



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 8

Commissioner: Honourable Justice Leo Barry

Tuesday

24 January 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry is opened.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Good morning.

Everybody here? Oh, Mr. Flaherty –

MR. SIMMONDS: He has something in court.

THE COMMISSIONER: Yes, he informed us that he wouldn't be here. Thank you Mr. Simmonds. He won't be here till this afternoon, so if he's in the order before that we'll just put him at the end of the list.

Now, Mr. Simmonds, we had a matter briefly discussed before we got started. Did you get a chance to get back over the remarks that I referred you to?

MR. SIMMONDS: Yes I, the – I reviewed the footage last night, Mr. Commissioner. It was a long day, I was tired and I regret my comments that you take issue with.

THE COMMISSIONER: It's past – all right, thank you.

I might say that it seemed to have started, the chain of comments, when you misunderstood I – when I was referring to a waste of time, which is what you heard, I was referring to it would be a waste of time were Mr. Kennedy to insist upon proving the continuity of possession of the chair.

And Mr. Kennedy sensibly accepted that the demonstration could proceed on the assumption that was either the chair or it was pretty well identical to the chair from – that we have photos of in the photo binder. So that's past. We'll move on from there. I will say that rather than being dismissive of the demonstration, it was actually, from my perspective, quite helpful in terms of understanding other possibilities in terms of where the gun, the rifle was in the room.

One point that I guess should be noted that will come out probably with the forensic witnesses, is that there was a fair bit of material in the side pocket. I can't remember if it was – if they refer to both pockets or just one.

MR. SIMMONDS: Mr. Commissioner –

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: Pardon me. I'm going to take Constable Smyth to a picture that –

THE COMMISSIONER: Right. Okay.

MR. SIMMONDS: And there's another point I've got to make when you're finished your –

THE COMMISSIONER: All right. That's fine.

I'll just leave it at that. I'll just say that I did find it useful. I'm not sure it's supportive of the notion of having the experiment because, if anything, it brings in certain other variables in terms

of the measurements. The measurements would vary depending upon how you – depending upon the angle of the rifle. If it's down in the pocket vertical or tilted back, or tilted ahead, that might have some influence on the measurements that would be assumed for that experiment and arguably – I'm still waiting until I hear the forensic evidence, but arguably it would make it more difficult to see how the experiment could usefully come to bear on an important issue in the case.

I mention that just to get you thinking about –

MR. SIMMONDS: Yes, I'll think about it.

THE COMMISSIONER: – at some point we're going to have to have a final argument and have me make a decision on that point regarding experiment. I am taking my time on that because I know that it's a significant factor in your approach to testing Constable Smyth's credibility and, therefore I don't want to be – to quickly dismiss about what we might get and the preliminary work that's done by the professor who you contemplate calling. It's interesting and it's not something that I'd quickly say could not be useful, but I have to keep in mind, and you might give – all counsel might give some thought to this, at some point you're going to be addressing it.

I have to, I think, keep in mind the test for concluding that evidence is sufficient on a particular point, and when can I make an adverse inference or make a finding of misconduct which would be, I think, in effect what I would be doing if I adopted your submission, Mr. Simmonds. It would result in, either directly or indirectly, arguably a finding of misconduct regarding Constable Smyth. And I think the law is fairly clear, that you got to, you got to have sufficient evidence and be able to give your reasons for choosing one version of the evidence over the other.

Anyhow, let's just – thinking ahead for when we get into further argument either on a specific evidentiary point or on the final report that I'll have to prepare.

Okay, Mr. Simmonds, I would leave it at that. And thank you for your comments and you can proceed with Constable Smyth.

MR. SIMMONDS: Mr. Commissioner, the chair is not going to be utilized today but it's in the room.

THE COMMISSIONER: That's all right.

MR. SIMMONDS: Could we provisionally have an order that's part of the evidence until you make your decision with respect to the expert, if you determine – because I think the two may be –

THE COMMISSIONER: That was the reason why I approved bringing in the exact chair because it removes one variable which is if you have a substitute chair to have the engineer do the work on, then you got that other variable, as you know, are the dimensions exactly the same. So that's why I ordered that the original chair be brought in, even though there had not been continuity of – the chain of possession had been broken. So, yes, I can provisionally –

MR. SIMMONDS: I understand (inaudible).

THE COMMISSIONER: – order that the chair constitute part of the evidence throughout the inquiry, that's fine.

MR. SIMMONDS: Thank you. And you're satisfied, and I take it counsel are satisfied, the staff here has a key. It's a room with nothing else in it and they've locked it just as a –

THE COMMISSIONER: You know, I don't think we need to get overly technical in the situation.

MR. SIMMONDS: And Commission counsel pointed out to me yesterday because we came up – the measurements I gave are the base of the chair.

THE COMMISSIONER: Yes, counsel pointed out to me that there appeared to have been a discrepancy in the forensic measurements and the –

MR. SIMMONDS: And he measured from the top which the back tilts back, so he'll explain that. We'll still have the chair. There'll be no issue as to – it was not attempt to mislead, it was just I could find –

THE COMMISSIONER: No, no, we knew that beforehand, and Ms. O'Brien I think raised it with me and raised it with you I think before we started yesterday.

MR. SIMMONDS: Yes, she did.

THE COMMISSIONER: The only other point is that I understand from reading the preliminary statement or the supplementary letter we got from the engineer, he might be contemplating doing measurements with the chair in its original position –

MR. SIMMONDS: Doing what?

THE COMMISSIONER: – which may not be –

MR. SIMMONDS: Well, what I had done –

THE COMMISSIONER: Yeah.

MR. SIMMONDS: – and, again, I'm not giving evidence; I just indicate to Mr. Commissioner what I've done.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: Before I had the chair brought in, I had them mark around the base of it exactly where it was situate in the room. And it may be necessary if you –

THE COMMISSIONER: Do we know that the chair – do we know whether or not the chair, you know, had been moved in the room, the living room. We don't –

MR. SIMMONDS: They never moved it. I can't –

UNIDENTIFIED SPEAKER: (Inaudible.)

MR. SIMMONDS: It was. Well then, counsel know better than I do.

MS. O'BRIEN: Yes, certainly we'll get that from the forensic officers but they did have to pull the chair –

MR. SIMMONDS: Okay.

MS. O'BRIEN: – back from the wall in the course of their work.

THE COMMISSIONER: Right, okay.

MR. SIMMONDS: I did not know that.

THE COMMISSIONER: Yeah, and we – I took a site visit as I think I mentioned to counsel previously with Commission counsel. I took a site visit so I know where this chair was in that living room, but I don't think it really affects matters that much in –

MR. SIMMONDS: Not a big deal.

THE COMMISSIONER: – terms of what you're seeking from the engineers.

MR. SIMMONDS: Correct.

THE COMMISSIONER: Assuming these are the distances –

MR. SIMMONDS: Correct.

THE COMMISSIONER: – carry on from there.

MR. SIMMONDS: Yeah.

THE COMMISSIONER: Okay. Nothing further I don't think.

Thank you. Go ahead.

MR. SIMMONDS: I'm going to ask if the photos could be brought up and I'll take you to the ones – some of these are still confidential photos and I'll let Commission counsel indicate which ones are and which ones are not.

Constable Smyth, at the end of questioning yesterday we had done the second – we had eliminated option one; you agreed on that. Option two with respect to it being fastened to the side of the chair, you agreed was not a possibility.

CST. SMYTH: Yes.

MR. SIMMONDS: The derivative of that is was it in the side pocket to the chair. And we went through a number of scenarios there of which at least two of you agreed you would have seen if it was in the side pocket.

CST. SMYTH: I think any portion that you showed where the firearm was sticking out beyond the front of the chair –

MR. SIMMONDS: You would have seen.

CST. SMYTH: – would not have been possible. And to be frank, I had somewhat eliminated in my own head the likelihood of it being in that pocket until you had showed it. I found it very helpful that when the barrel was pointed down and the firearm was back towards the back of the chair, it would likely been rested against the wall depending on how close it was to the chair.

I found it fairly remarkable to see that. When I saw that I realized that I would have had to have been almost over to the window to –

MR. SIMMONDS: Well, I'm going to take you to some pictures now, if that's agreeable and –

THE COMMISSIONER: Yeah, just let Constable Smyth just finish the statement.

CST. SMYTH: So in my, in my own mind I guess I had always reconciled that the gun must have been on the floor, but when you showed that, it made a lot more sense to me that the chair and that the arm of the chair would have provided some level of concealment from where I was standing the whole time. And it kind of struck me that I would have had to have very likely gone further beyond in the room towards the front window than I did to be able to see that. So I, as well, found that very useful.

MR. SIMMONDS: You gave a – it's Exhibit P-0213. And I think this was done, 0213. I think was done at the – or during or after the re-enactment?

CST. SMYTH: (Inaudible) show the exhibit.

MR. SIMMONDS: Excuse me, for a second. My co-council points out that it was done on April 6th; is that consistent with your recollection?

CST. SMYTH: Sir, what is the exhibit you are referring to?

MR. SIMMONDS: It's not up on your screen, is it yet?

CST. SMYTH: No.

MR. SIMMONDS: It's a rough diagram that you drew.

CST. SMYTH: Right.

THE COMMISSIONER: It's just came up there now.

MR. SIMMONDS: And I understand the star in that diagram is the point where you believe you were standing when the first shot was fired?

CST. SMYTH: Correct.

MR. SIMMONDS: And you moved along, back and forth along that mantelpiece while you were there, I believe you said.

CST. SMYTH: Correct. This was my recollection of the scene –

MR. SIMMONDS: Fair enough.

CST. SMYTH: – at the time. I will note that, you know, I incorrectly placed the mantel in this rendition.

MR. SIMMONDS: We have the diagram, if I might approach that diagram (inaudible).

I'm gonna lay this up on top of your exhibit.

UNIDENTIFIED MALE SPEAKER: Yes, Sir.

MR. SIMMONDS: This is the mantelpiece right here?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. This is the chair that he was sitting in.

CST. SMYTH: Yes.

MR. SIMMONDS: This is the mantelpiece right here.

THE COMMISSIONER: Right.

MR. SIMMONDS: This I the chair that he was sitting in.

THE COMMISSIONER: Thank you.

MR. SIMMONDS: If you moved along that, at some point you would have been directly across from him?

CST. SMYTH: Correct.

MR. SIMMONDS: I'd like you then – and I don't believe this photo has been entered yet and perhaps Commission counsel can help me and I do believe it would a confidential photo. It's from the photobook, 133.

MS. O'BRIEN: (Inaudible) it is a confidential exhibit, so I'll ask counsel to either turn off or tilt their screens and I will turn off televisions.

MR. SIMMONDS: Well, I don't think you can see mine so – is mine okay? You can't see it there; the lectern is in front of it.

And I take no joy in showing you this, Officer Smyth, but it is, as I think Mr. Kennedy recognized yesterday when he asked if there was a photo out showing a front-on shot – after going through the book of photos, that appears to be the clearest photo.

I don't know, is it up on your screen yet, Constable Smyth?

CST. SMYTH: No.

MR. SIMMONDS: No.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MR. SIMMONDS: 133.

THE COMMISSIONER: 133.

MR. SIMMONDS: It's towards, right towards the back.

THE COMMISSIONER: It's C 133, I guess.

MS. O'BRIEN: (Inaudible) thank you, Commissioner.

MR. SIMMONDS: That is indeed the photo. I'd ask you to focus your attention on the arm and the pocket. If the gun was placed in there and you were standing anywhere near directly across, would you agree that the gun would have been visible in that pocket?

CST. SMYTH: No.

MR. SIMMONDS: You do not?

CST. SMYTH: No.

MR. SIMMONDS: Can you tell me why, Officer Smyth?

CST. SMYTH: That photo is not taken directly from in front. It's not taken, I believe, from an angle that I would have been stood at.

MR. SIMMONDS: Okay. Let's work with that.

If you were on, if you were positioned in front of that, you would see the pocket clearly.

CST. SMYTH: If I was stood in the position that that photo was taken from, it would have increased the likelihood of being able to see that firearm.

MR. SIMMONDS: I'm sorry?

CST. SMYTH: If I had have been stood in the position that that fire – that photo was taken, I believe it would have increased the likelihood of being able to see a firearm.

MR. SIMMONDS: And you would agree that this photo was taken at the scene before anything was moved. It would appear there is little room to place anything in that pocket.

CST. SMYTH: The barrel of the firearm is fairly small, I (inaudible) –

MR. SIMMONDS: The barrel with the butt end sticking up?

CST. SMYTH: With the butt end sticking up, yes.

MR. SIMMONDS: Okay.

You can also see the space – so would you agree it's unlikely that the gun was in the pocket in the chair?

CST. SMYTH: I don't know –

MR. SIMMONDS: You don't know.

CST. SMYTH: I cannot agree to that, no.

MR. SIMMONDS: I would ask you then to go back to –

MR. KENNEDY: Excuse me, the photo – excuse me, Commissioner, the photo never did – do people have their mics on?

THE COMMISSIONER: Oh –

MR. SIMMONDS: I'm sorry, I got mine on, but –

THE COMMISSIONER: I'm sorry, my photo came up. Yours didn't come up?

MR. KENNEDY: Yeah, the photo didn't come up, Mr. Commissioner. We just got the top part, like about two or three inches of it.

THE COMMISSIONER: Okay, could we try it again?

MR. SIMMONDS: Do you know which one I'm referring to, Mr. Kennedy?

MR. KENNEDY: Scene 133.

THE COMMISSIONER: Okay, now I have it, but now it's the upper portion before – yeah, yeah, okay, yes. That's better. Okay, so you're zooming out.

Do you have it now, Mr. Kennedy?

MR. KENNEDY: Yes, I do.

MR. SIMMONDS: So, Constable Smyth, you believe if the barrel was stuck down in that cushion, you think it could still be there, even with the items that are there in that cushion, which were there at the time?

CST. SMYTH: Probably so, yes.

MR. SIMMONDS: Okay. That it would not have been clearly visible with it stuck down in that cushion, or stuck down in that pocket, pardon me.

CST. SMYTH: Not from where I was standing, no.

MR. SIMMONDS: Okay.

But you do – or do you agree, I should say, that it's highly unlikely it was in that pocket?

CST. SMYTH: No, I do not agree.

MR. SIMMONDS: Okay.

I'd ask you to go to photo – again, this is a confidential photo; it's Photo 044, which we discussed yesterday, Mr. Commissioner.

MS. SHEEHAN: Excuse me, Mr. Simmonds, could you please turn your monitor off or up, because the people behind you can still see the exhibit.

MR. SIMMONDS: Oh, (inaudible).

MS. SHEEHAN: No (inaudible).

MR. SIMMONDS: Oh, okay, sorry.

MS. SHEEHAN: Thank you.

MR. SIMMONDS: Is that okay?

Okay. Photo 044, which is one we discussed yesterday, and it is a confidential photo. Does that depict the position –?

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MR. SIMMONDS: Does that depict the position that you were standing in and the view you would have had, Constable Smyth?

CST. SMYTH: I believe that would have been a similar angle, yes.

MR. SIMMONDS: You believe that would have been –

CST. SMYTH: A similar angle.

MR. SIMMONDS: A similar angle.

CST. SMYTH: Yes.

MR. SIMMONDS: It is clear in that angle that you can see the space between the garbage bucket and the side of the chair.

CST. SMYTH: Yes, it is.

MR. SIMMONDS: And while there is significant amounts of garbage down, it is clear that you would be able to see the floor area as it's seen, as it's shown there now. And these photos were taken at the scene, I understand, that day.

Do you agree?

CST. SMYTH: Sorry, what am I agreeing to?

MR. SIMMONDS: Do you agree that the area between the white garbage bucket and the chair, the floor area there, there is garbage there but if the gun had of been laying there, you would clearly have seen it?

CST. SMYTH: There are parts of the floor exposed. If the firearm was tucked in closer to the chair then no. If it was in that void that you're referring to, if there had of been garbage on top of the firearm then perhaps no. If there was no garbage on top of the firearm and it was directly in that void that I believe you're referring to, then yes, the likelihood of seeing that firearm would have very much likely been increased.

THE COMMISSIONER: Just for the record now, the void you're referring to is the space between the right side of Mr. Dunphy's chair and the white garbage bucket where there does not appear to be much in the way of garbage, is it? Is that your reference –

CST. SMYTH: That's what I'm referring to and it's what I believe Mr. Simmonds is referring to, where the cursor is there now.

THE COMMISSIONER: (Inaudible) that's right. Someone is putting the cursor there, is that – yeah, the Clerk. That's correct. Okay.

MR. SIMMONDS: I'd now like to go to Photos – and these are not confidential photos, I believe – 103 and 104.

Could you check, Ms. –

UNIDENTIFIED FEMALE SPEAKER: (Inaudible).

MR. SIMMONDS: They're not.

In particular, 104, which appears – perhaps we can go to that one first.

THE COMMISSIONER: You have 104 in front of you, Constable Smyth?

CST. SMYTH: Yes.

THE COMMISSIONER: Okay.

MR. SIMMONDS: If the rifle was lying in that void, you would clearly have seen it.

CST. SMYTH: I would like to think so, yes.

MR. SIMMONDS: Okay. If it was closer to the chair you say you may not have seen it because garbage was on the floor.

CST. SMYTH: If –

MR. SIMMONDS: Or could have covered?

CST. SMYTH: It could have, yes.

MR. SIMMONDS: Would you agree that if the rifle was taken from the floor, with garbage on it, you would likely have heard the noise of garbage falling, the plastic containers, things of that nature.

CST. SMYTH: I don't know.

MR. SIMMONDS: You don't know. It certainly, if covered with garbage, if covered with a ginger ale bottle, a Gatorade bottle, a BOOST bottle, one of those cardboard boxes – if they were used to cover or hide the rifle, when it was lifted up those would likely make some noise that you would hear in a room 13 by 14.

CST. SMYTH: We're speaking about a hypothetical situation; it's challenging for me to, to –

MR. SIMMONDS: No, no –

CST. SMYTH: – to give you a definitive answer on it. If it was covered in paper and tissues, I think I wouldn't have heard very much; if it was covered in bottles and I was moving my feet at the time, it may have masked that. I can't give you a definitive answer, I'm sorry.

MR. SIMMONDS: Okay, well, let's, let's – these I understand were shots at the scene without anything disturbed.

CST. SMYTH: Okay.

MR. SIMMONDS: You agree?

CST. SMYTH: I agree, that's very likely, yes.

MR. SIMMONDS: Okay, if that's the way the scene was after the rifle was lifted up, if it was on the floor, then what it would appear to have been covering it would have been a piece of paper, a box, that Gatorade. You agree?

CST. SMYTH: There is a lot of other garbage in that picture.

MR. SIMMONDS: And if it was any of the other garbage, all of which appears to be bottles and paper, you would – you don't think you would have heard the rattle of those if the gun had to be reached from the floor, lifted up – you don't think you'd have heard that?

CST. SMYTH: Well, I see tissues and paper towel and other things that wouldn't necessarily make any noise. If the gun did move one of those bottles, I didn't hear it.

MR. SIMMONDS: Okay.

And again, from that photo, even though that's not directly across from him, if the gun is in the pocket, part of the pocket is visible there. So if the barrel was down, which I would submit is the only way the gun could have been in the pocket, the butt would have been clearly visible.

CST. SMYTH: No. It would have been concealed.

MR. SIMMONDS: Okay.

THE COMMISSIONER: Mr. Simmonds, when you refer to the portion of the side pocket being visible, that's just to the left of where the –

MR. SIMMONDS: Which picture are you –

THE COMMISSIONER: Where the cat has done some scraping there is it? Where the – is that where the most of it is?

MR. SIMMONDS: Yes, right there.

THE COMMISSIONER: Yeah.

MR. SIMMONDS: Whoever is representing the cursor, thank you very much.

THE COMMISSIONER: Yeah (inaudible).

MR. SIMMONDS: Going right along the edge there. The front of what you're seeing is the frayed edge of the chair.

THE COMMISSIONER: Right.

MR. SIMMONDS: And then the pocket is the slightly –

THE COMMISSIONER: That's what I thought it was. I wasn't sure, yeah.

MR. SIMMONDS: – slightly bulged out portion that you see there.

So would you agree, Constable Smyth, that whether it was in the pocket or on the floor the most likely option is that's the side that it came from and that's the area that it came from.

CST. SMYTH: That it came from the right-hand side?

MR. SIMMONDS: Yeah.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And it would have had to been either in the pocket, as you've said, with the barrel down, butt sticking up to the back, or on the floor for you not to – you say you wouldn't have noticed it.

CST. SMYTH: I believe so. Yes.

MR. SIMMONDS: Officer Smyth, you're a trained police officer in a Protective Services Unit, correct?

CST. SMYTH: Yes.

MR. SIMMONDS: You told us you were going out there that day because you wanted to check on tweets of concern. Not threats, but tweets of concern.

CST. SMYTH: That was part of performing the threat assessment, yes.

MR. SIMMONDS: Okay. When you got there you saw a house that was very much derelict in your opinion.

CST. SMYTH: Yes.

MR. SIMMONDS: You looked in through the window of that house, saw garbage inside and were somewhat surprised by that.

CST. SMYTH: Surprised at the, the state of –

MR. SIMMONDS: Were some –

CST. SMYTH: – of the home?

MR. SIMMONDS: Yeah, surprised at the state of the house, taken aback.

CST. SMYTH: Yes.

MR. SIMMONDS: You then went next door, after some period of time, to Dick and Debbie's who told you, be it 10-year-old information, of a man that they believed had issues, who had harassed them, who had done things to their plants, things of that nature.

CST. SMYTH: Yes.

MR. SIMMONDS: Is your concern any ways heightened at that point in time? I put to you that it is.

CST. SMYTH: Not for my personal safety at that stage, no.

MR. SIMMONDS: Your concern for the overall situation then, Officer Smyth.

CST. SMYTH: The concern for what? You're going to have to be a bit more specific.

MR. SIMMONDS: Was your sense of alertness and your training kicking in to say these are things I should consider?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay.

When you did get into the living room, you came back, knocked on the window, he comes to the door, you stand, you're back some distance. You have some commentary and then you go into the house. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: If I go to – in actual fact, if I go to what Dick and Debbie told you, in your statement of June 17, which is 021 – 0121, pardon me, at page 76.

MR. KENNEDY: What was the number of that exhibit?

MR. SIMMONDS: The number of that exhibit was 0121, Mr. Kennedy.

This is the information you advised Officer Little you gleaned from the discussions with Dick and Debbie. "... and they, you know they gave me some insight into you know a troubled man that had ... a long history ... which you know I would take as, as some level of mental illness."

So you've now been told by the people next door, be it 10-year-old information, that it was a troubled man – that's your description of him – and a man with mental illness.

CST. SMYTH: Yes.

MR. SIMMONDS: You know in terms of ah, just how he conducted himself, you know they were at their wits end with him in terms of the behaviour towards them, you know he was, seemed to be a real antagonist. The next line you say "constantly causing them problems."

So at this point in time you have a troubled man who you believe has some mental illness who's causing all kinds of problems to the next door neighbours.

CST. SMYTH: Yes.

MR. SIMMONDS: Did that raise your sense of heightened concern?

CST. SMYTH: No, we – you know as police officers we deal with persons suffering from mental illness on a daily basis. Like, we don't automatically correlate any form of mental illness automatically to violence; in particular violence so extreme that they would draw a firearm. So no, that correlation is not automatic.

Furthermore, as it relates to the relationship that Mr. Dunphy had with Dick and Debbie Dunphy, you know, I take that in a certain context as well. Family disputes are very common and have their own unique dynamic that also doesn't necessarily spill over into a general propensity for violence or that type of behaviour.

MR. SIMMONDS: I'm not –

CST. SMYTH: So no, that – while, yes, what I'm saying there is absolutely correct, it didn't necessarily cause me such a heightened concern that I should solicit extra assistance or –

MR. SIMMONDS: Never said that. What I'm saying is because of your training and being told this information, you had a heightened level of awareness when you went into that house. You knew – you believed you were dealing with a troubled man sending tweets of concern. You talked to Workers' Comp. Now you talked to Dick and Debbie and they tell you other

information. So I put it to you, you, indeed, did have a heightened level of awareness when you went into that house.

CST. SMYTH: Compared to walking into a different house, yeah, for sure. Yes.

MR. SIMMONDS: Okay, okay.

Then you go into the house – and this is in the April 6 statement, Exhibit 0119. This was a statement to Monty Henstridge at pages 10 and 11, which are probably 11 and 12 of the exhibit. The first page I'm looking to is page 10 of the actual statement which I believe to be page 12 of the, or 11 of the exhibit. That's correct. Thank you.

The middle paragraph there, Officer Smyth: And I was looking around the house and he was what are you looking at? What are you looking around for? Why are you looking around? What are you looking for? What are you looking for? And there was a bat next to him like a piece of wood with some duct tape on it.

So you're clearly – this room is 13 by 14. If I might approach that diagram.

That room is 13 by 14. You're in this area of it –

CST. SMYTH Yes.

MR. SIMMONDS: – then you have told us you're looking around, looking around to see the bat here. You're looking all over the room.

CST. SMYTH: Yes.

THE COMMISSIONER: You say this area, that's back by the mantel, is it?

MR. SIMMONDS: Back by the mantel.

THE COMMISSIONER: Thank you.

MR. SIMMONDS: That's where you were standing, right, Officer Smyth?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. And you're looking around, you see the bat. You move along the mantel so you're looking in this, in this space, correct?

CST. SMYTH: Correct.

MR. SIMMONDS: And while you're not concerned for your safety, you have a heightened awareness because of everything you've been told. Correct?

CST. SMYTH: Yes. Coupled with the, his decompensation and behaviour I guess, yes.

MR. SIMMONDS: And I do apologize, I'm having a job hearing you this morning. I don't know if –

CST. SMYTH: As his behaviour, demeanour deteriorated, it also increased, yes.

MR. SIMMONDS: Yeah. So – and I’m going to take you to that. You go to the next page there, page 12 of the exhibit: I saw him – and he’s – by this time he’s starting to froth. All around his mouth is starting to gum up. Ah, you know when you get a really dry mouth. You know, I think we’re probably all seen that. Henstridge: Yeah.

In front-line policing when you deal with someone that gets agitated and they start to foam, like the corners of their mouth get – the white and he has, he’s talking it’s stretched out. So that concerned me a little bit ’cause I know, I just recognize that as kind of your – you’re getting some of the physiological signs of agitation – ah, but I’m still thinking, you’re not a big guy.

So at this point in time the thought of some violence or some movement or some physical interaction with this man had clearly crossed your mind.

CST. SMYTH: At that stage, yes, it did.

MR. SIMMONDS: So you’re obviously looking right at him.

CST. SMYTH: Not all the time, no.

MR. SIMMONDS: Not all the time. Okay.

If you go to your statement again, 0121, June 15 at page 75 – it’s probably – no, this was right; page 75 is right.

You state at the top: And there was a sign on the front door of the – on the front of the house that made reference to, you know, a persecuted worker living here, political people not welcome, something along those lines.

Sergeant Little: Yeah. And there were cats around, there was garbage and junk around everywhere so you know, I was certainly, I was in a high, a little higher alert mode if you will.

So right now you’ve told us you believe there might be a physical confrontation, you’re in a higher alert mode, all of these things that you’ve seen in the house had put you on guard or put you on notice. You’ve been told that he may have mental illness by the person next door. Do you agree that you were on a significant degree of alertness?

CST. SMYTH: I think I described it accurately there. I was in a higher alert mode than compared to when I was driving out there, if you will.

MR. SIMMONDS: In fact, you considered what if he picks up the bat, what actions will I take in relation to it. You go to page 87 of that statement.

Eighty-seven, Madam Clerk, thank you very much.

First line at the top, “ ... this is the tone where it was going now.” So at this point he’s becoming agitated – correct?

CST. SMYTH: Yes.

MR. SIMMONDS: “Now he’s starting to froth at the mouth too, he’d get that, you know, that buildup of dried saliva in the corner.

Down at line 10: I was, you know I was thinking I was actually looking at the bat, I was like oh God if he picks that bat up, he’d be coming, he was just, he’s not a big man. Mm hmm. I think

well, 'cause okay what would he do? I'm thinking I'm going front kick him back down in the chair as he's getting aggressive, but, you know, my heart's not even, like I'm not in that.

So you were at that point clearly envisaging possible conflict, physical conflict, you had clearly seen a bat on the floor, you're at a heightened level of awareness in this room, this room is very small, and the focus of your awareness is on Mr. Dunphy.

CST. SMYTH: The next line, if you kept reading, I'm not in that, that zone where you're, where you're starting to become hyper-vigilant.

MR. SIMMONDS: No, I agree.

CST. SMYTH: I'm, I'm referencing not being in a hyper-vigilant –

MR. SIMMONDS: You're not hyper-vigilant at that point in time.

CST. SMYTH: Correct.

MR. SIMMONDS: But you are vigilant, you're concerned, and you've considered all those things, and you've even considered what evasive action you will take to defend yourself if he tries to become physical.

CST. SMYTH: Yes.

MR. SIMMONDS: Therefore your attention is clearly focused on what he might be doing.

CST. SMYTH: At times it was, yes.

MR. SIMMONDS: Okay.

If you go to your interview of December 22, 2016, at page 66. That's the statement interview of December 22, 2016, at page 66. Actually the bottom of page 65; on this page, 66 – there's four pages on the one.

I don't believe these transcripts are –

THE COMMISSIONER: No, they are not an exhibit.

MR. SIMMONDS: They're not an exhibit. Thank you (inaudible).

Ms. Chaytor asks on page 65, at about line 15,16, at the point in time when you're alone with a person of interest and you're starting to plan what could become a physical confrontation, what does your training teach you to do?

I was doing it to visualize and prepare for if it goes that way, but I'm also gleaning information for a threat assessment as far as I could gather at this time. Because, you know, I'm also witnessing someone who I didn't fear was completely stable, who was agitated and this issue caused him great stress. So you know, while I'm perhaps on a heightened alert level based on his behaviour, I'm also thinking, you know, this is exactly why I came here to see how this person behaves.

So you're on a heightened level of behaviour and you clearly want to check out how this person reacts because that's the way you – that's the reason you say you went there? Correct?

CST. SMYTH: Well, to examine their level of stability, sure, yes.

MR. SIMMONDS: So what do we have then? We have the information that you got from Workers' Comp. We have the information you got from Dick and Debbie. We have the information from your visual sighting and looking around the outside of the house. We have the information of the conversation that starts off cordially and then becomes agitated. We have a situation where this man supposedly starts to froth at the mouth. And we have a situation where your training cuts in, you're at a heightened level of alert, and have determined in your mind if he does anything physical, this is what I'm going to do. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: So I would put it that you are certainly making sure you're aware of all the surroundings in that room at that time.

CST. SMYTH: And definitely making extra efforts, yes.

MR. SIMMONDS: Definitely making extra efforts; and the focus of your efforts are the man seated in the chair.

CST. SMYTH: I was more so looking around the room which was bothering him.

MR. SIMMONDS: Are you saying that you didn't focus on the man seated in the chair?

CST. SMYTH: Not at all times, no. I always endeavoured to keep in my peripheral vision to see

–

MR. SIMMONDS: So you accept –

CST. SMYTH: – any significant movements, but I was also looking around the room trying to ensure there wasn't anybody else in the home, and steps like this.

MR. SIMMONDS: I want to post that diagram again. You were looking around the room, keeping him in your peripheral vision.

CST. SMYTH: Yes.

MR. SIMMONDS: But this is a very small room. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: You're over here, you're standing in the room looking front on and he's right in the midst of your vision. Correct?

CST. SMYTH: I would have to look directly at him, yes.

MR. SIMMONDS: If you looked to the side here, he would still clearly be visible in your peripheral vision. Would he not, Constable Smyth?

CST. SMYTH: He would be in my peripheral vision. I don't think anything is clear in your peripheral vision, but –

MR. SIMMONDS: Well, we'll talk about that now in a minute.

And this goes on for some period of minutes, I take it?

CST. SMYTH: Yes.

MR. SIMMONDS: Officer Smyth, your evidence is you didn't see the gun. Correct?

CST. SMYTH: I saw the gun when it was in his hands.

MR. SIMMONDS: You saw the gun when the barrel was pointed at you.

CST. SMYTH: Yes, in his hands.

MR. SIMMONDS: In his hands.

CST. SMYTH: Yes.

MR. SIMMONDS: And he's seated in the chair.

CST. SMYTH: Correct.

MR. SIMMONDS: Just to take you through a few things of what you indicated. Exhibit P-0122, August 26, 2015, statement at page 5, and this may be page 6 of – yes, it is. It will be page 6 of the document.

This is under questioning by Burke, because Burke came back to ask you again about this incident because you had used the words couch interchangeable with chair.

CST. SMYTH: At one point I did, yes.

MR. SIMMONDS: Okay. You said the gun was be – by the couch or behind the couch and you're maintaining when you speak to him again that, no, I meant chair is where it was at.

CST. SMYTH: I don't think I ever said behind the couch, but at one point in time –

MR. SIMMONDS: Or by the couch, I'm – please, if you recall exactly what it was?

CST. SMYTH: I don't recall exactly what it was, but I – once he brought it to my attention and showed it to me in the transcript from the original statement I'd given to the RCMP, in the latter part of that statement where they were trying to sum up and dissect some of my narrative, I did use the word couch when I was referring to the chair, yes.

MR. SIMMONDS: You were referring to the chair. Okay. So he comes back to review this issue with you.

CST. SMYTH: Yes.

MR. SIMMONDS: And at page 6 of the exhibit, at the very top, Burke says: Um-hum. And you say: I tended to be over this way. And I'm taking what you mean when you say you tended to be over this way is that you were over to this side of the mantel, this side of the mantel here.

CST. SMYTH: I believe so, yes.

THE COMMISSIONER: What side is that facing?

MR. SIMMONDS: He said he tended to be over this way and he's meaning this side of the mantelpiece.

THE COMMISSIONER: Okay. So we are, you're – for the record, you're pointing to left side of the mantel when you're facing it from the doorway.

MR. SIMMONDS: Correct.

THE COMMISSIONER: Okay.

MR. SIMMONDS: And you continue on: the left side being more visible and probably maximum in front of me. And I had no good reason for that Steve to be honest with you. I should have noticed it. It was a long gun rifle. There was – I can tell you right now, there was nowhere, there was no great hiding spot. Right. I bloody well should have noticed it.

So you agree that there's no good hiding spot there. You're standing somewhat to the side, but pretty much in front of him and you should have seen it. That's what you tell the officer.

CST. SMYTH: I've always believed that. I've always had difficulty with that very fact. Absolutely. In fact, it was probably your demonstration that gave me some solace that perhaps there was a better hiding spot there than I had originally thought.

MR. SIMMONDS: Uh-hum. On the re-enactment, tab 120 or – Exhibit 0120, page 9 and 10, down to lines 16 to the end.

No, that's the wrong – I'm sorry. My page 9 is probably page 10 of – this is page 8. Yes, that's the one: "fuckin' government" starting off. Yeah, that's the one.

If you go down to line 16 and 17, and you say: I'm not looking for anything – this is talking to Mr. Dunphy – you know, I'm looking at the state of your, your living conditions, and I said at one point in time, that's when he said "Fuckin' this is your ... fuckin' government" and so he's still in his chair and the whole time he's moving around, you know, from side to side, and when he puts weight on one side and weight on the other side, that drew my attention to it.

So anytime he'd move, it drew your attention to it, you're telling us.

CST. SMYTH: Sometimes it did, yes.

MR. SIMMONDS: Pardon me?

CST. SMYTH: Sometimes it did, yes.

MR. SIMMONDS: But you're only there some matter of minutes and you're in a very enclosed space. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: If we go again to Exhibit 0121. The statement given on June 7, page 89, and I believe these pages are in, consistent with the numbers on the document.

Now these are your statements to Constable or to Sergeant Little. Starting on page, starting on page 89, line 9. This is what you say to him: driving this guy bananas because I looked down at the folder and I really wasn't looking at it, and I was just kinda doing that to appease him and while it's there in my hand, it's kinda like now I know I'm looking at my hand but I can see you

– Mm hmm – see what you’re doing, see how you are, how you’re sitting and that, and it wasn’t necessarily on purpose, and that’s when I saw he’s sitting like this and he comes forward and he makes this type of movement you know, you know where it’s like to see out of your peripheral vision. Uh-huh. You’re not seeing exactly what he’s doing. That’s when I see the barrel of a gun come up, and like, there it was – there it was, it was held like a gun.

And then down a little farther, line 12: I stopped seeing his face and it was just the gun. I think he was, I think he was maneuvering. I get to a proper – I know where it came from. I still don’t know where it came from all this time.

You were looking at him, that’s what you said on the previous page – but I can see you. You’re looking at him, you notice his movements in his the chair. You see him going from one side to the other, but you don’t see him make any motion to go to the floor to get a gun or go to the side to get a gun.

CST. SMYTH: This, I was describing here as what I’ve described all along, seeing him out of my peripheral vision. And I did see him move to the right. To what extent, it’s challenging for me to say. Did he lean all the way to the floor? Did he put an arm back to reach to the back part of the chair –

MR. SIMMONDS: Okay.

CST. SMYTH: – or did he reach slightly to where the pocket was? I can’t tell you.

MR. SIMMONDS: Officer Smyth, I’m going to skip a couple and go to your interview transcript of December 22. Page 62, line 13 or 14, or a little bit above that actually: He said Maynard and he said another name, I believe, and this is also the same time that I’m looking around. And when I say looking around, I’m just moving my head. I’m not looking at him. He’s talking to me but I’m not looking at him and, in hindsight, I think maybe that bothered him. It’s almost like I’m not even paying attention to him, even though I was very much acutely paying attention to him.

So it may have been your peripheral vision but you told Ms. Chaytor you were acutely, acutely paying attention to him.

CST. SMYTH: What I’m saying there is that I’m acutely paying attention to what he’s saying to me. The fact that –

MR. SIMMONDS: No, that’s –

CST. SMYTH: The fact that I’m looking around seems to be bothering him. And maybe he felt I was ignoring him because I was looking around but, in fact, I was acutely paying attention to what he was saying.

MR. SIMMONDS: I think maybe that’s bothering him. It’s almost like I’m not even paying attention to him even though I was very much acutely paying attention to him. I was also trying to pay attention to what else might be happening in the house.

I put to you, Officer Smyth, you are saying there you were acutely aware of him, listening to him, looking at him, even if it is out of your peripheral vision.

CST. SMYTH: No, you’re incorrect. I think the statement actually even provides some more clarity. By saying I’m paying attention to what else is going on in the house, while also acutely paying attention to him, just firms up exactly what I’m trying to articulate to you now.

MR. SIMMONDS: Okay.

CST. SMYTH: I was looking around the house but also trying to pay attention to him.

MR. SIMMONDS: You go to page 158 of that same interview. I remember, like I don't remember seeing a lot of the floor in this area. All right, so you didn't recall seeing the BOOST or containers and the amount of garbage? Right?

So what you're suggesting is it could have been covered by the garbage? Of course it could have been. It could have been covered by the garbage. It could have been tucked under the chair. It could have been fastened to the side of the chair. You know, I'm trying to talk to you through what I was seeing and maybe provide some explanation.

So we know it wasn't in the chair, tucked in the chair. We know it wasn't fastened to the side of the chair. You say it's possible it could have been in the side pocket of the chair. That's what you've told us here today. Correct?

CST. SMYTH: Yes. Probably the most likely possibility, but yes.

MR. SIMMONDS: I'm just trying to talk to you through what I was seeing and maybe provide some explanation but some people will call that an excuse. I don't know; the bottom line is I didn't see the gun. I wish every day I had.

Okay if it had been under the chair, I take it, it would have taken him that much longer to be able to fangle it out from under the chair. I don't know the answer to that.

You don't know the answer to it. If it had been tucked under the side of the chair, the man has got to reach down, lift his body out of the chair. His arm won't reach the floor from sitting in the chair, so he's got to lift up and do some movement to get the rifle. Would you agree?

CST. SMYTH: Yes, absolutely.

MR. SIMMONDS: Okay.

CST. SMYTH: I don't know if he's arm wouldn't reach the floor. I find that hard to believe. If it was partially tucked just under the chair, the edge of the chair, I don't think it would take significantly more effort. If it was tucked further under the chair, which I find very inconceivable, it would have taken a significant amount of effort which would have drawn my attention, yes.

MR. SIMMONDS: That chair is such that it could not be tucked under it because of the framework that's there which can be examined if there's any issue on it. Do you take issue with that?

CST. SMYTH: Yes.

MR. SIMMONDS: I don't really want to haul the chair out again today –

THE COMMISSIONER: What was your question again?

MR. SIMMONDS: I'm putting to him that because of the construction of the chair there's no way the rifle could have been tucked under it any distance. There's a set of wheels but if you're –

THE COMMISSIONER: I confess, I don't recall that it couldn't have been. How much longer – just in terms of planning the moving the chair –

MR. SIMMONDS: I won't be terribly –

THE COMMISSIONER: We'll be breaking, you know, sometime before 11. What I was going to suggest was if you leave that point till the end –

MR. SIMMONDS: I might even be finished by 11.

THE COMMISSIONER: Well, then we'll break when you finish –

MR. SIMMONDS: Okay.

THE COMMISSIONER: – and the first thing –

MR. SIMMONDS: That's fine.

THE COMMISSIONER: – we'll get the chair out and the first thing we'll do is finish off that point after the break.

Yeah, okay.

MR. SIMMONDS: Okay.

On your statement of August 26 –

UNIDENTIFIED MALE SPEAKER: What exhibit are you referring to?

MR. SIMMONDS: I'll give it to you right now, Sir. That's Exhibit P-0122. August 26, Exhibit P-0122, and I'm looking at page 9, which is probably page 10 of the exhibit. Line 15 on: "Smyth: What he was sat in was a chair. Burke: Okay, appreciate that. Smyth: Yeah. Burke: And the firearm came from?"

"Somewhere on his right side. His right, you know, side of him. Burke: Okay." "The floor, beside a chair." "Yeah. Smyth: Somewhere in that region."

So I put it to you if it was somewhere in that region and he's sitting in the chair, and we can certainly call evidence to this, his arm would not reach the floor. You would have to lift up part of your body to get at the floor. That would be a movement that you would notice.

CST. SMYTH: I've stated all along that I did notice.

MR. SIMMONDS: So forget about seeing the gun. If the picture I understand is correct, you're at a heightened awareness, you're looking around the room, you're keeping him in your peripheral vision, it's a 13 by 14 room, you move back and forth along the mantelpiece, you have him at least in your peripheral vision the full time – forget about seeing where the gun came from, what about his body movement? His body movements would have been necessary for him to lift himself up, some portion, lean to the side, pick up the gun, bring it up over the arm, and then point it at you. And you're saying an alert police officer with your training, with the heightened level of alert that you were on, you didn't see that.

CST. SMYTH: Which part are you asking I didn't see? You just asked me to –

MR. SIMMONDS: You didn't see him move –

CST. SMYTH: – forget about the gun.

MR. SIMMONDS: – enough to be able to secure the gun from his right side –

CST. SMYTH: I'm sorry –

MR. SIMMONDS: – up over the chair.

CST. SMYTH: Am I forgetting about the gun or not?

MR. SIMMONDS: You didn't see him move – my question is you didn't see him move to go to the right side with enough motions to bring the gun up, even though you were acutely alert, acutely aware of him.

CST. SMYTH: Like I said, I've articulated all along that out of my peripheral vision I did see him move to his right.

MR. SIMMONDS: And Officer, you were thinking about front kicking him if he got up out of the chair. You were aware of a physical conflict, possible physical conflict, but yet you didn't foresee, you didn't note enough to be able to take any evasive action in the period of time it would have taken him to go to his right, get the gun up and move it in a position that it was pointed at you. You were not able to take any other evasive action at that time, except shoot him.

CST. SMYTH: I didn't not foresee him picking up a long-barrel rifle, no, I absolutely did not. What I was thinking about would have been larger movements – he stand up and a very obvious advance in my direction, a picking up of the stick – these are things that I was cycling through my mind.

MR. SIMMONDS: Officer Smyth, with the greatest of respect, you're a trained police officer on a Protective Services Unit. You've asked everybody about firearms; it's one of the first things you check when you spoke to everybody else. You're in a room where a man starts frothing at the mouth, you're in a room where there's bat on the floor, you're in a room where he becomes agitated and you're telling us he's able to move to his right side, go to the floor area, and bring up a gun that's 38½ inches long over the arm of the chair, put it in to a position where he's pointing it at you and you did not see either his body movement or the gun until the barrel was pointed at you.

CST. SMYTH: I did see his body movement. By the time I focused on the gun, it was pointed at me.

MR. SIMMONDS: How long would it have taken you to step from where you were standing to where he was? If I said less than a second, would you argue with that?

CST. SMYTH: Probably not.

MR. SIMMONDS: Probably not. So in less than a second you could have moved from the mantelpiece to chair while this disabled man – and we don't know the degree of his disability, but we'll hear about that – this disabled man is able to go to the side of the chair and get this gun. Do you agree that that is a difficult story to accept from a trained police officer?

CST. SMYTH: When I saw the gun it was pointed at me. My choice was not to engage in a physical wrestling match with somebody with a gun.

MR. SIMMONDS: Officer Smyth, you're a trained police officer on security detail. You are trained for situations where various hazards may present you.

You're in a room that's 13 by 14. When I say the distance from the far corner of the chair to the mantelpiece is nine feet, you standing in front of that takes away another foot. So at all times you were somewhere between six and eight feet away from him, maximum. Would you agree?

CST. SMYTH: At the time the firearm was presented I had guesstimated nine to 10 feet.

MR. SIMMONDS: Pardon me?

CST. SMYTH: At the time the firearm was presented to me I had guesstimated nine to 10 feet.

MR. SIMMONDS: Well, if you measure it off, it's nine feet from the far corner to the arm of the chair. From the closest corner to the arm to the mantelpiece is eight. Taking in your body size

–
MR. KENNEDY: Excuse me, Mr. Commissioner.

MR. SIMMONDS: – standing up –

MR. KENNEDY: Excuse me, Mr. Commissioner, are these the forensic measurements or the measurements of the forensic experts, or are they Mr. Simmonds's measurements?

THE COMMISSIONER: Well, to be fair to Mr. Simmonds, Mr. Kennedy, you were there when he was putting these measurements yesterday. I would have thought that if you were challenging them, you would have had your tape out and asked to check or confirm. Are you saying that you're not accepting the –

MR. KENNEDY: I've just asked a question, are these the measurements. I understood that the scene was measured by the forensic identification people. Are these the measurements of the forensic identification people or Mr. Simmonds's measurements?

THE COMMISSIONER: Yeah, the reason I raise the point that I did was that it doesn't seem to matter very much if they're one or the other, if that's what's going to be established, but can you clarify.

MR. SIMMONDS: These were measurements I took. I took them from the edge – the far end of the mantel to the closest corner of the chair was nine feet. From the other corner of the chair to the near end of the mantel was eight feet.

I put that to Officer Smyth earlier on. I understood he was accepting those as fairly close to the measurements that would be there. I certainly do not intend to mislead anybody here today. Would you accept those as the measurements that are fairly within the range? There might be a couple of inches either way.

CST. SMYTH: Yeah, the nine to 10 feet of where I was stood –

MR. SIMMONDS: Okay.

CST. SMYTH: – from the time when the firearm was shown, yes.

MR. SIMMONDS: Okay.

CST. SMYTH: The six feet, I don't. No.

MR. SIMMONDS: Do you want me to post that diagram again?

THE COMMISSIONER: Well, if I might say, just to clarify the – you're bringing back the chair to finish one point. Mr. Kennedy or other counsel will have the opportunity – wish to check whether distance, any distance that's given is something that they're querying or questioning. And they could ask the witness to check if they wish.

Go ahead.

MR. KENNEDY: The point is, Mr. Commissioner, when I made my comments about the chair being brought in is that we are isolating an exhibit from the environment in which (inaudible) –

THE COMMISSIONER: We are doing that because we're looking – we realize that we are only going get a specific bit of information from it. We're not going get the whole, the whole scene. You know that, but we will be able to get a picture of – if you have a forensic measurement from one point on the chair to the pylon, you will at least see just how much that distance looks like.

MR. KENNEDY: But we don't know the angle.

THE COMMISSIONER: Pardon?

MR. KENNEDY: The angle is the – forensic people were there. They would have measured from the angles that were –

THE COMMISSIONER: Well, I think that's what –

MR. SIMMONDS: Those are fair –

THE COMMISSIONER: – Mr. Simmonds last question related to the angle because as he is moving along the mantel the angle changes. But if you don't get the exact measurement from a particular point to a particular point, you will at least get an approximation, which may change depending on the angle – you're correct. Anyhow, I don't want to get bogged down –

MR. SIMMONDS: No, and Mr. Kennedy's –

THE COMMISSIONER: We'll see at the – all I'm saying is when this chair comes back, Mr. Kennedy is going to cross-examine shortly after that at some point, and it will be your opportunity to test the witness and/or that particular demonstration by challenging any particular measurement that you feel should be challenged. But subject to – and you're correct, it'll vary with the angle, which is what I'd earlier mentioned because it raises some difficulty with the proposed experiment because of the variables.

But again, I'd say we can at least get a range of distances. Go ahead – and in terms of the dimensions of the chair itself, they're not going to change. The height of the arm or from the front of the chair to the back of the chair and so forth.

MR. SIMMONDS: Okay –

THE COMMISSIONER: I don't want to bog this down –

MR. SIMMONDS: No, we won't bog down on this –

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: We won't bog down on this, Mr. Commissioner. Ms. O'Brien told me the measurement the forensic gentleman took, which included the back portion of the chair, which tilts back. I measured the front porch and what did you indicate, Ms. O'Brien?

MS. O'BRIEN: It was 37 inches. I can also add, as it might help this discussion, that the scene diagram that was prepared by Chris Saunders, who is from the Forensic Identification Team, is to scale. It's a to-scale drawing. Not every – and he'll give us detailed evidence on this. Not every item in that room did he actually measure its placement, but he certainly did the big ones. So I do believe – my memory is, the chair, Mr. Dunphy's knee, those things where he actually used triangulation and measured them in the room. So that may help resolve this distances.

MR. SIMMONDS: Perfect. So we will get the top- notch version.

THE COMMISSIONER: He will be a witness and you'll have his report and I understood that you want to take some additional measurements because ones that he hadn't taken, he didn't –

MR. SIMMONDS: I don't think he took –

THE COMMISSIONER: He didn't believe they're important for –

MR. SIMMONDS: But I don't think myself and Office Smyth are very far apart here. If I might –

THE COMMISSIONER: No, go ahead.

MR. SIMMONDS: If I might approach the diagram. This room I understand, Officer Smyth, from the diagram I looked at, is 13 by 14. Would you agree from your recollection that that sounds about right?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. The mantel is out some distance but let's say it's only a foot. That seem reasonable?

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. The chair is out probably two-and-a-half feet.

CST. SMYTH: Yes.

MR. SIMMONDS: Agreed. So we're down somewhere here – I measured this distance from that corner, as I described to Mr. Commissioner, that corner to that corner as nine feet.

THE COMMISSIONER: That's the left corner of the mantel to the left corner of Mr. Dunphy's chair.

MR. SIMMONDS: Nine feet. Would you agree that that's within the scheme of what you believe it was?

CST. SMYTH: Yes, it is. Even when I guesstimated I said 10 feet. So I think that's within the realm of –

MR. SIMMONDS: And the other one is eight feet, the closer – this end of the mantel to that corner is eight.

CST. SMYTH: Okay.

MR. SIMMONDS: We take you standing somewhere right here. I take it that knocks off probably another foot.

CST. SMYTH: Yes.

MR. SIMMONDS: Okay. So I said six, you said seven. So you're within seven feet.

CST. SMYTH: That's not where I was when I first saw the firearm. I would have been in the nine- to 10-foot range. I was back towards the end of the mantel, your original –

MR. SIMMONDS: Well, the concern I have with that is the exhibit that you drew, Exhibit 0213, shows you at the time of the first shot standing by the coffee table, almost in the middle of the mantelpiece. That would be somewhere between eight- and nine-foot distance to the chair and with your body weight and size, I would put it, it would be about seven feet.

CST. SMYTH: Right, but that was a drawing that was drawn just on memory. The proportions of that mantel, as you can see in the drawing, are nowhere close to what they actually are.

MR. SIMMONDS: Are you saying that drawing now is not accurate as to where you stood?

CST. SMYTH: I'm saying the proportions are incorrect. If you looked at the recreation and viewed where I stood, that would be a more accurate depiction of where I was. The measurements in this drawing are very rough.

MR. SIMMONDS: By your measurements then, you were eight feet to nine feet away from him.

CST. SMYTH: I've always said around 10 feet. I'll absolutely concede to nine.

MR. SIMMONDS: Okay. So you're in very close. To transverse that distance – again, I put to you – would not have taken more than a second.

CST. SMYTH: It would not take very long, no.

MR. SIMMONDS: It would not take very long.

So you're a trained police officer. You have the height and levels that I've gone through. You have the information that you've told us about. You see the man moving around, yet you don't pay enough attention to him so that he's able to grasp and bring up to a firing position a 30 inch, 38-and-a-half-inch long rifle.

CST. SMYTH: Correct.

MR. SIMMONDS: Do you agree that that does not seem logical? How this man, sitting in a chair, who at the very least you have in your peripheral vision, could do that and you not be aware of it as he starts to go to the floor to get it, or go in the floor region to get it.

CST. SMYTH: Well, I've always said that I noticed his movement to the right. And I saw the gun, and I was able to react to it.

MR. SIMMONDS: Within the time frame you had – and I’m not a scientist, but I would believe it would probably take him in excess of two seconds, maybe three, to get the gun from the floor, grasp it, move up in his chair, grasp the gun, bring it up over the arm, bring it in over the arm and bring it to a firing position and point it at you, and you’re standing nine to 10 feet away from him and you don’t notice that. And you’re a trained police officer with this special training who has a heightened level of alert.

CST. SMYTH: But I did notice it, and I responded to it.

MR. SIMMONDS: You didn’t notice it, you say, until it was up in a firing position.

CST. SMYTH: It was pointed at me by the time I saw it.

MR. SIMMONDS: That’s a firing position I believe.

CST. SMYTH: Aye. You may believe that.

MR. SIMMONDS: Can you offer any explanation at all as to how you wouldn’t have seen enough of this man, who had some degree of disability, wouldn’t have seen enough of this man’s movement that it wouldn’t have alerted you to come over – ‘cause you know, you’re saying if he starts to get up out of the chair you’ll front kick him. If he goes for the back –

CST. SMYTH: That’s not what I said.

MR. SIMMONDS: Pardon me?

CST. SMYTH: If he came up and stood up and approached me in an aggressive fashion, or had brandished the bat or the stick, then I would have considered being able to overpower him physically, sure. Yes.

MR. SIMMONDS: So yet he’s able to do this. Can you offer any explanation how in a room 13 by 14 – and you’ve been in it, I’ve been in it, the Commissioner’s been in it. You got to take away from that the size of the mantel, the size of the chair, you say 10 feet. I believe what we’ve shown to be less than that – how this man could be so surreptitious as to get that rifle up and you not see, let alone the rifle, his body movement which should have been pronounced enough with your training to immediately react without hauling a firearm out. Can you offer any explanation for that?

CST. SMYTH: Him moving around in the chair, being fidgety throughout our interaction may have lent to a higher degree of complacency on my part. That’s very possible, yes.

MR. SIMMONDS: Okay. Complacency on your part?

CST. SMYTH: Yes.

MR. SIMMONDS: That’s not in line with your training, to be complacent.

CST. SMYTH: I said it may have lent to a degree of complacency.

MR. SIMMONDS: But that’s not in line with any training you’ve taken as a professional to be complacent in a situation like that –

CST. SMYTH: No, of course not.

MR. SIMMONDS: – with a heightened level of alert. Correct?

CST. SMYTH: Of course not.

MR. SIMMONDS: And if it is complacency, it's had a very bad result in this situation. Correct?

CST. SMYTH: Is it – sorry, what?

MR. SIMMONDS: If it is complacency on your part, negligent I'll call it, that you didn't see this rifle, that complacency had a significantly bad result: the death of Mr. Dunphy.

CST. SMYTH: Well, any heightened complacency, if that is the case – I'm trying to offer you the explanation you asked for –

MR. SIMMONDS: Okay.

CST. SMYTH: – may have afforded him the increased opportunity to lean to the right because he had been moving so much in the chair. What led to the death of Don Dunphy was him pointing a firearm at me.

MR. SIMMONDS: And does it ever cross your mind, have you ever tried to reason out, knowing the facts that you do now, that this is a man that had no issues that day. This is a man that had been out with his daughter and her partner for an Easter lunch. This is a man that had come home – had gone to his daughter's, then come home, parked in his driveway and text a friend to come up to his house for whatever reason; to have a toke, to bring up some firewood, whatever reason. At the time this is going on with you, he might well have been expecting Colin Dinn to show up.

Have you ever grappled with the fact as to how did this man all of a sudden bring out a rifle that no one's seen, no one has knowledge of. And to top it off, he couldn't even use the rifle, the bolt is open. I – grant you, you would not have seen that.

Did they ever grapple with the fact that why would this man over an argument, which he's been having lots of with Workers' Comp, do this when indeed his neighbour may be dropping up. Do that seem odd to you?

CST. SMYTH: Do I grapple with that whole scenario?

MR. SIMMONDS: Yeah.

CST. SMYTH: Absolutely.

MR. SIMMONDS: Yeah. So do I, so do I. Do you have any answers?

CST. SMYTH: I think it perhaps speaks to the level of volatility. It speaks to how entrenched that particular unresolved grievance may have been. Maybe my presence questioning on that was a tipping point. I think it speaks to perhaps the level of crisis he really was in.

MR. SIMMONDS: But where was the crisis that day? Where was the crisis? The crisis wasn't the meal at the Woodstock. The crisis wasn't when he dropped his rig off and he took his daughter's partner's rig because he had a flat, air coming out of his tire. The crisis wasn't when he text his friend to come up who he had just passed on the road.

Where was the crisis? What generated a crisis to a level that a man who had never been violent before hauls a rifle on a police officer and is able to do it, even if he is disabled, without you seeing either him move or the gun come up?

CST. SMYTH: Okay, I'll try to answer as much of that as I can. The crisis, what I'm referring to, would go back well beyond that day. I'm not suggesting he was in crisis before seeing me. He himself had said he was in crisis. He said that in his own tweets – I recall reading that: I am in crisis – I think probably within the three- to four-month period before I arrived there.

MR. SIMMONDS: He was in a living crisis. We'd agree on that.

CST. SMYTH: That's what I'm referring to.

MR. SIMMONDS: Not a mental crisis.

CST. SMYTH: Well, I don't know. But he was indeed in a crisis.

MR. SIMMONDS: So why – what happened in those few minutes, because something drastic had to happen. What happened in those few minutes and how was he able to be so slick, smooth and capable to outfox a police officer with significant training, significant course work and a heightened level of concern when he went in there? How was he able to do that?

CST. SMYTH: That's a good question. Of course, I don't know the answer to that.

MR. SIMMONDS: Officer Smyth, do I understand this to be the grouping of facts that you're going to ask the Commissioner to accept at the end of the day? You get a tweet. When it's read in full, you agree it's not a threat. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: You confirm from various sources the man has no history of violence. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: Nonetheless, you deem it something you have to check out right away.

CST. SMYTH: As soon as practicable, yes.

MR. SIMMONDS: Okay.

You drive to his home arriving at about dinnertime on Easter Sunday. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: You knock on the window to the man's home. No one answers. You subsequently come back to the man's home, knock on the window again and he comes to the door. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: You give two versions and we did not make this an issue. You were the one that was so certain of how you introduced yourself, made a point of it in all the statements. You

gave contradicting versions of how you ID'd yourself, whether it was Sergeant Joe Smyth or it was just Joe Smyth, RNC. Correct?

CST. SMYTH: I think I gave approximately six versions but –

MR. SIMMONDS: That is correct that you did in one version give it as Sergeant Joe Smyth.

CST. SMYTH: One version I did.

MR. SIMMONDS: You're invited into the man's home. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: You say your comments and actions somehow upset him.

CST. SMYTH: It would seem so, yes.

MR. SIMMONDS: You had – you tell the inquiry you had concerns before you went there.

CST. SMYTH: I had –

MR. SIMMONDS: Correct?

CST. SMYTH: I had multiple concerns, yes.

MR. SIMMONDS: Okay.

CST. SMYTH: In various – related to –

MR. SIMMONDS: These concerns –

CST. SMYTH: – in various aspects.

MR. SIMMONDS: I'm sorry. Go ahead.

CST. SMYTH: Related to various components of the entire situation.

MR. SIMMONDS: These concerns clearly heightened as you talked to him. Correct?

CST. SMYTH: Correct.

MR. SIMMONDS: You say he became more agitated and started to move around in the chair.

CST. SMYTH: Correct.

MR. SIMMONDS: You were very carefully looking at him even if it was through your peripheral vision.

CST. SMYTH: At times, yes.

MR. SIMMONDS: Okay. You say the next thing you know a gun is pointed at you.

CST. SMYTH: Correct.

MR. SIMMONDS: You agree that the gun did not come from the inside arm of the chair.

CST. SMYTH: I do.

MR. SIMMONDS: You agree the gun was not fastened to the side of the chair.

CST. SMYTH: Not in how I had originally stated, no.

MR. SIMMONDS: You believe it is possible it may have been in the pocket, but it is more likely it was on the floor region.

CST. SMYTH: I did not say that.

MR. SIMMONDS: Do you agree it was either in the pocket in the manner you spoke of or on the floor region?

CST. SMYTH: Or potentially leaned up against the wall.

MR. SIMMONDS: Or leaned up against the wall.

CST. SMYTH: Yes, that is my (inaudible).

MR. SIMMONDS: Either position of which would have taken him, against the wall, would have meant he would have had to at least turn partially backwards to secure the gun. If it's on the floor, he would have had to lean partially over, pick up the gun, bring it up over the arm and point it at you. Do you agree?

CST. SMYTH: No.

MR. SIMMONDS: What don't you agree with?

CST. SMYTH: I don't believe he would have to turn back on to me to reach behind that chair, no.

MR. SIMMONDS: He would be able to sit in the chair and reach back with his arm like that and grab a gun while you're looking at him, that's up against the wall.

CST. SMYTH: I appreciate the theatrics, but what I'm referring to is him being able to do this.

MR. SIMMONDS: So you think it may come from behind you, or behind him, and his actions would not have been visible to you as he would have had to reach back, lift the gun up, bring it up in some kind of arc – I think –

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

MR. SIMMONDS: You don't think so. It came from somewhere on his right side, that's what you're asking the Commission to accept.

CST. SMYTH: Correct.

MR. SIMMONDS: You didn't see it, even though he was in your vision. You had a heightened sense of concern, and the gun is 38½ inches long. Correct?

CST. SMYTH: Yes.

MR. SIMMONDS: A man who has had some – at least some degree of disability, is able to surreptitiously bring this gun to the point where the barrel is pointing at you and likely into a firing position, and the first time you see it is the barrel is pointing at you.

CST. SMYTH: By the time I was able to focus in on it, and see that it was a gun, it was pointed at me, yes.

MR. SIMMONDS: This happens without you seeing any of his body movements, in that chair, to alert you that he may be doing this.

CST. SMYTH: I've always said that I saw in my peripheral vision he was reaching to the right.

MR. SIMMONDS: The barrel follows you across the room.

CST. SMYTH: Yes.

MR. SIMMONDS: And you had no choice but to fire four times, two to centre mass, two to the head, three of which appear to have hit Mr. Dunphy and killed him.

CST. SMYTH: Yes.

MR. SIMMONDS: All of this takes place in a room that's 13 by 14 feet, with you by your own estimation, somewhere around 10 feet – I would put it probably seven and a half to eight.

CST. SMYTH: Okay.

MR. SIMMONDS: You don't see the body movement, and you don't see the gun and he's able to point it at you, and your only possible reaction, only possible avoidance, was to shoot and kill this man. That's what you want the inquiry to believe.

CST. SMYTH: I did see the body movement. And I did see the gun. And it was pointed at me. And I reacted.

MR. SIMMONDS: And that's what you want the inquiry to believe.

CST. SMYTH: I want the inquiry to believe the truth.

MR. SIMMONDS: I believe that may be the extent, outside of that one issue, if you want to take the morning break.

THE COMMISSIONER: All right, it's almost 11 o'clock. We'll break now and just quickly give me an estimate. We'll assume that you'll finish during –

MR. SIMMONDS: Oh, I'll be very brief on the –

THE COMMISSIONER: How many counsel are going to wish to examine and for how long, roughly?

UNIDENTIFIED MALE SPEAKER: Well, the RCMP (inaudible).

THE COMMISSIONER: Mr. Freeman.

MR. FREEMAN: Bob, turn off your mic.

MR. SIMMONDS: Oh, I'm sorry.

MR. FREEMAN: We'll have no questions, Mr. Commissioner, thank you.

THE COMMISSIONER: Thank you.

MR. AVIS: I indicated to inquiry counsel I could be as much as two hours.

THE COMMISSIONER: She told me with the look of some surprise, but can you tell me where you're going, Mr. Avis, for two hours?

MR. AVIS: Well, there is not before you yet the statutory framework, the regulatory framework. I wish to go through the – for example, all his use of force to show that, I believe, it's significant, his use of force, but also to demonstrate, using the *Criminal Code*, using the regulations, using the *RNC Act*, that everything he did was according to law, according to policy and so forth, and I'm laying the foundation for the evidence for the use-of-force expert or experts who testify. I feel without my questions – anyway, we can (inaudible).

THE COMMISSIONER: Yeah, well, listen, I'm not trying to –

MR. AVIS: Yeah.

THE COMMISSIONER: – foreclose it, I'm just trying to make sure you have a sharp pencil, avoid duplication, including duplication of what you know your, or later, later experts or experience police officers will be testifying to. But okay, and you –

MR. AVIS: I'll do my best to do that –

THE COMMISSIONER: Sure.

MR. AVIS: – and I'm sure you'll keep me in line if I don't.

THE COMMISSIONER: Thank you, thank you.

Mr. Drover.

MR. DROVER: At the moment, I have maybe six or seven questions, but I'd be surprised if most of those weren't ticked off by the time we get through Mr. Avis's.

THE COMMISSIONER: Alright, thank you.

And Mr. Williams?

MR. WILLIAMS: Yes, I do have some questions, Mr. Commissioner. Obviously, it's not going to be around the incident itself. More along the lines of dealings of the Protective Services Unit with the Office of the Premier.

THE COMMISSIONER: Right.

MR. WILLIAMS: I don't think it'll be extensive, but I could be 20 minutes or so.

THE COMMISSIONER: Right, sharpen your pencil. Okay.

Mr. Kennedy, a part of – I should say I have a perennial problem: I'm going to have to finish around 4 o'clock. So I'm just trying to figure out how much time do you think you're going to need.

MR. KENNEDY: We should be fine, Mr. Commissioner. I've got to go through my notes over lunchtime, but I've divided my examination into four or five key areas.

THE COMMISSIONER: Yeah.

MR. KENNEDY: There will be some question arise from today, but using the lunchtime period I should be able to focus.

THE COMMISSIONER: Okay.

With only one rogue individual, Mr. Avis, I can see where we can probably finish counsel this morning, except for you, where you'd have most of the afternoon, up until 4 o'clock, as I say, so that should be enough.

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: Yes, Mr. Simmonds.

MR. SIMMONDS: Mr. Commissioner, I don't know if Mr. O'Flaherty or Mr. Flaherty –

THE COMMISSIONER: Mr. Flaherty may have some questions.

MR. SIMMONDS: He does have some questions. I don't know how long. I got the impression he thought maybe a half-hour to an hour, but –

THE COMMISSIONER: That's a lot, but okay.

MR. SIMMONDS: That's just my impression.

THE COMMISSIONER: Sure.

All right.

Okay, I'm just going to try and keep nudging you forward as much as I can.

Thank you.

We'll recess for 15 minutes.

MS SHEEHAN: All rise.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Go ahead when you're ready, Mr. Simmonds.

MR. SIMMONDS: Mr. Commissioner, I have the chair out there. Mr. Kennedy wanted to see it and to see what's – take the rifle and put it near the bottom there or whatever. I don't want to do anything with it.

THE COMMISSIONER: Right.

MR. SIMMONDS: But it's there and I can have it – tip it backwards if he'd like to see what's underneath.

THE COMMISSIONER: Do you have – yeah, the question was how easily or how much difficulty would be involved in having the rifle placed underneath the chair, tucked in underneath the chair. Is that your question –

MR. SIMMONDS: That was, I think, (inaudible).

THE COMMISSIONER: Was that what you had left to –

MR. SIMMONDS: Yes, I can do that if –

THE COMMISSIONER: Do that when you're ready and then Mr. Kennedy will do anything that he – well, when it comes to his turn.

We need it just tipped back to see what's underneath, I guess.

MR. SIMMONDS: We can do that (inaudible).

THE COMMISSIONER: Yeah, there's not much room – okay. It got legs and –

UNIDENTIFIED MALE SPEAKER: Do you want it brought over closer to you?

THE COMMISSIONER: No, no, that's – I think that's fine. Can all counsel see the – yeah, it would only be off the floor about an inch would it?

MR. SIMMONDS: I'm going to put the gun next to it, so that should answer any questions (inaudible).

Put it down, lay it on the floor flat so it's not (inaudible). Now, I'll put it on both sides so everyone can see it.

THE COMMISSIONER: Sure. Just let me see it on that side first.

MR. SIMMONDS: If anyone wants to come up and look at it.

THE COMMISSIONER: Okay. Well the lock wouldn't have been on it, but apart from that the lock –

MR. AVIS: The lock is up off the floor, actually. The (inaudible) bolt.

THE COMMISSIONER: Yeah. Is that the bolt? Okay.

Okay, so the butt of the rifle is too thick to go and the – yeah, okay, it's too thick to go under the chair. All right. But let's show on the other side and I'll let Counsel see.

All right.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MR. SIMMONDS: Do you want me to leave the chair there, Commissioner? (Inaudible) to take it out?

THE COMMISSIONER: Mr. Kennedy, are you going to want to do any measuring or –

MR. KENNEDY: There may be something done in particular. Yeah, Commissioner, there may be something done with the chair. Perhaps if we just put it back in the corner.

THE COMMISSIONER: Thank you, Mr. Corcoran.

Just give me a second now, Mr. Avis.

MR. AVIS: No problem.

THE COMMISSIONER: Okay. Mr. Avis, go ahead.

MR. AVIS: Thank you, Commissioner.

Now, Constable Smyth –

THE COMMISSIONER: I'm sorry, I should have mentioned; during the recess Commission counsel indicated to me that you may be getting into areas where, I think the chief of police, Ms. Chaytor, you said would be dealing with certain matters.

MS. CHAYTOR: Yes, I –

THE COMMISSIONER: Just help Mr. Avis out. What will the chief of police be dealing with?

MS. CHAYTOR: Yes, I would have anticipated – I did not put a line of questioning to Constable Smyth regarding the RNC Act or the legislation because I was anticipating that would be evidence that would be put forward by the chief.

THE COMMISSIONER: Through the chief of police, yeah.

MS. CHAYTOR: Yes.

THE COMMISSIONER: Okay.

MR. AVIS: I believe it's relevant to his –

THE COMMISSIONER: Sorry?

MR. AVIS: I believe it's relevant to Constable Smyth's testimony.

THE COMMISSIONER: Okay.

MR. AVIS: I would want to introduce some of this now and he would not be able to speak to the use-of-force policy because he doesn't have an expertise there anyway.

THE COMMISSIONER: Go ahead.

MR. AVIS: Okay.

MS. CHAYTOR: Sorry, and the use-of-force policy, we have Sergeant Bill James from the RNC who will speak to that.

THE COMMISSIONER: Yeah, Sergeant James is going to speak to the use of force as an expert.

MR. AVIS: I do understand that –

THE COMMISSIONER: And you have a pile of forms in addition to the ones that were put in by Ms. Chaytor which I think concentrated on times in which Constable Smyth may have taken out his firearm or pointed his firearm. You have other use-of-force documents and they were put in at your request, I think. What are they going to be?

MR. AVIS: Well, I think one of the most important histories of Constable Smyth is his use-of-force history, the frequency with which he used it throughout his career, because I think there are myths about how often police use force. And what's being questioned here is his use of force and his ability to – you know his understanding of the code and what have you. I wish to demonstrate that in all prior instances his use of force was in keeping with policy, procedure –

THE COMMISSIONER: In those specific ones that have been raised.

MR. AVIS: In those specific ones, I think –

THE COMMISSIONER: Yeah, okay. No, we were wondering about all the other forms going in and what the purpose of that was.

MR. AVIS: Yes, and I don't plan – I'm not going to be looking – no, I plan to do this very quickly.

THE COMMISSIONER: Okay, you –

MR. AVIS: I'm only pulling up the forms so other counsel can see them.

THE COMMISSIONER: Yeah. Sure.

MR. AVIS: I don't even need to see anything.

THE COMMISSIONER: Sure. You start when you're ready.

MR. AVIS: Okay. Good morning, Constable Smyth.

CST. SMYTH: Good morning.

MR. AVIS: As you know, my name is Nick Avis and I represent the Royal Newfoundland Constabulary.

I'd like to start with P-0300 and this is your Oath of Office. While it's coming, I'm just going to read it to you. You have sworn on the 20th day of June, 2002.

It says: I, Joseph Edward Smyth, do swear solemnly, sincerely and truly declare and affirm that I will faithfully, honestly and impartially to the best of my knowledge, skill and ability execute and perform the duties required of me as a member of the Royal Newfoundland Constabulary and will well and truly obey and perform all lawful orders and instructions that I receive as such without fear, favour or affection of or towards any person and that I will not directly or indirectly

without due authority disclose to any person any information or other matters that may come to me in the performance of my duties as a member of the Royal Newfoundland Constabulary. So help me God.

Now is that your signature, I assume, there on the right?

CST. SMYTH: Yes, it is.

MR. AVIS: Okay. Did you take your oath seriously when you took it?

CST. SMYTH: Yes, I did.

MR. AVIS: Do you still take your oath seriously?

CST. SMYTH: Yes, I do.

MR. AVIS: Do you feel you've upheld it throughout your career?

CST. SMYTH: Yes, I do.

MR. AVIS: I'd suggest to you that you were proud when you took this oath. Is that correct?

CST. SMYTH: Yes. I originally took it actually in 2001, but, yes.

MR. AVIS: Okay. And you are proud to be a peace officer serving and protecting the people of Newfoundland and Labrador.

CST. SMYTH: Yes, I am.

MR. AVIS: I would then ask, I'm looking for section 8 –

THE COMMISSIONER: I'm just wondering, why are the dates different there? Where is it 2002 for –

CST. SMYTH: I originally took the oath in 2001 and then went through a period of a layoff; was laid off for a couple months.

THE COMMISSIONER: Okay.

CST. SMYTH: When we were rehired, we took the oath again.

THE COMMISSIONER: Okay, keep going.

MR. AVIS: Okay.

If we could pull up P-0305, it is the *Royal Newfoundland Constabulary Act*. And I'm just going to go to section 8.

So section 8 reads as follows: The duties of a police officer include (a) preserving the peace; (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention; assisting victims of crime; apprehending criminals and other offenders and persons who may lawfully be taken into custody; laying charges, prosecuting and participating in prosecutions; executing warrants; obeying constabulary regulations, orders and rules respecting policy and procedures; and performing the lawful duties assigned to you.

Now, 8(2): “A police officer has authority to act throughout the province.” Now, under the act, under our legislation, you are a peace officer anywhere in Newfoundland and Labrador – correct?

CST. SMYTH: Yes.

MR. AVIS: And as you indicated in your testimony, the main difference between RCMP and RNC is not so much jurisdictional as it is administrative. Is that correct? Who does what, which part?

CST. SMYTH: Yes. I referred to, I think, allocation of resources and responsibilities in certain geographical areas, yes.

MR. AVIS: Right. So when we went out to Mr. Dunphy’s place that day, you had authority under the RNC Act, section 8 sub 2. Is that correct?

CST. SMYTH: Yes, I did.

MR. AVIS: Also says, sub 3: “A police officer has the powers and duties assigned to a constable at common law.”

So in terms of your role – I’m sorry, I just want to – I’m just putting these on and I will be referring to them a little more later.

Next I want to take section 6 of the regulations, which is – I’m just trying to put – the number was given to me a moment ago but I thought they would bring it in. I apologize.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: Thank you.

Duties of officer: A police officer shall (a) perform all duties assigned to him or her in relation to the preservation of the peace, the maintenance of order, the prevention of offences against the laws of the province and the *Criminal Code* and the apprehension of offenders and others who may be lawfully taken into custody; (b) perform all police and security duties assigned to the police officer that require the exercise of the powers of the peace officer; (c) relates to escorting prisoners; (d) executing warrants; (e) carry out his or her duties in an expeditious and conscientious manner.

Now, I will get back to it, but on that day when you had that information about Mr. Dunphy you said you were carrying it out as soon as possible. Is that what – do you believe that’s what you were talking about would be regulations 6.1.(e) carry out your duties in an expeditious manner.

CST. SMYTH: Well, yes. I wasn’t referring to that section specifically, but it is an understanding within the police service that any of our assigned duties and work be carried out as soon as practicable. And while I didn’t feel it was urgent, it’s something that I’d potentially be held accountable for if I didn’t do it.

MR. AVIS: Absolutely.

(f) complete investigations as assigned. Now, as I say, I will be trying to relate these as we go along.

You were in the Protective Services Unit at the time – correct?

CST. SMYTH: Yes.

MR. AVIS: Now, tell me if I have this correct. I'm just trying to give a sense of what your job is. The primary objective is the prevention of crime and the protection of our elected government representatives. Does that sound reasonable to you?

CST. SMYTH: Yes.

MR. AVIS: So going back to the act and the regulations 8(1)(a), preserving the peace; that's what you are doing with the Protective Services Unit? Correct?

CST. SMYTH: Yes.

MR. AVIS: (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention. Is that what you are doing in the PSU?

CST. SMYTH: Yes, Sir.

MR. AVIS: Every now and again you may or may not have to do a crime investigation or apprehend people, but primarily, as I understand it, you are doing crime prevention? Correct, essentially –

CST. SMYTH: In a very general way, yes.

MR. AVIS: Yes.

Now, if I understand, your work consists of primarily two components. One is the protective detail, is that correct?

CST. SMYTH: Correct. The more tactical, hands-on component of that position, yes.

MR. AVIS: Right. And the other one is threat and risk assessment. Correct?

CST. SMYTH: Correct.

MR. AVIS: And I guess there are other components including investigations, should an offense arise, and so forth.

CST. SMYTH: Correct.

MR. AVIS: Now, if I understand the protective detail, it is to protect our elected representatives from harassment, and to protect their person from any kind of threatening or assaultive behaviour. Does that sound reasonable to you?

CST. SMYTH: Yes, it does.

MR. AVIS: Just like to pick up on something Mr. Simmonds was questioning you on. He was saying that when you out that day you were primarily – sorry, when you're dealing with your unit, you're dealing primarily with some kind of physical harm. You brought up harassment and, I believe, stalking, which – isn't it true that they primarily have a psychological harm on the individual?

CST. SMYTH: Yes, they do.

MR. AVIS: Right. So you're there to protect psychological and physical harm – correct?

CST. SMYTH: Yes, if they meet the confines of how it's outlined in the *Criminal Code*.

MR. AVIS: And in the threat and risk assessment it's a little bit different; you are protecting them from potential future harm, either physical or mental.

CST. SMYTH: Correct.

MR. AVIS: Thank you.

And just to go back to the regulations, 6(1)(a) perform all duties assigned to him or her in relation to the preservation of peace, the maintenance of order, the prevention of offences against the laws of the province and so forth. The first part of that would be, I suggest, relate to your duties in the Protective Services Unit, in terms of crime prevention. Would you agree with that?

CST. SMYTH: Yes.

MR. AVIS: I'm going to, again – essentially what I'm trying to do here is to put some propositions to you and I'm looking for any commentary you have on it, agreement or disagreement, in a lot of these things. Now, would you agree that police officers risk their lives, sometimes every day, sometimes more than once a day, in their careers?

CST. SMYTH: Absolutely.

MR. AVIS: Would you agree with me that the two situations in which a police officer's life is most at risk are domestic disputes and traffic stops?

CST. SMYTH: I believe statistics show that that would be the case.

MR. AVIS: Right.

So domestic disputes and traffic stops are relatively everyday, ordinary police work?

CST. SMYTH: Yes, they are.

MR. AVIS: And how many domestic disputes have you attended?

CST. SMYTH: Probably –

MR. AVIS: Guesstimate, (inaudible), you know.

CST. SMYTH: – hundreds.

MR. AVIS: Hundreds. Can you even tell us how many traffic stops?

CST. SMYTH: No, I cannot.

MR. AVIS: Would you agree with me, as well – you've alluded to this and I'm just expanding on it slightly, which, depending upon your assignment, where you are most at risk. My understanding, correct me if I'm wrong, the street patrol is where a police officer's life and limb is in the most danger?

CST. SMYTH: Without question, yes.

MR. AVIS: And that's why it's compulsory that you wear body armour?

CST. SMYTH: Yes.

MR. AVIS: And it's where most of the use of force would occur, generally, in the police officer's career, subject to drugs and special units.

CST. SMYTH: Yes.

MR. AVIS: Okay.

So in criminal detective work, CID, which you did for a while, there's less confrontation, less danger, body armour isn't required, so there's a lot less use of force in criminal detective work than street patrol?

CST. SMYTH: That would be correct.

MR. AVIS: Tactical units such as the RNC Tactical Response Unit by their nature only called upon when use of force is necessary and they always have their weapons drawn when they get – once they get there. Is that correct?

CST. SMYTH: I believe that's close. They're certainly called in for the higher risk situations.

MR. AVIS: But it would be where it's deemed they're needed, so use of force is necessary. Do you agree with that?

CST. SMYTH: I don't think it's necessary. I don't think they call – they're called because use of force is imminent and will be necessary. I think they're a measure to take into consideration that use of force may be more likely, but the goal is always to avoid use of force.

MR. AVIS: Absolutely, and thank you for saying that.

Peace officers in drug and organized crime unit are likely to use force more than a regular detective. Does that sound reasonable?

CST. SMYTH: Probably certainly more drugs, not so much criminal intelligence.

MR. AVIS: Okay. Sorry, just going to make a note there.

And in the protective service unit, is it fair to say almost no force is ever used?

CST. SMYTH: Correct. This would very much be an anomaly.

MR. AVIS: And, while I will go through this again, you were on street patrol, correct?

CST. SMYTH: I was on street patrol, yes.

MR. AVIS: And I have 17 use-of-force forms and an incident that you (inaudible), which is 18 uses of force. Did you use force at any other time in your career, other than when you were with street patrol, notwithstanding this incident?

CST. SMYTH: Inclusive of handcuffing persons?

MR. AVIS: Well, these forms – when you – again, handcuffing a person doesn't require a use-of-force form unless they're resistant.

CST. SMYTH: There probably has been occasion. I can't think of any.

MR. AVIS: Right.

CST. SMYTH: There's been times when I've engaged in surveillance operations that turned into foot pursuits, but there's nothing of significance that I can recall.

MR. AVIS: When – and you stated already in your evidence in the protective service unit you yourself had never used any force prior to this incident.

CST. SMYTH: No.

MR. AVIS: And when in the criminal CID detective, did you ever have to use force?

CST. SMYTH: That was more of what I was referring to, maybe perhaps in some surveillance operations. I can't recall specifically, but there may have been occasion to use physical control of suspects that are being arrested.

MR. AVIS: Now, I would next like to go to the Use of Force Training Manual. And forgive me again, I actually went to get the number, wrote it down and I've lost it again. Perhaps counsel could help me out here.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: Thank you.

Now, I'm going to go through this in a general way, and as we go through the use of force and the incident of that day, go back and be more specific, but I'm just trying to now just lay down a framework.

If you go to – I'm going to wait for it to be pulled up because I need to see that my pages coordinate with the pagination there because I – page 7, I believe.

Yeah, there we go.

Now, perhaps you could just explain what's that colourful looking circle there designed for?

CST. SMYTH: This is what we refer to as the use-of-force continuum.

MR. AVIS: Right.

CST. SMYTH: And basically it describes the various levels of force that you may potentially progress to and back from, depending on the situation, officer presence being the first stage of –

MR. AVIS: Okay, I don't need you to go into that detail, we'll get to that, but this is what is referred to as the use-of-force continuum. Now, it's not a straight line, is it –

CST. SMYTH: No.

MR. AVIS: – use of force? It's an integrated circle. Is that correct?

CST. SMYTH: Correct.

MR. AVIS: So from its very nature it implies that you have to be looking at everything all the time. All these options have to be going through your head in the observations you're making while you're doing, say, a threat assessment.

CST. SMYTH: Correct.

MR. AVIS: Okay.

CST. SMYTH: It's to illustrate that there – depending on the situation, you may have to jump from one element of use of force over others directly to another, depending on how – what the perception is and what's happening in that situation. And conversely, you may be able to de-escalate, depending on what's presented to you as well.

MR. AVIS: All right. Thank you.

And the little bold heading underneath, “The officer continuously assesses the situation and selects the most reasonable option relative to those circumstance as perceived at that point in time.”

I take it from that that essentially there's no formula here. It has to involve an assessment by you based upon your skill, background and training?

CST. SMYTH: Yes.

MR. AVIS: One and two are obvious; “3. Law enforcement officer safety is essential to public safety.” Can you explain to us why that is so?

CST. SMYTH: Use of force is necessary at times to execute our duties, and our duties are very much part and parcel to ensuring public safety. If it's to apprehend an individual who's carrying out a criminal offence, the use of force being carried out to apprehend that individual is being done so to create a safer community.

MR. AVIS: Is it another way to put it, you basically, as a police officer, you have to put yourself often between the assailant and the potential victim? So if the assailant gets you, they get to the victim. Is that correct?

CST. SMYTH: Well, yes, it's fundamental to policing operations and why you're there.

MR. AVIS: Go to page 8, I'm just going to look at the second paragraph: It is important to note that there is no specific formula that governs a law enforcement officer's actions in a particular, in particular situations. Would you agree with that?

CST. SMYTH: Yes, absolutely.

MR. AVIS: “This is because every situation presents unique circumstances, such as environmental factors, officer capabilities and subject abilities.” Correct?

CST. SMYTH: Correct.

MR. AVIS: And I'll get to it later, but in your questioning there by – from my learned friend, Mr. Simmonds, when you were talking about taking on Donald Dunphy with a bat, you were looking at your capabilities versus his capabilities in that situation. Correct?

CST. SMYTH: Correct.

MR. AVIS: You weren't thinking about, for example, if he had a gun.

CST. SMYTH: No.

MR. AVIS: Right.

CST. SMYTH: At that point, I was not.

MR. AVIS: And, again, it goes on to say: "For this reason, an officer is required to assess the situation and determine the appropriate police response after reviewing the totality of the circumstances." And you would agree with that?

CST. SMYTH: Yes. It refers to, you know, individual officer's ability and it's a good point.

In my assessment of Don Dunphy, physical capabilities with the stick, I would have been comfortable with intermediate use of weapons at most, such as maybe pepper spray, but was perhaps more comfortable engaging him physically if I had to. Versus there are certainly other officers who would not be comfortable with that and may have to result to higher levels of use of force based on their own capabilities and comfort. And the same would go for me. If Don Dunphy had of been a 250-pound man, I wouldn't have considered a physical confrontation.

MR. AVIS: Right. If you're going to physically confront someone, you have to have – be able to physically overpower them, simple as that.

CST. SMYTH: Yes.

MR. AVIS: Okay. If we go to page 10, essentially they're talking here – just those 1, 2 and 3: "In order for police to use force to control a subject, three elements MUST exist" So, basically, to start with they've got to have a weapon before you can – did the subject have a weapon? That's one of the first things you have to consider. Is that correct?

CST. SMYTH: Yes.

MR. AVIS: You look for weapons or means. You know, did they have a weapon, they got their fists raised, whatever.

Intent; the person is demonstrating some kind of intent towards you, the public or someone else. Correct?

CST. SMYTH: Yes.

MR. AVIS: And thirdly, they have the ability to deliver what – the threat or the assault, the use of the weapon as the case may be. So would you agree that those are the three things that you'd have to go through your mind –

CST. SMYTH: Yes.

MR. AVIS: – when you're confronting, you're immediately confronting someone?

CST. SMYTH: Yes.

MR. AVIS: Okay. And, again, we may get back to it, but your evidence – your question, your answer was false on the other one, it may not.

Mr. Dunphy had a weapon. Correct?

CST. SMYTH: Yes.

MR. AVIS: He was following you with the weapon as you moved. He did nothing when you said no, no, no and held up your hand. Presumably, he saw you pulling your gun. Did you feel he had the intent?

CST. SMYTH: I think as soon as it was pointed at me I felt intent.

MR. AVIS: And did he have the ability to deliver, pull the trigger, I guess, in your view?

CST. SMYTH: Oh, yes. I saw him holding the weapon, so yes.

MR. AVIS: And in terms of physical ability, doesn't take much to pull the trigger, does it?

CST. SMYTH: No.

MR. AVIS: Now, go to page 11. I'm leading a lot because I'm just trying to get you through this and then we're going to try and get back, but these are just the force options.

So Officer Presence – and I'd just like to point out, because you said use of force is somewhat exceptional. Is it fair to say that in a lot of situations merely having officer presence resolves a situation, because most people respect – even though they might be out of their mind at the time, they generally respect the law, respect your uniform or they know what's coming so they calm down. Is that reasonable?

CST. SMYTH: It can. It can have the inverse effect as well.

MR. AVIS: Oh, sorry, yes, I appreciate that. And that was one of your concerns with Mr. Dunphy?

CST. SMYTH: No. I wasn't afraid that Mr. Dunphy was going to see the uniform and –

MR. AVIS: I misquoted. That was your concern with a uniformed officer?

CST. SMYTH: My concern with a uniformed officer was not that he might act out violently or become more agitated to the point that he might carry out an act of violence, it was that it may not put him at a level of comfort that he would speak freely.

MR. AVIS: Understood. So simply enough the next step you take is you start trying to communicate with the person and see if that can resolve the situation.

CST. SMYTH: Yes.

MR. AVIS: And that's – again, that's what you were doing with Mr. Dunphy on that day, trying to communicate with him.

CST. SMYTH: Yes.

MR. AVIS: The next step; Physical Control. They speak of empty hand, soft and hard. Empty means you don't have a weapon, am I right?

CST. SMYTH: Correct.

MR. AVIS: And soft and hard more or less describe themselves; you grab someone, you give them a slight push or you punch them. You're moving towards from soft to hard.

CST. SMYTH: Soft being controlled movements.

MR. AVIS: Right. Right, taking their arm to get them in there, but if you have to get physical that's called hard. You have to put them down to the ground to cuff them or something like that.

CST. SMYTH: Right, could be an open-handed or close-handed strike.

MR. AVIS: Then we get to Intermediate Weapons or Weapons of Opportunity. Now just to go down there, you – on that day you had an OC spray?

CST. SMYTH: Yes.

MR. AVIS: And you had your gun. Correct?

CST. SMYTH: Yes.

MR. AVIS: You don't carry – and you had your cuffs obviously, but you don't carry a baton in plain clothes, do you?

CST. SMYTH: I don't. No.

MR. AVIS: Right.

I believe the, the idea behind that is, is with your weapon and plain clothes, it has to be concealed at all times?

CST. SMYTH: Yes.

MR. AVIS: And really no way to conceal a baton – baton, is there?

CST. SMYTH: It's a bit more challenging.

MR. AVIS: Yes.

CST. SMYTH: Even though they're collapsible, it does become difficult to conceal. Yes.

MR. AVIS: Then the last force option is Lethal Force. Correct?

CST. SMYTH: Yes.

MR. AVIS: Right.

So page 14, just go down to the last paragraph really. Some of this is repetitive. It is the first line: It is important to recognize that two officers may respond differently to the same situation or resistance levels. Although certain factors may be the same in both situations, number of subjects and so forth, officer abilities and skills may differ. Is that correct?

CST. SMYTH: Yes.

MR. AVIS: 17 – and I just want to address The Seven Tactical Principles here. And the first thing you look for is cover, if it exists. Correct?

CST. SMYTH: Yes.

MR. AVIS: While you are constantly – go to page 18. You are constantly on the alert for threat cues. Is that correct?

CST. SMYTH: Yes.

MR. AVIS: Go to the next page, 19; the Time Distance Ratio. What they're talking about there – and I will get back to that when I go through your use-of-force forms – is primarily you need a distance between you and someone with a sharp-edged weapon. And it's important to maintain that distance and if you're less than that distance, it's a concern. And normally you would have your – may have to draw your weapon, but that relates to sharp-edged weapons concern, is that right?

CST. SMYTH: Correct.

MR. AVIS: Yeah.

CST. SMYTH: It's to drive home the fact that if you're presented with a subject with a sharp-edged weapon in a – within close proximity, that it takes you a certain amount of time to draw your firearm and address that subject. So if they're closer, within 20 to 30 feet, then based on that knowledge, you should have your firearm drawn.

MR. AVIS: Right, so they can cover – it says here – maybe a minimum of 30 feet, but you say they can cover 20 to 30 feet before you have a chance to draw your weapon. Correct?

CST. SMYTH: Yes. A very physically capable person can definitely do that.

MR. AVIS: One-plus-one rule has been alluded to, verbal communication – these are your options again – de-escalation, you've addressed that.

Win mentality hasn't come up. Your survival is essential, so how do you perceive this win mentality in a threatening situation?

CST. SMYTH: I think, in essence, it describes a situation where an officer finds himself in physical danger and never to allow themselves to be mentally defeated, that no matter how dire the situation gets you have to keep the mentality that you are going to come out of this situation alive.

MR. AVIS: Page 29 – what I just want to show here in 10.0 – sorry, 10.2: Whenever you use force, it has to be reported; isn't that correct?

CST. SMYTH: Yes.

MR. AVIS: And use of force just a. Empty Hand – Soft; Empty Hand – Hard, whether you use your hands; your impact weapons; when you cuff a non-compliant person, you have to file a form – correct?

CST. SMYTH: Correct.

MR. AVIS: If you use the OC Spray – correct?

CST. SMYTH: Yes.

MR. AVIS: Draw your handgun, point it or discharge it – correct?

CST. SMYTH: Yes.

MR. AVIS: And 10.3 (a) on page 30: “Every Police Officer who engages in the use of force shall complete Form # 096 and forward it with the corresponding file to the File Management Unit.”

So whenever you use force it must be reported, on every occasion – correct?

CST. SMYTH: Yes.

MR. AVIS: Page 100 – just to confirm something I was saying about you on that day – it’s talking about – this is in respect to the firearms policy – and they’re talking about when you are civilian clothing and it says (f): “A Member on duty wearing civilian clothes must: (1) conceal their firearm from public view; and (2) keep the firearm on their person in an approved holster.” Correct?

CST. SMYTH: Yes, it’s referred to as the first level of security, the fact that it’s concealed and perhaps the individual doesn’t know it’s there adds to the level of security. And permits you to carry a different holster as well.

MR. AVIS: So I’d now like to – so I’m now going to go through your Use of Force Reports, which are P-0291. While that’s being pulled up, I’m not going to go through it with you, but throughout the process of most of these are apprehension of somebody in criminal activity but, in every instance and every moment while things are going on, you are doing threat and risk assessment on an ongoing basis. Is that correct?

CST. SMYTH: As it relates to officer safety, yes.

MR. AVIS: Yeah.

So let’s start with number one. Now, I’m going to state something – it will become evidence, so I don’t go over it. Every one of these reports was done when you were on street patrol because that’s the box you’ve ticked, except in the last one but it’s in the same time frame.

When were you in street patrol? Could you just remind us?

CST. SMYTH: From 2001 until 2007, maybe early part of 2008.

MR. AVIS: Okay. So in this one – now this is the problem, what we have here, also need the edged weapons – I’ll get to that one in a moment, but this was an edged weapon. So I’ll just outline the circumstances. You drew your handgun and you had to cuff the person. Essentially what happening there, there was an 18-year-old boy at home threatening himself with a knife, so he was threatening his own life and threatening and abusive and confrontational with his family. He was in possession of a knife.

Firearm drawn outside the residence and held in low ready at all times. You went in there and basically he handed over the knife, quite easily; is that correct?

CST. SMYTH: Correct.

MR. AVIS: I'm going to go now if I can to back to the previous exhibit and I want page 239 – so it is 292, page 240, actually, or I hope.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: Yes.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: Okay, I'm sorry. (Inaudible.) And I'm looking at page 240; I hope it's the correct one.

The exhibit there on the thing is not the right one. I just read what was there.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

THE COMMISSIONER: 233.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: Okay, oh, well done.

Just at the top there: What would you do in an edged weapon attack? It says there: Without question, the preferred response is distance, cover and the sidearm deployed and ready.

And you've just explained that to us about distance and so forth. On that day, would you agree with me that was essentially the policy that you were following? It's, without question, the preferred response when you're confronted with an edged weapon –

CST. SMYTH: Yes.

MR. AVIS: – particularly if there's any close proximity.

CST. SMYTH: Yes.

MR. AVIS: So the situation was resolved without incident or injury – correct?

CST. SMYTH: Pardon me?

MR. AVIS: This incident –

CST. SMYTH: Yes, it was.

MR. AVIS: – was resolved without incident or injury. You never heard back from management, which means your use of force was appropriate.

CST. SMYTH: That's how I would take it, yes.

MR. AVIS: Yeah.

So before we leave the edged weapons, I'd just like to go to page 241, so that I don't have to go back to it again.

On the second page there's a little thing there about Edged Weapon Awareness, and I think these are the kind of stats that the public might not be aware of. But in your training, essentially, you are told how dangerous sharp, edged weapons are?

CST. SMYTH: Yes.

MR. AVIS: And as indicated here, I'm not going to go through it, but basically, as it says there, 30 per cent of aggravated assaults with a knife compared to 2.5 per cent with a firearm. Correct?

CST. SMYTH: Yes.

MR. AVIS: Essentially, what it's saying here – and those statistics I think are useful and a bit scary, but essentially the knife or the edged weapon is used more frequently than the gun and it's a major concern in our society 'cause everybody has a sharp edged weapon in their home pretty much, don't they?

CST. SMYTH: Yes.

MR. AVIS: Right. Just to go down to the bottom there, The Local Situation, types of weapons, it includes a syringe. Correct?

CST. SMYTH: Yes, it does.

MR. AVIS: Now, I'll get back to that later. So I don't need this one anymore, thank you. And go back to Exhibit 0291.

That sort of domestic call that you did there on the 15th of April, 2008, that's a pretty heavy day event for you, isn't it? Sorry, when you are on street patrol.

CST. SMYTH: I'm not sure if it's every day, but it's a fairly regular occurrence to be exposed to on street patrol.

MR. AVIS: Well – okay, let me put it this way. Every day you're going to people's houses, you're not quite sure what you're going to be confronted with when you open the door, are you?

CST. SMYTH: No. Yes, you're correct.

MR. AVIS: This case you had awareness beforehand.

CST. SMYTH: Yes.

MR. AVIS: Right. So your risk and threat assessment was pretty well – you knew everything, almost everything you needed to know before you went in. Is that correct?

CST. SMYTH: We had more information than –

MR. AVIS: Right.

CST. SMYTH: – normally have the luxury of getting, yes.

MR. AVIS: That's my point, yes. Considerably more compared to the situation with Mr. Dunphy. Correct?

CST. SMYTH: Yes.

MR. AVIS: So if we go to page 5, and there's a number of these, so I'm not going to spend a lot of time on these in particular. Page 5, in this example on the 19th of February, 2008, is essentially cuffing a resistant subject. And when you cuff a resistant subject, you have to make a use-of-force report.

CST. SMYTH: Correct.

MR. AVIS: And you were able to place this person in handcuffs. They had, actually had needles on them, or this person had needles on them, or this – and you had to control him to the ground and place handcuffs. Correct?

CST. SMYTH: Correct.

MR. AVIS: No injury?

CST. SMYTH: No.

MR. AVIS: And, once again, you never heard back. So your assumption is that your use of force was appropriate. Correct?

CST. SMYTH: Correct.

MR. AVIS: I think it's more than an assumption but maybe someone else will have to say that.

Page 8, again this is a simple – you used empty hands soft and handcuffs. Essentially, a male and a female were assaulting each other. The male had the female pinned against the wall. The male refused to step away from her after being told to several times which means you used officer present first, you used verbal commands first. They didn't work so you moved to the next step which is to hold him to the ground and cuff him. Correct?

CST. SMYTH: Correct.

MR. AVIS: And once again, your understanding would be that your use of force that day was legal and appropriate. Correct?

CST. SMYTH: Yes.

MR. AVIS: Go to page 9. Again, this is a domestic disturbance. You have to use, again, soft empty hand and handcuffs. Basically, this man was assaulting his girlfriend. He was agitated and aggressive towards the two friends, wasn't paying much attention. So, again, just had to be forced to the ground and cuffed. Correct?

CST. SMYTH: Correct.

MR. AVIS: Once again, you never heard back and that would mean, to you, that your use of force was appropriate. Correct?

CST. SMYTH: Yes.

MR. AVIS: Okay. Page 10, now. And this was a use of pepper spray.

I'm going to – Madam Clerk, I'm going to need page 10 in a moment. In the meantime, I need to go back to P-0233, which I assume is the Use of Force Training Manual. I hope I got that right. And I want 274.

UNIDENTIFIED FEMALE SPEAKER: Page 274.

MR. AVIS: Okay.

Presentation: I'm just going through this to help everyone understand the limitations of this weapon. They state that basically you have to be within 10 feet –

CST. SMYTH: Yes.

MR. AVIS: – to be effective. And there is no risk of injury to the subject if properly deployed and followed up. Is that correct?

CST. SMYTH: Correct.

MR. AVIS: So what – assuming it's properly deployed, what's the follow-up?

CST. SMYTH: They're brought to the hospital for decontamination and for some reason a hospital is not available you can use water to flush their eyes. Some subjects find that effective.

MR. AVIS: Okay. So the weaknesses, they say pain compliance is required. In other words it's a painful experience for the person, isn't it?

CST. SMYTH: Yes, it is.

MR. AVIS: It says here 70 to 93 per cent effective. Is that – have you experienced that yourself?

CST. SMYTH: Yes, I have. I've experienced –

MR. AVIS: Okay. Can you tell us what any malfunctions, or what have you, that you have experienced with the OC spray?

CST. SMYTH: I experienced using it on highly agitated persons, persons who are under the influence of certain narcotics or alcohol. Combined with being in an agitated state, they can have a higher level of resistance to the OC spray.

MR. AVIS: Similarly, wind and rain can adversely affect it?

CST. SMYTH: Yes.

MR. AVIS: A canister can be faulty?

CST. SMYTH: Yes.

MR. AVIS: If you're in closed quarters there's a danger of you getting contaminating, you getting in the way.

CST. SMYTH: Yes, that's pretty common.

MR. AVIS: Go to 275, Document Failure Rate, they say – Documented Failure Rate. As studies show, the range is 70 to 93 per cent effective. Failure rates across the country have been reported as high as 30 per cent. Are you able to comment on that at all, in any way?

CST. SMYTH: I haven't carried out my own statistics of when I used pepper spray. I've certainly experienced it when they've been highly effective and I've experienced it when it's had no effect.

MR. AVIS: Officer Safety Considerations: not a primary option against edged weapon attack or other deadly force scenario. So you would –

CST. SMYTH: No.

MR. AVIS: – never use an OC spray with a gun pointed at you.

CST. SMYTH: Not with a gun, no.

MR. AVIS: Would never –

CST. SMYTH: Potentially with an edged weapon if you had sufficient cover and distance.

MR. AVIS: Now, this isn't related to this one, but so we don't have to pull this one up again and it's right next door, if you just go to 281, which is the baton – 'cause you do use it at one point in the use of force so I just get this out here. Really just the first – “The baton is an impact weapon which is designed to increase an officer's safety and to temporarily incapacitate a high-level resistant subject.” Not intended to punish.

Would you agree with that comment?

CST. SMYTH: Yes.

MR. AVIS: So you need a, you know, you're progressing, when you use the baton, much like the other one – you've tried speaking to them, you may have tried soft or even a little hard resist, open-hand resist, use of force. When that doesn't work, high-level resistance, you're looking at maybe baton and/or OC spray. Is that –

CST. SMYTH: Correct.

MR. AVIS: Depending upon your assessment of the circumstances. And 282, Use of Force Context: “The baton is an intermediate weapon, fitting in between empty hand control tactics and the firearm.” Would you agree with that?

CST. SMYTH: Yes, Sir.

MR. AVIS: Okay. So let's go back now, to Exhibit P-0291, page ten, which was use of OC spray. Now again, here, you're on patrol, it's a disturbance and you used aerosol weapon, after which you cuffed the person. It's my understanding that once you've used the aerosol you're – I mean, once you've used the aerosol you're required to cuff the subject, aren't you?

CST. SMYTH: Yes.

MR. AVIS: Okay. So one follows from the other. Basically somebody was fighting with staff outside some bar. He was combative and wanted to fight the staff. A lot of people in the area, many were concerned or – I can't quite read that word.

CST. SMYTH: Aggravated.

MR. AVIS: Aggravated but he continued to fight; officer presence had no effect?

CST. SMYTH: No.

MR. AVIS: Talking to him had no effect.

CST. SMYTH: No.

MR. AVIS: So you took the next step, which you chose as the pepper spray and it worked.

CST. SMYTH: Yes.

MR. AVIS: And as a result he was apprehended. Once again, you never heard back because use of force was appropriate.

Page 11 – again, this is sort of what I call a standard cuffing of a resistant subject – and sorry, just to go back to 10, you don't need to go back, Madam Clerk. Presumably that this man was, as you say, decontaminated, taken to the hospital or washed his eyes out?

CST. SMYTH: Yes.

MR. AVIS: No injury to him, no harm?

CST. SMYTH: No.

MR. AVIS: Page 11, which is the one you have up, again this what I just called a relatively simple cuffing but the person was detained for assaulting bar staff and was placed in handcuffs after refusing to comply with the police. It seems to be minimal resistance there, but you still have to report on a use-of-force report form because it was cuffs with some resistance – correct?

CST. SMYTH: Correct.

MR. AVIS: And obviously there no injury, no anything; subject was apprehended and arrested as the case may be; never hear back from management, so your assumption again is your use of force was entirely appropriate.

CST. SMYTH: Correct.

MR. AVIS: Apart from that, is it your view that your use of force in all these cases was appropriate?

CST. SMYTH: Yes, it is.

MR. AVIS: Okay.

So page 12, now page 12 this is the syringe case. And I am going to go into that one in a little more detail. Because here you used a combination of drawn gun and OC spray and is that something you do, train to do? In certain circumstances, it seems to me that one supports the other.

CST. SMYTH: Yes.

MR. AVIS: Right. Can you explain that in any general way for us?

CST. SMYTH: Well –

MR. AVIS: If not, I'll just go through the example.

CST. SMYTH: A presentation of an edged weapon could escalate potentially to use of deadly force depending on if the distance is closed to the point where you have no other option. If your environment permits you to leave that distance open, then you could utilize alternate weapons such OC spray.

So if I can approach a subject knowing that there is available space for me to move back, or a police vehicle in this particular case, that I can move behind, I may be able to maintain that distance and utilize the OC spray without ever having to resort to deadly force.

MR. AVIS: Okay.

I'd just like to talk about a syringe. We've already learned it's a sharp-edged weapon. So it's capable of grievous bodily harm and death. Would you agree?

CST. SMYTH: Yes.

MR. AVIS: The second aspect of a needle is, if it has been used, it may have a communicable disease. Is that correct?

CST. SMYTH: Yes.

MR. AVIS: Which could make it very harmful or deadly as well.

CST. SMYTH: Yes.

MR. AVIS: Concerns are AIDS or hepatitis C and things of that nature.

CST. SMYTH: Yes, and in this particular case the syringe had been presented to security staff at the retail establishment. So in approaching that subject, we would also refer to one-plus-one rule. That if they had used a syringe as a weapon, we would also give consideration that they may be other weapons that they would –

MR. AVIS: Absolutely.

CST. SMYTH: – intend to use.

MR. AVIS: And the third thing about a syringe, making it a particularly pernicious weapon, is it can contain something that could be harmful or deadly as well. So there are at least three concerns with a syringe. Correct?

CST. SMYTH: Yes.

MR. AVIS: And unlike a knife, let's say if the needle is used, and you can just be nicked with a needle that's been used and it can be potentially very harmful.

CST. SMYTH: Yes.

MR. AVIS: If it's a used needle. And obviously, in this day in age it's fair to say there's a lot more – you can see more people on the street using needles?

CST. SMYTH: Yes, it's often why it used as a weapon to threaten. Usually the threat is inclusive of such a communicable disease.

MR. AVIS: Okay. So this was clearly an armed robbery. The person had stolen items from Sears and used the syringe to escape. I'm not going to get the code but it's section 343A of the code, uses a weapon to essentially complete the offence even if it's afterwards.

So I do want to go through what, specially, you did. Not in any great detail I hope. Essentially, there was a man at Sears; stole stuff, as you say; threatened the staff with the syringe when they went to apprehend him. You had been contacted and you sort of picked the thing up somewhere. They were chasing him were they and you picked the thing up in the middle? You arrived?

CST. SMYTH: Yes.

MR. AVIS: Okay. And eventually it says here: As Constable – this is someone else's report – as Constable Smyth exited the police vehicle, he drew his sidearm and ordered the suspect to the ground; however, the suspect did not immediately comply. He was trying to bury the stolen merchandise. You made a second order for comply and the subject, at that time, started to move towards you. Correct?

CST. SMYTH: Yes.

MR. AVIS: And at this point I don't know if the needle was present, but your concern is he may have a needle and possibly some other weapon and he's coming towards you, even though you're commanding and holding a knife.

So that was a very threatening situation. Correct?

CST. SMYTH: Yes, it was.

MR. AVIS: Advance towards him. Eventually, the third time, he dropped to the ground. Once he was on the ground he resisted being cuffed so you OC sprayed him. Correct?

Sorry, you just read – yeah, so you're looking there.

THE COMMISSIONER: All right, Constable?

MR. AVIS: Sorry, I don't –

CST. SMYTH: Pardon?

MR. AVIS: Sorry, the question is –

THE COMMISSIONER: He's waiting for a response from you.

MR. AVIS: I think he's reading his notes, maybe, to check.

THE COMMISSIONER: (Inaudible.)

MR. AVIS: That's what I was waiting for.

Essentially – but when you went to cuff him he became resistant so you pepper sprayed him. Correct?

CST. SMYTH: Yes, I did.

MR. AVIS: Right. And at that time when he's resisting, you're unaware where the weapon is, if it's in his hands. Your concern would be that if you didn't control him in that manner you could find yourself in close proximity being stabbed by him. Correct?

Is that correct?

CST. SMYTH: That's correct.

MR. AVIS: Yeah.

And, once again, you did not hear back – use of force (inaudible) appropriate.

Page 19 – so this one was on the 8th of April 2007, again, while you were in general patrol; it's called an other disturbance. And in this case you used empty hand, soft impact weapon, hard and handcuffs. And the impact weapon was the baton. Correct?

CST. SMYTH: Yes.

MR. AVIS: So I'll just give a scenario: There's a report of a disturbance and when you arrived there was a male there who was upset because someone had head-butted his girlfriend. When you arrived, he said he was leaving and started to go. You stood in front of him and told him he was under arrest and would have to go to your vehicle until the matter is resolved. He started to walk away, so you grabbed him.

Grabbing him would be the soft, empty hand. Correct?

CST. SMYTH: Correct.

MR. AVIS: That didn't work because he pulled away, so you pursue him. You were verbally commanding him to – telling him to stop and he paid no attention. Correct?

CST. SMYTH: Yes.

MR. AVIS: Then you said if he doesn't stop, you're going to strike him with the baton. So you had an opportunity to warn him, so you did.

CST. SMYTH: Yes.

MR. AVIS: Is it fair to say that you do warn people whenever you have such an opportunity.

CST. SMYTH: When the opportunity exists.

MR. AVIS: Right.

CST. SMYTH: Sometimes we'll utilize the baton when in foot pursuit because it could be used to trip a subject –

MR. AVIS: Okay.

CST. SMYTH: – to give yourself an extra couple of feet of distance to trip the subject before. So that's why sometimes it's already in your hand and available.

MR. AVIS: Right.

So he continued to run and a second situation is afield. You grabbed at him. It didn't work. You yelled at him. You were yelling for him to get to the ground. He continued to resist, so at that point you struck him in the lower part of his legs with your baton. Correct?

CST. SMYTH: Correct.

MR. AVIS: So the object was to get him to the ground, as they say, to overcome his resistance, not to punishing him. So you struck him in the most appropriate area you felt at the time –

CST. SMYTH: Yes.

MR. AVIS: – rather than, say, in the face.

CST. SMYTH: Correct.

MR. AVIS: Right. So then he was, he fell to the ground and was placed in cuffs.

So essentially what happened here, empty hand wasn't working, commands weren't working. Do you believe there was a high level of resistance here?

CST. SMYTH: Yes, I do.

MR. AVIS: And that's why you used your baton?

CST. SMYTH: Correct.

MR. AVIS: And once again I – there's no reference to any injury to him but he wasn't taken to hospital or anything.

CST. SMYTH: No.

MR. AVIS: Right. So as far as you know there would have been no injuries. Again –

CST. SMYTH: He probably sustained –

MR. AVIS: Sorry?

CST. SMYTH: – bruising of some sort but –

MR. AVIS: Yes, there would – might be –

CST. SMYTH: – nothing beyond that, that I was aware of.

MR. AVIS: Right. In the situation of the use of the baton there's always likely to be some kind of thing.

Judge, I'm doing – sorry, Commissioner, I'm doing very well.

MR. COMMISSIONER: Uh-huh.

MR. AVIS: Time wise, sorry. Time wise is all I meant. I know it's 1:30. I have every confidence that I will finish within the hour when we come back.

THE COMMISSIONER: Within another hour? Okay, so that's –

MR. AVIS: I'd suggest, I'm suggest – hoping at the outside. I'm going back through this (inaudible).

THE COMMISSIONER: Okay, but when we get back we're going to have – we get back at 1:30. We'll have, what's that, three hours will be 4:30, about 2½ hours so.

MR. KENNEDY: It –

THE COMMISSIONER: I'd like to see if we could finish Constable Smyth today.

Sorry, go ahead.

MR. KENNEDY: My estimate on finishing, Commissioner, had been premised on the basis – excuse me – that I would start at 1:30 –

THE COMMISSIONER: Right.

MR. KENNEDY: – and would have a couple of hours. But there's no way – the way this is going, there's no way I'm going to finish this afternoon.

THE COMMISSIONER: Right.

MR. KENNEDY: I'm going, I'm going – excuse me. I'm going to need, I would think, two hours.

THE COMMISSIONER: Right.

All right, well, let's see. We're not giving up on that yet.

I think, Mr. Avis – I'm not sure we need to go through in as quite as much detail; you know, you can describe the incident. I don't know how many you have left there, but –

MR. AVIS: There's only a few left there.

THE COMMISSIONER: Yeah, okay.

All right, we'll do the best we can.

MR. AVIS: Thank you.

THE COMMISSIONER: So we'll adjourn for lunch until 1:30.

MS. SHEEHAN: All rise, please.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Okay. Go ahead, Mr. Avis, when you're ready.

MR. AVIS: I think counsel, sorry, wanted to clarify something first.

MS. CHAYTOR: Yes, sorry.

Yes, Commissioner, there are a couple of exhibits that we would ask, please, to have entered, it's P-0305, 0306, 0307. And, as well, last week when we did the re-enactment video, that should have actually been put into evidence as an exhibit, and that would now be assigned P-0329.

THE COMMISSIONER: 032 –?

MS. CHAYTOR: Nine.

THE COMMISSIONER: Nine.

MS. CHAYTOR: Yes, that's correct.

And, P-0291, which Mr. Avis was referring to this morning, that's a number of Constable Smyth's use-of-force forms and he was taking Constable Smyth through those this morning.

THE COMMISSIONER: Right.

MS. CHAYTOR: That's not all of Constable Smyth's use-of-force forms, just to clarify –

THE COMMISSIONER: Right.

MS. CHAYTOR: – but the RNC did offer to provide more and we said that wasn't necessary for them to go back any further in their records.

THE COMMISSIONER: Okay, thank you.

All right, Mr. Avis.

MR. AVIS: Yes, Commissioner, just to add a little bit to that. Essentially what we have is a year's worth. One year, I believe that is what is selected.

THE COMMISSIONER: Right.

MR. AVIS: Okay, I'm just going to touch upon two more of these, as briefly as I can. I just want to touch upon the School for the Deaf incident. This arose, according to the information there was – there were residents there and an alarmed resident contacted the supervisor who contacted the police. Is that your recollection?

CST. SMYTH: Yes, it was. It was a belief, if I recall, that somebody was making an attempt to break into the school.

MR. AVIS: Page 25; I'm sorry, Madam Clerk. Oh, I'm sorry, that's where I am, page 23.

Okay. Now, the person also had parked his car in the Village Mall parking lot and then come over to the School for the Deaf?

CST. SMYTH: Yes.

MR. AVIS: And he said he was looking for a girlfriend or a friend?

CST. SMYTH: I don't recall what his excuse was.

MR. AVIS: He was there at about 12:30, 1 in the morning?

CST. SMYTH: Yes.

MR. AVIS: There had been complaints of somebody bothering the female students in the past. Is that correct?

CST. SMYTH: I'm not sure. We were working plainclothes duty that night because of high incidents of break-ins in the area.

MR. AVIS: When you went there, was there any information you received or passed on to the police that the person was deaf?

CST. SMYTH: No.

MR. AVIS: So did you have any idea that the person was deaf?

CST. SMYTH: No.

MR. AVIS: Could you have possibly known that?

CST. SMYTH: No.

MR. AVIS: A final one I just wanted to touch on, is the other incident within these things where you used your weapon. If you could pull up page 29. Again, this is an incident of handgun, aerosol, empty soft, empty hand soft.

Now in this case, in the file it indicates that you had some prior knowledge of the suspect who was involved in this case. Is that right? Do I have that correct?

CST. SMYTH: Correct.

MR. AVIS: And what was your prior knowledge?

CST. SMYTH: This particular case is actually one that we've utilized before in criminal intelligence as instruction to front-line policing as an application of intelligence-led policing in front-line operations and how you apply that methodology and philosophical approach to also reactive policing.

The previous information we had on the individual was a method of operation and factors of how he carried out his home invasions that were consistent with previous behaviour, coupled then with specific details related to the individual having a history of violence, being armed, resisting arrest and violence towards police officers.

MR. AVIS: And that's why your gun was drawn on that occasion?

CST. SMYTH: Yes.

MR. AVIS: I'm not going to go into it, but there was, again, trying to find him, some resistance and eventually you got him. Right?

CST. SMYTH: Correct.

Note there, pepper spray was used in that case and was ineffective as well.

MR. AVIS: Sorry?

CST. SMYTH: Pepper spray was used in that case and was ineffective.

MR. AVIS: Now, I just want to touch very briefly on this British Virgin Island incident, more to do with the past.

How old were you in 2005?

CST. SMYTH: 26.

MR. AVIS: Since then have you married?

CST. SMYTH: Yes.

MR. AVIS: Do you have any children?

CST. SMYTH: Yes, I do.

MR. AVIS: How old is your child?

CST. SMYTH: Seven months and six years.

MR. AVIS: Okay. Evidence says you accepted – you were charged internally. You accepted responsibility, pled guilty and you were disciplined.

CST. SMYTH: Yes, correct.

MR. AVIS: You then went into – as you indicated this morning – in patrol for a number of years.

CST. SMYTH: Yes.

MR. AVIS: After that, it's not a promotion but you were put into criminal investigation. Correct?

CST. SMYTH: Correct.

MR. AVIS: And in order to do that, I would suggest if you agree with me, you have to have a certain level of investigative skills to be given that job.

CST. SMYTH: I believe so.

MR. AVIS: Okay. Then, the next thing you were made a supervisor. Well, let's put it this way, it's a more responsible position perhaps than a patrol officer. You had more to do, or am I not being fair to patrol.

CST. SMYTH: Yeah. No, I don't actually agree with that.

MR. AVIS: Okay, I'm sorry.

Then you became supervisor of the protective service unit, which is where you worked when this incident occurred.

CST. SMYTH: Correct.

MR. AVIS: So you essentially, again, though you were an acting staff sergeant or acting sergeant, you were supervising people, you were coordinating, writing policy. Correct?

CST. SMYTH: Correct.

MR. AVIS: Okay.

Now, I'm going to try, if I can just clarify a few points on threat and risk assessment –

THE COMMISSIONER: I have to confess, in one of these manuals the way they describe it seem to me to be a bit contradictory. So they're using the word "threat" as a term of art or jargon rather than it would be used by the layperson. I can't put my hand on it right now but you (inaudible).

MR. AVIS: Yes, that's why I say I'm going to – I don't know that I can. I think I have a similar kind of issue but maybe not that one in particular –

THE COMMISSIONER: Have a brief try at it. Okay.

MR. AVIS: A brief try at it to try and bring some clarity to the matter.

So I'd just like to look – it says P-0250, and this is excerpts from the *Criminal Code*. And I just want to indicate under the *Criminal Code* what a threat – where the word "threat", sorry – 264.1 on page 4 is uttering threats. It's: Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person; burn, destroy or damage real or personal property.

When you were doing your threat and risk assessment, there was obviously no indication at that stage that he was going to cause death or bodily harm to any person, was there?

CST. SMYTH: No.

MR. AVIS: Right.

And if we go to the next page, 5, 265(1)(b) says: A person commits an assault when he attempts or threatens, by act or gesture, to apply force to another person and if he causes that person to believe he can affect his purpose.

So those are the, where the words "threat" comes up in the *Criminal Code*. And once again there was nothing under 265(1)(b), you hadn't got that far in the process that day, had you, by any means.

CST. SMYTH: No, I was not investigating even that component of the *Criminal Code*.

MR. AVIS: Right.

CST. SMYTH: No.

MR. AVIS: Right.

Now, the focus – what I’m trying to deal with here is why you decided to pursue the matter beyond the tweet itself. Do you understand what I mean?

And I – so you had just received in that case a complaint from the Premier’s office or someone in government – correct?

CST. SMYTH: Correct.

MR. AVIS: Right. So you’re the protective service unit, you get a complaint from the Premier’s office – do you have to act on that?

CST. SMYTH: I’m obligated to at least consider it.

MR. AVIS: Right. So the focus as I – then, is the word “dead” in two prick dead MHAs – correct?

CST. SMYTH: I believe they’re probably the words that caused the heightened level of concern.

MR. AVIS: Right. And I may hurt as in might have good family members I may hurt. Correct?

CST. SMYTH: Correct.

MR. AVIS: Yeah, I’m just trying to connect this to the notion of assault and threats under the Code. Would you agree this language contains words that can imply harm or violence with some suggestion of future harm?

CST. SMYTH: Within a silo, within and of themselves, yes. If you didn’t –

MR. AVIS: Yes. I believe your words were that the tweet indicated some aggression.

CST. SMYTH: I think the verbage was certainly aggressive in its nature, yes.

MR. AVIS: So you’re, you’re just focusing on certain elements of the language. Would you agree that the interpretation of the words at this stage is just the first small step in a threat and risk assessment?

CST. SMYTH: Yes, very small.

MR. AVIS: I believe if I wrote it down correctly, you indicated that on the 5th of April you were in the embryonic stages of a threat and risk assessment.

CST. SMYTH: I think I said infancy, but – yes.

MR. AVIS: Okay, sorry, wrote it down. Now, I just want to just clarify another point. When you’re considering a threat specifically, you are looking at threats that may be aimed at specific – a specific person or persons, am I right?

CST. SMYTH: Yes, that’s what I would consider, yes.

MR. AVIS: Yeah, and then you have to be concerned whether the threat is also to the public, at that stage?

CST. SMYTH: Yes.

MR. AVIS: And again, you have to consider, at least begin the threat assessment of your own safety even from the outset.

CST. SMYTH: Correct.

MR. AVIS: Right. And is it fair to say that all three of those – that is to say, particular person, public, officer safety – that’s what you are, when you’re doing a threat assessment you are looking at all three at the same time?

CST. SMYTH: Yes.

MR. AVIS: And the same information may apply to all three.

CST. SMYTH: It may, yes.

MR. AVIS: Right. Similarly, I believe it was your words: Risk assessment is the likelihood of carrying out a threat. Was that, were those –

CST. SMYTH: Correct.

MR. AVIS: So no threat, no risk – correct?

CST. SMYTH: Sure, yes.

MR. AVIS: And again, you would be looking at the risk to specific person or persons, public and officers.

CST. SMYTH: Yes.

MR. AVIS: Right.

I’ll just give an example of information that applies to both or all three. A person had a record of violence that can affect whether the conduct is potentially threatening. Yes or no?

CST. SMYTH: Yes.

MR. AVIS: What about the likelihood of it being carried out?

CST. SMYTH: It could. It’s back to the adage of history being the best predictor for future behaviour, yes.

MR. AVIS: And it may also give you a concern for officer’s safety.

CST. SMYTH: Yes.

MR. AVIS: Okay.

Now, you guesstimated that you’ve done 20 to 30 threat assessments, and I believe you said more than anyone else in the protective service unit.

CST. SMYTH: It’s a possibility. I had – was probably more likely to take on more of those than I would assign.

MR. AVIS: Okay.

And okay, just on the point of assigning, where you are the supervisor the act and the regulations talk about undertaking your assigned work and you assign it to yourself effectively, don't you?

CST. SMYTH: In essence, yes.

MR. AVIS: Right.

You went – you said, I believe, that you went to half of the threat assessments – again, I understand you're just guessing, I'm not holding you down to half. You went alone.

CST. SMYTH: Yes, probably in that realm.

MR. AVIS: Prior to this with Mr. Dunphy, were there any incidents where you went – home visits – either alone or with another officer?

CST. SMYTH: Yes.

MR. AVIS: What incidents?

CST. SMYTH: Pardon me?

MR. AVIS: Can you give us an example?

CST. SMYTH: Sure.

There was one particular file that was generated through the minister of Works, Service and Transportation. He had been actually the recipient of a – what would be classified as an actual *Criminal Code* threat, even though it was kind of on the benign end of the threats. I think it referenced the next time I see this minister I'll punch him in the face.

The persons operating a social media, Twitter account, under the perception of complete anonymity through exhaustive efforts we were – I was able to identify the owner of the account. Then through the same cursory background checks that I had done on Mr. Dunphy, completed on this individual and determined that there had been no criminal history, no background of violence, no violent ideation, no particular grievance with government. Inhibitors to carry out an act of targeted violence were – there were many. There was a family, there were children. The individual was a professional, working individual. There appeared to be no history of mental health or instability.

So while it was a relatively benign criminal threat, there was also a – what had been voiced to me – a reluctance to pursue any criminal charges; as there often was with politicians not wanting to necessarily engage constituents with those types of court proceedings. So I ultimately visited that individual by myself at his home and in that case, because there had been an actual criminal element associated to it, I conducted a cautioned interview with the person and he understood explicitly, you know, the errors of his conduct and it was never an issue again.

There were others where commentary was more general, such as Mr. Dunphy's commentary, and the grievance, although present, it didn't, it wasn't as entrenched as what Mr. Dunphy's was. Again, the account was generally anonymous, but was able to identify the holder through some previous commentary with friends. That individual turned out to be a high school student that was simply espousing rhetoric for the sake of, I think, being a nuisance.

MR. AVIS: Okay, thank you (inaudible).

Have you ever been threatened or assaulted – prior to this incident, have you ever been threatened or assaulted doing threat assessments with home visits?

CST. SMYTH: No, never.

MR. AVIS: One last thing, the – sorry, Exhibit 0250 again, Madam Clerk, if you could, page 6. Just to – it’s almost stating the obvious. I just – you see arrest section 495 of the *Criminal Code*. I just want to bring to your attention here, it says, “A peace officer may arrest without warrant (a) a person who has committed an indictable offence or who, on reasonable grounds, he believe has committed or is about to commit an indictable offence;” so on “(b) a person whom he finds committing a criminal offence.”.

As far as 495(1)(a) goes – page 6, Madam Clerk, sorry – you were nowhere near that that day, were you? You were nowhere near having reasonable and probable grounds, were you?

CST. SMYTH: No, I was not.

MR. AVIS: I’d like to start now with the shooting incident, the concluding topic. Hopefully it won’t take too long.

Okay. So let me see if I have this right. You were in the execution of your duty that day to protect government officials. Is that correct?

CST. SMYTH: Yes.

MR. AVIS: And you visited Mr. Dunphy because you felt it was necessary as part of your threat and risk assessment?

CST. SMYTH: Correct.

MR. AVIS: When you arrived there, did Mr. Dunphy object to your presence?

CST. SMYTH: No, he did not.

MR. AVIS: Did he get upset with you because you were there on Easter Sunday?

CST. SMYTH: He made no reference to Easter Sunday.

MR. AVIS: Do I understand it correctly; initially he was cordial and invited you in?

CST. SMYTH: Yes, he did.

MR. AVIS: You entered in the living room; he’s in his armchair and you’re standing?

CST. SMYTH: Correct.

MR. AVIS: Now, the question I have for you, do you think he would have invited you into his living room if he thought for one moment you could see his loaded rifle?

CST. SMYTH: I don’t think so, but that’s – it’s hard for me to answer that. I don’t know –

MR. AVIS: Sure.

CST. SMYTH: – what he was thinking.

MR. AVIS: If a person has an unloaded gun, in say the commission of an offence, how is that different than a person having a loaded gun in the commission of an offence?

CST. SMYTH: There's no difference.

MR. AVIS: Okay.

THE COMMISSIONER: What was the question?

MR. AVIS: When a person, it wasn't – I'm going to have to rephrase it, how's that? My question was, if I may, is there a difference between a person who is, has a loaded gun or an unloaded gun and he said that there's no difference. And I just hadn't – I don't think I phrased the question very well. So I'm going to rephrase it.

Is an unloaded gun as potentially lethal as a loaded gun?

CST. SMYTH: The end result would obviously be different.

MR. AVIS: Right. In law they're no different, I guess. Was that what you are saying?

CST. SMYTH: Yes.

MR. AVIS: Okay, and that's why I –

CST. SMYTH: Sorry, I thought that's what you were asking me.

MR. AVIS: Yes, that's why I changed it.

What Criminal Code offences was Mr. Dunphy committing by having that firearm in his living room loaded?

CST. SMYTH: Well, the illegal possession by failing to have a licence; the illegal storage of the rifle itself improperly; the improper storage of ammunition; and then, of course, the pointing of the firearm.

MR. AVIS: Yes, the pointing of it in that particular occasion.

If you had known beforehand Mr. Dunphy had an unregistered gun, what would you have done?

CST. SMYTH: I probably would have approached the house differently and likely with multiple officers.

MR. AVIS: Right, multiple officers. What if you knew he kept a loaded gun in his living room?

CST. SMYTH: If I knew that?

MR. AVIS: Yes.

CST. SMYTH: I probably would have endeavoured to locate Mr. Dunphy at an outside location and execute a search warrant in his house.

MR. AVIS: And who would you take to the search? Would you go alone?

CST. SMYTH: No. If Mr. Dunphy is not in custody it would probably be with a tactical unit.

MR. AVIS: Now, if I understand Mr. Colin Dinn's evidence correctly, he said that Mr. Dunphy was paranoid about people robbing him, and said after sending a letter or a bad tweet he would not be surprised if someone came some night. He said to him, they're liable to come and get him any time. Let 'em come.

In your threat and risk assessment, what do you, would you make of this on its own, Mr. Dinn's comment?

CST. SMYTH: That he's probably a paranoid individual and that you shouldn't approach there without the appropriate security measures in place.

MR. AVIS: And – so, I guess, using Mr. Simmonds's words, it's a heightened level of concern if you'd known that information.

CST. SMYTH: Yes.

MR. AVIS: Absolutely.

Now you've indicated in several different ways that you, you're still troubled by the fact that you didn't see the rifle. Correct?

CST. SMYTH: Yes, I am. Less so after seeing the –

MR. AVIS: Right.

CST. SMYTH: – demonstration here, but yes.

MR. AVIS: I'd also just mention to you, the evidence is that Meghan Dunphy never saw the gun by his armchair, if I have that correct, and Mr. Dinn said he never saw it at all. Does that give you any comfort that two other people didn't ever see it?

CST. SMYTH: Does it give me comfort?

MR. AVIS: Yes. They didn't see it, you didn't see it. That give you any comfort?

CST. SMYTH: Not particularly, no.

MR. AVIS: Like to go to – my heavens, I'll find it in a moment.

Okay, I'll just mention it. In one – you can go to Scene 103. That's the side of the chair. I just have one question there.

At the back by the plugs appears to be something that looks like a jacket or a coat or a blanket. Have you any idea when you were there whether that jacket or coat or blanket was always in the place it is in that photograph? Or –

THE COMMISSIONER: It's behind the white garbage –

MR. AVIS: Yes, behind the white garbage bag just there by the plug. Do you know where those items were you went in?

CST. SMYTH: No.

MR. AVIS: If they were covering the rifle when he picked it up, they wouldn't make a noise, would they?

CST. SMYTH: I wouldn't think so, no.

Mr. Commissioner, can I go back and answer or revisit a question that Mr. Avis just asked regarding what I would have done if I had known the gun was in the house?

THE COMMISSIONER: Go ahead.

CST. SMYTH: I probably answered that a bit too quickly. The reality of that is there are way too many variables for me to give you a good answer. For me to say I would execute a search warrant, there are way too many variables that I'm assuming even providing you with that answer. To say I would respond with a tactical unit, inclusive of that there are way too many variables for me to ever say we would ever get to that stage so –

MR. AVIS: I appreciate your answer. Perhaps I'll just put it in the context I was thinking. If you decided to go to a house where a person you knew had a loaded gun, who would you take with you?

CST. SMYTH: If I'm going there with the definitive answer of or the definitive intention of getting in there to speak to the person, it may very well attend with a tactical unit; but if you know that somebody has a loaded gun and has a known hatred for police, this might be a situation where going to their home just may simply not be an appropriate course of action.

I may be aware or have some level of intelligence that they may have a loaded weapon in their house, but it may not be sufficient enough to fulfill what would be required to get a search warrant and attend with a tactical team. So it may just be simply we shouldn't go to this person's house. Intelligence suggests that there's information that would put us at risk. We should consider alternative measures, of which there are could be many.

MR. AVIS: Okay. Were you just doing a threat risk assessment in your head as you were answering this question?

CST. SMYTH: Well, yes, in a very cursory fashion, yes.

MR. AVIS: No, I understand, but they do have to be done quickly sometimes on the spot –

CST. SMYTH: Yes.

MR. AVIS: – in the moment and when you're in the presence say of Mr. Dunphy you often only have very little time to do them; is that correct?

CST. SMYTH: In some cases, yes.

My point, sorry, bringing it back up, was that I was probably too quick to give you that answer.

MR. AVIS: Yes, no I appreciate that, and thank you for that.

Now I want to pull up Exhibit P-0250.

THE COMMISSIONER: How are you doing with your –

MR. AVIS: Sorry?

THE COMMISSIONER: Do you have a rough estimate of how much more time you're going to need?

MR. AVIS: I am 10, 15, I hope, at the most; I'm getting there.

Sorry, Exhibit P-02 – oh, I'm sorry (inaudible). Page one. Now these are the criminal – I'm just going to go briefly through the *Criminal Code* provisions that apply, and actually, justify your actions that day. Or not. Our view is to justify them. Excessive Force 26: Everyone who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

What that is essentially saying is that if use of force was necessary, was firing your weapon excessive force? Do you feel that you used excessive force?

CST. SMYTH: No, I did not.

MR. AVIS: And why is that?

CST. SMYTH: Because I felt that my life was in imminent danger and I responded accordingly to that.

MR. AVIS: In your training, what is the response to deadly force?

CST. SMYTH: It's deadly force.

MR. AVIS: Is there any other –

CST. SMYTH: (inaudible) there are no other options available to you.

MR. AVIS: Right. So for example Mr. Simmonds talking about you charging someone who may be in the process of pulling up a gun – do you consider that a realistic option?

CST. SMYTH: No, I do not.

MR. AVIS: Is that, is that any part of your training, that you would actually take on someone who was in the process, or – whether they had the gun up, or down, anyone that was grabbing for a gun – what would you do? If you saw him grabbing for a gun, what would you do?

CST. SMYTH: If I saw him grabbing for a gun?

MR. AVIS: Yes, if you'd actually seen Mr. Dunphy going for the gun.

CST. SMYTH: If there was time for me to get to Mr. Dunphy and prevent him picking up the firearm, then yes I would have considered that as an option.

MR. AVIS: But once you see the firearm up, there's only one option.

CST. SMYTH: That's the only option I perceived at that time, once it was pointed at me, yes.

MR. AVIS: Now also, okay – I think this is one of the prohibited pictures so I won't bring it up. In the room, as I understand, between you and him there was at least – there was one, if not two coffee tables?

CST. SMYTH: Between him and I?

MR. AVIS: Yes.

CST. SMYTH: There was one coffee table that was directly in front of him that would have been between us; there was another coffee table that was in front of the couch, that at times would have potentially been between us but I would suggest for the most part it wasn't between us.

MR. AVIS: Okay, so there was one table between you.

CST. SMYTH: Yes.

MR. AVIS: Is that an obstacle? To you getting to him?

CST. SMYTH: It's a small one.

MR. AVIS: Okay.

27, Use of – Everyone is justified in using as much force as is reasonably necessary (a) to prevent the commission of an offence (i) for which, if it were committed, the person who committed it might be arrested without warrant.

So for, I guess, pointing a firearm at you, which is the least of what Mr. Dunphy was doing that day, would you have had grounds to arrest him without a warrant?

I've got the section there if you need the help.

CST. SMYTH: Sorry. Yes, I would have had grounds to arrest Mr. Dunphy based on the various firearms offences I think I outlined, yes.

MR. AVIS: Okay.

That would be likely to cause immediate and serious to you. Was that true?

CST. SMYTH: Pointing a firearm, yes.

MR. AVIS: Yes.

Okay. To prevent anything being done that, on reasonable grounds, you believed if it were done it would be an offence mentioned in paragraph (a).

That is to say you believe the offence was that he was committing an offence of pointing a firearm.

CST. SMYTH: Yes, absolutely.

MR. AVIS: Go over to page 2, Defence of Person. So I'll just put it into a question: Did you believe on reasonable grounds that the force being used against you – sorry – did you believe on reasonable grounds that force was being used against you?

CST. SMYTH: Yes.

MR. AVIS: That day, sorry.

(b) you pulled the gun, or pulled your weapon, in order to defend yourself.

CST. SMYTH: Yes.

MR. AVIS: (c) the act committed is reasonable. Did you consider the act reasonable?

CST. SMYTH: Yes, I did.

MR. AVIS: Now subsection 2 goes through the various factors: The nature of the force or threat against you was deadly force – correct?

CST. SMYTH: Yes.

MR. AVIS: The extent to which the force was imminent and whether there were other means available to respond to the potential use of force. What do you say about that?

CST. SMYTH: I absolutely felt the force, the threat of force was imminent and I did not see any other options.

MR. AVIS: Yes, was there any real cover there at all?

CST. SMYTH: Not in the room, no.

MR. AVIS: And how much time do you have to get out of the room in that situation?

CST. SMYTH: How much time would it take me to get out of the room?

MR. AVIS: Yes.

CST. SMYTH: It wouldn't take very long.

MR. AVIS: Did you feel you had enough time?

CST. SMYTH: No, the gun was pointed at me. I thought I was going to be shot.

MR. AVIS: Then it goes to the person's role in the incident – now that's you – and your role that day was you were conducting a threat and risk assessment.

CST. SMYTH: Correct.

MR. AVIS: And that was in the execution of your duty as a peace officer.

CST. SMYTH: Yes, it was.

MR. AVIS: (d) whether any party to the incident used or threatened to use a weapon. Well, Mr. Dunphy did – correct?

CST. SMYTH: Yes, he did.

MR. AVIS: (e) is the size, age, gender, physical capabilities of the parties to the incident. Now you've already indicated that you could overpower him physically, if necessary.

CST. SMYTH: Yes, if the only threat was physical violence, yes, I felt I could overpower him.

MR. AVIS: Here where it's a gun, what physical capability does a person need to fire a gun?

CST. SMYTH: Very little.

MR. AVIS: Go to page 3, I'm just going to go straight to (g). Do you believe that the nature and proportionality of your – how do you consider the relationship between the nature and proportionality of your response to him pointing the gun at you?

CST. SMYTH: Sorry, can you –

MR. AVIS: I'm sorry. Just have a look at (g). You're the person in the section. You're, you – there was a threat of force, the nature and proportionality of the force you applied to him, do you have an issue with that? It's sort of the same thing again.

CST. SMYTH: Yes.

No, I believe it was proportional based on what I was faced with, absolutely.

MR. AVIS: Right.

Now, (h) did you think Mr. Dunphy's pointing the gun at you was in any way lawful?

CST. SMYTH: No, absolutely not.

MR. AVIS: Just a few questions, I hope.

Just have some questions about after the (inaudible) – you'd mentioned about memory. Prior to this incident, did you ever have any memory problems?

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

MR. AVIS: Right. Since this incident, have you had any memory problems with things that occurred after this incident?

CST. SMYTH: You mean immediately thereafter?

MR. AVIS: No, today, ever since?

CST. SMYTH: Nothing of any drastic note, no.

MR. AVIS: Right. Because you did say that time was hard to piece together. What were you referring to? What times, prior to Mr. Dunphy pulling the gun or when you were in the living room or when he pulled the gun, if you know what I mean.

CST. SMYTH: No, I think all of it. You know, even referring to the conversation with Dick and Debbie Dunphy. I appreciate, in light of what occurred, the need to try to assign very finite numbers to that, but you know the reality is, is that's challenging. To have a 15, 20 – 20-minute, 25-minute conversation with somebody, you know, regardless of how the outcome was, can sometimes be challenging. I think you add in what occurred and it probably becomes that much more challenging.

MR. AVIS: You said again: Time frames have been affected, nothing else. Is that still your view, just the time frames?

CST. SMYTH: Yes.

MR. AVIS: You said also it all happened very slowly. Can you expand upon that for us?

CST. SMYTH: That's also very difficult because, you know, the incident itself – is that what you're referring to, the actual shooting?

MR. AVIS: I'm assuming that's what you were referring to, yes, when you said that. That's my understanding, yes.

CST. SMYTH: I think what I've generally said is it happened extremely quickly and very slowly at the same time.

MR. AVIS: Yes.

CST. SMYTH: And I appreciate that that's almost a contradictory statement but it's referring, I guess, to, you know, some of the motions happening very quickly, but also the perception of some of my own movements and Mr. Dunphy's movements were almost in slow motion. And the amount of information that goes through your head seems like you would normally need a lot of time to process that kind of information, but in reality you process it over a very short period of time, in a matter of seconds.

MR. AVIS: Okay.

Have you ever experienced that in any other situation as a peace officer or even in life?

CST. SMYTH: Yes. Not to that extreme but, yes.

MR. AVIS: Would that have been a stressful situation?

CST. SMYTH: Would that situation have been stressful?

MR. AVIS: Yes, the one that you said that may have experienced it somewhat.

CST. SMYTH: Yes.

MR. AVIS: You didn't – I just wanted just to get a few points on the effect of, on you, of this life-threatening situation. You said you were in shock; you had high adrenaline. What about your heart rate?

CST. SMYTH: It was very high.

MR. AVIS: You said you were shaking.

CST. SMYTH: Yes.

MR. AVIS: Were you sweating?

CST. SMYTH: I don't recall.

MR. AVIS: Was your throat dry?

CST. SMYTH: My throat got very dry, yes.

MR. AVIS: Any other physical reactions you can help us with?

CST. SMYTH: I think the shaking, the instantaneous dry mouth, I think just that surge of adrenaline that puts you in that high-alert phase. Perhaps, you know, that hypervigilance where you're picturing or considering I should say threats that, in hindsight, weren't really even – I didn't have a good reason to believe them, but I was in such a mode that I was considering them.

MR. AVIS: You also said, if I got it correctly – and please correct me if I've got you wrong here. You said you – the day of incident you said you could have given a statement that day, but it would be more challenging having regard to your state of mind. Now, those might be my words. What did you mean by that?

CST. SMYTH: I think just having that surge of adrenaline that remains in your body. Even when I read back the statement I gave to the RCMP the next day, the way I communicated was at sometimes disjointed and almost as if I was, for lack of a better phrase, ramped up and maybe that was just part of retelling the incident. But, you know, when I read back that statement or when it was read back to me or I sit here and read some of it, it's almost embarrassing. I'm doing a poor job of articulating myself. There's a lot of ahs, uhs and interrupting my own sentences with a change in a topic, if you will.

I think that would have been amplified maybe worse than the night before. My memory of it has become, did become clearer days after. You know, for example, it wasn't until we got closer to the recreation that I even remembered the explicit details of drawing my firearm, moving my jacket back, unhasping my holster. The actual day of providing my statement and certainly the night before I didn't have – those memories weren't there. It was as if I just had the firearm in my hand, that that draw was all one motion. I didn't have the memory of actually removing it so

MR. AVIS: Okay. You indicated as well that after the incident you said that you should have checked the weapon. Do I have that correct or –

CST. SMYTH: Yes.

MR. AVIS: You also, I get from it, you did not properly clear the residence afterwards.

CST. SMYTH: No.

MR. AVIS: Are these not necessary routine things for your own protection?

CST. SMYTH: They normally would be, yes.

MR. AVIS: Can you give us any explanation as to why you didn't do them?

CST. SMYTH: Not particularly, just I think the mindset you're in at the time after the shooting, it was tough to think very clearly to the point where you need to do a proper clearing of this residence or you need to pick that firearm up and make the – ensure that it's made safe in case there is another person in the house, or for anybody else coming in the home.

MR. AVIS: Since then, I believe you indicated that you don't sleep well. Are you still not sleeping well? Did I get that correct?

CST. SMYTH: Yes, you did, yeah.

MR. AVIS: That's been ever since – we're getting close to two years now?

CST. SMYTH: Yes.

MR. AVIS: Any other physical affects that you're experiencing?

CST. SMYTH: I don't think so.

MR. AVIS: Sorry?

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

MR. AVIS: How about your frame of mind. How's that been impacted by the incident and taking two years to come to, hopefully, some – oh, a little over two years to come to some kind of closure? How's that been affecting you?

CST. SMYTH: My frame of mind?

MR. AVIS: Yes, your frame of mind.

CST. SMYTH: Can you be more specific?

MR. AVIS: Okay. Do you find it impacts your mental state in any way?

CST. SMYTH: Yeah, of course, and this is extremely challenging to deal with in every way. The – you know, the belief that, the belief out in, within the public that you're a cold-hearted cowboy assassin is extremely, extremely difficult to take. And I'm, you know, I'll be – this whole process, having to sit through this, or even anticipate sitting here and baring every aspect of your life for public consumption, yeah, that's tough to deal with.

MR. AVIS: I believe you've also, and I'm just – you feel in some respects you don't have enough, you did not get enough support from the RNC. Is that fair to say?

CST. SMYTH: Well, in some ways yes, and some ways no. Internally, I had tremendous support, overwhelming from internal members. I feel how it's been dealt with publicly has been perhaps the biggest failure, and that's a failure on our organization as a whole. It erodes the public confidence, which does have an impact on me individually, because you feel that you're at the, at the core of it. But in terms of support individually, internally from officers who voice their support and concern, no, there's been a lot of that, and that's been greatly appreciated.

MR. AVIS: What about your career. You're in motor vehicle right now?

CST. SMYTH: I applied to go to our traffic –

MR. AVIS: Traffic.

CST. SMYTH: – the services section, yes.

MR. AVIS: And what are you doing on a day to – where are you now, you're not – are you working right now?

CST. SMYTH: At this moment I'm on leave to attend this inquiry.

MR. AVIS: Okay. Do you feel like your career has come to a standstill over this?

CST. SMYTH: Yes, of course it has.

MR. AVIS: And is it fair to say your view, as it's taken a long time to resolve for you, for you to get closure and move on?

CST. SMYTH: Well, I think that would suggest that there's been some closure and I've moved on, which is not the case. So I don't know when that day comes.

MR. AVIS: I see.

One final proposition I suggest to you, that all you were doing that day was your job you were trained to do and required by law to do, when all of a sudden Mr. Dunphy points a weapon at you and you had to defend yourself. Is that correct?

CST. SMYTH: That's a simplistic but accurate summary, yes.

MR. AVIS: Thank you.

Those are my questions, Commissioner.

THE COMMISSIONER: Thank you, Mr. Avis.

Now, who wants to go next?

Mr. Drover.

MR. DROVER: Yes. Thank you, Mr. Commissioner.

Constable Smyth, there were some questions from Ms. Chaytor about your conversation with Tom Mahoney. And Ms. Chaytor had discussed the fact that Workers' Compensation had monitored and reviewed some tweets by Mr. Dunphy and determined that they did not need to involve police.

My question is, what information did Mr. Mahoney share with you in relation to any investigation by Workers'?

CST. SMYTH: He didn't provide any explicit details just that they had previous dealings and concerns with the individual. I don't recall getting anything specific beyond that.

MR. DROVER: There were some questions this morning I believe from Mr. Simmonds, or it could have been yesterday, about whether or not – when you attended different training sessions, whether there were members of the RCMP in attendance. Were there also members of other forces in attendance at those training sessions?

CST. SMYTH: Yes, absolutely.

MR. DROVER: Do you have any idea, approximately, how many different forces were? Some examples?

CST. SMYTH: I don't know. We've done training with various agencies, including probation office, Canada Boarder Services Agency, Eastern Health, forestry, conservation. Most law enforcement agencies in the province we've engaged in joint training operations, depending on the nature of it, on a number of occasions. How many I was involved in directly and how many were at various training, I don't know.

MR. DROVER: Thank you.

Everybody's asked all the rest of my questions.

THE COMMISSIONER: Thank you, Mr. Drover.

UNIDENTIFIED MALE SPEAKER: Mr. Flaherty had some questions.

MR. FLAHERTY: (Inaudible) if I'm last on the list I'll –

THE COMMISSIONER: Sure. I was going to do you after Mr. Williams. That's fine, you can go ahead now.

MR. FLAHERTY: Now, I do apologize. I was not here for the morning session –

THE COMMISSIONER: Understand that I'll stop you if you're getting into any duplication dealt with.

MR. FLAHERTY: Yes, for sure.

All right. Constable Smyth, my name is Cletus Flaherty and I'm counsel for the Donald Dunphy Community Coalition.

So when you got appointed to the PSU, that was, that was a pretty big deal in your career, wasn't it?

CST. SMYTH: I don't think it was – it was a new assignment. It's not necessarily an appointment.

MR. FLAHERTY: Is this, is this an important job? Is this a job that provides –

CST. SMYTH: I don't think it's any more important than the myriad of other positions that exist or that I've undertaken at different times. I was pleased to, to take it on.

MR. FLAHERTY: Well, you get, you get to be around the Premier and other dignitaries. It is a bit of an important position. You're essentially the bodyguard for the head of government here in Newfoundland and Labrador.

CST. SMYTH: Yes, but I don't think it's any more important than a lot of the other jobs that exist within the RNC.

I'm sorry, I'm just – I'm not sure what you're asking exactly.

MR. FLAHERTY: I'm just trying to ask whether or not you were very excited to get this job, and is this job – this job is no different than other job you could have had at the RNC?

CST. SMYTH: Oh, it's different. Most different facets of policing are differing in some way, shape or form, so this one is different.

MR. FLAHERTY: Were you excited to take the job?

CST. SMYTH: I was happy to take the job. I'm not sure if I was beaming with excitement. There are pros and cons of the job. There's a lot of downsides to it, too. There's a heightened demand on schedule, on family. There's little in the ways of predictability in what you're going to be doing from day to day. So there are elements of it which I was happy to do and there's components of it that weren't so good.

MR. FLAHERTY: You must have took it as an honour, though, to protect the Premier of the province.

CST. SMYTH: Sure, absolutely.

MR. FLAHERTY: And not just any Premier, when we go back to the date of Mr. Dunphy's death. It wasn't just any Premier, it was Paul Davis who was a fellow police officer, correct?

CST. SMYTH: He was a fellow police officer, yes.

MR. FLAHERTY: And there is a tight and strong bond between police officers, is there not?

CST. SMYTH: There can be, yes.

MR. FLAHERTY: You would want to protect a fellow police officer, wouldn't you?

CST. SMYTH: Yes.

MR. FLAHERTY: And not just any police officer. Paul Davis is actually a friend of yours?

CST. SMYTH: Mr. Davis and I haven't socialized outside of work functions.

MR. FLAHERTY: So you text his wife, but you won't text him outside of work functions?

CST. SMYTH: I've texted family members of probably every other premier that I've ever dealt with.

MR. FLAHERTY: So you and Paul Davis aren't friends.

CST. SMYTH: Well I've – it depends I guess on how you're going to classify a friend. I just tried to clarify that for you to say that we didn't socialize outside of work functions.

MR. FLAHERTY: And during your mutual shared time in the RNCA you didn't, didn't ever socialize?

CST. SMYTH: That would be work.

MR. FLAHERTY: It must have been pretty important to you to ensure that the premier and his staff didn't have any unresolved concerns, correct?

CST. SMYTH: In relation to what our mandate was?

MR. FLAHERTY: Yes, sure. Your mandate generally, let's go with that.

CST. SMYTH: Yes, of course.

MR. FLAHERTY: And when someone sends you a concerning email, a concerning tweet, you don't want to leave that concern unresolved.

CST. SMYTH: Well, that's a specific duty contained within our mandate. It would be a potential dereliction of duty if I didn't follow through as soon as practicable.

MR. FLAHERTY: No, no matter how meritless or unreasonable that concern might be?

CST. SMYTH: If the concern was meritless, then it wouldn't have required any follow-up. I've received meritless complaints. And we didn't do any follow-up.

MR. FLAHERTY: Why, 'cause you interpreted the threat or concern not to have any merit.

CST. SMYTH: Well, the particular comment, as I've said here before, in this particular case, I didn't interpret as a threat. It was the other issues at hand that, to me, constituted the beginning of a threat assessment.

MR. FLAHERTY: I mean, what appears to be clear from the evidence both documentary and both what you've provided here, Constable Smyth, is that you're not particularly comfortable with anyone saying anything impolite or using any aggressive language at all with respect to politicians. Is that a fair – is that a fair assessment?

CST. SMYTH: No, that's highly unfair.

MR. FLAHERTY: Okay, what's unfair about it?

CST. SMYTH: There are hundreds and thousands of rude, inappropriate, hateful comments that get directed towards the premier and public officials, on a regular basis. I didn't follow up on those.

MR. FLAHERTY: And so what's the difference between everything that you just said that happens on a regular basis and what happened in this situation with Donald Dunphy?

CST. SMYTH: The extensive background of this person.

MR. FLAHERTY: What extensive background? He's an injured man who had a gripe against Workers' Comp and the government.

CST. SMYTH: Right.

MR. FLAHERTY: What's the extensive background?

CST. SMYTH: So the background being a, as I've said many times in the past few days, the long-standing grievance towards government, elements of which are not founded in reality –

MR. FLAHERTY: How do you know none of that was founded in reality? The day that you got the tweet of concern, how did you know his grievances were not founded in reality?

CST. SMYTH: What I said was elements of his grievance –

MR. FLAHERTY: What elements?

CST. SMYTH: – such as –

MR. FLAHERTY: And when did you, and when did you assess these elements?

CST. SMYTH: Sorry, which question do you want me to answer?

MR. FLAHERTY: You made a comment, you said that Donald Dunphy had a grievance against government not based in reality, and then you said no, it's –

CST. SMYTH: (Inaudible.)

MR. FLAHERTY: – elements weren't based in reality. So what elements, and when did you identify these elements that weren't based in reality?

CST. SMYTH: To suggest that a government entity is responsible for your wife's death would, could be construed as not being founded in reality.

MR. FLAHERTY: It could be, but it may be actually founded in reality, could it not?

CST. SMYTH: I don't know how.

MR. FLAHERTY: I mean, hospitals, do you see hospitals as being a part of government? It's a government service provided, isn't it? And people die of negligence at hospitals.

CST. SMYTH: Yes.

MR. FLAHERTY: So if someone's negligent performance of their duties at a hospital led to my wife dying, I mean that's not a, that's not unrealistic?

CST. SMYTH: I don't know, Sir; I would need more details of the particular incident you're referring to.

MR. FLAHERTY: Okay, so what details did you have when you made the determination there was unrealistic elements of Mr. Dunphy's grievance? When did you get those?

CST. SMYTH: The Saturday before when I was cycling through his social media feed.

MR. FLAHERTY: Okay, and so what are the unrealistic elements?

CST. SMYTH: Well, I just gave you one.

MR. FLAHERTY: So you're willing to say that proven you knew on that day that that was unrealistic?

CST. SMYTH: Yes.

MR. FLAHERTY: How much of his Workers' Comp file did you go through before you made that assessment?

CST. SMYTH: I didn't have his Workers' Comp file.

MR. FLAHERTY: No. How much training do you have on Workers' Comp regulations, policy, procedures?

CST. SMYTH: None.

MR. FLAHERTY: No, okay. So you're making determinations about things that you have no real training or idea about?

CST. SMYTH: These would just be found in common sense.

MR. FLAHERTY: You are determining that parts of political speech, in your mind, are unrealistic, and then – do you not?

CST. SMYTH: I'm sorry; I'm confused what you're asking.

MR. FLAHERTY: Okay, you, you have made determinations about people's grievances, what I would call political speech, and you've sat down and you said, I think that's unrealistic, and therefore I should go visit their house with my gun – haven't you?

CST. SMYTH: Well, that's not the only reason, but you haven't let me finish.

MR. FLAHERTY: No, you have, hadn't you – just say it, you have, haven't you?

CST. SMYTH: No.

MR. FLAHERTY: You've never deemed someone's grievance against government an example of political speech as being unrealistic and then based upon that assessment, you've never gone to someone's house with a gun?

CST. SMYTH: Well, you're confusing me a bit there. Everywhere we go is with a gun. We're not permitted to leave our building in the execution of our duties without it so –

MR. FLAHERTY: Well, you need a reason, though. I mean, I would expect that you would have some rational basis for you to visit someone's house unannounced with a firearm and I think most people would want to know what the rational basis is.

So what you're saying is, that your rational basis was I deem elements of Donald Dunphy's political speech to be unrealistic; therefore, I'm going to go see him.

CST. SMYTH: It wasn't his political speech I'm referring to now, no.

MR. FLAHERTY: What are you talking about?

CST. SMYTH: It's comments that he directs towards elected officials either (a) regarding his grievance or regarding his grievance only that sometimes are potentially and perceivably rooted in a lack of reality.

MR. FLAHERTY: The grievance that we were talking about was the grievance that he had with respect to the death of his wife and he blamed that on who, the government or Workers' Comp?

CST. SMYTH: He seemed to blame it on both.

MR. FLAHERTY: Okay. So it's political speech.

CST. SMYTH: That's not what I would refer to as political speech.

MR. FLAHERTY: What is political speech?

CST. SMYTH: I think it would refer specifically to politics versus social and administrative affairs of government.

MR. FLAHERTY: So you're saying today that Donald Dunphy complaining about the Workers' Comp process, the treatment that he got from Workers' Comp and the government, that isn't political speech?

CST. SMYTH: There are certainly elements of his social media commentary that were political, for sure.

MR. FLAHERTY: So you identified the fact that you thought it was unrealistic that Donald Dunphy's treatment by Workers' Compensation led to his wife's death. What were all the other elements that you noticed?

CST. SMYTH: I would need to see his feed to make specific reference but there were components of –

MR. FLAHERTY: You've had about, what, a year and a half now to be prepared for this. You knew these questions are coming. What did you see in Twitter which you thought were unrealistic elements suggestive that this person could pose a risk or a threat to government officials?

CST. SMYTH: That's not the only component. What we look at in the threat assessment process is, first of all, has a person feel that they've had an injustice committed against them by, in this case, a government agency. That would just form one small part. That's the justification.

MR. FLAHERTY: Okay. And before we go on to that, and I promise you we're gonna go through your training as much as the circumstances allow. But I – no, I just want to go back to the unrealistic elements. What were all the unrealistic elements?

CST. SMYTH: Um –

MR. FLAHERTY: In his Twitter commentary?

CST. SMYTH: Beyond that one in particular, I would have to refer to some of the exhibits and the file.

MR. FLAHERTY: We have all the time in the world. Is there any exhibits that you would like to say or describe?

CST. SMYTH: Sure. You can bring up the Workers' Compensation exhibit if you like.

MR. FLAHERTY: If the Commissioner wants to allow the – I'm prepared to move on knowing that Constable Smyth cannot identify and doesn't know at this time a very straightforward question, which obviously he would have known. It would have come up at some point. I mean, why did you go visit Donald Dunphy? Ah, well, you know, his Twitter commentary is unrealistic.

MR. COMMISSIONER: Come to your argument now, final submissions; unless you have a specific exhibit that you want to refer Mr. –

MR. FLAHERTY: I don't need –

THE COMMISSIONER: – Constable Smyth to, I'd say move on.

MR. FLAHERTY: Okay. I'm going to move on.

So as soon as Donna Ivey sends you an email saying that she had concern about the tweet, you decided to go pay Mr. Dunphy a visit.

CST. SMYTH: As soon as I received it?

MR. FLAHERTY: Yeah.

CST. SMYTH: I wouldn't say as soon as I received it. I made that decision probably very shortly after that. A home visit would have been the next logical course of action to permit him the opportunity to speak to it.

MR. FLAHERTY: And before you went down that intrusive road, did you ask Donna Ivey: Donna, what do you find concerning?

CST. SMYTH: Well, that wasn't a specific role that I would want to leave to those individuals. I always made it very explicitly clear that if they had anything disconcerting whatsoever, to send it to our attention so we could apply a broader lens to looking into this person's background, inclusive of their history with police, mental health, other elements of instability, any other social media components that we would want to examine further. I don't want those people to try to make that determination or burden them with that responsibility.

MR. FLAHERTY: Okay. Now your training says you have to utilize common sense, doesn't it?

CST. SMYTH: Yes.

MR. FLAHERTY: Okay. So if Donna Ivey sent you an email with, you know, sorry referring to a tweet, a Facebook comment, whatever, and is patently unreasonable to think that there should be any concern attached to it or there's any threat in it, you're not going to use your common sense to say: Look, Donna, there's really nothing here.

CST. SMYTH: If that was the case, yes, I would tell them that based on a review of what the information they sent us, coupled with any history that might be benign in nature, or there might be no other history to suggest or to contribute to a threat assessment then, yes, I would convey that message. In this particular case, when you first read that tweet alone by itself, absolutely, there is reason for concern.

Now I took it upon myself to examine it further and read it in context, but by that time I had also examined Mr. Dunphy's social media feed in greater length. So why I didn't necessarily have any particular concern or misinterpretation of that group of tweets, I did have concern as to what the intention was for sending the tweet directing towards an elected official and the other components of his social media feed.

MR. FLAHERTY: I mean the intention seems pretty clear to most people that do read it. It's like anything else in political speech, you want to lobby, you want to pressure government officials to make policy decisions that you're in favour of. Correct?

CST. SMYTH: Well, I think some other people who do reading could construe those types of social media commentary as having the intent to harass and cause fear.

MR. FLAHERTY: Well, I mean there could be fear. I mean a politician doesn't want to see, you know, tweets get out into Twitter sphere that could lead to losing an election. Now you're not going to be policing that type of fear, are you?

CST. SMYTH: No, that's not what I'm referring to. Some people make these types of commentary with the intention to cause fear and to harass specific individuals, not necessarily to achieve a resolution to a particular cause.

MR. FLAHERTY: And you don't think that you were capable or able to provide a reasonable interpretation of what Mr. Dunphy's intention was?

CST. SMYTH: I think I have a heightened responsibility in that position, and as a police officer, to investigate that further. That would be perhaps the work of, you know, an opinion writer. I can't rely solely on what my interpretation is. That's not going to be an acceptable method of investigation.

MR. FLAHERTY: So if Donald Dunphy had to say in a tweet: I hope you're having a good day, Premier of Newfoundland. Donna Ivey, for whatever reason, had a concern about that. What are you doing with that tweet if it gets brought to you?

CST. SMYTH: I don't think that's reasonable. I –

MR. FLAHERTY: So you interpret the intent, you would look at what the intent of that, of what that tweet was, wouldn't ya?

CST. SMYTH: Well, I don't think she would bring that type of tweet to my attention or it probably wouldn't cause her any concern.

MR. FLAHERTY: How do you know that?

CST. SMYTH: How do I know that Donna Ivey –

MR. FLAHERTY: That she won't send you unreasonable, unfounded concerns in an email? How do you know that?

CST. SMYTH: Because she never had.

MR. FLAHERTY: She never has.

CST. SMYTH: No.

MR. FLAHERTY: I would put to you that Ms. Ivey didn't have a handle, first off, on Twitter generally and had no idea of the full and proper grammatical context of the tweet – of the, of the commentary. There's six tweets, all one piece – it's all, it's seems like one piece of commentary. She didn't even provide you a complete record of that did she?

CST. SMYTH: She didn't, no.

MR. FLAHERTY: No. So how, how are you supposed to believe her that she has a handle, that she has a reasonable and rational concern when you're seeing that she's cherry-picking pieces of comments?

CST. SMYTH: If she had of sent me a tweet that said: Have a nice day, Premier, and she titled that email with a tweet of concern. Then, yes, I would question her reasonable capacity to interpret. However, that tweet within and of itself had elements of disconcerting commentary. I think she was appropriate in sending it to me and I would expect her to do that in the future.

MR. FLAHERTY: What's the dis – what's the disconcerting commentary in that one tweet? We can remove it from the proper context but one – but that one tweet, what is disconcerting?

CST. SMYTH: It makes reference to dead MHAs and families I may harm.

MR. FLAHERTY: Yeah.

CST. SMYTH: It speaks to intentionality.

MR. FLAHERTY: Okay.

Yeah, and then with the proper context what, what does it say?

CST. SMYTH: I think –

MR. FLAHERTY: What are the – what's the disconcerting elements of the commentary, the full chain of tweets?

CST. SMYTH: Well, they're absolutely much lessened, for sure. When you put it in the complete context it would very – it seems if – is he referring to the families of previously deceased MHAs and not wanting to speak ill will about them out of respect.

MR. FLAHERTY: Uh-huh.

CST. SMYTH: Of course, it still begs to question directing those, that commentary to political officials as to what the intent that is. It's not a call to resolve a particular grievance or further a cause, it could be an intent to harass or cause fear, which could be a – lend to a broader threat assessment and speak to ideation.

MR. FLAHERTY: Now – sorry, I may have misunderstood you, but are you saying that there was no purpose or real intent of anything out of those six tweets?

CST. SMYTH: I'm saying it's not up to me to assign what the specific intention.

MR. FLAHERTY: But you do sometimes. That's all I'm trying to make a point of. You do sometimes use your own common sense and training to assign intent to things.

CST. SMYTH: If it's very clear and we don't have the option of allowing the author of the information to speak to it. For example, if Mr. Dunphy had have just simply met me at the door and said, no, you're not welcome to come in here; I don't want to talk to you. I would've formed that as part of my threat assessment that I was unable to engage in verbal conversation; and, however, based on my own interpretation of this particular tweet, I would have provided the exact same interpretation as we've discussed here today.

MR. FLAHERTY: So what did you consider before you knew you were going to see Don Dunphy? You saw, you had the emails from Donna Ivey, and what else did you do, or what else did you consider?

CST. SMYTH: I had his social media feed and some information from Workers' Compensation that he had a previous history with him, that they've had some concerned dealings.

MR. FLAHERTY: And when did you get that information? When did you review the feed, and when did you get information from Workers' Compensation?

CST. SMYTH: On Saturday.

MR. FLAHERTY: On Saturday. How long after, you were speaking with Ms. Ivey by email, did you get that information?

CST. SMYTH: Which information?

MR. FLAHERTY: The information we were just talking about, Workers' Compensation information –

CST. SMYTH: How long after?

MR. FLAHERTY: – and the Twitter feed. How long after your email train with Donna Ivey did you review that information?

CST. SMYTH: Twenty-four hours.

MR. FLAHERTY: Twenty-four hours. And you spent a full hour reviewing a year's worth of tweets?

CST. SMYTH: Approximately, yes.

MR. FLAHERTY: How many tweets was there?

CST. SMYTH: Over that one year?

MR. FLAHERTY: Yeah.

CST. SMYTH: I don't know.

MR. FLAHERTY: You don't know. You never took any notes?

CST. SMYTH: Of the Twitter feed that was available for print off at any time, no.

MR. FLAHERTY: Okay. So you were going to have to just review the feed for those specific elements of concern or unrealistic elements. You wouldn't make any notes just for a quick reference, would you?

CST. SMYTH: At that stage, no.

MR. FLAHERTY: No. Okay.

I will put to you that your sudden determination to visit Mr. Dunphy is at odds with your training.

CST. SMYTH: Okay.

MR. FLAHERTY: Okay. What do you think about that? Is that correct or incorrect?

CST. SMYTH: I think that would be incorrect.

MR. FLAHERTY: Okay.

I'm going to ask that Exhibit 0017 be put up on the screen, please.

Yes, that's the Managing Targeted Violence exhibit. Oh, sorry, it's Exhibit 0218, 218. I don't know where 17 came from. It must have been page 17.

THE COMMISSIONER: Two one eight.

MR. FLAHERTY: Okay. Just bear with me for one moment. First I'd like to go to page 17 of Exhibit 0218. I'll see that on the screen.

THE COMMISSIONER: Can't find it? Okay.

MR. FLAHERTY: It's page 17 to start with. Okay, yes you're right there. Sorry.

Okay. So the basic requirements of assessing a threat: you need to have an understanding of mental illness, personality disorders and psychopathy.

What was your training with respect to those three elements? What training did you have to be able to assess or deal with mental illness, personality disorders or psychopathy?

CST. SMYTH: Psychopathy?

MR. FLAHERTY: I guess you must have been trained in it.

CST. SMYTH: They're – we've undertaken various training seminars around mental illness, personality disorders – inclusive of psychopathy, albeit very minor.

MR. FLAHERTY: When did you have your training in dealing with mental illness, personality disorders and psychopathy?

CST. SMYTH: We would do that fairly early on in our training, our initial basic training, but I did do various refresher courses, you know, seminars around mental illness.

MR. FLAHERTY: When did you do these refresher courses?

CST. SMYTH: Probably around 2006, 2007, 2005.

MR. FLAHERTY: So no training in the areas really of mental illness, personality disorders or psychopathy since 2006?

CST. SMYTH: That'd be correct, yeah.

MR. FLAHERTY: Okay. And did that training entail –

CST. SMYTH: The training entails –

MR. FLAHERTY: Oh, no, I'll just ask you, did it – did it entail how to conduct interviews where you show up unannounced to a person's house who might be mentally ill or have a personality disorder or psychopathy? Did you go into that?

CST. SMYTH: Sorry, can you repeat the question?

MR. FLAHERTY: Did your training – did you have any aspect of that training train you on how you should approach a person who may be mentally ill, who may have a personality disorder, who might be psychopathic? Any of your training show how you're supposed to structure interviews with these people or set up interviews?

CST. SMYTH: Most of it was around understanding and recognizing persons in crisis and what they're experiencing, what they're going through.

MR. FLAHERTY: Okay.

CST. SMYTH: Versus carrying out lengthy interviews.

MR. FLAHERTY: If I could go to page 88, Madam Clerk. Page 88 should have the header: Circumstances and Context. Okay, right there.

So what does that slide say to you? What is it talking about?

CST. SMYTH: Circumstances and context of inappropriate contact and communication.

MR. FLAHERTY: Of inappropriate contact and communication. And so, when it says message intent, doesn't that suggest that that is something that you can look into yourself without interview?

CST. SMYTH: No, it says that it's an element that we should consider and investigate further.

MR. FLAHERTY: Okay. Can – so you always have to investigate. You just can't consider whether or not the intent is negative or positive.

CST. SMYTH: Depending on the other factors at play, that may very well be an option, yes.

MR. FLAHERTY: Okay. And so – and the other factors at play is, is that you determined that there was one possible unrealistic element.

CST. SMYTH: No, there was a long-standing unresolved grievance within and of itself, regardless if there's elements that are founded in reality. We have to take that into consideration. Again, within a silo, that of course does not lend to the possibility of somebody carrying out an act of targeted violence, but it is stage one of the pathway to violence, is that long-standing unresolved grievance. That's just the first step.

MR. FLAHERTY: How can you – can you articulate a connection between the pathway to violence and that, that tweet that you received from Ms. Ivey? How can you realistically, rationally, reasonably say Mr. Dunphy's on a pathway to violence, I'm going to –

CST. SMYTH: I've never –

MR. FLAHERTY: – intrude into his house.

CST. SMYTH: I've never said that Mr. Dunphy was on a pathway to violence. What I'm explaining to you is that there is methodology contained, much of it, contained within this manual that you would have to look at in its entirety, not pages by themselves, that speak to behaviours that have been learned through studies of past cases of acts of targeted violence from school shootings to assassinations in that, within all of these, there is a particular pattern of behaviour that has been identified that we look for to determine if somebody is indeed on that pathway.

Each one of those generally start, unless you're dealing with pure psychopathy, is initiated with a particular grievance. Whether that grievance is real or perceived in some level of or lack of reality – and I'm not saying Mr. Dunphy's grievance wasn't real. Clearly, it absolutely was. While there may be elements that were, didn't have a root in reality, the vast majority of his grievance was absolutely of course in a reality. But there are, within that, other factors that we're obligated to consider and determine if he is potentially on a pathway to violence.

This is step one, very much in its infancy.

MR. FLAHERTY: You've named one unrealistic element. You haven't been able to name any others –

CST. SMYTH: There doesn't need to be any.

MR. FLAHERTY: Pardon?

CST. SMYTH: There doesn't need to be any is what I'm trying to tell you.

MR. FLAHERTY: There doesn't have to be an unreasonable element to their grievance?

CST. SMYTH: Correct.

MR. FLAHERTY: Okay.

CST. SMYTH: The grievance just has to be potentially unresolved. If the person feels that there has been an injustice committed against them that may very well be stage, their first step. Now again, I recognize in a silo it doesn't mean a lot because there are literally, undoubtedly, thousands of unresolved grievances towards government; but there are other steps that are contained within that pathway to violence that we have to consider, and that is part of the process that was being engaged at that time.

MR. FLAHERTY: So what you're saying is if I have an unresolved grievance against government and, say, for instance, I got on Twitter and said the current premier of the day is a prick and one of his staff sends that to you, I'm getting a visit from a police officer because of that. Because of my grievance and because I wanted to use impolite language, although not criminal, I can likely expect now that police are going to show up at my door to interview me?

CST. SMYTH: That's not what I said and I apologize if you're not comprehending me but –

MR. FLAHERTY: No, I fully comprehend, Mr. Smyth. I fully comprehend.

CST. SMYTH: We do not have the resources or even the mandate to carry that out. There would have to be other elements that we would take into consideration.

MR. FLAHERTY: And the element of consideration in this was the Premier's office said that they're concerned; I better go down and take care of this right now. That was the main element for you, wasn't it?

CST. SMYTH: No.

MR. FLAHERTY: Okay.

The Judgment Tools of page 67; you never used any of those, did you?

CST. SMYTH: Which are you referring to? Sorry.

MR. FLAHERTY: Page 67 of this exhibit, the Judgment Tools. You didn't use any of them.

CST. SMYTH: These are tools that we would apply after you get more information.

MR. FLAHERTY: How much information do you, do you require?

CST. SMYTH: As much as you can possibly get.

MR. FLAHERTY: Okay. So what if you had no information other than the tweet that Donna Ivey sent you and your review of the, of Don Dunphy's Twitter account, you would forego use of any tools because you don't have enough information.

CST. SMYTH: I'm sorry, what – are we referring to just a hypothetical situation generally?

MR. FLAHERTY: Sure, yeah. Yeah, no, a hypothetical situation or we can use it to this.

At the moment on Saturday before you went down to Donald Dunphy's house, did you have enough information to use the tools that were provided to you in your training to assess threats?

CST. SMYTH: Not to my satisfaction. I wouldn't want to use them at that stage; I would want to glean more information.

MR. FLAHERTY: Okay.

Do you not understand how the lack of investigation documents that you kept, the lack of notes, how that, to a layperson, undermines the integrity of your investigation that you never bothered to take any notes?

CST. SMYTH: Yes, I understand that completely (inaudible).

MR. FLAHERTY: So that's, so if there's one lesson we learn from this inquiry is that police officers – to ensure that people respect the law, respect the process, respect police, you want to ensure that police officers respect their own policies and procedures and take notes during investigations.

CST. SMYTH: Yes, absolutely. Much of the information that I had received up to that stage was contained electronically. Other than the conversation with – I had either on the way out there with Adrian Cox and Dick and Debbie Dunphy and the conversation I had with Don Dunphy, would have been brought into notes afterwards but, of course, that situation changed dramatically from the more –

MR. FLAHERTY: But, I mean but the policy and procedures generally for note taking is that they should be made as soon as possible, contemporaneously with the event that you're noting. Correct?

CST. SMYTH: Correct.

MR. FLAHERTY: Okay. But you decided to forego that.

CST. SMYTH: Oh yes, I've acknowledged that the note taking wasn't sufficient in this case.

MR. FLAHERTY: Okay.

Ma'am, just to go to the threat managing strategies at slide 97.

Okay. So there's non-confrontational strategies. Why could you not have used a non-confrontational strategy in order to assess the threat or risk of the tweet that Donna Ivey sent you?

CST. SMYTH: Which non-confrontational strategy would you be referring to?

MR. FLAHERTY: Well, I don't know, well, what – are you aware of any non-confrontational strategies that you can use in your investigations?

CST. SMYTH: Not ones that would glean the amount of information that you would get from speaking to a person directly.

MR. FLAHERTY: Okay. But the, the reason why, and you can correct me if I'm wrong, the reason why we have non-confrontational strategies is that the confrontational strategy may be inappropriate in the circumstances, correct?

CST. SMYTH: No.

MR. FLAHERTY: No. So it's up to your discretion as to whether or not, when you want to confront or not confront someone?

CST. SMYTH: For the most part, yes.

MR. FLAHERTY: And so whatever your training says about the use of non-confrontational strategies, if you don't want to, if you don't want to utilize that training, you'll go straight to confrontation, because that's how you like to deal with these types of things – you want to confront a person who's made inappropriate remarks to the premier.

CST. SMYTH: I don't think confront is the right language use –

MR. FLAHERTY: Well, that's the language used in your training manual.

CST. SMYTH: I never confronted Don Dunphy, and never did I ever look to confront individuals in these circumstances. That doesn't –

MR. FLAHERTY: But you are, you're saying, you go to their house and you say, you made, you made this tweet – why? I mean, that's confronting a person, isn't it?

CST. SMYTH: Well right, and it does have an adversarial context to it, and I'm just trying to avoid that being misunderstood.

MR. FLAHERTY: So there was an adversarial context to your visit to Don Dunphy's house?

CST. SMYTH: There was not.

MR. FLAHERTY: No, because you said he made – did you not tell him that the communications he made was inappropriate?

CST. SMYTH: I don't believe I used that language with him, no.

MR. FLAHERTY: What did you say about the tweets?

CST. SMYTH: I read them out to him and told him that they caused some concern and endeavoured to solicit his response and his reasoning for sending them –

MR. FLAHERTY: Okay, so what did, what exactly did you say?

CST. SMYTH: Just that.

MR. FLAHERTY: You said I have some concerns and I'm endeavouring to find out what you meant by that?

CST. SMYTH: I'm here to speak to you about some comments you made directed at the premier, and I would like to get your thoughts on those.

MR. FLAHERTY: And so when he laughed at ya and said I can do – I can say whatever I want. What did your training suggest you should do at that point?

CST. SMYTH: Our training in response to that (inaudible) –

MR. FLAHERTY: Yeah, well going back to your training, you have someone, you don't know his mental health – you have someone laughing at ya and saying I can say what I want. So what does your training tell you to do then?

CST. SMYTH: Continue talking, de-escalate the situation.

MR. FLAHERTY: Okay. So after someone says I can say whatever I want, it's your – and what you did in this case was you're going to continue to prod to get the information that you want.

CST. SMYTH: I'm not looking to prod. I agreed with him that he can indeed say whatever he wants –

MR. FLAHERTY: Okay.

CST. SMYTH: – within reason. You can't threaten and you can't make that type of commentary. So I would want to distinguish between those two things but we never got that (inaudible) –

MR. FLAHERTY: So his commentary was within reason?

CST. SMYTH: If your comments weren't threatening in any way, I think they were (inaudible)

–

MR. FLAHERTY: You earlier said that some of his comments had unrealistic elements and now you're saying that they are reasonable. So what are they? Were his comments within reason or not within reason?

CST. SMYTH: I'm sorry unrealistic and unreasonable are two different terms.

MR. FLAHERTY: Oh, really? If someone says something is unrealistic – if I say an unrealistic thing, is that reasonable or unreasonable?

CST. SMYTH: It depends the context.

MR. FLAHERTY: Moving on to your training that you received, one of the possible non-confrontational steps was take no further action at this time. The advantages are: cost effective and able to focus on other files. You did outline that cost is one of the issues with respect to how you may go about your duties in an investigation. Correct?

CST. SMYTH: Well, resource management is something that we have to take in consideration, for sure.

MR. FLAHERTY: Okay.

CST. SMYTH: Absolutely.

MR. FLAHERTY: And did you take resource management into a – Madam Clerk, you can put that back up? Please, thanks.

Did you take resource allocation into consideration?

CST. SMYTH: It was something that we would, I would always take into consideration.

MR. FLAHERTY: No, but did you, for the Donald Dunphy matter, did you take resource allocation into consideration?

CST. SMYTH: I think so, yes.

MR. FLAHERTY: Really? I would say that you didn't and I would say that because you don't even have all your checks done and you're already driving out to his house. You could have received checks that showed that he was a violent man and then what were you gonna do?

CST. SMYTH: Allow the RCMP to come with me.

MR. FLAHERTY: And get additional resources. So you never really had a good handle on what resources were required, till you were well on your way out there?

CST. SMYTH: Policing is a dynamic thing and we have methods in place to deal with that. If an immediate risk assessment to me as an individual changes any point in time, then I reach out to those resources or I change my approach.

MR. FLAHERTY: But why wouldn't you want to take that information into account before you decided to drive out there?

CST. SMYTH: Sorry, which information?

MR. FLAHERTY: All the checks that you asked in your conversation with Constable Cox, why wouldn't you have that information in your possession, obtain it, consider it, look at all the information you have, before you decide to go out and visit Don Dunphy? Why?

CST. SMYTH: Because if anything within that information gave me a heightened level of concern for my personal safety, then I would have engaged the local RCMP. Which could happen at any time, on my way out there or once I'm out there.

MR. FLAHERTY: So there's no waste of time.

CST. SMYTH: There weren't any resources that I had to consider before leaving.

MR. FLAHERTY: But it could have resulted in a big waste of time, correct?

CST. SMYTH: Sorry? How – I'm not

MR. FLAHERTY: If you drive out to Don Dunphy, and say you've received some information that suggested that your assessment was incorrect, that you would need help, that would result in a waste of time. 'Cause then you'd have to wait for the proper resources that you're supposed to manage, or wait for the proper resources to show up and help you – correct?

CST. SMYTH: In a case where I couldn't find another police officer to attend with me?

MR. FLAHERTY: In any case. I mean you're the one who's managing resources, you need to ensure that you have adequate resources when you go to interview someone, don't you? And you didn't. You were out driving on your way before you had all that information in your possession, correct?

CST. SMYTH: So to get a police officer to come with me is a rudimentary resource that I can lean on at any time. That's always available.

MR. FLAHERTY: Okay so there was nothing in the way of you taking out another police officer to go visit Donald Dunphy with you.

CST. SMYTH: No.

MR. FLAHERTY: You just chose not to.

CST. SMYTH: Right.

MR. FLAHERTY: Based upon your training.

CST. SMYTH: Based upon my assessment of the situation, yes.

MR. FLAHERTY: Based upon your training.

CST. SMYTH: There are some elements of training associated to that, yes.

MR. FLAHERTY: Okay, so what training did you go through to suggest that going out by yourself in these circumstances was the correct decision?

CST. SMYTH: Well, I think common sense plays a part in that too. If there's going to be an element of an interview that you feel is going to aggravate the subject then you should take that into consideration. If I feel my interview is better off and more likely to result in a more transparent and full, frank discussion, then that's the methodology that I'll consider.

MR. FLAHERTY: Well, I mean your methodology that you're going to consider, that has to have some rational basis. I mean, your beliefs as a police officer has to come from training or something like that. So where was the training that suggested that at this point you shouldn't take another police officer even though you could have – very easily from what you're saying today?

CST. SMYTH: The fact of the matter is that a significant portion of policing is often carried out by a lone officer. So we're always trained in situations to be carried out alone and by ourselves.

MR. FLAHERTY: Okay. But this is, this is a circumstance with its own facts, that can't be applied to every circumstance and every factual pattern or situation that a police officer might find themselves in, in the conduct of their duties.

CST. SMYTH: Sorry, you were asking me about training.

MR. FLAHERTY: Yeah. Okay, and then you went on to say well, you know, police officers –

CST. SMYTH: Are trained.

MR. FLAHERTY: – are trained to go by themselves, okay. In what situations and how do those situations relate to the situation of you interviewing Donald Dunphy?

CST. SMYTH: In what situation?

MR. FLAHERTY: Yeah, what situations are you trained to go by yourself in that are similar to your decision to go interview Don Dunphy? What is the training that you received that says that is the correct way to conduct my investigation?

CST. SMYTH: Any call for service that results in a police officer attending by himself is, it may be a domestic violence dispute, it may be something as benign as a shoplifter.

MR. FLAHERTY: So those are, those are emergent situations.

CST. SMYTH: Shoplifter, no.

MR. FLAHERTY: No, you're going to leave the shoplifter in the shop all day are you? I mean, if someone calls and says I have a shoplifter, you would go and investigate that as soon as you could, would you not?

CST. SMYTH: As soon as practicable. There are occasions where they could sit there a long time, yes.

MR. FLAHERTY: How long are you going to leave a shoplifter in a shop like that?

CST. SMYTH: It could be some time.

MR. FLAHERTY: What's some time?

CST. SMYTH: It could be hours.

MR. FLAHERTY: How many hours?

CST. SMYTH: I don't know.

MR. FLAHERTY: Okay.

One of the advantages of taking –

THE COMMISSIONER: Mr. Flaherty, if you're starting on another –

MR. FLAHERTY: I'll be another hour for sure.

THE COMMISSIONER: Another what?

MR. FLAHERTY: I'll be another hour, maybe a half hour if I want to go quickly.

THE COMMISSIONER: Well, we're going to take a break now; but, Mr. Flaherty, you're going to have to zero in a little bit. Your questions, such as the last one, I'm not sure I was on chapter three or chapter four of my 2,000 page book, when I was trying to figure out how to deal with that. I mean you – we got to be a bit more –

MR. FLAHERTY: And I understand, I will try to focus more; but, with all due respect, a lot of the evidence has been: Oh, it's been my training, or this is the training in this circumstance. So I really want to know what that training is.

I'm not prepared to let Constable Smyth just say, well, I received training in that, or this is what police always do. I want to know where he got the training, what type of training and if the training truly was applicable to the situation he found himself in with Donald Dunphy. Because as it looks, when you look at this exhibit, it appears that Mr. Smyth blew by all the non-confrontational strategies and I want to know why.

MR. KENNEDY: Mr. Commissioner, subject interview is listed as a non-confrontational strategy. I'm going to go through that, but we've been five days – my client has been on the stand five days now. Mr. Flaherty wasn't here today. There's been a lot of information covered.

MR. FLAHERTY: Okay. And I know that Mr. Kennedy would have jumped up and objected if I was going into the realm of duplication. Have I –

MR. KENNEDY: (Inaudible.)

MR. FLAHERTY: Have I overly duplicated anything at this point?

THE COMMISSIONER: No, Mr. Flaherty, and I don't think Mr. Kennedy was saying that, but just – we'll break now for the mid-afternoon break, 15 minutes, and you might consider whether some of your questions might be –

MR. FLAHERTY: On focus.

THE COMMISSIONER: Focused, right.

MR. FLAHERTY: Yeah.

MS. SHEEHAN: All rise.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Just before we continue, Mr. Flaherty, I want to check with counsel. Is counsel able to start at 9 tomorrow instead of 9:30? We got to try and pick up a little bit of time if we can or we're going to have to push some witnesses back. Does anyone have a problem with 9? Okay. You didn't want to sleep anyhow.

All right, Mr. Flaherty, continue.

MR. FLAHERTY: So just to go back, I am going to refer you to slide 82, Constable Smyth. It talks about the non-confrontational strategies.

CST. SMYTH: Right.

MR. FLAHERTY: It talks about the non-confrontational strategies as – excuse me, the last slide that was up is the one I'm referring to.

THE COMMISSIONER: P-0218, page 97, okay.

MR. FLAHERTY: Yeah.

So the bullet points on slide 82, they refer to situations when a non-confrontational strategy would be appropriate – correct?

CST. SMYTH: Yes, it refers to when an investigative process is not even required, such as, perhaps, one of the examples you mentioned earlier whereby you might be sent a piece of information that you quickly determine doesn't have any merit, there's nothing in the background to identify any potential threats so there may not be any action required conclusive of just simply closing the file.

MR. FLAHERTY: The second point says: "No threat identified" – correct?

CST. SMYTH: Yes.

MR. FLAHERTY: And there was no threat identified in this situation with respect to Mr. Dunphy in his Twitter commentary.

CST. SMYTH: Well, what that's referring to is the broader sense and the broader definition of threat, not the – an actual criminal threat such as a statement to cause or intent to cause harm or danger to somebody. This was referring to the no threat identified in your broader threat assessment. You'd have to go back a few more slides to probably –

MR. FLAHERTY: Well –

CST. SMYTH: – see that.

MR. FLAHERTY: Okay. So, so – okay, so back a few slides it says that – it's talking about the overall threat assessment and not a specific threat.

CST. SMYTH: Well, I think to get the actual context of this particular slide.

MR. FLAHERTY: Okay. There was no threat identified in this situation with Donald Dunphy?

CST. SMYTH: Which – sorry.

MR. FLAHERTY: There was no threat in Donald Dunphy's tweet that was sent to you by Donna Ivey.

CST. SMYTH: Definitely not.

MR. FLAHERTY: And you were present for Ms. Ivey's testimony, were you not?

CST. SMYTH: Yes, I was.

MR. FLAHERTY: Okay. It appeared to me that she may not still, to this day, know what those tweets meant. Were you sure that she had an accurate handle on what the tweets meant?

CST. SMYTH: I never asked her.

MR. FLAHERTY: So you don't know if the initial report was erroneous or overly exaggerated?

CST. SMYTH: That was what I would have learned by the initial examination myself.

MR. FLAHERTY: Oh, well, it says here – it doesn't say initial examination; it says initial report. So I would imagine it's the report of the risk or the report of the threat, possible threat. And this slide here says: "Initial report erroneous or overly exaggerated."

CST. SMYTH: So the initial report I can tell you was not erroneous and was not exaggerated in any way. Her – it was fairly basic in its report; it simply said tweet of concern and then just the tweet itself.

So there's no error or erroneous nature. That would refer to, you know, an allegation that you determine to have no foundation whatsoever or an exaggeration of a situation. This was just simply I am concerned and here's the statement –

MR. FLAHERTY: Well, let's –

THE COMMISSIONER: Just a second. It seems to me this has got to be taken in the context of – the instructions that Ms. Ivey has, to be fair to her, she had instructions to raise any matters of concern, no matter how small. That was – I'm not sure those are the exact words, in effect that was it.

MR. FLAHERTY: Yes, Sir.

THE COMMISSIONER: But she was instructed to forward those to the PSU.

MR. FLAHERTY: Correct. And –

THE COMMISSIONER: She did that so what –

MR. FLAHERTY: And she did –

THE COMMISSIONER: Sorry.

MR. FLAHERTY: Sorry.

THE COMMISSIONER: Go ahead.

MR. FLAHERTY: I'm not questioning whether or not what she did or at the time that she thought what she did was right; however, she forwarded her own subjective concern. She had a concern about the tweet.

THE COMMISSIONER: Caused by the language the –

THE FLAHERTY: Caused by the language.

THE COMMISSIONER: The form of language used and, frankly, I have a question as to where she went wrong in light of her instructions. Now, whether she was correct or not in terms of it constituting a threat, if she saw that strong language and it raised a concern with her, wasn't she justified under the terms for employment and maybe even required to raise anything no matter how small that she thought could be of concern?

MR. FLAHERTY: Well, I think there has to be some sort of reasonable basis for that duty that you're talking about –

THE COMMISSIONER: Well, yeah, we can debate what's reasonable and what's not in many cases due to that, but – go ahead; I'm not going to delay matters. I just want –

MR. FLAHERTY: No, and fair enough, and I'm not trying to take shots at Donna Ivey here today, other than to say that it appeared that she had a poor handle on what the tweets meant and there's a possibility that her concern was overly exaggerated.

CST. SMYTH: No.

MR. FLAHERTY: No.

She was right to be concerned about Donald Dunphy and his communication with the Premier of Newfoundland and Sandy Collins. She was right to be concerned?

CST. SMYTH: She was right to have concern based on what she had read, yes.

MR. FLAHERTY: And concern of what? What's her concern of?

CST. SMYTH: Well, that is what we requested of her to allow us to determine.

MR. FLAHERTY: Okay, and what was her concern?

CST. SMYTH: What was her concern?

MR. FLAHERTY: Yeah. I mean she said this is a tweet of concern. So what's the concern?

CST. SMYTH: That they may be dealing with – and of course I'm speculating now because I haven't had this conversation with Donna Ivey. But I can only assume that her concern is that they're dealing with a potentially volatile person that may have a background that they're not aware of and that may potentially turn violent.

MR. FLAHERTY: Now, she's a communication staff officer. She may have had previous dealings with Don Dunphy. Part of the intelligence-gathering process is to have, or try to take in as much information as possible and review it. So you failed to get as much information as possible from Donna Ivey with respect to what her concern was, the context of the tweet – didn't you?

CST. SMYTH: If that's what you believe. I don't believe that.

MR. FLAHERTY: No, I'm asking you. You didn't ask her for any information and isn't information, the more information, the better the assessment.

CST. SMYTH: I asked her what the context of the tweet was.

MR. FLAHERTY: Yeah. Okay, and that was enough. One-line, two-line email is enough for you then to say I'm going to go to Don Dunphy's house.

CST. SMYTH: As I've stated time and time again, we were very much in the infancy of a threat assessment so the information-gathering process was very much underway. That home visit is just a component of that.

MR. FLAHERTY: Could you scroll down to slide 83, Madam Clerk.

Sorry, actually, scroll down to the next page, page 95. Okay; no, up to the slide.

MR. KENNEDY: What page is that?

MR. FLAHERTY: So that page is 98 of the exhibit page.

When to use the approach or the strategy of take no further action: When no threat is known or likely. How were you able, in 24 hours, to determine that (a) there was a threat, or (b) that a threat was likely?

CST. SMYTH: I hadn't arrived at that conclusion.

MR. FLAHERTY: So you just skipped over that strategy in your training?

CST. SMYTH: Which strategy? Which strategy are you referring –?

MR. FLAHERTY: What's in front of you right now, Constable Smyth?

CST. SMYTH: Take no further action.

MR. FLAHERTY: Yeah, okay. So we're talking about this, I just read it out to you. You know what slide I'm talking about.

THE COMMISSIONER: Mr. Flaherty, the way you're putting your question – take constable to the point that you want to make there.

MR. FLAHERTY: I did, the strategy is take no further action. When to use –

THE COMMISSIONER: Okay.

MR. FLAHERTY: When no threat is known or likely.

THE COMMISSIONER: Okay –

MR. FLAHERTY: Okay.

THE COMMISSIONER: – so what's your question there?

MR. FLAHERTY: So the question is, in the 24 hours, in 24 hours following Donna Ivey's email to you, were you able to identify a threat or identify the fact that a threat was likely?

CST. SMYTH: That's the process that we were engaged in is the actual threat assessment. Again, the reference to when no threat is known or likely, that refers to a point in time where you've gone through some sort of process, a threat assessment process and determined one way or the other.

MR. FLAHERTY: But you, you weren't –

CST. SMYTH: We hadn't arrived at that conclusion.

MR. FLAHERTY: But you weren't doing a threat assessment. You were doing the risk assessment, weren't you?

CST. SMYTH: No, Sir, I was engaged –

MR. FLAHERTY: Okay.

CST. SMYTH: – in the beginning of a threat assessment.

MR. FLAHERTY: What's the definition of a threat assessment in this book? Or what's your definition, and then we'll visit what your training says a threat assessment is.

CST. SMYTH: A threat assessment is a process –

MR. FLAHERTY: Yeah.

CST. SMYTH: – by which you gather information to determine the likelihood of whether or not somebody has the capacity to carry out an act of targeted violence in this context.

MR. FLAHERTY: So how is it different from a risk assessment?

CST. SMYTH: The risk assessment refers to whether or not, first, of the likelihood of that threat actually being carried out.

MR. FLAHERTY: Okay. That's different from what your training manual says.

CST. SMYTH: Okay.

MR. FLAHERTY: Is it? Do you know that that's what the training manual defines those things as?

CST. SMYTH: That's my understanding of threat assessment and risk assessment.

MR. FLAHERTY: Okay. Is that what your training manual says?

THE COMMISSIONER: Why don't we turn the page and we'll see?

MR. FLAHERTY: Well, the next page, I don't believe, shows the differences between –

THE COMMISSIONER: Back – we have to go back two pages. That was the – those were the definitions, I think, that I mentioned caused me some problems early on. I have it visualized. It's a page which –

MS. CHAYTOR: Sorry, slides 55 and 56. The tops of my pages aren't numbered but it's slide 55 and 56. That was covered with Constable Smyth earlier.

THE COMMISSIONER: Do we know where to find that?

MS. O'BRIEN: It's page 61 of the document. We just don't have the exhibit number.

THE COMMISSIONER: Page 61, did you say?

MS. O'BRIEN: Six one.

MS. CHAYTOR: 61, yeah.

MS. O'BRIEN: Sorry, Madam Clerk, it's page 61 of the document. We do not have the exhibit numbers here at our bench, so it's going to be a couple of –

UNIDENTIFIED MALE SPEAKER: Page 64 of the exhibit.

THE COMMISSIONER: Page 64. It's right here, I think. Threat assessment vs. Risk Assessment is where it starts, Mr. Flaherty, I think.

MR. FLAHERTY: Okay.

THE COMMISSIONER: Is this the one you're thinking about?

MR. FLAHERTY: Yeah.

So this definition, what you were provided in your training, says that a threat assessment is, "A process designed to assess the likelihood that the threatener will carry out the threat."

So in your threat assessment that you've told us all about over the last – what is this – five days now, who was the threatener and what was the threat they were going to carry out?

CST. SMYTH: Well, the risk assessment falls into part of the threat assessment.

MR. FLAHERTY: That's not my question. My question is – you said that you were engaged in a threat assessment and a threat assessment is defined as, "A process designed to assess the likelihood that the threatener will carry out the threat."

Who was the threatener and what was the threat?

CST. SMYTH: Right. So at that stage of the threat assessment process, we haven't arrived at a point where we believe a threat may indeed be present.

MR. FLAHERTY: At that stage of the threat assessment. With all due respect, that definition refers to the entire process. And the process would start once there's a threat, wouldn't you say? I mean, that's what the definition says.

CST. SMYTH: I realize that you could take it like that.

MR. FLAHERTY: So when you're talking about – when you said, no, well, that's a threat assessment and that's a risk assessment, trying to explain your way out of some questions. It doesn't appear that you really know what a threat assessment or a risk assessment is based upon what your training has to say.

CST. SMYTH: Okay.

MR. FLAHERTY: Correct, isn't it?

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

MR. FLAHERTY: You're providing incorrect definitions and we're relying on you as an officer to say, to know – when you say you're dealing with a threat assessment, I want to know that you are engaged in a threat assessment. Your definition and the definition in your training are two different things, aren't they?

CST. SMYTH: No, they're not.

MR. FLAHERTY: Okay. Who's the threatener and what was the threat?

CST. SMYTH: Well, we haven't arrived at that stage yet. The person who's (inaudible) –

MR. FLAHERTY: This is an entire process –

THE COMMISSIONER: Let him, let him finish.

MR. FLAHERTY: – it's not an initial stage.

THE COMMISSIONER: Mr. Flaherty, let him finish his question. You asked a question.

MR. FLAHERTY: Okay.

CST. SMYTH: The subject of that particular assessment at that stage would indeed be Mr. Dunphy, but I haven't arrived at a conclusion whereby a threat for him to carry out an act of targeted violence may exist or not.

MR. FLAHERTY: So a threat assessment, which is a process – and by the way, it says process. It would go from the beginning of the process which would be the infancy stages, the preliminary stages, all the way to the end of the assessment. That's the process.

And it says it's: A process designed to assess the likelihood that a threatener will carry out the threat. So what that threat assessment is or what this says is, is that – what it appears to say is, is that there's been a threat and we need to see what the likelihood that the threatener will carry out that threat. Is that not what it says?

THE COMMISSIONER: (Inaudible.)

MR. FLAHERTY: Am I misunderstanding what that definition is?

THE COMMISSIONER: And that should read probably, Mr. Flaherty, should it not, that a process designed to assess the likelihood that the suspect, suspected threatener will carry out the threat. Does that, does that meet your concern?

MR. FLAHERTY: I had –

THE COMMISSIONER: I tend to think that that second paragraph – the same thing struck me when Constable Smyth was asked about it before, that, as you said, that seems to be more a threat assessment than – sorry, a risk assessment than a threat assessment where you're talking about the likelihood, assessing the likelihood that the, we'll say, suspected threatener will carry out the threat. Why isn't that a risk assessment?

CST. SMYTH: Pardon me, Sir?

THE COMMISSIONER: Why wouldn't that be considered risk assessment?

CST. SMYTH: That is a valid question. I think you are taking one slide and not having the total discussion around the entire topic, but I believe it's articulated a bit more in the very next line in terms of risk.

MR. FLAHERTY: Oh, just –

THE COMMISSIONER: Sorry, Mr. Flaherty, for interrupting there –

MR. FLAHERTY: Sorry (inaudible).

THE COMMISSIONER: – but I had the same question you had when I, when I looked at that. And I did have the full book in front of me, I just – I confess, I did not take the time to – just go down to the following page, it talks about risk assessment there.

Yeah, here we go: “A proactive process designed to assess the likelihood that a risky event will occur.” Well, the only difference between those two paragraphs seems to be the likelihood that a suspected threatener will carry out a threat is the same as saying if the risky event will occur, isn’t it? Is it not?

CST. SMYTH: Based on that language, yes.

THE COMMISSIONER: Pardon?

CST. SMYTH: Based on that language, yes.

THE COMMISSIONER: Yes. So it would seem that the risk assessment, threat assessment – or the way they’re defined there, are basically the same thing.

Go ahead, Mr. Flaherty.

MR. FLAHERTY: Well, first off, I would just note that –

THE COMMISSIONER: We shouldn’t take all this for gospel is what –

MR. FLAHERTY: No, no –

THE COMMISSIONER: Training manuals is all I’m saying –

MR. FLAHERTY: No, and I understand –

THE COMMISSIONER: Particularly when you get into these, what do they call them, the –

UNIDENTIFIED FEMALE SPEAKER: PowerPoints.

THE COMMISSIONER: PowerPoints, exactly –

MR. FLAHERTY: Well then, that is an issue for the Commission to determine.

THE COMMISSIONER: Exactly.

MR. FLAHERTY: If his training has been relegated to PowerPoint presentations, that’s an issue.

THE COMMISSIONER: Well, he hasn’t said that, and I haven’t said that, but you’re assuming that –

MR. FLAHERTY: So do you feel that these PowerPoint presentations and this class, course, whatever you did, that it adequately trained you?

CST. SMYTH: Well, there’s a lot more in this manual that describes –

MR. FLAHERTY: That’s not my question; that’s not my question.

THE COMMISSIONER: He’s giving you the answer now; he’s giving you the answer. He’s saying there’s a lot more in the manual than – and he’s going to go on. Continue.

CST. SMYTH: There's a lot more in this manual that describes the very process that I have described here throughout the past five days. And so if we want to go through that, I'm happy to talk about the process –

MR. FLAHERTY: You'll get, you'll get –

CST. SMYTH: The process that I was following.

MR. FLAHERTY: You'll get the chance under re-examination with your counsel. But my question is: Do you believe your training was adequate?

CST. SMYTH: Yes.

MR. FLAHERTY: So these – so you had, you take no issue with the fact that a lot of this appears to be slides and may be summarized. You have no issue with that.

CST. SMYTH: Well, these here are slides, but there's a lot more in this manual is what I'm saying that describes the process in length.

MR. FLAHERTY: Okay. So what is the process? Let's just go – 'cause obviously it appears to me you skipped over a lot of what this manual suggests, so what is the process and what is your process for threat assessment and risk assessment?

CST. SMYTH: Well, okay, firstly, we would examine and determine if somebody has a long-standing grievance with a particular entity, official, individual –

MR. FLAHERTY: How do you get to that part? Because that just can't be the first part because you're not going through a telephone book saying, I'm going to see if this person has a grievance against government. That can't be the initial stage of a threat assessment?

CST. SMYTH: Sorry, what going – I'm confused, going through a phone book or – I'm sorry.

MR. FLAHERTY: Well, you said the first part of a threat assessment is, you start seeing, you start to review whether or not there's been an outstanding grievance. What I'm saying is, that can't be the first part of your process; there has to be an initial preliminary stage where a threat has been communicated to you?

CST. SMYTH: No.

MR. FLAHERTY: Or a concern? So concerns alone you're saying that you engage in a threat assessment.

CST. SMYTH: No to the threat. That you don't necessarily have to engage in a threat assessment because you had an actual criminal threat brought to your attention. You know, threat assessments are carried out in a myriad of different formats –

MR. FLAHERTY: Such as?

CST. SMYTH: Domestic situations, for example; you might have a situation where there's a history of domestic violence between two individuals and you may engage in the threat assessment process on the part of the aggressor and you examine –

MR. FLAHERTY: But we're talking – are we not talking about threat assessments in the context of close protection services?

CST. SMYTH: Well, the –

MR. FLAHERTY: So I mean the –

CST. SMYTH: I'm trying to give you some generalities around the threat assessment process and how they're initiated.

MR. FLAHERTY: Uh-huh.

CST. SMYTH: That's one example. We see an example here whereby I was sent a piece of information that I immediately initiate the first stages of a threat assessment, which is firstly to establish whether or not that individual may have a sense of injustice being committed against them. In this case –

MR. FLAHERTY: But wouldn't you want to see if there's a threat? Before you engage in a threat assessment, don't you want to make a determination that there is or isn't a threat, at some level?

CST. SMYTH: That is the process.

MR. FLAHERTY: It doesn't have to be your final determination. But do you not make that determination?

CST. SMYTH: That's a process that you're engaging in, to try and determine if there is a potential threat for this individual to carry out an act of targeted violence.

MR. FLAHERTY: If I threaten someone, Mr. Smyth, you really don't need to get into the history of my potential grievances. If I threaten you, you're threatened, are you not?

CST. SMYTH: If you've committed the criminal act of a threat, yes.

MR. FLAHERTY: Okay.

So we'll just move on from that, but I would say just two things, with respect, Commissioner, just to the suspected, reading in suspected into the slide, into slide 55. We and Mr. Smyth in his training can only go by what the slides do say. And I would suggest that Mr., or Constable Smyth, a proactive process. Is a risk assessment a proactive process and a threat assessment is not a proactive process?

CST. SMYTH: I would consider them both proactive.

MR. FLAHERTY: They're both proactive. But why is one called proactive and the other one isn't?

CST. SMYTH: I don't know why they've used that specific language there. Like I said the actual processes are outlined in this manual, the factors that you would take into consideration.

MR. FLAHERTY: Okay.

Scroll down, Madam Clerk, please, just to 57. So here, just to provide further context it says – well, here's Threats: I'm going to kill you; putting out a contract to kill someone; stalking. So those are examples of threats and those are the types of threats that are assessed in a threat assessment.

Whereas Risk says you know that criminal organization X will attempt to intimidate, attack or kill. You were looking into the risk of whether or not Donald Dunphy was attempting to intimidate, attack or kill, weren't you?

CST. SMYTH: Based on that definition, yes.

MR. FLAHERTY: Okay.

This is – your training is pretty confusing, isn't it?

CST. SMYTH: Some of the verbiage –

THE COMMISSIONER: You've been to law school.

MR. FLAHERTY: Pardon?

THE COMMISSIONER: You've been to law school.

MR. FLAHERTY: Oh yeah. No, I know. And if we want to engage into a public inquiry into my law school performance, I'll be moving out of the country.

We can move on from that. At the very least, it appears that threat and risk is confusing within the materials.

But we'll scroll down to slide 58. So Threat & Risk: Same or Different? A "Threat: Can be specific and highly focused, dynamic in nature and needs to respond to changes in circumstances."

"Risk: Typically more general in nature and highly dependent on intelligence."

Wasn't your assessment highly dependent on intelligence work?

CST. SMYTH: Yes.

MR. FLAHERTY: Okay.

Scroll down to slide 59, Madam Clerk. We can scroll past that. I bring our attention to page 98, slide 85 – 85, Madam Clerk. Oh, there you go.

So this is the second or third non-confrontational strategy. Can you explain to me what this strategy entails, the Watch and Wait?

CST. SMYTH: If it's a situation where the person's commentary is of a lower level of concern, you don't feel that there's any need for any degree of intervention, it may be somebody that you kind of, for lack of a better phrase, put on your backburner and continue to monitor at a later date to see if there's been any escalation in their particular behaviour.

MR. FLAHERTY: And were you aware that Workers' Comp – or when did you first become aware that worker, WorkplaceNL were engaged in a monitoring exercise with respect to Don Dunphy?

CST. SMYTH: In speaking to Mr. Mahoney.

MR. FLAHERTY: And it appeared to work very well for Workers' Comp, did it not?

CST. SMYTH: I don't know.

MR. FLAHERTY: Did he say that it didn't work well?

CST. SMYTH: He didn't say –

MR. FLAHERTY: Did he –

CST. SMYTH: – either one.

MR. FLAHERTY: Did he say that we had to stop monitoring and take proactive action?

CST. SMYTH: Well, I think there would be an element of proactive action just in the monitoring; but, nonetheless, he hadn't given me any indication that they had moved beyond that.

MR. FLAHERTY: Okay. What was so urgent that you couldn't sit back and monitor Mr. Dunphy's Twitter commentary? Why couldn't you just watch what he had to say as opposed to going to his house?

CST. SMYTH: Based on what I was reading in his social media feed I saw what could be construed as an escalation in anger towards government. I didn't see any benefit, based on knowing that he had a very extensive communication with government already and that Workers' Compensation had already engaged in a phase of monitoring, that I didn't see any necessary advantage in doing that; that the behaviour up to that point justifiably speaking to Mr. Dunphy.

MR. FLAHERTY: What was the time period for this escalation, and what was the evidence of escalation that you relied upon?

CST. SMYTH: In looking at the history of his comments on social media, probably the three months previous – well, probably a bit more, five or six, because it would go back to probably December or February when to me there seemed to be a noticeable increase in the commentary directed at the Premier, at – Steve Kent was another one, calling of liars and strong language, these kinds of things, seemed to be that escalation and an increase in intensity. A lot more of, there could be sometimes 15 a day, type thing.

MR. FLAHERTY: Uh-huh. Now for the average Twitter user, are you aware of what the average Twitter or how many tweets that person would send out in a day? I mean, is 50 tweets a lot?

CST. SMYTH: In a day on one topic, I think in this case it would be considered a lot. He wasn't getting any response to it, so the concern is heightened around whether or not this person is reaching the end of their rope. They're not getting any results. He had indicated quite clearly in his communications that he wasn't receiving any response to his contact with government; felt he was being lied to. So the concerns that if that continues, what is his next strategy to resolve his grievance?

MR. FLAHERTY: Do you know if he was lied to?

CST. SMYTH: I don't know.

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

Scroll down, Madam Clerk. You can scroll down past that.

So the advantages of waiting: “Allows the observation of behaviours or contacts over a period of time.” You could have taken additional time to see if there was further escalation, couldn’t – you could have, couldn’t you?

CST. SMYTH: I didn’t think that would be the appropriate thing to do. One of the advantages of social media, while it provides that platform, it also provides a recorded history for us to examine. In the not-so-distant past there would be a reliance on receiving other forms of communications, whether it be telephone, actual mail, email, these kinds of things. So, social media has changed our ability to evaluate that to a certain degree.

MR. FLAHERTY: Have you received any training with respect to identifying escalation in written commentary?

CST. SMYTH: Not specific to that, no.

MR. FLAHERTY: How much training have you received in Twitter? In investigations relating to Twitter use?

CST. SMYTH: Limited; probably two courses. A digital, general digital technology course that gives some insight to investigators on different tools that would exist online to assist in investigations.

MR. FLAHERTY: Okay. But that, that general course, when did you take that?

CST. SMYTH: Probably around 2011.

MR. FLAHERTY: Okay. And that shows you tools to use in an investigation but it doesn’t specifically go into how someone should assess – essentially, psychologically assess whether or not someone is communicating in written form, escalation cues. Did it –

CST. SMYTH: No, it didn’t touch on that topic specifically.

MR. FLAHERTY: Let’s scroll down to slide 89. When to use: “If unsure or if further information is required.”

You determined pretty early on that an interview was required. Do you feel that there was further information available from other sources, and would receiving that information had have prepared you better for an interview with Don Dunphy?

CST. SMYTH: It may have potentially better prepared me, but I didn’t feel it was prudent to wait. I felt it was the proper decision to give Mr. Dunphy the opportunity to speak to us. Let him know that we were engaged in that process, why we were engaged in that process, and if there was any other avenues that he might be considering.

MR. FLAHERTY: Now, it does say here, “If unsure.” Can you tell us what that is referring to, if unsure of what? If you’re unsure of whether or not there was a threat, if you’re unsure of whether or not someone actually is a risk.

CST. SMYTH: I can’t recall.

MR. FLAHERTY: Okay.

We'll scroll down to the next page: Third Party Control and Monitoring. You had a discussion with Tom Mahoney. Was there any thought to letting them monitor the situation and for you to keep tabs on Mr. Dunphy through WorkplaceNL. Did you consider that at all?

CST. SMYTH: Not that point; I felt that that had been done. They had, without me obviously being aware previous to speaking to Mr. Mahoney, but they had already in essence engaged in that process.

MR. FLAHERTY: And you could've just borrowed the fruits of their labour. If they're monitoring, why not just let them monitor. And if they can find a real issue, you can rely on their monitoring, could you not?

CST. SMYTH: I think that would have been irresponsible of me, but –

MR. FLAHERTY: If it's irresponsible, why is this even in the training manual? Why does it suggest that third party control monitoring is a strategy that you could have implemented?

CST. SMYTH: Well, at that stage I think it would have been irresponsible. You've also got to take into consideration that this manual and this training is provided to non-law enforcement entities as well.

MR. FLAHERTY: Okay.

CST. SMYTH: People in Mr. Mahoney's position, people that work within various corporate environments whereby they might be conducting workplace threat assessments. So the context of that has to be altered based on what exactly your position and mandate is.

MR. FLAHERTY: So is your position that this slide here is only applicable to civilians who underwent this training?

CST. SMYTH: No, no. It would be just a point of consideration is all I say that for. That it may differ, depending on what your role and your mandate is.

MR. FLAHERTY: Okay. Well, consider this, can police engage in third party control monitoring as contemplated in this training manual?

CST. SMYTH: I think we could, yes.

MR. FLAHERTY: Okay.

Scroll down to slide 91, please, Madam Clerk.

All right: Subject Interviews. Now subject interviews, as your counsel alluded to earlier, can be confrontational in style or non-confrontational in style suggests the manual. But, in either way, you're coming into physical contact with a person you didn't know. Correct?

CST. SMYTH: Correct.

MR. FLAHERTY: Okay. So let's just take a look at the disadvantages, physical danger high. Did you consider that disadvantage?

CST. SMYTH: Well, I think this is probably the more appropriate slide to address the issue of this being provided to non-law enforcement personnel as well. That, you know, a person, a civilian individual would have to give higher consideration to the potential for physical danger

than police officers would because we have the training and the tools to mitigate those types of issues.

MR. FLAHERTY: So was there a high physical danger in your interview with Mr. Dunphy?

CST. SMYTH: (Inaudible.)

MR. FLAHERTY: Did you assess it?

CST. SMYTH: Based on the assessment beforehand, no.

MR. FLAHERTY: Okay.

What were the factors that you assessed in determining that there was no high danger, high physical danger?

CST. SMYTH: Primarily was there any history of violence or a history of firearms usage.

MR. FLAHERTY: Now, you're a police officer and although you have set duties with the PSU, you also have a duty to protect the public. Correct?

CST. SMYTH: Yes.

MR. FLAHERTY: Okay.

And this man may very well have been – I don't, I don't think he was based upon the evidence, but he may have been at the time mentally ill. Correct?

CST. SMYTH: It's possible.

MR. FLAHERTY: Did you do an assessment as to the physical danger that he may be in? Did you ever assess his safety?

CST. SMYTH: In what respect, from who?

MR. FLAHERTY: Did you ever assess in any respect the safety of Donald Dunphy in an interview that you would have at his house? Did you ever assess, did you ever turn your mind to whether or not this approach would be safe for him?

CST. SMYTH: Whether me speaking to him –

MR. FLAHERTY: Yeah.

CST. SMYTH: – would potentially cause him physical danger?

MR. FLAHERTY: Well, it obviously did, didn't it?

CST. SMYTH: Based on his actions, yes.

MR. FLAHERTY: Yeah, okay.

So you didn't know if he was mentally ill. He very well could have been. So you went in unannounced into the house of someone who could have been mentally ill, not reacted well to

your presence and yet you had no plan for that person's safety, did you? You didn't have a plan for Don Dunphy's safety, did you?

CST. SMYTH: I wasn't going there with the intention of causing him harm. So from my perspective I wasn't a threat to him.

MR. FLAHERTY: I'm not talking about your intention. You went into a situation that you didn't have the best handle on, I would say. You didn't know really how Don Dunphy was feeling, whether or not he was in good mental health. You were potentially walking into a situation where you were going to interview someone who may be violent, who may be experiencing a mental health crisis and yet you had no plan for that man's safety.

CST. SMYTH: Well, I think you've accurately described a significant portion of policing. That's just an unfortunate reality –

MR. FLAHERTY: What's –

CST. SMYTH: – of policing.

MR. FLAHERTY: What's the – what reality are you talking about? What portion are you talking about, Constable Smyth?

CST. SMYTH: Policing in general often involves going into situations, into person's homes where you don't have every answer, you don't know (inaudible) –

MR. FLAHERTY: That's generally in emergent situations, or generally where there's been some complaint as to criminal activity?

CST. SMYTH: Not necessarily, no.

MR. FLAHERTY: So it's common for police not to assess whether or not a potential interview subject will be safe or if there's any issues there. Is that what you're saying, that the police do not assess whether or not an interview would be safety from the position of the person to be interviewed? You don't look into that?

CST. SMYTH: From the police, do we assess whether or not we might potentially cause somebody harm, is that what you're asking?

MR. FLAHERTY: 100 per cent. You caused harm, you walked into a man's house, he did engage in actions that you allege that he pointed a gun at you. Did you not think that your presence could cause a mental or physical issue with the subject interviewer, and did you not think that if he got angry or if he was distraught, if he was a psychopath, that he may do something which would require you to hurt him? Did you think about that, ever?

CST. SMYTH: There's always potential for that in everything we do. So you always consider that but it can't prohibit our –

MR. FLAHERTY: But you didn't consider it. Did you consider it or didn't you consider it?

CST. SMYTH: We always consider it.

MR. FLAHERTY: So you considered it. So you assessed, you had a plan with respect to the safety of Mr. Dunphy during that interview? Is that what you're saying?

CST. SMYTH: No, it's not what I'm saying at all.

MR. FLAHERTY: So what are you saying?

CST. SMYTH: I said that we are very aware that there are unknown elements that will always exist into going into somebody's home, and that there are simply factors that are outside of our control that may turn into a situation that results in potential of a violence.

MR. FLAHERTY: What factor, beyond your control, made you go visit Don Dunphy that day?

CST. SMYTH: There was no factor beyond my control that made me go visit him.

MR. FLAHERTY: Okay.

You had opportunity for further intelligence gathering, to get a better handle on what Mr. Dunphy was all about. You could have went and spoke to Meghan Dunphy.

THE COMMISSIONER: We're going to stop now. We're gone after – past 4 and I have another commitment where I have to be, Mr. Flaherty.

I'm sorry, I was waiting –

MR. FLAHERTY: No, that's fine.

THE COMMISSIONER: – for a better place to break, but you just kept going for the last two or three minutes.

So we'll have to break here. You'll have to continue where you left off. We're going to start at 9 to see if we can avoid unduly inconveniencing a couple of witnesses that we expect to get on tomorrow. So we'll recess until 9 tomorrow morning.

Thank you

MS. SHEEHAN: All rise.

The Commission of Inquiry is now closed.