Smyth. My job is to ask you questions based upon the evidence you've given and what you've said. And what you said here is you were at their place at around 1:40, give or take a couple of minutes. You were there for 15 to 20 minutes, give or take a couple of minutes, and that you would have been at Don Dunphy's around 2 o'clock, give or take a couple of minutes. Now that's what you've said. We can stop and let you review this if you'd like a moment, I don't have a problem with that.

CST. SMYTH: Well, there's – sure, we'll take all the time you want to review that. Then we –

MR. SIMMONDS: Would you like to stop and review it?

CST. SMYTH: Then we should review the initial statement that I gave to the RCMP that gives the longer time frames. And I'll provide you with a full analysis of a description of the times it takes me to drive from one place to another, exit the vehicle –

MR. SIMMONDS: Office Smyth, unless – and maybe Ms. Chaytor can clarify. I've got three volumes of what you said to Ms. Chaytor over three days. I understand you had all the time in the world, all the resources in the world and all the ability in the world to set these things out.

I just quoted to you what you said; not what I said, what you said. You said 1:40. You said I was there within a minute or two of that. I left in 15 to 20 minutes. You said, again, I was at Don Dunphy's house around 2 o'clock. If you were at Don Dunphy's house around 2 o'clock, that puts a sizeable period of time after the event before you called the police, correct? Correct?

CST. SMYTH: If you're going to assign those times, then yes.

MR. SIMMONDS: But that's your evidence, that's not – I didn't make that up, did I? That's what you – that's the information you gave Ms. Chaytor. Did you not?

CST. SMYTH: Well, it's applying finite numbers to broader guestimates.

MR. SIMMONDS: Did – you didn't say that to her, did you?

CST. SMYTH: I said those things.

MR. SIMMONDS: Did you not tell her –

CST. SMYTH: Yes, I did.

MR. SIMMONDS: – those answers, yeah, I just asked you.

CST. SMYTH: Yes, I did.

MR. SIMMONDS: Okay. So you go there and you knock on the window. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: And he comes to the door and you stand back some feet from the door so he can see you.

CST. SMYTH: Yes.

MR. SIMMONDS: You introduce yourself and you come into his porch.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. You're, you have some discussions in the porch, correct?

CST. SMYTH: Yes.

MR. SIMMONDS: And then you go in through – he goes into his living room, which is – may I approach that sign?

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: You came in over these rickety steps.

CST. SMYTH: Yes.

MR. SIMMONDS: You have some discussions here – I'm with –

THE COMMISSIONER: That's all right, go ahead. I can recall it, I've seen it.

MR. SIMMONDS: You have some discussions here in the front porch area –

UNIDENTIFIED FEMALE SPEAKER: Excuse me, Mr. Simmonds, would you use this mic?

MR. SIMMONDS: Thank you (inaudible) is easy to pick up.

You have some discussions there in the porch area.

CST. SMYTH: Yes.

MR. SIMMONDS: You go from there. He goes from there into here in the chair and sits down.

CST. SMYTH: Correct.

MR. SIMMONDS: Okay. And then you follow him into the room.

CST. SMYTH: Yes.

MR. SIMMONDS: And further back (inaudible) I understand you to walk into the room and go over by what you referred to as the mantel, this area right here.

CST. SMYTH: Yes.

MR. SIMMONDS: And the whole time you were there you didn't move from the mantel area. You moved along the mantel but that was pretty well where you were at till you exited the room.

CST. SMYTH: That's correct.

MR. SIMMONDS: Okay. So you would have gone from along this mantel here.

CST. SMYTH: That's correct.

MR. SIMMONDS: The position I showed you just then.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. He sits in his chair and you said that's where he stayed the whole time.

CST. SMYTH: That's correct.

MR. SIMMONDS: Okay. You talk back and forth, correct?

CST. SMYTH: Yes.

MR. SIMMONDS: You're looking around the room; you see the bat which is pictured there on the left-hand side of his chair on the floor, ah, as you enter the room.

CST. SMYTH: I didn't see it as I was entering. I noticed it after we got in the room, yes.

MR. SIMMONDS: You didn't kick it or trip in it or anything of that nature?

CST. SMYTH: No.

MR. SIMMONDS: Okay. You see garbage all around.

CST. SMYTH: Yes.

MR. SIMMONDS: You see BOOST containers?

CST. SMYTH: Yes.

MR. SIMMONDS: And you say the conversation was originally cordial but at some point it turned from cordial to a difficult – he became aggressive, type of situation.

CST. SMYTH: Yes.

MR. SIMMONDS: What did you say to him to change, do you think – to change the course of the conversation?

CST. SMYTH: I don't know if it was anything I said or if it was the realization of the situation. I don't know.

MR. SIMMONDS: Okay. So you'd gone down there to gather evidence and the evidence would be what he meant by those two tweets or that string of tweets.

CST. SMYTH: I went down to gather information, yes.

MR. SIMMONDS: Was the information what he meant by those tweets? I thought that's the purpose you said you were there?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. So two prick, or two dead prick, or whichever it is, MHAs.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. Once you found that out, then you had your answer.

CST. SMYTH: To that specific question, yes.

MR. SIMMONDS: To that specific question.

Well if you knew who the two were, and that they were – a significant period of time had passed since they were deceased and this is who he was referring to, and he wasn't referring to any current ministers, what other questions would you have had for him?

CST. SMYTH: Well, the other questions would be around the threat assessment component.

MR. SIMMONDS: Pardon me?

CST. SMYTH: I said the other questions would be around the threat assessment component, you know, do you feel that Workers' Compensation is responsible for your wife's death, for example, and can you talk to me about that.

MR. SIMMONDS: But you're not – your mandate is not to investigate for Workers' Compensation. Workers' Compensation, we understand from Mr. Mahoney, did their own investigation, sought legal advice, and had made a determination that they should take no further action – correct?

CST. SMYTH: Yes, the question is not for Workers' Compensation. The question is to fulfill the mandate of the threat assessment.

MR. SIMMONDS: And the mandate of the threat assessment, once you find out who he's referring to, and that these are significantly deceased, period of time has passed, then what other question would flow from that?

CST. SMYTH: Yeah, the threat assessment is not an assessment that's focused on those particular comments. That forms a very small inconsequential portion component of the broader threat assessment.

MR. SIMMONDS: But you had nothing else in the broader threat assessment to be indicative of any kind of violence or inappropriate behaviour by him. We've already been through that.

CST. SMYTH: And my answer to it was yes.

MR. SIMMONDS: So I understand that you said you wrote the two names down in the file folder.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And I understand you to say, at this hearing, that Mr. Dunphy gave you the two names and positions.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And this was done earlier in the conversation – and this is January 18 at page 27 of the transcript of the hearing; earlier in the conversation when things were a little more cordial.

So while things were cordial you had the answer to who the dead two MHAs were he was referring to. They'd been deceased for some period of time; he told you their positions. Why didn't you just leave then?

CST. SMYTH: Sorry, I thought I explained it, but that's just one small portion of the reasoning. We're still dealing with the broader based actual threat assessment, questions that you're trying to identify any potential justification as to carry out an act of targeted violence. Does he feel that there's been a significant injustice carried out against him by Workers' Compensation or the government entity? What inhibitors are in place in his life? What did he mean by – what was the intent of certain tweets? While I might have the specific interpretation of the actual words, I would like to know what the intent of it was.

MR. SIMMONDS: You –

CST. SMYTH: Sorry, go ahead?

MR. SIMMONDS: You realized you had no licence to be there. You had no right to be there outside of his inviting you in?

CST. SMYTH: Yes, absolutely.

MR. SIMMONDS: Okay. When he became upset, it was clear that, you know, you're really no longer welcome. At that point in time, your licence or your invitation had been revoked. Why didn't you just leave?

CST. SMYTH: I didn't perceive that.

MR. SIMMONDS: You didn't perceive from him becoming upset and agitated and you say, in fact, frothing at the mouth that that was a revocation of any invitation that you had? You didn't see that?

CST. SMYTH: He at no point told me to leave, or didn't want me there.

MR. SIMMONDS: He started to get upset and he called you government puppet. Who sent you? Is that correct?

CST. SMYTH: Yes, it is.

MR. SIMMONDS: And the next thing –

CST. SMYTH: Actually he said, sorry, he said arm of government. He referred to me as an arm of government; you're just an arm of the government and –

MR. SIMMONDS: And a government puppet.

CST. SMYTH: I don't think he ever said government puppet, he just said puppet or effing puppet. I don't think he ever connected those two.

MR. SIMMONDS: And out of the peripheral vision, you see the gun barrel.

THE COMMISSIONER: Mr. Simmonds, I'm going to have to leave for a few minutes. It seems to me this might be an appropriate time before we –

MR. SIMMONDS: Absolutely.

THE COMMISSIONER: – move on, to take the – even though it's a bit early we'll take the midafternoon break at this point.

MS. SHEEHAN: All rise.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Sorry, Mr. Simmonds, I knew I was going to have to leave. And I think you're starting on a line of inquiry which may take a bit of time and –

MR. SIMMONDS: I'm fine.

THE COMMISSIONER: – probably the break before it.

Go ahead.

MR. SIMMONDS: So, Constable Smyth, I was saying to you just before the break that the next thing you knew after the commentary was you saw out of your peripheral vision the gun barrel coming up and being pointed towards you.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And you instinctively yelled: No, no, no, put your hand up, as if you were – I think you used the analogy of blocking something thrown at you like a ball or something of that nature.

CST. SMYTH: Yes.

MR. SIMMONDS: Yeah, and you started to run out of the room.

CST. SMYTH: Yes.

MR. SIMMONDS: And you did a little drawing of how you ran out of the room when you gave one of the statements to the police and you showed the positions you were in as you were exiting and shot the four shots.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And you fired four times, two to centre mass and two to the head.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

Why did you go down there alone? I've heard what you said to Constable Cox that might set him off, and we've been through that and I'm not going to revisit it again. So why did you go – why did you go there alone?

CST. SMYTH: Well, it's the same answer, I guess, I gave you before is I didn't have any information to suggest he might act out violently. I felt a uniformed presence wouldn't do anything to assist my effort to build a rapport, put him at ease and have a full, frank discussion with him.

MR. SIMMONDS: Okay. So you've told this and we've been through part of that, that you knocked on the window, he comes to the door, you stand back, he invites you in.

Where were you to when you introduced yourself to him, Constable Smyth?

CST. SMYTH: On the grass in front of his front porch.

MR. SIMMONDS: So this took place before you proceeded up over the steps?

CST. SMYTH: Yes.

MR. SIMMONDS: I didn't mean to start in the absence of counsel.

UNIDENTIFIED MALE SPEAKER: That's fine (inaudible).

THE COMMISSIONER: All right, I didn't notice Mr. Williams was not there.

MR. SIMMONDS: I'm sorry.

CST. SMYTH: Yes.

MR. SIMMONDS: You stood back and you, you were on the grass, you hadn't started up over the steps.

CST. SMYTH: Correct.

MR. SIMMONDS: Okay. How did you introduce yourself, Constable Smyth?

CST. SMYTH: I had my badge and ID in my hand. I showed that and said: Joe Smyth with the RNC, was wondering if I could talk to you.

MR. SIMMONDS: You did not tell him you were with the Protective Services Unit?

CST. SMYTH: No.

MR. SIMMONDS: Why wouldn't you do that?

CST. SMYTH: Probably for a similar reasoning. I realized he had a – just by virtue of all the commentary I had reviewed up to that point and, of course, the sign further affirmed it. But he obviously had distaste for political affiliation and I would be fearful that he would make the same mistake you did, that that unit has some political affiliation.

MR. SIMMONDS: Oh, I wasn't mistaken. I understood your answer. You wanted to distance yourself from any political associations.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. So you didn't tell him you were part of the Protective Services Unit working for the Premier, that type of thing.

CST. SMYTH: Correct.

MR. SIMMONDS: Did he ask you if you worked for government?

CST. SMYTH: Not specifically, but I think it would be fairly reasonable to suggest that he knew I worked for government, police being a known government entity.

MR. SIMMONDS: But did you tell anybody? Did you – you say you don't think he specifically asked you.

CST. SMYTH: He didn't ask: Do you work for government? I didn't get the sense that he was confused around the issue of police being a government entity.

MR. SIMMONDS: Okay.

We'll go to Exhibit P-0182. It's the summary occurrence report of Officer Downey. The female officer, that was one of the first attenders at the scene. It'd be page 2 of that document, seventh paragraph down.

Downey had a very brief – “Cst. Downey had a very brief conversation with Cst. SMYTH in the driveway of the residence where he stated that everything started off good. SMYTH identified himself to DUNPHY, Dunphy invited him inside the residence, they began having a conversation. He described it as very “cordial” at first. However, he stated that DUNPHY's demeanor quickly changed. DUNPHY began asking Cst. SMYTH questions such as who he was and who he worked for. Cst. SMYTH stated that DUNPHY asked him if he worked for the government.”

Now, her recollection is that, indeed, you said that that was one of the questions that he did ask you.

CST. SMYTH: No, it was not. He never asked me that specific question.

MR. SIMMONDS: This is the officer – okay, let's go back through the drill we did before. Are you saying the officer has recorded it wrong or do we accept that this is an accurate recording of the officer's notes?

CST. SMYTH: No, I think in this case she probably misinterpreted what I said. Maybe your reference to –

MR. SIMMONDS: She misinterpreted what you said?

CST. SMYTH: I believe so, yes.

MR. SIMMONDS: Because it clearly states here: Constable Smyth stated that Dunphy asked him if he worked for government.

CST. SMYTH: Yeah, I see what it says. He – Mr. Dunphy never asked me that and I never said that to anybody.

MR. SIMMONDS: Would you think – would you not think that she would be – and we will hear from her, would you not think that she would attempt to be very accurate and precise in her notes, as she was one of the first attending people at the scene?

CST. SMYTH: For sure, but I think it's a misinterpretation of me making reference to Mr. Dunphy probably saying you're an arm of the government.

MR. SIMMONDS: But this seems to be a pattern. The other people made mistakes about the threat. Now this is another officer making a mistake about asking if you worked for government and you're saying: No, I never said that, these people just misunderstood me.

CST. SMYTH: In this particular case, I never said that.

MR. SIMMONDS: So you come in, Dunphy sits in the chair or goes into the living room, as I pointed out to before, sits in the chair, and you've told us numerous times, he never got out of the chair.

CST. SMYTH: Correct.

MR. SIMMONDS: Okay. You're looking around the room as you come in.

CST. SMYTH: Yes.

MR. SIMMONDS: You see the bat, that stick.

CST. SMYTH: Yes.

MR. SIMMONDS: You see a heater, which you in fact notice is turned in a funny position. And I take it by that, the side that emits the heat was turned away from Mr. Dunphy, was turned out.

CST. SMYTH: I believe so, yes.

MR. SIMMONDS: Okay, so you noticed that. You noticed the garbage.

CST. SMYTH: Yes.

MR. SIMMONDS: Right. Now, you have been consistent in that – and you don't see any firearms there when you're there.

CST. SMYTH: No.

MR. SIMMONDS: Okay.

There's a bullet on the table, but you don't see that.

CST. SMYTH: No.

MR. SIMMONDS: You've asked your people about a firearm. You inquired of Dick and Debbie about a firearm. It would seem to me that one of the first questions you would ask when you went into Mr. Dunphy's house, after you establish a rapport and introduced yourself, was is there any firearms there, but you didn't ask that.

CST. SMYTH: No, I didn't.

MR. SIMMONDS: But yet you asked everybody else, and it was your first concern in those other situations.

CST. SMYTH: Correct.

MR. SIMMONDS: One of the questions you asked.

CST. SMYTH: That's correct.

MR. SIMMONDS: But you choose not to ask him.

CST. SMYTH: Yes, at that point.

MR. SIMMONDS: I don't understand you've ever asked if he had a firearm –

CST. SMYTH: You're right. I never had the opportunity to ask, no. It probably would have been a question later in the conversation, should it, had it remained cordial, but to start a conversation with somebody where your hope is to develop that rapport –

MR. SIMMONDS: But it was cordial.

CST. SMYTH: Pardon me?

MR. SIMMONDS: But it was cordial you've told us –

CST. SMYTH: At that stage.

MR. SIMMONDS: At the start, it was very cordial.

CST. SMYTH: Right.

MR. SIMMONDS: He comes in and sits down. Invites you to sit down. You stand up by the mantel, you know. You tell him generally why you are there and yet you don't ask the very first question that you asked everybody else which understandably is an important question: Do you have a firearm here?

CST. SMYTH: Sorry, did you want me to finish my first answer, or –

MR. SIMMONDS: Please do.

CST. SMYTH: So I began the conversation with him. Beginning that conversation when your goal is to develop that rapport with somebody, to start it with, do you have any firearms, I don't think that would lend to getting to that point. That's the reason it wasn't asked immediately.

MR. SIMMONDS: The first concern in any of these situations is officer safety – correct?

CST. SMYTH: Uh-huh. Correct.

MR. SIMMONDS: And if officer safety is the first concern, wouldn't that not be a logical question to ask: Do you have a firearm?

CST. SMYTH: It is definitely a logical question to ask at some point in time. The reality of asking that question is you can't fully accept the answer to it as definitive truth. If a person illegally possesses a firearm, I don't expect them to automatically say, yes, I do have an illegal firearm in my possession. Hence why we do the background checks; hence why we ask potentially objective third parties are they aware of information –

MR. SIMMONDS: And you did that.

CST. SMYTH: – to provide that intel.

MR. SIMMONDS: You did that. That makes all the more reason, I would think, that that would be one of the first questions you'd ask Mr. Dunphy.

CST. SMYTH: I think I explained why I didn't.

MR. SIMMONDS: Okay, fair enough.

So you're in the room – again, may I approach the diagram, Mr. Commissioner?

THE COMMISSIONER: Uh-huh.

MR. SIMMONDS: You're in this room right here – correct?

CST. SMYTH: Yes.

MR. SIMMONDS: I think that's (inaudible).

You're in this room right here and you go over by the mantelpiece and you move along this mantelpiece back and forth?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. You don't ever move from this mantelpiece area to go out here or anything of that nature?

CST. SMYTH: No.

MR. SIMMONDS: If I said to you this is a fairly small room, I've been in it, you've been in it and we've seen the re-enactment from it; 13 by 14 I think forensics showed it to be, 13 feet by 14 feet. Would you think that's an appropriate estimate as to the size of that room?

CST. SMYTH: Yes, I would think so.

MR. SIMMONDS: So if you're here, if I said you, from the farthest corner of this mantel to the edge of that chair is nine feet, and that the distance from this, the nearest corner of that mantel to the edge of that chair is eight feet, would you agree that sounds reasonable, sounds appropriate?

CST. SMYTH: Yes, it does.

MR. SIMMONDS: Okay. So if you moved along that mantel, you were somewhere between eight to nine feet away from him, at most, during any period of time.

CST. SMYTH: Sounds accurate, yes.

MR. SIMMONDS: Okay. And your attention is on Don Dunphy because that's who you've gone to speak with.

CST. SMYTH: At times, it is. At times is on other parts of the room, yes.

MR. SIMMONDS: It's on other parts of the room as well?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

But you do note him getting upset.

CST. SMYTH: Yes.

MR. SIMMONDS: And, in fact, you phrased it as he's frothing at the corners of his mouth and strands of saliva were between his two lips.

CST. SMYTH: Yes.

MR. SIMMONDS: So would it be fair to say that your concern is heightened at that point in time?

CST. SMYTH: My concern that he had gotten agitated was, for sure, yes.

MR. SIMMONDS: Okay.

And then the next thing is the gun barrel out.

CST. SMYTH: Yes.

MR. SIMMONDS: And the very next thing is you shoot and kill Don Dunphy.

CST. SMYTH: Yes.

MR. SIMMONDS: Officer Smyth, do you have any doubts about any of the evidence you've given?

CST. SMYTH: No.

MR. SIMMONDS: No?

CST. SMYTH: No.

MR. SIMMONDS: Have you suffered as a result of this incident or from the result of anything else any memory problems or anything of that nature?

CST. SMYTH: I readily admit that assigning definitive time frames to meetings leading up to and thereafter have been challenging, yes.

MR. SIMMONDS: Any other memory problems outside of that?

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

MR. SIMMONDS: You don't think so?

CST. SMYTH: No.

MR. SIMMONDS: And you have no problem remembering here and now at the inquiry for the Commissioner?

CST. SMYTH: No.

MR. SIMMONDS: And there's no reason for you to make a mistake on any point?

CST. SMYTH: I don't think so.

MR. SIMMONDS: Okay.

And you give evidence – I think your position is – with a certainty?

CST. SMYTH: Pardon me?

MR. SIMMONDS: You're giving your evidence with a large degree of certainty?

CST. SMYTH: As best I can. I realize there was – incorrect in how the firearm was facing in terms of how I recalled it in the recreation and how I recalled it after.

MR. SIMMONDS: But anything that you've given us that you haven't corrected, you're certain about, you've had time to reflect on and this is your evidence.

CST. SMYTH: Yes.

MR. SIMMONDS: Officer Smyth, are you prone bad judgments?

CST. SMYTH: I don't think I'm prone to them, no.

MR. SIMMONDS: You don't think you're prone to them?

CST. SMYTH: No.

MR. SIMMONDS: Okay.

And I'm not going to revisit in minute detail the incident in the British Virgin Islands, but if I understand it – and you tell me if I get the gist of it – you were down there on vacation, you were drunk, you're on vacation, you get held up at knifepoint by two people?

CST. SMYTH: Yes.

MR. SIMMONDS: And you get robbed of your wallet, which I think it had your police badge in it, probably.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. You get so angry that you throw a flower pot. You start screaming and yelling out. You say you didn't say, I'm a Canadian police officer, but the witnesses said you said that.

CST. SMYTH: Yes.

MR. AVIS: (Inaudible.)

MR. SIMMONDS: Did I say something wrong, Mr. Avis?

MR. AVIS: (Inaudible) I have difficulty with (inaudible) second-hand information we're never going to hear.

THE COMMISSIONER: Are you acting now for Mr. Smyth? I don't hear Mr. –

UNIDENTIFIED MALE SPEAKER: (Inaudible) necessary.

THE COMMISSIONER: No, I don't think it is necessary, Mr. Avis.

MR. AVIS: (Inaudible) concerned about this evidence as well. According to counsel (inaudible) has been, this as I understood, for the purpose of allowing him to respond because it was out there. But to try and contradict him with second-hand information that is from another country, we're never going to hear from this witnesses, I think is really unfair.

THE COMMISSIONER: And I think – I think you're making a reasonable point, but you're very early in the exercise 'cause I haven't – that may be where Mr. Simmonds is planning to go, but I haven't seen him start, or at least get very far down on that. He raised the difference between the two versions; Constable Smyth's and that of certain witnesses.

Mr. Simmonds, where are you going? We might as well raise it because it is a valid point that in these types of situations the – we're dealing with the remarks of individuals who are not available for cross-examination.

MR. SIMMONDS: He entered a guilty plea, Mr. Commissioner, to the facts as read out in court.

THE COMMISSIONER: He did, and that's all – that's already there. And that's established on the record of this inquiry.

MR. SIMMONDS: But that means he accepts the facts.

THE COMMISSIONER: Sorry?

MR. SIMMONDS: So that would mean, does it not, or at least I understand, my understanding is that means he accepts the facts that were put forward, but I don't intend to belabour this a whole lot –

THE COMMISSIONER: All right. Well, I think as long as you recognize that I have to ensure that we're being fair to –

MR. SIMMONDS: Absolutely.

THE COMMISSIONER: – different parties, all parties, really, into the inquiry. They're entitled to be treated with fairness, and how far you go with differences –

MR. SIMMONDS: Mr. Commissioner –

THE COMMISSIONER: – between the two –

MR. SIMMONDS: I'm sure –

THE COMMISSIONER: – it may create difficulty, you know.

MR. SIMMONDS: I'm sure if I reach out of bounds, if you don't take me to task, then Mr. Kennedy surely will.

THE COMMISSIONER: All right. Well, again, one of the things we've decided we're not going to do is engage in duplication or unnecessary examination, and that's already on the record, the fact that Constable Smyth has pleaded guilty.

MR. SIMMONDS: Yeah.

THE COMMISSIONER: So, go ahead.

MR. SIMMONDS: I just have a few more questions anyway.

So, Constable Smyth, we understand that in the midst of this anger and rage you threw a flower pot, which you said wasn't intentional, but it damaged some other vehicles.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

And then you took a two-by-four or a paling off the fence, depending on which version you want, and went down the road and beat out at least one window in the bus and the bus owner says it was four.

CST. SMYTH: That's correct.

MR. SIMMONDS: And you ended up paying compensation of \$15,000.

CST. SMYTH: That was part of it, yes.

That was part of it, yes.

MR. SIMMONDS: Okay. You're a police officer in a foreign country and you commit a criminal act, which would be a criminal act in Canada.

CST. SMYTH: Yes.

MR. SIMMONDS: Would you not agree that that is a significant display of bad judgment?

CST. SMYTH: Absolutely.

MR. SIMMONDS: Would you likewise agree, as raised by Commission counsel, your email of April 10, 2015, was another display of incredibly poor judgment.

CST. SMYTH: I think whoever leaked it to the media was an incredible display of –

THE COMMISSIONER: Sorry, I couldn't hear you.

CST. SMYTH: Whoever leaked it to the media made an incredibly –

MR. SIMMONDS: So you don't acknowledge that you writing this memo, sending it out to your RNC, to some friends who – RCMP veterans as well as RNC veterans – was a bad judgment.

CST. SMYTH: I wish I didn't do it because of –

MR. SIMMONDS: That wasn't my question.

CST. SMYTH: – the end ramifications.

MR. SIMMONDS: Do you acknowledge it was a bad judgment to also send it to the investigating RCMP officer?

CST. SMYTH: In light of the end result, yes, it was bad judgment.

MR. SIMMONDS: And would you say that it's a fair – as opposed to the position you've put forward, that this was to try and assist and calm the troops out there, that a reading of this could clearly show an angry man who felt he was being unjustly – unjustifiably criticized for his actions.

CST. SMYTH: No, Sir, I don't read that.

MR. SIMMONDS: You don't read that. And you don't rely – and you don't agree that the last paragraph: I cannot regret my actions, is a very inappropriate thing to write.

CST. SMYTH: Out of context, it is highly inappropriate. But it's not what I was referring to, to have no regret for this situation to have occurred, do I lack remorse. That is not what that statement was intended for.

MR. SIMMONDS: Would you agree, Mr. Smyth – Constable Smyth – that these are two significantly poor judgment calls?

CST. SMYTH: I cannot deny that the incident in the Caribbean was horrifically inappropriate and poor judgment. I don't think I would put writing that email in the same classification. The

fact that it got leaked to the media and the fact that it was read by the family is highly unfortunate and I sincerely wish I never wrote the email or sent it but I do not classify the two in the same category. No, I'm sorry, I don't.

MR. SIMMONDS: Do you classify it as in appropriate, poor judgement?

CST. SMYTH: To have written the email originally?

MR. SIMMONDS: Yeah.

CST. SMYTH: Arguably so.

MR. SIMMONDS: Okay.

And you would not, and I don't mean to make light of it, you would not be – it is quite reasonable to assume that with the amount of scrutiny being given this matter that this email upon reflection, and you slept on it overnight, is likely going to find its way to the media. That wouldn't have been a massive jump in logic?

CST. SMYTH: It wouldn't have been, but it was not in my train of thought at the time nor was the inevitable pending inquiry.

THE COMMISSIONER: I think it's fairly obvious that whenever there's a police involved shooting, there's likely to be an inquiry.

CST. SMYTH: For sure, and I understand that. Just my thought process at the time with the amount of emotion involved and what was going on at home, and family, at work, an inquiry wasn't in my thought process at the time. I had never had a problem with an inquiry. I just didn't apply that lens to it, that everything you do and everything you say, every text you write and receive is going to be subject to public consumption in the manner in which it is now. I just never applied that lens to it at that time.

THE COMMISSIONER: And I make that remark as much for public education and information as for anything else which is one of the things – I think is the roles of a Commissioner in an inquiry like this.

Go ahead, Mr. Simmonds.

MR. SIMMONDS: And that's exactly the point. Through your lens you didn't see any problem. Through anybody else's lens, i.e. the lens of people looking at you going down there on the Sunday da, da, dah, they see it as difficult, strange, inappropriate. You write this email that through most people's lenses was clearly inappropriate but you didn't realize it was inappropriate. Correct?

CST. SMYTH: Well, it has the appearance of being highly inappropriate because it was subject to the media and (inaudible).

MR. SIMMONDS: It certainly has the appearance of being highly inappropriate.

Officer Smyth, how long were you in the house in total, up to the time of the incident?

CST. SMYTH: Up to the time of the incident?

MR. SIMMONDS: Up to the time of the incident.

CST. SMYTH: So from the time I walked in the door originally with Mr. Dunphy –

MR. SIMMONDS: Yeah, from the time where he said, come in b’y, and you stop in the porch to –

CST. SMYTH: To the time –

MR. SIMMONDS: – when shots were fired.

CST. SMYTH: The last shot was fired?

MR. SIMMONDS: Yeah.

CST. SMYTH: I can’t see it being more than 15 minutes.

MR. SIMMONDS: Okay.

Officer Smyth, you told us you’re certain about your evidence – correct?

CST. SMYTH: Yes.

MR. SIMMONDS: I’d like to go to Exhibit P-0109. It’s the statement of April 6, 2015 given to Constable Henstridge, at page 45. I understand this is – oh no, pardon me: Exhibit P-0119. Did I say P-0109? I apologize.

Line 14.

MR. KENNEDY: What page was is that, Mr. Simmonds?

MR. SIMMONDS: Page 45, Mr. Kennedy. Actually it would be page 45 of the document. It’s page 46 in the exhibit.

Line 14, Officer Burke asks: ... when I was going through ’em here. When you identified yourself, can you take us through that? What, you know, did you see your badge – did you your badge, your police ID, and how you identified yourself as – were you a member of the premier’s protective detail? Your answer: No.

“Burke: ... were you a member of the RNC.” You answer: “RNC.” Burke: “Can you just take us”

You answer: “Joe – yeah, I didn’t use – I don’t – I don’t – never use rank and I bloody know how rank – Acting Sergeant for two years so” Burke: “Uhm.” “... I don’t know it is myself – like – so I – I – and I don’t – I don’t do that anyway.”

Is that a correct rendition of what you said at that time?

CST. SMYTH: It would appear so.

MR. SIMMONDS: It is or it isn’t, Officer Smyth? Does it appear to be – isn’t it appear –

CST. SMYTH: Yes, it is correct.

MR. SIMMONDS: Thank you.

Exhibit P-0120, at page 3, which would likely be page 4 of the exhibit, at line 11-12: I showed – 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, 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 it was Mr. Dunphy and he said yes. 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.

Is that a correct rendition?

CST. SMYTH: Yes.

MR. SIMMONDS: At the inquiry in January 17, at page 95 – and I don't think we have that on the system so that it can be shown, do we, Ms. Chaytor or Ms. –

UNIDENTIFIED FEMALE SPEAKER: No.

MR. SIMMONDS: We don't.

I would read to you what I understand you to say there, Ms. Chaytor said, question – and this is at page 95: And what did you say?

I hauled out my police badge and ID. I showed it to him. I said I was Joe. I asked him if he was Don Dunphy. He said yes. I told him I was Joe Smyth with the RNC.

On January 18, 2017, at page 17, "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 rank." No.

"MS. CHAYTOR: Okay, why not?" It just wasn't something I traditionally did in that setting. When trying to rapport built and set somebody at ease, rank doesn't lead to the process very well, I find."

Is that correct?

CST. SMYTH: Yes.

MR. SIMMONDS: Correct rendition?

Exhibit 0092; this was a statement you did up, a Narrative Text Hardcopy that you did up the day after the incident – correct?

CST. SMYTH: I haven't seen this here yet.

MR. SIMMONDS: Oh, I'm sorry. It's entitled: Narrative Text Hardcopy, Narrative: Case Summary-1, Author: 610 Smyth, Joe.

It's Exhibit 0092 – 0092. Do you have that there?

CST. SMYTH: Yes.

MR. SIMMONDS: You wrote this the same day you went for the RCMP – or the next day you went to the RCMP to give them a statement. You took it with you – Officer Smyth?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

This is done in your own – you wrote this of your own volition. You were under no pressure to write this. You had ample time to write it and decide what you wanted to put in it.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. So it should be deadly accurate, correct?

CST. SMYTH: Yes. I think it tends to have a little more formality to it than what would be rendered through a more informal conversation, but, yes, accuracy would be the goal.

MR. SIMMONDS: It's page 2 of 4, third paragraph down: At approximately 1415 I again checked Don Dunphy's driveway and then observed a black Jeep Cherokee parked there. I approached the home again, knocked on the front door –

UNIDENTIFIED MALE SPEAKER: Window.

MR. SIMMONDS: – or knocked on the front window. A male came to the front door. I removed my police badge and ID and identified myself as Sergeant Joe Smyth.

Now, I didn't make an issue of this, you've stated in numerous positions throughout this hearing and in statements that you never used sergeant. Yet in this, your first one, you do it yourself. You're under no pressure: I ID'd myself as Sergeant Joe Smyth.

CST. SMYTH: Yes, I see that.

MR. SIMMONDS: Can you explain that?

CST. SMYTH: Only that, you know, it's written without giving a tremendous amount of thought to that type of nuance and –

MR. SIMMONDS: Oh, wait now –

CST. SMYTH: – it's written in a more formal way. As I was walked through the re-creation –

MR. SIMMONDS: Nuance.

CST. SMYTH: – as I did the statement with the RCMP, you know, that particular memory became a little bit fresher. You tend to envision it and put yourself back there in the situation and I didn't use rank.

MR. SIMMONDS: Mr. Smyth –

CST. SMYTH: So that's a – that's an error.

MR. SIMMONDS: Constable Smyth, it wasn't a nuance. You're doing a statement that's going to be part of the file. You take it with you when you go to the RCMP to give them your statement. You make an issue of it in numerous statements that I never use rank. I don't even know what it means myself. And yet, the first one you do, yourself, without anyone leaning over your shoulder, you tell us you identified yourself as Sergeant Joe Smyth. That's an error in either your recollection, your testimony, one of it. Would you agree?

CST. SMYTH: Yeah, it's there.

MR. SIMMONDS: Okay. Any other errors like that?

CST. SMYTH: Probably so.

MR. SIMMONDS: Probably so. But I asked you that originally and you didn't think you had any.

THE COMMISSIONER: Could you just establish for sure now, where is, where is the error? Which is the correct one and –

MR. SIMMONDS: If you go, Mr. Commissioner, you –

THE COMMISSIONER: No, I just want Constable Smyth to –

MR. SIMMONDS: Oh, I'm sorry.

THE COMMISSIONER: (Inaudible) whether it's this document or the –

CST. SMYTH: In my original summary of the incident that I prepared the day after –

THE COMMISSIONER: The general occurrence hard copy?

CST. SMYTH: Correct.

THE COMMISSIONER: So there's an error in that, in the use of Sergeant there, is it?

CST. SMYTH: Right. I said in that that I identified myself as Sergeant Joe Smyth. You know, as I had opportunity to walk through it in more informal process, that – I don't have that actual memory of saying that, and it's not something I'd practically, or normally, would have done. So it is undoubtedly an error.

And are there other errors? Yeah, I've picked out some in relation to times as well. There's some estimates that are different in other statements. There are times that I refer to when I arrived in Mitchells Brook that are different. So when you asked if I stand by my evidence, overall yes. But are there errors contained within the multitude of statements I've given? Absolutely there are.

MR. SIMMONDS: Are there any substantive errors contained in the multitude of statements that you've given or the evidence you've given before this Commission to date?

CST. SMYTH: Not that I'm aware of.

MR. SIMMONDS: Not that you're aware of. You told the Commission, and I believe you told the Commission again today, you never told Don Dunphy you were with the Protective Services Unit.

CST. SMYTH: No.

MR. SIMMONDS: And that was your testimony today and it was also your testimony on January 17 at page 98. Ms. Chaytor: And when you introduced yourself to him, did you tell him you were a member of the Protective Services Unit? No, I don't recall telling him that. No, I don't recall telling him exactly what unit I was attached to, no. At any point in time did you tell him you were a member of the Protective Services Unit? No, I don't think so. Ms. Chaytor:

Okay. And why not? I didn't necessarily see the relevance and I also didn't want him to necessarily tie me to politics. Okay.

Ms. Chaytor: And he and I know, you've told me we'll talk about this, but at one point in time Mr. Dunphy got, gets agitated with you and starts calling you a name. Can you tell the Commissioner what it is Mr. Dunphy called you? Ah, he referred to me as a fucking puppet, an arm of government, those kinds of things. But in saying that – Ms. Chaytor: Okay, but in saying that to you, he wasn't aware you were a member of the Protective Services Unit? Constable Smyth: No, but I had articulated at that point in time exactly what I was doing.

That was your evidence?

CST. SMYTH: Yes.

MR. SIMMONDS: Do you recall giving a statement to Grant Little who was brought in to review the procedures and some of the events with respect to this investigation?

CST. SMYTH: Yes.

MR. SIMMONDS: And I believe that statement is Exhibit 0121.

And this was to Grant Little who is a sergeant, I believe. Do I have it correct, Constable Smyth, with the Saskatoon police force?

CST. SMYTH: Yes.

THE COMMISSIONER: I think it's sergeant, yeah.

MR. SIMMONDS: And this statement was 138 typed pages, so very thorough. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: He asked you a similar question at line 10 or at line 8. Oh, page number is 81, I'm sorry. I'm talking 81 of the typed statements. Oh, no, it's 81 of that statement too. Thank you very much.

We start off at line 5, where you say: And so then I walked up over the front steps and went into his house, and then I walked in and everything was, was very amicable. Little: Okay. And you answer: you know I told him, you know I told him I was here to chat to him. I've got a file I was looking into and he didn't question me too much on that. Yeah.

And then you say: I just got some general conversation cause it started you know, so you're RNC, and I said yeah. And he said, well, jeez what are you doing down here. And I told him where I worked and what I did and I don't even remember what his reaction to it was at that point in time.

So you told him where you worked and what you did, which any reasonable interpretation of would be. You told him exactly what you said you didn't tell him.

CST. SMYTH: I don't recall telling him specifically Protective Services Unit. I may have said I work for the RNC, for the Criminal Investigation Division and I was there to speak to him about comments he had made on Twitter. But using the words of – what I would be reluctant to use in that situation is language that would draw direct connection to working or leaving the belief that

we worked for the Premier. That would have been my concern, and what I would have endeavoured to avoid.

MR. SIMMONDS: Officer Smyth, you said here: I told him where I worked and what I did. Now I don't think that there's an open misinterpretation of that. And I don't even remember what his reaction to that was.

CST. SMYTH: So I work for the Royal Newfoundland Constabulary, is true. I work for the Criminal Investigation Division, is true. I work under the intelligence and organized crime section, is true. The verbiage I would have tried to avoid is any direct connection that somebody might perceive to a political office.

MR. SIMMONDS: So that's a misunderstanding of what you've said there, the interpretation I'm putting on it? That you clearly said there, I told him I worked with the Protective Services Unit and I was here to do an investigation in relation to it.

CST. SMYTH: Well, I guess I don't know what exactly your inference is. I'm just trying to articulate –

MR. SIMMONDS: I'm saying a reasonable inference from what you've written there, the evidence you've given.

CST. SMYTH: Sorry?

MR. SIMMONDS: I'm saying that's the only reasonable inference from the evidence you've given.

CST. SMYTH: Is what?

MR. SIMMONDS: That you indeed did tell him you were with the Protective Services Unit.

CST. SMYTH: Okay.

MR. SIMMONDS: You disagree?

CST. SMYTH: Well, yeah, I just explained why I disagree. I can explain it again if you like.

MR. SIMMONDS: Mr. Dunphy – or I apologize, Mr. Smyth, what has been the central core of the investigation?

THE COMMISSIONER: I'm not sure your mic is picking you up that far away, Mr. Simmonds.

MR. SIMMONDS: Constable Smyth, what has been the central core of the investigation by the RCMP with respect to this incident? If I said to you it's what happened in the house in that 10, 12 minutes, whatever it was, would you agree?

CST. SMYTH: I don't know, Sir; you'd have to ask the RCMP that.

MR. SIMMONDS: You don't disagree?

CST. SMYTH: I don't know. I don't know the answer to that question.

MR. SIMMONDS: Would you agree that the central theme is what took place between you and Mr. Dunphy where you ended up being forced to shoot him three times?

CST. SMYTH: I don't know. You'll have to ask the RCMP. They asked me a lot of questions and given the amount of disclosure that I see done, I'm not sure how much of a specific focus that was. I'm sure it was significant but I think the RCMP could never answer that question.

MR. SIMMONDS: Okay, well, let's go with significant.

So it's a significant part of the investigation being undertaken, what happened in the house during that 15 minute period, 12- to 15-minute period, 10 to 15, whichever it is, in which Mr. Dunphy was killed.

CST. SMYTH: Yes, I think that would be fair.

MR. SIMMONDS: That would be fair?

CST. SMYTH: Yes.

MR. SIMMONDS: And you would want to be absolutely certain of the evidence you've been giving with respect to what took place in those minutes.

CST. SMYTH: Yes.

MR. SIMMONDS: Again, Exhibit P-0119, the statement of April 6th, given to Corporal Henstridge, page 50, line 4. Actually it's page 50 of the document, I'm sorry, so it would be 51 of the exhibit. "Burke: And just one more thing. Yeah, can you kind of give us, ah, what you saw him doing, ah, when he takes the firearm? Does he stay seated? Does he stand up? What – at what point does he present a firearm in full view? Can you kind of take us through his actions"

Do you see that, Constable Smyth?

CST. SMYTH: Yes, I do.

MR. SIMMONDS: "I'd have to say he's like – he wasn't out of the chair. Like he wasn't – he wasn't standing."

Down at line 21 you again state: "... or right here. But he was not fully upright ever at any point in time. And, yeah, it was – and the gun was moving. It was coming like following me."

That was your evidence?

CST. SMYTH: Yes.

MR. SIMMONDS: Or that was the statement you gave at that point in time?

CST. SMYTH: Yes.

MR. SIMMONDS: Exhibit P-0120, page 21, which is probably 22 of the exhibit, line 15. "Burke: So Mr. Dunphy (ahh) was where in the livin' room during this?" Answer: "He sat right in that chair."

“Burke: Um hmm. Smyth: He never moved from it. He moved around in it. Burke: Right. Smyth: You know, he sat up and he sat back and moved to one side, to the other and but he never got out of it.”

That was your information –

CST. SMYTH: Yes.

MR. SIMMONDS: – at that time?

Your interview with Commission counsel on December 22, 2016, at page 37. Ms. Chaytor, at line 10, inside his front door, okay. Constable Smyth: He initially kind of laughed that off. It was almost like oh, that’s why you’re – and he asked me to come into his living room. He said come in and sit down and he immediately went to the chair that was – when you walk in from the porch into the living room there’s a chair immediately to the right which is the same place he was found. He went in there and sat down and he remained there the entire time.

That was your information to Commission counsel on that day?

CST. SMYTH: Yes.

MR. KENNEDY: Sorry, what page was that, Mr. Simmonds?

MR. SIMMONDS: That was page 37, Mr. Kennedy.

The same date, page 103, Ms. Chaytor: What about his position during your conversation? You’ve told me in terms of your position that you had moved around the mantel back towards the corner and seem to be your positioning throughout, staying close to the mantel. What about his? Where did his position himself throughout?

Constable Smyth: He didn’t move from his chair, he sat down the whole time. There might have been some adjustment in his chair, you know; he’d do this and that. So when you’d say he’d do this, you’re putting your arms out. He moved forward in the chair almost readjusting himself and came back in the chair. I didn’t think anything of it at the point in time. At any point in time did he get out of that chair? No.

That was your evidence on that day or your – the information you provided to Commission?

CST. SMYTH: Yes.

MR. KENNEDY: Commissioner, I just want to clarify the process again. I’m not – I’m sorry for the interruption.

I’m assuming that what I can do in re-examination is when Mr. Simmonds refers to the first line of that paragraph when I – in re-examination I can put it to Constable Smyth, did you say this in the next seven or eight lines. Is that the process that’s envisaged? It’s a re-examination?

THE COMMISSIONER: Yeah, I would say, Mr. Kennedy. You know how re-examination goes just the same as I do; you’ve done enough of it. So you’re not going to be unduly restricted. The normal thing – I don’t see any reason why the normal rules wouldn’t apply to that.

Go ahead, Mr. Simmonds. Now, if there’s anything, Mr. Kennedy, as we go along and specifically that you can bring in mind, but you’re entitled to –

MR. SIMMONDS: And I'll –

THE COMMISSIONER: – clarify the context of what's said. Go ahead.

MR. SIMMONDS: And I have no problem with putting that next portion to him. At any point in time did you – did he get out of that chair? Constable Smyth: No. Ms. Chaytor: At any point in time did he attempt to get out of that chair? Not until he had the firearm. I felt like when he started coming up with the firearm, you know, by the time I saw it, it was coming towards me and he seemed to be doing some adjustment with the gun in his hand. And he was either coming forward or preparing to stand up at that time and he never got to a standing position. I don't know if he was trying to stand up or just adjust himself in the chair.

That's the full of the quote. If I –

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: – misled, I apologize. I didn't think I was.

I understand, Officer Smyth, through all those places, and again through the evidence you've given as recent as January 18 to Ms. Chay– on direct – on examination by Ms. Chaytor, this is January 18, 2017.

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

He did stay seated, yes. He moved around a lot in the chair. He shifted 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: Did he appear to get up at any time or attempt to try and stand? No, no, not until the point where I saw the firearm. 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 it.

Okay – Ms. Chaytor: Okay, so he was never fully upright? Never, no.

MR. KENNEDY: And what page is that, Mr. Simmonds?

MR. SIMMONDS: That's page 2 of the transcript of Wednesday, January 18.

So your evidence has been that he never, ever got up out of the chair.

CST. SMYTH: Correct.

MR. SIMMONDS: Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: That's not something you would make a mistake about.

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

MR. SIMMONDS: You don't think so, no. You agree that that's a crucial piece of evidence because if he was in a different position, then the forensics done – then the forensics done with respect to the shot pattern and all of those things would likely or could possibly be different.

CST. SMYTH: Correct.

MR. SIMMONDS: It would also mean that there was a whole lot more movement that you should have seen before a gun or while a gun was being pointed at you. Correct?

CST. SMYTH: I don't know. Sorry, what's the question?

MR. SIMMONDS: If someone moves around in a chair it's one thing; if someone gets up and stands up out of the chair, that's a significant, larger piece of body movement –

CST. SMYTH: Yes.

MR. SIMMONDS: – which you would have to see?

CST. SMYTH: Yes.

MR. SIMMONDS: And you knew this issue was important from day one.

CST. SMYTH: His position in the chair, yes.

MR. SIMMONDS: Yeah.

I won't take you to it but there are other portions and I've already quoted some of them. There are other places where you say similar, a similar thing, would you agree?

CST. SMYTH: About?

MR. SIMMONDS: Whether he stood up or he was sitting in the chair the full time.

CST. SMYTH: I'm sure, yes.

MR. SIMMONDS: I'd ask you to go to Exhibit 0121, June 17, 2015. That's, again, the interview with Grant Little. Page 94, which would probably be 95 of the exhibit, starting at line 13 or line 12, 13.

Little: Uh-huh. Smyth: Like kind of police response to an incident and, in this, I think –

THE COMMISSIONER: Sorry, what page?

MR. SIMMONDS: I'm sorry, page – it is – be 95 of the exhibit.

THE COMMISSIONER: And what line are you talking about?

MR. SIMMONDS: Ninety-four of the statement and it would be line 12 onward.

THE COMMISSIONER: He was moving and mind you and we're close –

MR. SIMMONDS: No, I think – are you on page –

THE COMMISSIONER: I'm at page 95 of the exhibit.

MR. SIMMONDS: And it should start off, the very first line –

THE COMMISSIONER: He's still, he's still seated.

MR. SIMMONDS: No.

THE COMMISSIONER: It's just a –

MR. SIMMONDS: No, no, it's the page before that I think.

CST. SMYTH: Line 4 maybe? That the same page?

MR. SIMMONDS: Ninety-four –

CST. SMYTH: Line 4 of that same page, I think, maybe you're looking at.

MR. SIMMONDS: No, it's the next page, page before that, Commissioner.

THE COMMISSIONER: You've got the same as I have on the monitor –

MR. SIMMONDS: I'd like to –

THE COMMISSIONER: – presumably.

MR. SIMMONDS: Yes, there we go: "Little: Mm hmm."

Line 12, Commissioner.

THE COMMISSIONER: Oh, it's page 94.

MR. SIMMONDS: Ninety-four –

THE COMMISSIONER: Lines –

MR. SIMMONDS: – of 138. Ninety-four of 138 at line 12.

THE COMMISSIONER: Line 12.

MR. SIMMONDS: "Mm hmm" – that's Little.

And Smyth says: Like kind of police response to a, an incident, and, in this, I think, I think my hand came in and I doubled up my grip and I fired another shot to his, his centre mass and he's, I'm still, the gun is still there in his hand and his, I'm, he's still coming towards me but I felt like, I feel like that point I was like a millimetre out of it, about 'cause I'm moving as he's coming towards me and I still feel it, 'cause he had to come around this way and I'm moving this way to go.

Little: Right. Smyth: Basically by him so he's a, he's gotta move in this kind of awkward. Little: Uh-huh.

Smyth – and this is at the top of page 95 – he's still, he's still seated, I think he might have been up, he's starting to – yeah – he was starting to stand I think is what he was doing 'cause I think he was up out of the chair and I started to fire.

Now, Constable Smyth, that's not a misinterpretation. That's a statement about a central core of what took place and you've told a different – a significantly different piece there that Don Dunphy was standing up out of the chair.

CST. SMYTH: I'm not trying to say he's standing up. I'm referring to him being forward out of the chair and I said there's a –

MR. SIMMONDS: No.

CST. SMYTH: – there's a point and a possibility where he may have been so far forward that his, his bottom –

MR. SIMMONDS: That's not what you said.

CST. SMYTH: Well, I (inaudible) –

MR. SIMMONDS: Read it again, please.

CST. SMYTH: – what I said, that his bottom may have been up out of the chair.

MR. SIMMONDS: That's not what you said.

CST. SMYTH: So he could have been a half inch, a quarter of an inch –

MR. SIMMONDS: That's not what you said.

CST. SMYTH: – I couldn't tell.

MR. SIMMONDS: Read it again, please.

CST. SMYTH: Because I think he was up out of the chair.

MR. SIMMONDS: He's still, he's still seated. I think he might have been up, he's starting to – what –he's starting to stand, I think, is what he was doing 'cause I think he was up out of the chair.

He was up out of the chair. You have consistently said he never got up out of the chair. In some places you've said he remained in the chair the full time. In this place you indicate that he was up out of the chair. That's a material distinction, a material difference that would affect, in fact, the forensics of how the shots were fired or where they came from.

CST. SMYTH: No, I don't agree. I'll read it back to you.

MR. SIMMONDS: You don't need to read it back to me, Officer Smyth. I can –

CST. SMYTH: I think you're misunderstanding some of it.

MR. SIMMONDS: Well, unless I don't know how to read, I will read it again.

CST. SMYTH: Okay.

MR. SIMMONDS: Smyth: He's still, he's still seated, I think he might have been up, he's starting to – yup or whelp – he was starting to stand I think is what he was doing 'cause I think he was up out of the chair and, I started to, I, I fired.

He was up out of the chair.

CST. SMYTH: See, Mr. Commissioner, what I'm saying there is I think that he may be starting to stand. That he came forward enough in the chair that his bottom may have been potentially lifted up off the chair. It's not trying to say he is standing or he's fully upright –

MR. SIMMONDS: That's what you said: He's up out of the chair.

CST. SMYTH: Well, I can be up out of the chair and not be standing.

MR. SIMMONDS: You said he was up out of the chair, very clearly. You've said before he was seated. I put to you that's a material difference. You're explaining it by saying his bottom had lifted off the cushion.

CST. SMYTH: Right. I think he was up out of the chair. He was starting to stand. I think he was up out of the chair.

MR. SIMMONDS: Officer Smyth – could I get the chair that we've been referring to? Could I get that moved out?

MR. KENNEDY: Commissioner, it's over in the corner there.

THE COMMISSIONER: Who's going to move it? I'm not.

Where do you want to put it, Mr. Simmonds?

MR. SIMMONDS: Move it out to right about there. Thank you.

You've asked that the corner not be exhibited, where the piece was cut out. Commissioner, you've asked that the corner that was cut out –

THE COMMISSIONER: I don't recall specifically, but that's fine, yeah.

MR. SIMMONDS: Mr. Commissioner, I'd also like to be allowed to use that pylon to show the distance that Officer Smyth would have been from that chair.

THE COMMISSIONER: Okay. Now we're getting into some form of re-enactment and we've mentioned –

MR. SIMMONDS: No.

THE COMMISSIONER: Well, you may say no, but that's in effect what it is partly. Where – do you have the measurements?

MR. SIMMONDS: Yes, I do. I took the measurements and if there's any issue, the forensic gentleman took measurements with a scale.

THE COMMISSIONER: Okay. How far are you going with this? Our rules generally are against this form of demonstration but I'm not going to be unduly restrictive, but I want to know where you're going.

MR. SIMMONDS: I wanted to put the pylon out from the chair –

THE COMMISSIONER: Yeah.

MR. SIMMONDS: – put the pylon there to represent the distance that Officer Smyth would have been from this chair.

THE COMMISSIONER: Okay, go ahead.

MR. SIMMONDS: And –

MR. KENNEDY: Just can we confirm for the record, Commissioner, that that is the same chair. That it's not up anything. That it's – it wasn't seized by the police.

THE COMMISSIONER: Sorry?

MR. KENNEDY: The chair wasn't seized by the police, because Mr. Simmonds –

THE COMMISSIONER: It wasn't seized, no. It was in the – it was left in the house. So we –

MR. SIMMONDS: The chair has been in the house. The room has been left the same in the hope or the anticipation that the expert would be retained. The chair was brought in here by Mr. Cochrane and it has remained under lock and key out in the room adjacent to this space. It has not been tampered or changed in any form whatsoever. And if need be, we can recall either Meghan and or –

THE COMMISSIONER: Yeah, I'm not sure – Mr. Kennedy, is there any real – we have photographs. There's no real issue as to that being the same chair, is there?

MR. KENNEDY: I don't – all I wanted is confirmation that (inaudible).

THE COMMISSIONER: We don't have – well, you're not going to get it in terms of we don't have continuity of exhibits as far as that chair is concerned, as you know, because it wasn't seized, which is what you've said. So the continuity is not – the chain of continuity has been broken.

The chair looks very much the same as the chair that we have in the various photographs, unless I'm missing something. Is that not correct Mr. Kennedy?

MR. KENNEDY: No, I'm not questioning, Commissioner. All I'm wondering – I just want confirmation it's the same chair. Like there's wheels or something on the chair, are those the same that was there at the time?

THE COMMISSIONER: Are there wheels there now, or where they the ones that were just removed when Mr. Cochrane – that he wheeled it in on. That was just a trolley. Sorry?

MR. SIMMONDS: I apologize. That's the same chair.

THE COMMISSIONER: Right.

MR. SIMMONDS: It is a therapeutic chair that was given him. It has a movement device that's attached to it, but it is exactly the same chair without any changes. The corner, or the top – if you're looking at it, the top left-hand corner is missing because that is the portion that the police cut out –

THE COMMISSIONER: Mr. Simmonds, you can't give testimony, all right, unless – and all this is fine as long as other counsel are consenting too. And as far as I can see, it'll be just an expenditure of time unnecessarily.

Mr. Kennedy, unless you're pointing to something in the photograph or something that raises a doubt that that's the same chair, I mean I'm comfortable with the fact of that either being the same chair or one that is virtually identical from what I can see in the photographs. And as far as I can see, in terms of what Mr. Simmonds is proposing to use it for, one that's virtually similar, it's just as good as the original.

I suggested, after Mr. Simmonds requested that they have the original chair, that we put the original in so that there'd be no possible discrepancy if that experiment result – or the results of the experiment, which has been proposed by Mr. Simmonds, ever went in.

Now, I still have to make a final ruling on that which I indicated would only come following, if I recall, the testimony of Constable Smyth and the forensic evidence. You're looking quizzically, Mr. Simmonds.

MR. SIMMONDS: Well, no, I'm a little concerned, Mr. Commissioner, because this is twice now. And just moments ago you referred to this as basically being a – I can't remember your exact words but a useless – waste of time or a useless –

THE COMMISSIONER: No, no, no, no don't you mis –

MR. SIMMONDS: You know, so I –

THE COMMISSIONER: Well, one second now, you misread me totally. I'm saying a waste of time to start requiring proof of, that that's the same chair.

MR. SIMMONDS: It is the same chair. My solicitor's oath –

THE COMMISSIONER: You cannot testify, Mr. Simmonds. We're trying to keep this as –

MR. SIMMONDS: I'm not testifying, Mr. Kennedy asked me a question.

THE COMMISSIONER: Sorry?

MR. SIMMONDS: Mr. Kennedy asked me a question, was it the same chair. He leaned over and said: Is it the same chair. I attempted to answer that.

THE COMMISSIONER: Well, you're, as far as I can see, attempting to answer a question that I never asked and you're – you put the wrong interpretation on when I said a waste of time.

It's a waste of time as far as I can see for Mr. Kennedy to pursue his objection because it will just mean that we have to adjourn, you have to call Ms. Dunphy, et cetera. And we'll get as close as we can to being continuity, we won't get perfect continuity.

But as far as I can see, as I just said, this chair is either the same chair or a virtually identical chair which will meet the needs of your demonstration. Now, is there something that you don't understand about that?

MR. SIMMONDS: No, I understand that clearly, Mr. Commissioner.

THE COMMISSIONER: From what I said – what you said a moment ago, I understood you to be complaining because I appeared to be saying it's a waste of time for you to do something.

MR. SIMMONDS: That's – that's what I thought you said but I see I misunderstood.

THE COMMISSIONER: Well, I hadn't said that, Mr. Simmonds, which is why I'm explaining it to you, okay?

MR. SIMMONDS: Fair enough.

THE COMMISSIONER: Now, Mr. Kennedy, do you have any problem with Mr. Simmonds proceeding as though this were the original chair?

MR. KENNEDY: No problem, Mr. Commissioner.

THE COMMISSIONER: Okay, go – carry on, Mr. Simmonds.

MR. SIMMONDS: Okay. Thank you.

That, I understand, to be nine feet.

THE COMMISSIONER: Okay. So for the record, the pylon is nine feet from the chair, from the front of the chair. Is that correct?

MR. SIMMONDS: That is correct.

CST. SMYTH: I don't think the angle would be correct, Mr. Commissioner. I'm not sure exactly what he's doing, but –

THE COMMISSIONER: And I think there was some testimony that, I don't know if it was testimony or your indication that there's approximately a foot difference, depending on whether you measure from the right corner of the chair or the left corner of the chair?

MR. SIMMONDS: Measure the distance from this corner of the mantel –

THE COMMISSIONER: Okay, now, we're not picking that up on audio. So from the corner of the mantel furthest away from where Constable Smyth was originally standing – is that correct?

MR. SIMMONDS: If you measure from this corner –

THE COMMISSIONER: Which is, for the record, again, the corner where Constable Smyth indicated he originally took his position.

MR. SIMMONDS: – to that corner of the chair –

THE COMMISSIONER: To the corner of the chair, which would be the left corner with Mr. Dunphy's left-hand side where he was seated.

MR. SIMMONDS: – is nine feet. From this corner to the chair is eight feet.

THE COMMISSIONER: Okay. So from the far corner to the chair is, is – far corner, I mean furthest from Constable Smyth's original position, that's eight feet. And from his original position to the chair is nine feet, okay.

MR. SIMMONDS: Do you accept my measurements as being consistent with your recollection?

CST. SMYTH: Is the pylon supposed to indicate where I was standing at the point of the shot being fired –

MR. SIMMONDS: The pylon would represent the end of the mantelpiece –

THE COMMISSIONER: Sorry, are you trying, are you –

CST. SMYTH: Where I would have been standing?

THE COMMISSIONER: Sorry, I think Constable Smyth is asking, are you, is this set up to have the same angle of the chair –

CST. SMYTH: No, it's not.

THE COMMISSIONER: – you're just dealing with how far it would be, okay. The distance.

CST. SMYTH: The distance.

THE COMMISSIONER: Does the distance appear to be how far –

CST. SMYTH: Yeah –

THE COMMISSIONER: – you are, okay.

CST. SMYTH: – sure, that sounds, it looks about accurate.

MR. SIMMONDS: It looks about right?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

Would you agree that there are three options as to where the rifle would have come from. In one place it would be on the right side of the chair, or on the right side in the chair, one; two, fastened to the right side of the chair; or, three, on the floor on the right side next to the chair.

Would you agree that they're the only three options where the rifle could have been at the time you entered the room?

CST. SMYTH: Well, I think it could potentially be leaned up against the wall behind the chair as well.

MR. SIMMONDS: Okay.

CST. SMYTH: And I would suggest there are probably numerous positions on the floor where it could be.

MR. SIMMONDS: Well, will we agree that the first two are it was jammed into the cushion of the chair, which is what you said at one point and I can take you to the – if you go to Exhibit P-0122, August 26, 2015 at page 3.

CST. SMYTH: I think I later eliminated that as being very likely, given the size of the firearm, but I did make reference to that.

MR. SIMMONDS: We'll take you through it, Constable Smyth.

August 26, Exhibit P-0122, August 26, 2015 at page 3 – one more page, and about half ways down that large paragraph where you speak there, Constable Smyth, you say – this is about five, six lines down: All I know is that he reached down to his right hand side, you know, it was before I was able to kind of focus in on it, it was in his hands, you know, in this kind of fashion and being held – I don't know where his hands were now. I can't recall, so I don't know if it was on his side in the chair – option one – or if it was fashioned to the side of the chair – option two – or if it was on the floor next to him – option three.

Would you agree that those are the three options?

CST. SMYTH: No, I agree that that's what I said in that statement.

MR. SIMMONDS: Okay. And you don't agree they're the three options?

CST. SMYTH: I think there are additional options.

MR. SIMMONDS: And what would the additional options be?

CST. SMYTH: I think it could have potentially been leaning up against the wall; it could have been numerous places on the floor next to the chair.

MR. SIMMONDS: Well, we will show you some photographs and I'll ask you to review those photographs. And if it was on the wall (inaudible) if it was one the wall, he would have had to have been – you're talking about this wall right here?

THE COMMISSIONER: Just let me see the plan now so I can put it on the record. On the wall, that would be the wall you're saying to the back of the right-hand side of the chair, Mr. Dunphy's right-hand side.

CST. SMYTH: Correct. After doing the recreation I felt that there was potential it could have been actually leaning against the wall, maybe partially tucked behind the chair making it accessible by just reaching with your right hand.

THE COMMISSIONER: I think there was a reference somewhere to the possibility of it having been in a pocket on the side of the chair.

MR. SIMMONDS: I'm going to deal with that

THE COMMISSIONER: Okay, fine.

MR. SIMMONDS: And the other place I take you to would be Exhibit P-0120, which is the statement of April 10th, the re-enactment at page 10, which is probably page 11 of the – if you read about down at line 14, "It could've been jammed into the cushion." So you're meaning it could have been jammed into the cushion on the chair – correct, Officer Smyth?

CST. SMYTH: Yes. But I believe I had dismissed that as any likelihood, given the size of the firearm.

MR. SIMMONDS: So I don't know in any of the evidence that you dismissed either one of these options but if you know a place I'll certainly review too of it.

CST. SMYTH: I thought I did, but I don't know where it would be specifically.

MR. SIMMONDS: So option one is on his right side in the chair, could have been jammed into the cushion – correct?

CST. SMYTH: I had raised that as a potential option just by virtue of really having no idea where it came from. I'm speculating as much there as I am now.

THE COMMISSIONER: You're going down on to line 16 are you, Mr. Simmonds?

MR. SIMMONDS: I will if you wish. I was trying –

THE COMMISSIONER: Well, 'cause I see some relevance to what was said earlier.

MR. SIMMONDS: And it was mashed into the side of the chair. I can't say that that's not the case unless he had it poked into that side pocket.

THE COMMISSIONER: Right. Because of my reference earlier, yeah.

MR. SIMMONDS: Again, may I quote from (inaudible).

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: The chair's overall depth – and certainly this can be checked – is 30 inches back to front. The inside measurement from the back to the front of the arm is 21, 22 inches and the gun's overall length is 38.5 inches.

THE COMMISSIONER: Just give me those again. You got 30 inches back to front.

MR. SIMMONDS: The overall depth of the chair, from back of the chair to the front of the chair is 30 inches.

THE COMMISSIONER: Right.

MR. SIMMONDS: The inside measurement, back to front, is 22 inches. That's inside by the cushion you would sit up against. And the back cushion to the end of the arm is 21 inches because the cushion comes out a little farther. The overall length of the gun is 38.5 inches.

CST. SMYTH: Sorry, did you say the height of the back of the chair?

MR. SIMMONDS: No, I did not say the height of the back.

CST. SMYTH: Okay.

THE COMMISSIONER: Okay, do you want to just repeat it again so that everybody has it, Mr. Simmonds.

MR. SIMMONDS: The first option was that it's on the right side in the chair, could have been jammed into the cushion. In that situation, the chair's overall depth from back – the farthest point on the back to the most protruding point on the front, is 30 inches.

The inside measurement from the back, inside by the cushion where your back would be, to the front of the cushion which protrudes out, is 22 inches. The back cushion to the end of the arm, on which your arm would lie, is 21 inches.

The overall length of the gun, the rifle, is 38.5 inches. And the end of the barrel to the bolt is 13.5 inches.

THE COMMISSIONER: How much?

CST. SMYTH: And, Sir, how far was the chair out from the wall?

MR. SIMMONDS: We have the pictures that will indeed show that, Officer Smyth.

THE COMMISSIONER: From the end of the barrel to the bolt was how much?

MR. SIMMONDS: The end of the barrel to the bolt is 13.5 inches.

THE COMMISSIONER: Thirteen point five inches. Okay.

MR. SIMMONDS: So the chair with the gun in it would be 38.5 inches minus 22 inches using the biggest measurement. So it would be 16.5 inches sticking out. Would you agree?

CST. SMYTH: Yeah, again, when seeing the chair; hence, why I dismiss that.

MR. DROVER: Mr. Commissioner, it seems to me that we're kind of getting into some forensics here perhaps. I don't know how much is appropriate or exactly where we're going with it. I mean –

THE COMMISSIONER: Well, I'm not sure either. Mr. Simmonds –

MR. DROVER: – Constable Smyth's testimony is that he didn't see the gun.

THE COMMISSIONER: Sorry?

MR. DROVER: Constable Smyth's testimony was that he did not see the gun.

THE COMMISSIONER: Right, and I guess (inaudible).

MR. DROVER: So whether he should have saw it or –

THE COMMISSIONER: Just hold on. Mr. Simmonds is testing that, checking that and I don't think there's anything inappropriate so far.

He's given an objective statement of the distances in the chair or the lengths in the chair, which presumably counsel can check to confirm whether or not they're correct because – he's walking a thin, grey line in that if he's – he's got to choose, is he going to be a witness or counsel. This is usually the position that counsel may find themselves in.

So Mr. Simmonds, I am, I'm bending over backwards to avoid any unnecessary technicalities to slow down or to cause problems for your demonstration. But you know, you know that there are – there's only so far you can go there. But as I say, I don't think you've gone too far yet, but I don't know where you're going from here.

MR. SIMMONDS: I can certainly –

THE COMMISSIONER: You're – what you're attempting to show, I take it, that for these various options the firearm or parts of the firearm would or would not be visible.

MR. SIMMONDS: I'm attempting to show pretty much what you've just stated, Mr. Commissioner. That option number one, the gun was stuck into the cushion is not realistic. So much would be protruding that you couldn't possibly miss it at the distance that pylon is from the chair –

THE COMMISSIONER: Okay. Well save it, save that for the argument. We know what you're proposing.

So thank you.

MR. SIMMONDS: That option number –

THE COMMISSIONER: So go ahead. So that's option one. So it's – so option one is out, as far as you're concerned. Okay.

MR. SIMMONDS: Option two is that it's somehow fastened to the side. I believe the officer used the word fashioned, but I'll take that by what he means. And he can clarify that if it's not, he doesn't mean fastened. But I think that's what you meant by the word fashioned? That it's somehow attached to the side of the chair?

CST. SMYTH: Right. And that was, I made that statement without even seeing –

MR. SIMMONDS: Fair enough.

CST. SMYTH: – that side of the chair. When we did the re-creation I had made some suggestion that, clearly that wasn't the case. There was no holster fashioned –

THE COMMISSIONER: So there's a – there's a, is there a pocket on the other side visible to you?

MR. SIMMONDS: There is a pocket on the other (inaudible).

THE COMMISSIONER: On which side is the pocket? The –

MR. SIMMONDS: There's a pocket on both sides, Mr. Commissioner.

THE COMMISSIONER: A pocket on both sides?

CST. SMYTH: So I did make the suggestion when seeing the pocket, that it could have been partially –

THE COMMISSIONER: Right.

CST. SMYTH: – held in that, maybe leaned against the wall but, you know, I don't know. Again, I was just providing –

THE COMMISSIONER: All right. So what are you asking us to see there?

MR. SIMMONDS: So the first is –

THE COMMISSIONER: We dealt with one, this is number two. So –

MR. SIMMONDS: Number two, and the third option is that –

THE COMMISSIONER: And you're rejecting option two because the firearm was too long considering where the pocket is?

MR. SIMMONDS: No, I'm – for a number of reasons I'm rejecting option two, and I believe Officer Smyth will reject option two, is that during the re-creation he was in there, he didn't see anything that would allow it to have been attached to the side of the chair. I'm sure Constables – Corporals Henstridge or Burke, if they had have found any kind of apparatus that would allow the gun to have been attached to the side of the chair, would have indicated that. I don't believe that there's any indication that that's the case. So it's not option two, I would respectfully say.

THE COMMISSIONER: Okay, go ahead.

MR. SIMMONDS: Okay. Option three is that it's somewhere on –

THE COMMISSIONER: You're (inaudible) I think rather than putting it as your submission for closing argument, put it to Constable Smyth, would he agree that that's most likely?

MR. SIMMONDS: And I'm – I was going to go up with the gun to prove the point, if that's acceptable.

THE COMMISSIONER: If Constable Smyth accepts that that's likely, I don't know if you need to do that. I thought Constable Smyth said – did you accept that that option two that was mentioned was not, was not likely?

CST. SMYTH: Where it was – where it was stuck in the chair?

THE COMMISSIONER: Supposedly fastened to the chair.

CST. SMYTH: Yeah, I eliminated that as soon as I saw the side of the chair. I did make the suggest that with the pocket there it could have perhaps been maybe partially in that pocket and leaning up against the wall. But without examining that further, I don't know if that's an option either.

THE COMMISSIONER: Sorry, I couldn't hear, you were turned away.

CST. SMYTH: I don't know if that's an option either. I just made that as a suggestion. But no –

THE COMMISSIONER: Okay.

CST. SMYTH: – there was obviously no holster fashioned there, and it obviously can't be stuck into the cushion.

THE COMMISSIONER: So what do you want to do, Mr. Simmonds? Go ahead.

MR. SIMMONDS: I wanted to show that it couldn't have been in the pocket without being clearly visible.

THE COMMISSIONER: Go ahead, go ahead.

I assume that's a lock on the trigger there.

MR. SIMMONDS: It is, sorry.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: (Inaudible) if it was any ways into the pocket or fastened to the chair.

CST. SMYTH: That wasn't my suggestion.

THE COMMISSIONER: Sorry?

CST. SMYTH: That wasn't my suggestion.

THE COMMISSIONER: Oh, okay. What was your suggestion, Constable?

CST. SMYTH: That perhaps the barrel or the stock could have been in the other way so that the barrel or the stock was leaning against the wall.

MR. SIMMONDS: Which would be outside the chair.

CST. SMYTH: Which would be behind the chair, perhaps leaning against the wall.

MR. SIMMONDS: Behind the chair leaning against the wall, fair enough. But you agree it's not –

THE COMMISSIONER: Okay. The so-called option two leaves – just for the record – how many inches we're talking about, close to the 13 inches anyhow, 9 or 10 inches sticking out from the front of the chair.

MR. SIMMONDS: (Inaudible) 9 or 10 –

CST. SMYTH: I had never proposed anything like this, your honour.

THE COMMISSIONER: Okay.

Go ahead, so option three.

MR. SIMMONDS: Option three is that it's on the floor or somewhere in that vicinity.

CST. SMYTH: Well, on the floor I guess it could – there's maybe a foot or a foot and a half between the chair and the wall. But it could have been, you know, a couple of inches from the chair. It could have been partially – I guess see there now maybe parts (inaudible) –

MR. SIMMONDS: Do we have the book photos?

CST. SMYTH: Of course the other option –

MR. SIMMONDS: Perhaps we can deal with that.

CST. SMYTH: The other option being leaned up against the wall behind the chair.

MR. SIMMONDS: The book of photos and the first – and now, the confidentially issue with respect to these photos I have reviewed with Meghan and we dealt with this last time. Some of these pictures are indeed pictures of the deceased in the chair. I thought your ruling had been or your agreement had been the last time, your ruling, to let these pictures become – because members of the public were not able to fully follow what was taking place 'cause they couldn't see the pictures.

THE COMMISSIONER: Again, it may be my recall, but I don't recall using those terms. The general, the understanding when we started that there would be photos just to preserve the dignity of the body that we would not be posting publically the pictures of Mr. Dunphy deceased. There are then – if there are photos that are necessary to show aspects of the case obviously, Mr. Simmonds, you can call the shots on that in consultation with Ms. Dunphy, I assume.

But at times, just because this is an open hearing does not mean that everything is going to be displayed to the public. Sorry, that's not the way it works.

MR. SIMMONDS: No, but do you recall –

THE COMMISSIONER: I'm not really saying sorry to you; I'm saying sorry to members of the general public who think they are entitled to see everything in every fine detail.

MR. SIMMONDS: Do you recall, though, last week, Commissioner –

THE COMMISSIONER: Go ahead. Sorry.

MR. SIMMONDS: One of the gentlemen spoke to me and indicated that he could not follow – this is the gentleman that is doing some kind of a book or some kind of an article or some information with respect to it, could not follow the gist of what was being said because he could not see the pictures. I raised that with counsel, Commission counsel, and I raised it with other counsel here and I thought the agreement was – and I had reviewed it with Ms. Dunphy, obviously, to make sure she would not be upset by these pictures. I thought the agreement was that these pictures would now be put up, but it's not my issue.

THE COMMISSIONER: Was there any undertaking that the pictures would go up. I frankly I don't recall it, but it's not the first thing I don't recall. Go ahead.

MS. O'BRIEN: Thank you, Commissioner. It's not our recall that it was ever fully resolved, though I fully agree with Mr. Simmonds that we had discussed that and one of the options that we discussed was that the photographs could be shown on the monitors here so that people in the room could see them, but that they would not be broadcast out over the Internet.

THE COMMISSIONER: Right.

MS. O'BRIEN: So that was certainly one that was discussed, but I don't know if it was finally landed on.

THE COMMISSIONER: Right. And with – I don't have any problem with that, Mr. Simmonds, as long as we keep in mind the photos you select should be the least disturbing as possible.

MR. SIMMONDS: They are the least – I don't know if I can put that –

THE COMMISSIONER: But as long as they meet your requirements, you know.

MR. SIMMONDS: One of the pictures is going to be a clear shot of the deceased sitting in the chair.

THE COMMISSIONER: What's that needed for?

MR. SIMMONDS: Because it shows the distance and the – the distance between the side of the chair and the nearest other item. It shows the path into it and the distance the chair is from the wall or it gives a general idea.

THE COMMISSIONER: When you say it shows the distance, you mean –

UNIDENTIFIED MALE SPEAKER: Forty-four.

THE COMMISSIONER: – you mean it gives a rough approximation from your – it wasn't measured, I take it.

UNIDENTIFIED MALE SPEAKER: No.

THE COMMISSIONER: What is the photo?

MR. SIMMONDS: It's Photo 044. Perhaps you want to look at it in confidence first?

THE COMMISSIONER: Can I see it, please?

No, I don't think that's appropriate. I don't see 044 as being appropriate and I don't see it as being something you can get the distance out of either. Forty-five – 045 is quite close to the same thing in terms of what your, what your needs are, Mr. Simmonds. It's –

MR. SIMMONDS: It is and four of those – the other two that I wanted are Photos 103 and 104

THE COMMISSIONER: Would you agree that 45, 045 – CWS0054, what's that? Okay.

So it's – would you agree that that 045 is suitable or acceptable?

MR. SIMMONDS: Mr. Commissioner, the problem that it has it doesn't show the arms. And, again –

THE COMMISSIONER: Doesn't show the arm. What arm?

MR. SIMMONDS: It doesn't show the arms and the distance you would have to reach back if the firearm was leaning against the wall which is one of the options –

THE COMMISSIONER: Well, it doesn't show that on the – it doesn't show that on –

MR. SIMMONDS: But it gives you a much better –

THE COMMISSIONER: Well, it doesn't give me any better –

MR. SIMMONDS: Okay. Okay.

THE COMMISSIONER: – perspective of this –

MR. SIMMONDS: Okay.

THE COMMISSIONER: – that you're trying to show me. I have no idea what the distance is from that white, I think it's a garbage bucket to the right of the chair, back to where that apparent plug is, just past Mr. Dunphy's right elbow there.

MR. SIMMONDS: Uh-huh.

THE COMMISSIONER: Now, that plug is apparent in the next photo as well. You can see. Do you see that?

MR. SIMMONDS: The plug is apparent in Photo 045.

THE COMMISSIONER: That's what I'm saying.

MR. SIMMONDS: Yes. Yeah.

THE COMMISSIONER: So I don't, I don't see and I think we're getting—

MR. SIMMONDS: And the other two —

THE COMMISSIONER: — we're getting into the — an aspect of sensationalism and —

MR. SIMMONDS: That's not my intention.

THE COMMISSIONER: Well, it may not be your intention but I have to consider what the result is, Mr. Simmonds. And I have to be sure that there is sufficient probative value for what you're proposing to have this go out as a public exhibit. And you haven't shown me where the probative value is yet and I can see for myself that it's a, you know, a highly inflammatory photo.

MR. SIMMONDS: The other two pictures that I would utilize would be 103 and 104.

THE COMMISSIONER: 103 — sorry, 103 — where am I? 099 — okay, 103, that seems to be — yeah, that seems to be okay. And, again, I think it gives as much of a picture of the distance as the first one you asked to put in, doesn't it, as far as that area of the plug is concerned and the right arm of the chair.

103 — where's 104?

MR. SIMMONDS: 104 is right underneath it.

THE COMMISSIONER: Okay, 104. Any — counsel have any comment on any of those?

I think we have to again keep in mind it's one thing when you go open in the age of social media, the — you're not, you're not in a position to rely upon the professional discretion of either counsel or the media, local media, who are present and see the photos and what distribution is made of photos outside the inquiry room.

So tell me, are you satisfied you can proceed with 103, 104 and the — what was the other number, 40 —

MR. SIMMONDS: 045.

THE COMMISSIONER: 045.

MR. SIMMONDS: Yes, we'll utilize those.

THE COMMISSIONER: All right. I'm going to take it as — I haven't heard from counsel so I'm assuming there's no objection from counsel.

Sorry, Ms. O'Brien, go ahead.

MS. O'BRIEN: No, Commissioner, I just wanted—

THE COMMISSIONER: I, I was referring to external counsels.

MS. O'BRIEN: Yes, I understand. I just want to confirm what your ruling is before things start happening. When these photographs are shown will they not be broadcast over the Internet on the website?

THE COMMISSIONER: No, these ones that we're releasing now, it's up to — subject to any objection, they would go out, the 040, 045, and 103 and 104 I think it is, that those are the numbers.

MR. SIMMONDS: That's correct.

MS. O'BRIEN: As public exhibits.

THE COMMISSIONER: They would go out as public exhibits.

MS. O'BRIEN: So they'll be posted on our website, broadcast over the Internet and media will be able to capture photographs of them.

THE COMMISSIONER: That's — yeah.

MS. O'BRIEN: Okay. I just wanted to make sure it was clear what was happening.

Thank you.

THE COMMISSIONER: Unless as I say, Mr. Kennedy —

MR. KENNEDY: Yeah.

THE COMMISSIONER: — you're blinking green, you're red.

MR. KENNEDY: Yes.

THE COMMISSIONER: You've gone red. Are you —?

MR. KENNEDY: Yes, I don't understand the purpose of the photos other than to be utilized here. There is an inflammatory aspect as you've pointed out, Commissioner. I'll leave it to your discretion but they're confidential exhibits. They can be utilized for whatever purpose they're needed to be utilized here so —

THE COMMISSIONER: Well in the — it was put to me, I'm not sure I agree, but it was put to me that there was difficulty on the part of the general public present in the inquiry room to follow the testimony without having the photos. And the same thing would apply for, to your eye, even more strongly to the general public who are not in the inquiry room. So that it would be in the hope and expectation that anyone looking either on our web feed or elsewhere would be able to better understand the testimony.

Now you're looking quizzical Mr. Kennedy. What that — it seems to me, isn't it, we're just not talking about members of the general public who are here having difficulty following. We're, if we're going to make it suitable for them to follow, then presumably the members of the general public who are not present should have the same opportunity.

You have, do you anything?

MR. KENNEDY: Yeah –

THE COMMISSIONER: I'm not sure if you're objecting or –

MR. KENNEDY: No, I'm not objecting.

THE COMMISSIONER: – just seeking –

MR. KENNEDY: I'm not objecting, Commissioner.

THE COMMISSIONER: – seeking clarification or what.

MR. KENNEDY: I'm not objecting because it's entirely within your discretion. The problem is, though, that there has been a significant inflammatory and prejudicial backlash which always goes against my client in the public or in the media or social media –

THE COMMISSIONER: Which is why I have decided that the first suggested photo should not go in. Now, the second one and the two last ones, they do not seem to me to have the same inflammatory aspect, unless I'm missing something.

MR. KENNEDY: Commissioner, if I could just ask you to look at – so we're talking about photographs –

THE COMMISSIONER: Which one are you looking at now?

MR. KENNEDY: Ah no, we're talking about Photographs – if I understand Mr. Simmonds – 045, 103 and 104. There was another one, Mr. Simmonds, wasn't there?

MR. SIMMONDS: I have to make something clear, Mr. Commissioner. I'm certainly willing to use the photographs as confidential photographs, use the ones I want and I am not here running interference for the public.

One of the gentlemen approached me. That's why I brought it to the attention of counsel that the gentleman was saying – and he's been here throughout – that he couldn't follow.

If your ruling is, or if your concern is that any of these pictures are inflammatory, I'm fine. Look, we won't use them at all with respect to – unless they're confidential. I will use them as confidential exhibits, I'll make the references to it and the public won't see it.

I am not making a stand here to have the public have access to this; I simply communicated when one gentleman came to me and said that last week.

THE COMMISSIONER: Well, it has led to some confusion, Mr. Simmonds. But, again, there is a, there is a public aspect to this case that I don't want to unduly restrict. As I understand it, this package of photos was available to counsel and was reviewed by Commission counsel and other counsel, was it not?

MR. SIMMONDS: And the photos are –

THE COMMISSIONER: And they were – it was decided that they should go in as restricted, restricted photos.

MR. SIMMONDS: I'm not going to get in the middle of this. I thought we had a decision on this last week. I thought I'd raised it because this gentleman just passed me this. I'll leave it to the Commission counsel how they want to deal with it.

I am not attempting to have these pictures made public. I thought the issue was – and perhaps I understood but I thought your – Mr. Commissioner had said that we could talk to counsel. If they agreed on it, then the pictures would be available to everybody. I thought that was when we left here last week.

THE COMMISSIONER: The way it works, the way it works, anything like that refer to counsel, contact counsel; you come back to me for a final decision. It never came back to me that I'm aware of for a final decision. Now –

MR. SIMMONDS: I thought –

THE COMMISSIONER: – oh –

MR. SIMMONDS: I thought we had that piece –

THE COMMISSIONER: Maybe –

MR. SIMMONDS: – but in any event –

THE COMMISSIONER: – unless I'm missing something. Go ahead, Ms. O'Brien.

MS. O'BRIEN: Thank you, Commissioner.

I've just been passed a note for Mr. Simmonds but it's from someone in the, in the hearing room. It's not Mr. Simmonds's note. It says: Need to see the scene to see if Mr. Smyth is telling the truth of where the gun fell.

THE COMMISSIONER: Well, I wish I had his ability to perceive as finally as that. I may or may not be in a position to decide that. In terms of, in terms of individuals who are looking at the photos in the inquiry room, do we not – is Photo – has Photo 046 gone in, 046 being that you've never – in terms of where the firearm ended up, is that – has that gone in through any public photos?

UNIDENTIFIED MALE SPEAKER: Commission counsel (inaudible).

THE COMMISSIONER: Yeah.

MR. KENNEDY: Commissioner, if I could just clarify one point, too. There's no allegation on our part that Mr. Simmonds is doing anything. He was simply the message bearer when he came up to us last week or talked to people. He's – this is not, there's no allegation made that Mr. Simmonds is trying to enter inflammatory photos. That's not –

THE COMMISSIONER: No, I understand.

MR. KENNEDY: Okay. I just wanted to make that clear, though, from our perspective.

MS. O'BRIEN: Commissioner, I do not believe Photo 046 has gone in.

THE COMMISSIONER: Do we have either similar photo –

MS. O'BRIEN: (Inaudible.)

THE COMMISSIONER: – which shows the manner in which the firearm was found –

MS. O'BRIEN: Yes.

THE COMMISSIONER: – according to the testimony.

MS. O'BRIEN: Yeah.

THE COMMISSIONER: Do we have a photo similar to that?

I'll just take, take a moment here to check and see because I think that is an aspect of the evidence that – where a picture might be worth a thousand words.

MS. O'BRIEN: Commissioner, I may have misspoke. I was just checking with Madam Clerk, but when I look at the book I do think that Scene 046 went in as a confidential exhibit already.

MS. CHAYTOR: Yes, it's –

MS. O'BRIEN: And that does show the gun on the top.

THE COMMISSIONER: All right. Did you have something to add there, Ms. Chaytor?

MS. CHAYTOR: No, that's right, they are – 046 is in and 044 –

THE COMMISSIONER: 046 is –

MS. CHAYTOR: 044, 045, 046, 047, they're all in evidence as confidential exhibits.

THE COMMISSIONER: Right. Now, does anybody have any problem with the exhibit, Photo 046 going in as a public exhibit? Being changed from – Mr. Kennedy, you have no concerns as far as your –

MR. KENNEDY: The only concern I have –

THE COMMISSIONER: Basically, that's showing the way the rifle landed and the barrel appears pointed in Mr. Dunphy's position and the stock away from him.

Go ahead.

MR. KENNEDY: Yeah. Unfortunately, Commissioner, 044 is the best picture that looks directly at the scene, but my concern –

THE COMMISSIONER: No, not in terms of the firearm, 044 doesn't –

MR. KENNEDY: No, no, but my concern is, Commissioner, where Constable Smyth was standing. These pictures are very difficult to find one that shows the perspective of where he was standing and what he was looking at as we're talking about the right side of the chair. And I don't know if –

THE COMMISSIONER: Well, that's fine. That's a different question now.

I've decided, subject to anything further, that Photo 044 is not going in as a public exhibit, okay. It is too graphic and it is not appropriate for widespread distribution. Nothing to be – sorry, Mr. Simmonds?

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: You're fine with that.

So that photo will be – the needs of Mr. Simmonds and as far as you can get it, Mr. Kennedy, yourself, in terms of the positioning of Constable Smyth, while it doesn't show as wide a scene arguably, I think you get basically the same thing from Photo 045. So that 045 should go as a public exhibit, if there are no objections. And 046 would meet the concerns of those members of the general public that want to get a better view of just exactly how that rifle was found by first responders when they appeared and the first police on the scene following the shooting. And we have – so that will go as a public exhibit; again, last chance for objections.

And then we have 103 and 104, Mr. Simmonds which –

MS. O'BRIEN: 104 is public already.

THE COMMISSIONER: 104 is public already. Okay.

So – and that purportedly shows the floor to the right of Mr. Dunphy's chair and 103 – yeah, 103 shows the same basically. So 103 and 104 can go in as public exhibits.

All right, anything further to be dealt with in that regard? It's getting late in the day which may explain why it's getting a bit slow, too.

Okay. Mr. Simmonds, carry on. Are you finished? You've gotten to option three, which was what?

And by the way, this is an exceptional circumstance where I'm accepting a message from, from the general public by means of Mr. Simmonds. And I'm not blaming you for that, Mr. Simmonds. We're not carrying on the inquiry by hourly or daily notes sent in to us.

Go ahead. Option three? What do you see?

MR. SIMMONDS: Option three, Mr. Commissioner, is that the rifle is on the floor on the right side of the chair.

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: And Officer Smyth has added now – I had not seen this before, but Officer Smyth has added now that he believes it might be stood up against the wall, back of the chair or by the side of the chair.

Is that correct, Officer Smyth?

CST. SMYTH: Well, I think we'd be remiss not to consider all options. I've never said specifically where it came from other than to the, to the right.

MR. SIMMONDS: And I intend to use the pictures. If they're not – if, indeed, those pictures are confidential, they are confidential; if they're not confidential, they're not confidential.

THE COMMISSIONER: That's fine.

MR. SIMMONDS: That's fine? Then I –

THE COMMISSIONER: Now, do we have – is that the last option, option three?

MR. SIMMONDS: Option three is –

THE COMMISSIONER: Was the –

MR. SIMMONDS: – the option that it must be, would you agree, Officer Smyth?

THE COMMISSIONER: Are you talking about we'll say to the right side of the chair, either leaning against the wall or on the floor?

MR. SIMMONDS: Or on the floor.

THE COMMISSIONER: Right.

MR. SIMMONDS: Or against the wall.

CST. SMYTH: On the floor or against the wall?

MR. SIMMONDS: Yeah.

CST. SMYTH: That would be, I think, the most reasonable –

MR. SIMMONDS: That's the –

CST. SMYTH: – options there.

MR. SIMMONDS: Well, we've eliminated one and two. It couldn't have been tucked into the chair. Agree?

CST. SMYTH: Into the cushion?

MR. SIMMONDS: Into the cushion of the chair.

CST. SMYTH: I agree.

MR. SIMMONDS: It could not, it was not – you were never told of any devices used to fasten it to the side of the chair. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: You looked at it during the re-enactment. You didn't see any devices to fasten it to the side of the chair.

CST. SMYTH: Correct.

MR. SIMMONDS: And when you look at the chair now if it was stuck in the cush – in the pocket on the side of the chair, it would be protruding out, you would have clearly seen it? Correct?

CST. SMYTH: Well, it could have been extended back the other way on an angle behind the chair. Absolutely it was not sticking out the way you so set it out.

MR. SIMMONDS: If it was sticking towards the back of the chair in the pocket, it would mean someone would have to reach down, turn the gun around to point the barrel at you. Correct?

CST. SMYTH: If the barrel of the gun is in the pocket and the back of the gun is back towards the wall, then no.

MR. SIMMONDS: If the barrel of the gun is in the pocket, they would still have had to reach down, bring the gun up over the arm –

CST. SMYTH: Correct.

MR. SIMMONDS: And if I put that in the pocket, I don't believe it will stay there. Do you take issue with that?

CST. SMYTH: I don't know. I don't know the answer to that.

MR. SIMMONDS: I don't want to get into another demonstration.

THE COMMISSIONER: You're not going to, Mr. Simmonds.

MR. SIMMONDS: Your Honour – or, Mr. Commissioner, I'm going to ask if we can break here today. It's about quarter to. If you want to start – I have no problem if you want to start 15 minutes early, but I think this will be an appropriate place to take our break for the day if we could.

THE COMMISSIONER: Right.

Just one second now, we'll see if we're finished with the – have you finished with the chair?

MR. SIMMONDS: No, I was going to leave the chair there because I believe it's useful. But I will have it put away this evening.

THE COMMISSIONER: Right.

You're – excuse me, you looked somewhat quizzical on my last remark when I spoke about not getting into a demonstration.

MR. SIMMONDS: No, what –

THE COMMISSIONER: Do you have some concerns there?

MR. SIMMONDS: Well, I've attempted to use the chair. Obviously, with the greatest of respect, I feel that you're not – you don't put any weight to this at all. You think that I'm wasting the Commission's time but you're going to let me do it.

I believe the first two –

THE COMMISSIONER: Well, you know, I –

MR. SIMMONDS: I believe the first two options are clear, that it couldn't have been tucked into the cushion – I exempt it – nor could it be tucked into the side pocket. Officer Smyth says

now it could have been tucked in with either the butt end hanging up or the, or the barrel hanging up.

THE COMMISSIONER: That seems to me to be a matter of common sense. That you can put

MR. SIMMONDS: And which would be clearly visible.

THE COMMISSIONER: If there's a pocket there, it could be – the barrel could be down or the, or the stock could be down.

MR. SIMMONDS: And it would be clearly visible in that situation.

THE COMMISSIONER: It would be clearly visible on the measurements that –

MR. SIMMONDS: Clearly visible from the photos that we've seen.

THE COMMISSIONER: Correct.

MR. SIMMONDS: Right.

THE COMMISSIONER: So –

MR. SIMMONDS: So that's what I wanted to do was put it but I'm not going to argue it any further.

THE COMMISSIONER: What did you want to do? You wanted to bring the –

MR. SIMMONDS: I wanted to put the gun into the pocket.

THE COMMISSIONER: Let's do that before we break.

UNIDENTIFIED MALE SPEAKER: Mr. Simmonds, I think you (inaudible).

MR. SIMMONDS: No, I can get this on (inaudible).

THE COMMISSIONER: Uh-huh.

So just for the record, Mr. Simmonds has placed the rifle in barrel first with the butt – would be pointing out in the direction that Mr. Dunphy would have been sitting or watching from his chair.

Go ahead. So you're going to now put the –

CST. SMYTH: I can see it, yes.

THE COMMISSIONER: And they, just for the record again, there's approximately eight or nine inches of butt that would be sticking out in front of the chair. On this one, the – you've put the barrel of the rifle in first with the butt pointing back towards the wall behind Mr. Dunphy's chair.

And there, the – it is not as obvious that the gun would be visible from the front. And the, you're showing, I think you said 13 inches so it's probably 10, 11 inches, roughly, sticking out back behind the chair. Would that be, would that be what would be appropriate there to record, Mr. Simmonds?

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: Okay. All right, anything further?

MR. SIMMONDS: The last of the locations I suppose are –

THE COMMISSIONER: It could be with the barrels – the butt in first and the barrel pointing to the front of the chair. And it would – and most of the barrel would be showing in front of the chair.

Go ahead.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

THE COMMISSIONER: And the second one was with the stock in and the barrel pointing behind the chair. The first – the first and the third, I guess would be, would you agree, improbable, Constable, without your having seen the –

CST. SMYTH: Yes, absolutely.

THE COMMISSIONER: – the firearm.

CST. SMYTH: Any portion of the firearm, especially in that significance sticking out in front of the chair –

THE COMMISSIONER: Whether it was the barrel or the stock that was sticking out –

CST. SMYTH: – I would have seen it.

THE COMMISSIONER: – you probably would have seen it.

Okay, Mr. Simmonds, is there anything further you want to demonstrate with respect to the chair?

MR. SIMMONDS: Another time.

THE COMMISSIONER: All right. Can you tell us how much further you're going to need with Constable Smyth, by the way?

MR. SIMMONDS: Hmm.

THE COMMISSIONER: I just want a rough estimate to assist us in –

MR. SIMMONDS: I would think between an hour and a half and two hours. I wouldn't think I'd be any longer than that.

THE COMMISSIONER: Right. Okay, now before I leave, I'm not going to leave your earlier comment unnoted –

MR. SIMMONDS: Which is?

THE COMMISSIONER: – which is that I was showing no interest in the chair or what you were proposing with the chair. I'd suggest that you wait or either raise it as an objection as to what I am saying or what I am doing before you make commentary on it.

And if it happens again from anybody, it won't go without consequences, okay?

MR. SIMMONDS: And I take it I'm supposed to take that as some – as an acknowledgement of –

THE COMMISSIONER: Well, do you understand to what I refer and do you consider it an appropriate remark?

MR. SIMMONDS: I felt, as I said, that what I heard of the – and perhaps I didn't hear your full statement, was that you were saying you didn't see use of this process. If that's the case, I was willing to stop.

THE COMMISSIONER: There was never any reference to my seeing any use of that process. I did find a problem with some of the ways in which you proceeded to go about it, including the use of that first photo that you proposed. But that was, that was not a problem, it was resolved. Right –

MR. SIMMONDS: But –

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: I'm not – you're taking issue with me for these photos. I am not presenting any position on it.

THE COMMISSIONER: I'm not taking issue with you, Mr. Simmonds. I'm just saying that you should understand the effect of that particular photo and the undesirability of having it in widespread publication. Not in the hands of responsible journalists or responsible counsel, but out in the sphere, the general public, where it's use would not be controlled.

Sorry, go ahead, you want to –

MR. SIMMONDS: At the risk of repeating myself, because obviously I'm not doing a very good job at communicating this to you. Last week, I was approached by the gentleman. I did not take any position on it.

THE COMMISSIONER: We're passed that now. We're passed that.

MR. SIMMONDS: I said it to counsel, and that's how I got to be the spokesperson, somehow, for it.

THE COMMISSIONER: I'm not speaking about that. We're speaking about –

MR. SIMMONDS: The photo I want to use, if it's acceptable to you, these are photos that we're entitled to use, some of which will be –

THE COMMISSIONER: And by the way, you're entitled to use them all in the course of your submissions as we go along.

MR. SIMMONDS: And we're entitled to use them, are we not, in the course of examination as we go along? That was what I was – I just put that forward to be an assistance to someone that came – I was not taking any position on it. Your ruling with respect to why they are inflammatory I take no issue with, but I want and intend to use them. If you want to say no, they're not going to be made clear to the public, that's not what I understood last week. But that's fine. I'm not taking any position on it either way.

THE COMMISSIONER: That's why I say we're past that. We resolved that. But subsequently when you made the comment about my attitude towards your use of the chair, that's where I did not consider it appropriate, quite frankly. You obviously think differently.

MR. SIMMONDS: Mr. Commissioner, I understood from what was said, and obviously you're saying I never heard all of it, but that's what I thought you said. And if that's the case, I will stop using the chair and I would stop going through this demonstration.

It was the whole reason why I wanted to call or have called the expert because I believe the issue of how the gun came from the floor up to the chair in a firing position, or in a position that could have been pointed at Officer Smyth is very, very much the crucial nub of this whole issue and how believable his evidence is (inaudible) that I couldn't see the gun. I didn't see gun at any point in time. I believe that's a very fair, real issue, and I believe it's only one that can be fully, fully exhibited by having science step in.

THE COMMISSIONER: Are we into another –

MR. SIMMONDS: No.

THE COMMISSIONER: – issue now in terms of the proposed experiment? Is this what you think is under discussion now?

MR. SIMMONDS: No, I thought the – I'm not sure I'm following you. We made the application with respect to the expert and you're going to decide on that down the road.

THE COMMISSIONER: Yeah, but is this further argument you're making on that now?

MR. SIMMONDS: No, no, it's part of the statement as to why –

THE COMMISSIONER: And how is that related to the demonstration?

MR. SIMMONDS: Because I believe some of the things that I've demonstrated would be the very issues that this expert would go over. Where the gun was to, how it came up from the side. I take it I'm either missing your point or –

THE COMMISSIONER: Yeah, I think you are missing the point.

All right. You've heard what I had to say and it was a remark that I interpreted as an unnecessary criticism. And I don't care about personal criticism, but I'm acting as a Commissioner under a statute that been enacted by the House of Assembly on behalf of the people of Newfoundland and I'm going to protect this inquiry and you have a professional responsibility in terms of the way you deal with –

MR. SIMMONDS: And I don't think in the 36 years I've been practising law that I've ever violated that professional responsibility, and I've appeared before you many times.

THE COMMISSIONER: Okay. And let's leave it at this. You go back and think about your comments this afternoon and see whether it falls within the purview of the responsibilities you have as counsel, all right. We'll deal with it further when we come back – briefly, we'll deal with it when we come back tomorrow.

But as I heard your remarks, they were not remarks that I should let go unchallenged, and I don't.

Okay. We're going to break now – it's two minutes to five – until 9:30 tomorrow morning.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now closed.