



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 35

Commissioner: Honourable Justice Leo Barry

Friday

3 March 2017

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Commissioner Leo Barry presiding.

Please be seated.

THE COMMISSIONER: Interesting colour.

Good morning everybody.

Any housekeeping before we start with our next witness? I take it so no –

MR. SIMMONDS: Can I just ask one – just a mechanic question, actually, because Ms. Breen is going to come back when we get to the applications. Do we expect to get finished with Mr. Barr this morning and go right to the applications or are we going to break for lunch or is there –

THE COMMISSIONER: Well, we'll have to play it according to – Ms. Buis, I see Mr. Kennedy has drawn on you again.

MS. BUIS: Yes.

THE COMMISSIONER: Is he going to be around? He, I think, has a CV that he's making available for us, does he, for his witness that he's proposing. Or are you –

MS. BUIS: Yeah. We'll reach out to him, Commissioner.

THE COMMISSIONER: Sorry?

MS. BUIS: We'll reach out to him on that.

THE COMMISSIONER: Yeah, there's no –

MS. BUIS: But he will be here this afternoon.

THE COMMISSIONER: He's planning to be here this afternoon as opposed to – yeah, we're not sure how long that – I'm sorry, your rank, Mr. Barr? What's your current –?

MS. O'BRIEN: Mr. Barr is a civilian.

THE COMMISSIONER: Civilian.

You have the same rank as the rest of us. Okay, good.

Mr. Avis. Sorry.

MR. AVIS: Commissioner, Mr. Drover was going to have to contact Mr. Kennedy. Maybe he'll have a – he just said he didn't have –

THE COMMISSIONER: Yeah, okay –

MR. AVIS: So maybe he'll have an answer for us, Sir.

THE COMMISSIONER: Yeah, thanks, Mr. Avis.

What we're trying to figure out is if we finish early with Mr. Barr, whether we'll be able to –

MS. BUIS: Yes.

THE COMMISSIONER: My inclination would be to proceed right into the applications then. So if you know what time Mr. – is Mr. Kennedy anticipating after lunch or?

MS. BUIS: No, Mr. – I'm going to keep Mr. Kennedy apprised of how quickly we move along this morning.

THE COMMISSIONER: Okay.

MS. BUIS: So he can be here, if we're –

THE COMMISSIONER: He'll be available?

MS. BUIS: – if we're quicker than normal.

THE COMMISSIONER: That's great.

MS. BUIS: Yes.

THE COMMISSIONER: Yeah, okay.

MS. BUIS: Not a problem.

THE COMMISSIONER: That's fine. And –

MR. SIMMONDS: And I'm sure I can do the same with Ms. Breen.

THE COMMISSIONER: Sorry?

MR. SIMMONDS: I can do the same with Ms. Breen.

THE COMMISSIONER: Sure. And if we need to wait for a little while we'll do that, but we don't want to lose too much time. Since we're in the closing stages we've been moving pretty well. Any news from –

MR. DROVER: No, I'll send him a text message.

THE COMMISSIONER: Nothing to report?

Okay, thank you, Mr. Drover.

All right, so we'll affirm the witness.

MS. O'BRIEN: Thank you, Mr. Barr, if you could just press the button there on your microphone to activate it, please. Thank you.

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

MR. BARR: I do.

MS. SHEEHAN: Please state your full name.

MR. BARR: Darryl, D-a-r-r-y-l; Glen, G-l-e-n; Barr, B-a-r-r.

MS. SHEEHAN: Thank you so much.

MS. O'BRIEN: Good morning, Mr. Barr. Kate O'Brien, one of the Commission co-counsel.

Before we begin with your evidence, I'm going to ask the Commissioner for an order to have entered the following exhibits: P-0757 through to P-764 inclusive.

THE COMMISSIONER: So ordered.

MS. O'BRIEN: Thank you.

Mr. Barr, I'm going to begin with a review of your curriculum vitae and if, Madam Clerk, could please bring up P-0757.

Now, I understand that you have recently started a company, Bulletproof Forensic Consulting Limited, to do consulting work. Is that right?

MR. BARR: That's correct.

MS. O'BRIEN: And this was your first engagement through that company?

MR. BARR: Yes.

MS. O'BRIEN: Okay.

But I understand – thank you, Madam Clerk. I understand that your day job is with the Calgary Police Service. Am I right?

MR. BARR: It is, yes.

MS. O'BRIEN: Okay. And you're currently the manager of their Forensic Firearms and Tool Mark Laboratory.

MR. BARR: Yes, I am.

MS. O'BRIEN: Okay.

I understand you're properly described as a forensic scientist and specifically as a firearms and tool mark examiner. Am I right?

MR. BARR: That's right.

MS. O'BRIEN: Okay.

THE COMMISSIONER: A forensic scientist and ...?

MS. O'BRIEN: A firearms and tool mark examiner. And in just a moment I'm going to ask Mr. Barr to tell us what that is.

THE COMMISSIONER: Okay.

MS. O'BRIEN: From your CV, Mr. Barr, we see that you – which is up on the display in front of us. We see that you received a bachelor of science degree in 1992 and that you started your career as a firearms and tool mark examiner for the RCMP.

First, here we see that you were in Winnipeg and then later, in approximately 2002, you moved to Nova Scotia. And you were with the RCMP in that position until 2011 when you moved to the Calgary Police Service.

MR. BARR: Correct.

MS. O'BRIEN: Okay.

Can you please explain to the Commissioner what the firearms and tool mark examiner does and how you became qualified to do it?

MR. BARR: Sure.

So the role today of a firearms and tool mark examiner is, in the forensic sciences, is to examine and interpret physical evidence related to shootings and firearms so that it deals primarily with the physical evidence; so the analysis, interpretation of firearms-related evidence and subsequent testimony when required.

MS. O'BRIEN: Okay.

And so I understand to get that designation you did a number of training courses here that we see all listed in your CV. There's quite a number but also you did a, is it a three-year mentorship program? Is that correct?

MR. BARR: Yeah. So when I started my career with the RCMP in Winnipeg, the basic training you would call is an understudy-type training program which lasts three years. And you're studying one on one with an experienced firearms and tool mark examiner following a formal course of instruction which is based upon the Association of Firearm and Tool Mark Examiners training guide which is an international association of professionals involved in the same field.

MS. O'BRIEN: Okay.

MR. BARR: So I conducted that training or completed that training in Winnipeg back in 1995 it was. And then the additional training after that is professional development-type ongoing training that I've taken ever since.

MS. O'BRIEN: Okay.

And now that you're in a lab manager position with the Calgary Police Service, do you still do your own examinations?

MR. BARR: I do. I spend about – probably about 30 to 40 per cent of my time doing actual analysis still.

MS. O'BRIEN: Okay.

MR. BARR: The remaining part is managing the lab and doing reviews of the work done by my employees there.

MS. O'BRIEN: Okay.

And I understand that the work that you did in this case, looking for Constable Smyth and Mr. Dunphy, you described that as shooting scene reconstruction. Is that right?

MR. BARR: That's correct.

MS. O'BRIEN: Okay.

And you've told me previously that this would be considered a subdiscipline of firearms and tool mark examination. Am I right?

MR. BARR: Yeah, it's considered as sort of the subdiscipline in there. There's a number of subdisciplines to do with firearms and tool mark examination.

MS. O'BRIEN: Okay.

We see here and I'm just going – I'm on, actually, page 3 of your curriculum vitae or the exhibit. And here we see that on the first bullet under certifications and appointments that you've been qualified as an expert in the subject of firearms and tool mark identification on – it says here 60 but I understand that's now 61 occasions in provincial and superior level courts in the provinces of British Columbia, Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia and Newfoundland as well as military court. Is that correct?

MR. BARR: Yes, that's correct.

MS. O'BRIEN: Okay.

And has all your expert – when you've given expert evidence, were you always in the employment then of either the RCMP or the Calgary Police Service?

MR. BARR: Yes.

MS. O'BRIEN: Okay, so all your evidence would have been given on behalf of the Crown. Is that fair to say?

MR. BARR: That's correct.

MS. O'BRIEN: Okay.

And has your evidence always been accepted by the courts?

MR. BARR: Yes, it has.

MS. O'BRIEN: Okay.

And I understand the majority of these 60 or 61 cases that you did, did involve elements at least of shooting reconstruction. Is that correct?

MR. BARR: The majority, yes.

MS. O'BRIEN: Okay.

And as you'll note here, Commissioner, Mr. Barr did do work before the courts in Newfoundland and I understand that was related to a scene reconstruction that you did for the Crockwell case out of Bay Bulls. Is that right?

MR. BARR: Yes, I think I believe I testified in 2012 on that.

MS. O'BRIEN: Okay.

Now, I understand that most of the time that you have given evidence in court you were presenting your own work and that you were the person – you were on the scene and did an analysis of the scene itself, the crime scene itself, and collected data, whereas here, you did a scene reconstruction based on evidence that was collected by the local Forensic Identification team. Is that true in most of the cases you would be doing it based on your own work?

MR. BARR: Yes. Primarily, yes.

MS. O'BRIEN: Primarily, okay. But I understand this is not the first time that you have worked in this way in that at least a portion of these cases you would have been doing a review and presentation similar to what you've done in the case here?

MR. BARR: Yes, I have.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Do I understand you correctly; normally the evidence would be collected by you, Mr. Barr. But in this – this case differed somewhat in that it was collected by the police and provided to you. Is that ...?

MR. BARR: Well, normally the evidence is collected by the police agency as in this case.

THE COMMISSIONER: Okay.

MR. BARR: The only real difference is when I go to a scene I would do any specific analysis to do a shooting reconstruction. Primarily, that's the trajectory or bullet path analysis that I would do if I'm there.

THE COMMISSIONER: Right.

MR. BARR: Sometimes the police agency crime scene members do that analysis, as in this case, and I would be presented with that to –

THE COMMISSIONER: Okay. So that relates, that relates specifically to the bullet trajectory?

MR. BARR: It does. Yes.

THE COMMISSIONER: That's the only –

MR. BARR: That's really the only thing I do at a scene is the bullet trajectory analysis and any impact damage assessment where there's suspect bullet holes, to evaluate those.

THE COMMISSIONER: Okay.

MS. O'BRIEN: Okay.

But I understand, Commissioner, and Mr. Barr can correct me, that this is not the only time that he has relied on the bullet trajectory analysis of other police officers.

THE COMMISSIONER: Yeah, I understand.

MR. BARR: That's correct. Yeah.

MS. O'BRIEN: Okay. All right.

Here in this section you have listed your certifications by the Association of Firearm and Tool Mark Examiners and by the RCMP. And, also, you're appointed as a firearm analyst for the purposes of Section 117.13 of the *Criminal Code*.

There's a whole list here, Commissioner. It's been put into evidence. His CV, it's quite lengthy, I don't intend to review it in detail.

THE COMMISSIONER: Okay, what section out of the Code was it?

MS. O'BRIEN: I think 117.13.

THE COMMISSIONER: 117.13, okay.

MS. O'BRIEN: Okay.

THE COMMISSIONER: Thank you.

Sorry, go ahead.

MS. O'BRIEN: And Mr. Barr also has – he has a fair amount of ongoing training as well as towards the end of his CV, a lengthy list of publications and training presentations he has both given and attended. Commissioner, subject to further questions by counsel, I will be seeking to have Mr. Barr qualified for shooting scene reconstruction.

THE COMMISSIONER: A second now, I'll just go slow in this. It's shooting scene reconstruction.

MS. O'BRIEN: Including bullet path analysis.

THE COMMISSIONER: Including bullet path analysis. Okay.

MS. O'BRIEN: And those are all the questions I have for Mr. Barr but other counsel may have some.

THE COMMISSIONER: Okay. Thank you.

Counsel questions on Mr. Barr's qualifications?

RCMP, no?

MR. AVIS: No questions and no objection to the qualification, Commissioner.

THE COMMISSIONER: Thank you, Mr. Avis.

MR. DROVER: I have one question but it's more to clarify something.

THE COMMISSIONER: Go ahead.

MR. DROVER: I think Ms. O'Brien asked you if this is the first time you relied on the analysis by another police force and you said, no, it wasn't. But is it more that you're relying on the evidence they collected than the analysis? Because I understand that you did the analysis as opposed to the RCMP.

MR. BARR: Sure, I can clarify that.

So normally what happens is the police agency collects the evidence at the scene. And sometimes there is bullet path analysis required, at which times, if I am there, I will do it. There has been times where the police agency has done the bullet path analysis and I have received those results.

And then for the rest of the investigation, sort of a standard lab analysis, we'll get the exhibits like the firearm and the bullets and the cartridge case to do all the microscopic comparisons. Those are always done in the lab by me when it comes to that.

So the stuff, the work that's done at the scene is – the evidence is collected always by the police agency. The only analysis would be the bullet path analysis or impact damage assessment. There has been times where the investigating agency has conducted that analysis and I will be given the results of that just to evaluate with reference to the other evidence.

THE COMMISSIONER: Okay. Thank you.

Ms. Buis, do you have anything?

MS. BUIS: No questions or objections, Commissioner.

THE COMMISSIONER: Okay. Thank you.

Well, I'm satisfied from the evidence supplied regarding Mr. Barr's training and experience and his curriculum vitae, his prior qualifications as an expert in various courts, that he should be qualified today as an expert to provide opinion evidence concerning shooting scene reconstruction – I can't read my writing here – and –

MS. O'BRIEN: Including?

THE COMMISSIONER: – including bullet path analysis.

Thank you.

MS. O'BRIEN: Thank you.

Before we begin getting into your report, I want to bring up P-0761, please, Madam Clerk. The report we're going to be reviewing today with you, Mr. Barr, I understand is actually an amended report. And I'm just bringing up the letter here that explains this just to get you to confirm and clarify that.

So I understand that you submitted a first report to the RCMP. And after your submission of the first report, the National Commission on Forensic Science adopted some new terminology. Is that right?

MR. BARR: Yeah, there were some recommendations made about some new terminology about a month after I had issued my report.

MS. O'BRIEN: Okay.

So because of that I understand you voluntarily amended your report to adjust or use this new terminology. Is that right?

MR. BARR: Right. That's correct.

MS. O'BRIEN: Okay.

Did the amendment that you make change any of the results, conclusions or opinions of the original report?

MR. BARR: No, it didn't.

MS. O'BRIEN: Okay. Thank you.

THE COMMISSIONER: That's interesting, I haven't seen – I should have seen it because I've been involved with the preparation of a science manual for judges across the country, and the distinction between a reasonable degree of practical certainty and absolute certainty, I haven't realized it had risen to such prominence. So that's just recognizing that you're the – as far as science is concerned there's nothing with absolute certainty basically.

MR. BARR: That's exactly right.

THE COMMISSIONER: If it's not falsifiable, it's not science according to Karl Popper.

MR. BARR: Exactly.

THE COMMISSIONER: It might be religion, it might be a belief but it's not a scientific statement if it's not a statement that could possibly be falsified. And that's how science proceeds and makes progress. Would that be correct?

MR. BARR: That's exactly.

THE COMMISSIONER: Okay.

MR. BARR: Exactly correct. Yeah.

THE COMMISSIONER: Good. Thank you.

MS. O'BRIEN: Thank you.

We'll now bring up your report. P-0759, please, Madam Clerk. I'm going to start the review with actually section 2.0 of your report.

And, Commissioner, I should be clear; just prior to Mr. Barr taking the stand I gave him a paper copy of his report, because there's times during this evidence we're going to be looking at other exhibits on the screen and he might want to refer to his report itself. So what he has there on the bench is just a copy of this exhibit.

THE COMMISSIONER: So what number do you have?

MS. O'BRIEN: The exhibit is P-0759.

THE COMMISSIONER: Thank you.

MS. O'BRIEN: And I've gone just on page 3 of that exhibit. I'm going to start with section 2.0, the Introduction. In this section here essentially you're setting out, as I understand it, Mr. Barr, what you were asked to do. Is that fair to say?

MR. BARR: That's correct. Yes.

MS. O'BRIEN: Okay.

And so you write here: "At your request a review of materials has been undertaken with respect to the shooting related evidence in the shooting death of Donald DUNPHY on April 5, 2015 in Mitchells Brook, NL. The account of SMYTH was reviewed and compared to the shooting related evidence in order to determine if any physical evidence exists that either supports or refutes the account of SMYTH."

So does that succinctly capture what you were doing in this case?

MR. BARR: Yes, it does.

MS. O'BRIEN: Okay.

Who requested that you do this work?

MR. BARR: It was Corporal Burke from the RCMP here in Newfoundland.

MS. O'BRIEN: Okay and we've already had testimony from Corporal Burke. And he was the primary investigator on this file.

Your consulting agreement has been filed with certain financial information and whatnot redacted. It's been filed, Commissioner, as P-0758. That agreement was dated on November 20, 2015, and it's signed by Mr. Barr as well as the CROPS officer.

THE COMMISSIONER: The 20th of November is it?

MS. O'BRIEN: Yes, 20th of November, 2015.

THE COMMISSIONER: That's the retainer letter?

MS. O'BRIEN: That's exactly – his consulting agreement is how it's termed.

THE COMMISSIONER: Thank you.

MS. O'BRIEN: And there's no need for me to review it but I just wanted to alert you that it's there in evidence.

THE COMMISSIONER: Thank you.

MS. O'BRIEN: Okay, so when you say here that you were reviewing the physical evidence to determine whether it either supports or refutes the account of Constable Smyth, the physical evidence here, were you looking at just the shooting-related physical evidence?

MR. BARR: That's right. Only the shooting-related evidence from the scene is what I was considering.

MS. O'BRIEN: Okay.

I'm going to look now at the section 1 of your report which is the summary of your findings. And I don't need to get into all the details of your findings because we'll do that when we reach your conclusions, but I do want to ask the two basic questions.

Did you find any elements of the physical shooting evidence that supported Constable Smyth's statement as to what happened?

MR. BARR: I did, yes.

MS. O'BRIEN: Okay.

And those are – you've listed six of them there. Is that right?

MR. BARR: That's correct.

MS. O'BRIEN: Okay. And we'll get into those in more detail as we go through your evidence.

Did you find any elements of the physical shooting evidence that refuted Constable Smyth's statement of events?

MR. BARR: I did not.

MS. O'BRIEN: Okay.

Okay. Before we start reviewing your findings in detail, can you please explain to the Commissioner your methodology? And, specifically, I understand from our pre-hearing interview, you did your work in two phases or two stages. Can you explain to the Commissioner how that worked?

MR. BARR: Yes, I can.

So I'll just make clear that we're talking about a shooting reconstruction here so the whole – this whole analysis is concerned only with the moments that the gunshots are fired. So when I'm considering the account of Smyth, as you've stated, I am only considering those portions of his account that have to do with the actual gunshots, okay? So it's a very specific area of his account that I'm focused on, only relating to the gunshot evidence.

So during the course of this whole investigation of my part, we are talking here – whenever I'm talking, we're only talking about, in this case, four moments in time; the moments that four gunshots were fired. So what happened before those gunshots, what happened after the gunshots and what happened in between those gunshots I'm not concerned with, I can't determine. Okay? So just so we're clear about what it is we're talking about, it's a very, very specific part of the whole incident.

So to begin my analysis, I follow a scientific – a basic scientific methodology throughout this whole process and it begins with the collection of data. And that's where I had requested the evidence that was collected at the scene from the RCMP.

MS. O'BRIEN: And it may assist you here – I'm just going to put up on the screen section 3.0 of your report which is the evidence, the material you reviewed, as you might need to or you might want to refer to that in your explanation. Sorry for interrupting.

MR. BARR: Sure. Thank you.

THE COMMISSIONER: And what page is that?

MS. O'BRIEN: It's on page 4 of the exhibit, Commissioner. And I'll ask, Madam Clerk: If she just makes it a little bit smaller we'll actually see the full list I think.

THE COMMISSIONER: Yes, all right. Thank you.

MS. O'BRIEN: Okay.

MR. BARR: So I start by collecting data such as what is listed in my report there: the notes, sketches, photographs, video from the ident people that processed the scene, the RCMP forensic lab report, the autopsy report; any evidence that may have some information about the moment that the shots were fired. Okay?

So I start by collecting the data. I then go through a process of analyzing that data to see what it tells me about the shooting incident. So I analyze any data in this material and make certain determinations at that point about what happened. So at that point, as with any shooting scene, I can start to get sort of an overall but vague picture of what occurred. Okay?

There are certain determinations I can make already at that point such as the number of shots that were fired based on the evidence I reviewed. In some cases, I can narrow down the areas in the room where a shot was fired based on the trajectory analysis, for example. So there's certain things I can determine based on this review alone. It doesn't tell me what happened but it starts to give me some indication, some hints based on the evidence.

Again, it is not a full picture but it starts to give you some pieces of that little puzzle. Once I determine what evidence there is available, I then know whether it's worthwhile or whether I'm able to proceed with comparing that evidence to a statement. There are some shooting scenes where –

THE COMMISSIONER: If you're able to compare it to what?

MR. BARR: To a witness statement, for example –

THE COMMISSIONER: Okay.

MR. BARR: – at the request of the investigators. There are times in a shooting case where there's just insufficient evidence to be able to compare it to a statement, for example, and nothing can be done. So that's why the first stage is just to review the evidence, make sure there is something that is available to work with and to get a truly independent view of the evidence prior to hearing a reading, anybody's version of the events. So that was the first stage I conducted.

MS. O'BRIEN: Okay.

And is it fair – during the first stage, I understand, the evidence that you were looking at is listed here in 3.1 to 3.10. Is that correct?

MR. BARR: That's correct.

MS. O'BRIEN: Okay. So in your initial stage, when you're looking at really the physical evidence, those were the – that was the documentation and items you had.

MR. BARR: That's right.

MS. O'BRIEN: Okay.

And then after you were finished stage one, what happened?

MR. BARR: So after I finished that stage, I let Corporal Burke know that I was ready at that point to compare or test the evidence against any witness statements that they had. And then he proceeded to send me more data about the account of Constable Smyth and that consisted of notes, a video statement, video re-enactment, transcripts of the re-enactment.

MS. O'BRIEN: All right.

And the items that you had at the sec – you received at the second stage are listed here in 3.11 to 3.18. Is that correct?

MR. BARR: That's correct.

MS. O'BRIEN: Okay.

MR. BARR: So now –

MS. O'BRIEN: So is –

MR. BARR: Oh, sorry.

MS. O'BRIEN: So was it at your request that you did – that you did not receive, for example, Smyth's statements, his re-enactment, until after you had completed your stage-one analysis. Was that your request?

MR. BARR: Yeah, I made that clear at the very start of this process that I didn't want to see that information until I was ready.

MS. O'BRIEN: Okay.

MR. BARR: So the next stage of the process, after the collection analysis of the data, is to review the account of Constable Smyth and break that down into a workable hypothesis on my part that only concerns itself with the shooting event itself. So I'm taking his entire statement of what Constable Smyth stated occurred and I'm pulling out only certain elements.

THE COMMISSIONER: Read the entire – you say eight minute – I just missed the hearing of this –

MR. BARR: Oh sorry. I had his – I had Constable Smyth's entire statement –

THE COMMISSIONER: Right.

MR. BARR: – and re-enactment.

THE COMMISSIONER: Right.

MR. BARR: And I went through it and picked out only certain elements that made reference to either the location and position that he was in when the shots were fired.

THE COMMISSIONER: Okay.

MR. BARR: Any reference to the number of shots, any elements that I knew I had evidence to compare to.

THE COMMISSIONER: Okay.

MR. BARR: And so what I do is I take out those elements of the statement and I form a, you know, a condensed, very focused hypothesis. And so this hypothesis is what I use to test against the evidence that I'd reviewed.

MS. O'BRIEN: Okay.

MR. BARR: And so as Mr. Commissioner stated earlier, any scientific method is only valid if it can be proved false. So the way I go about this comparison is I take the elements of his statement and I look at the elements of evidence I have from the scene, and I determine whether or not I can use that element as a valid comparison.

And the way that's done is I have to determine whether or not that evidence has the ability to refute that statement. Okay? So – and if it does, I'm going to proceed. If that evidence that I'm comparing does not have the ability to refute that statement, then I'm not going to consider that evidence; it's just not a valid test.

So let me summarize that another way. If I have some evidence to compare to the hypothesis and that evidence, in essence, could support any hypothesis, I am not going to proceed with that comparison. It would be unfair and unscientific to say that this evidence supports the hypothesis when in fact it would support any hypothesis.

So the test is that evidence has to have the ability to negate that hypothesis. And if it can, then I'm going to go ahead and do the comparison. And the conclusions from there are going to be one of two: It's either going to offer support to the hypothesis or it's going to refute or negate the hypothesis.

MS. O'BRIEN: Okay.

MR. BARR: Those would be my conclusions.

MS. O'BRIEN: Okay.

All right. Thank you.

And just when we get into your report, just on an organizational level, Commissioner, you'll see that in section 4 of Mr. Barr's report is – when we get to that section, that's where he does his evaluation of the physical evidence. And section 5 is where he does a review of Constable Smyth's various statements that he made about the shooting. He looks at the elements of Constable Smyth's account in section 5. And in section 6 he brings those two things together and offers his conclusions and opinions.

Is that right? Have I got that right, Mr. Barr?

MR. BARR: Yes.

MS. O'BRIEN: Okay.

MR. BARR: Yes.

MS. O'BRIEN: Did you ever visit the scene of Mr. Dunphy's house in Mitchells Brook, Newfoundland and Labrador?

MR. BARR: No, I didn't.

MS. O'BRIEN: Okay.

So as we mentioned earlier for scene measurements you were relying on the work primarily of the ident team who would have been Sergeant Saunders and Corporal Lee. Is that right?

MR. BARR: That's correct. Yes.

MS. O'BRIEN: Okay. We've heard evidence from both of those individuals.

How did you assess the quality of the work, of their work for your purposes? So, for example, if you'd done the work yourself, if you, you know, been here and been able to do the trajectory analysis yourself, or collect – or directed someone to collect the evidence, is there anything you would have done differently?

MR. BARR: Well, I did assess the – or attempted to assess the quality of the work that was done there. As far as the trajectory analysis itself, because I wasn't there to do it, having gone through Sergeant Saunders's notes, he describes his process that he used and his results, of course, were documented.

In this particular case, I wouldn't have done anything different. He appeared to be quite thorough and went as far as, you know, cutting out a hole in the drywall to see exactly where that bullet had gone inside the wall through the wooden stud, for example. He took the steps that I would normally take as well. So it seemed to be a very thorough job with that. I had no concerns with it.

In addition to the trajectory analysis itself for the one gunshot, I was able to use another method that I have which is termed the trig-elliptical method.

MS. O'BRIEN: And I'll leave that for right now because I'm going to get into that in some detail. And I have something to show you –

MR. BARR: Oh, okay.

MS. O'BRIEN: – to show how you did that. But right now I just want to know whether the quality of their work, did you have any – you know, was there any data, for example, that you would have liked to have had collected that wasn't collected in this case?

MR. BARR: No, there was nothing critical that wasn't collected.

MS. O'BRIEN: Okay.

Okay. Okay.

So I'm going to go now to –

THE COMMISSIONER: Just before I –

MS. O'BRIEN: Yes.

THE COMMISSIONER: Just for my notes, the method you say you used yourself, what'd you call that? Don't seem to ...

MR. BARR: Trig-elliptical.

THE COMMISSIONER: The trig-elliptical. Okay.

MS. O'BRIEN: And, Commissioner, I am going to take – because that is a very interesting part of Mr. Barr's report and I'm going to take him through that in some more detail in a few minutes.

THE COMMISSIONER: All right, so we're going to get into a bit of trigonometry I take it?

MR. BARR: That's right. Yeah.

THE COMMISSIONER: Right.

MS. O'BRIEN: Okay.

So I'm going to look now at section 4 of your report, Mr. Barr, which is, as I said, the evaluation of the physical evidence. In your report you refer to the north, south, east and west walls of the living room. And we have displayed up here, you'll see the – you'll probably recognize that schematic of Mr. Dunphy's home, but it shows the living room there.

And I under – the north wall is the wall that the couch was on, the south was the wall of the mirrors and then, of course, west and east flows from there, west with the door and east with the fireplace. Is that right?

MR. BARR: That's right.

MS. O'BRIEN: Okay. So if at any time in giving your evidence it's helpful to refer to that which has been entered into evidence at P-0035, you can feel free to do so.

So I'm going to start going through your report in some detail. And here, Madam Clerk, I'm going to ask you to make it a bit bigger so that we can read it. Thank you.

Okay, so I'm going to start with your section 4.1 of your report. And here I understand the – what your ultimate conclusion here is down at the bottom that you concluded that four gunshots were fired. Can you explain to the Commissioner the reasoning as set out in this section, please?

MR. BARR: Sure.

THE COMMISSIONER: Sorry, again which one? Is that 4.1? Okay.

MS. O'BRIEN: 4.1.

THE COMMISSIONER: Thank you. Sorry.

MS. O'BRIEN: Okay.

MR. BARR: So in this section I outline that there were four fired cartridge cases and four fired bullets recovered from the scene and the body of Mr. Dunphy. And in the brackets I just referenced the materials that I used for that information.

The RCMP forensic lab report identified that three of the cartridge cases and all four bullets as having – were fired in the same Sig-Sauer pistol that was submitted to them. Their report concludes that one fired cartridge case was cycled through the action of the Sig-Sauer pistol. As to whether or not the cartridge case was fired in the pistol, the report does not offer an opinion and as such will be treated as inconclusive.

“The Sig-Sauer pistol is a semi-automatic firearm, which means that one fired cartridge case is ejected from the firearm for every bullet that is fired. Therefore, the recovery of four (4) fired cartridge cases and four (4) fired bullets indicate that four (4) gunshots” had been fired.

MS. O'BRIEN: Okay. So –

THE COMMISSIONER: Sorry, I just have a question here now.

MS. O'BRIEN: So here –

THE COMMISSIONER: Just a question. If it was an automatic firearm, what would you expect to see rather than that?

MR. BARR: Rather than semi-automatic?

THE COMMISSIONER: Yeah.

MR. BARR: It would be the same. Same result.

THE COMMISSIONER: Yeah.

MS. O'BRIEN: Sorry, Commissioner, I didn't mean to speak over you.

THE COMMISSIONER: Sorry, I didn't mean to throw you off.

Go ahead.

MS. O'BRIEN: So here in this section you – what I understand is you were relying on the RCMP Forensic Science and Ident Services lab report for their – you didn't actually examine the casings and the bullets themselves. Is that right?

MR. BARR: No, I didn't examine those. I'm relying on their report to indicate that they were fired in that Sig-Sauer pistol.

MS. O'BRIEN: Okay.

MR. BARR: That examination was done at the lab.

MS. O'BRIEN: Okay.

And that report, Commissioner, has already been entered into evidence at P-0320. That's – so – and we've already heard evidence on that, that the gun itself, the casings, the bullets were sent to that laboratory for examination and we've already had some evidence on this. But I just wanted to be clear that in this section Mr. Barr is relying on that report.

And, ultimately, your conclusion here was that all four bullets were fired from Constable Smyth's gun and that three of the casings could be shown to be definitively fired from his gun. And one of the casings was cycled through his gun but because the markings weren't there enough to definitively say it was fired from his gun.

MR. BARR: Yeah, I'll just clarify that. Those aren't my conclusions; those are the conclusions of the RCMP lab. My ultimate conclusion with that is the number of shots fired which is four.

MS. O'BRIEN: Okay.

MR. BARR: Yeah.

MS. O'BRIEN: Thank you.

So then, moving on to Section 4.2; in this section of your report I understand we're looking at your trajectory analysis.

MR. BARR: Yes.

MS. O'BRIEN: And I believe in the first paragraph here what you are doing is describing the trajectory analysis done by Sergeant Chris Saunders. Is that right?

MR. BARR: That's right.

MS. O'BRIEN: Okay. And so you set out here the findings of Sergeant Saunders with respect to the trajectory of the bullet being approximately 40 degrees from parallel to the west wall; extending back from the impact in the west wall to a point on the north wall approximately 1.16 meters from the east wall; the bullet path being approximately 10 degrees downward and measuring the distance between the north wall and the impact on the west wall.

MR. BARR: Yes.

MS. O'BRIEN: We've already heard evidence from Sergeant Saunders in detail how he did that trajectory analysis and we can see it there in P-0035 just represented as a dotted red line.

In the next paragraph here, like you – this is a case where you may want to look at your paper report, Mr. Barr, because to explain this paragraph you refer to two photographs in that paragraph. And as you're explaining that paragraph, I'm going to bring up those two photographs to assist you. Okay?

MR. BARR: Yeah.

MS. O'BRIEN: So if you do want to go, your paper report is there for that purpose.

MS. CHAYTOR: Are they (inaudible)?

MS. O'BRIEN: No, they are not. They're both public exhibits.

And the first exhibit to bring up is photo – in P-0010, Photo 144, please.

Okay. Mr. Barr, does that assist you in explaining to us this paragraph?

MR. BARR: Yes, it does.

MS. O'BRIEN: Okay.

You can go ahead when you're ready.

MR. BARR: "The initial impact damage to the wall bears a well-defined partial elliptical shape and shows no indication of destabilization or deformation of the bullet as a result of an intermediary impact and is consistent with being a direct shot."

MS. O'BRIEN: Okay.

So what does that mean? When you look at this photograph and this is – we know this is the photograph of the hole in the wall, in the west wall. You say it's a partial elliptical shape. I think we can see that.

What do you mean when you say there's no indication of destabilization or deformation of the bullet? Do we have to look at the photograph of the bullet to –?

MR. BARR: No. No, I'm simply referring to the bullet damage when I say that.

MS. O'BRIEN: Okay.

MR. BARR: At this point.

MS. O'BRIEN: Okay.

All right, so is there anything that you need to point out on this photograph before I bring you to the next photograph which is a photograph of the bullet?

MR. BARR: Well, I can – if you'd like me to explain that more in relation to the photograph I could.

MS. O'BRIEN: Okay. Yes.

MR. BARR: What that is essentially saying is that the characteristics of that bullet hole are indicative of a direct gunshot as opposed to the bullet having struck something first and then hitting the wall. If a bullet strikes an object or person before striking another surface, this impact, for example, would look very different. It wouldn't be a nice elliptical shape. It would be very irregular in shape, for one thing, because the bullet would have been either damaged itself, but it would certainly be destabilized and not flying straight, nose first at that point.

So this is part of an impact damage assessment that's done.

THE COMMISSIONER: When you say destabilizing, the bullet would be wobbling somewhat?

MR. BARR: Yeah, wobbling or tumbling or off axis.

THE COMMISSIONER: Or tumbling. Okay.

MR. BARR: And you would get a completely different – you would get different characteristics to the bullet hole in the wall if that were the case.

MS. O'BRIEN: Okay. So just looking at that hole, you're able to say it's a direct shot.

MR. BARR: It's indicative of a direct shot.

MS. O'BRIEN: Indicative of a direction. Okay.

All right and then we'll bring up – the next photograph that you refer to in that paragraph is in P-0010, photograph 176. And this is the bullet itself that we've heard from Sergeant Saunders, he retrieved from the wall in the front porch of the house.

And here, Madam Clerk, if you can just zoom in a little bit because I think what Mr. Barr needs to point to is difficult to see. Can you make it bigger?

Okay. Well, that's okay. Maybe, Mr. Barr, you can just explain what's the significance of this photograph to – there we go.

MR. BARR: Sure, yeah.

So as I continue on with my report: The hollow-point nose of the bullet reportedly recovered from this bullet path – which I believe is the one that we're looking at here – appears to have wood fibres embedded in it which is indicative of impacting the wall in a stable, nose-first formation and through a wooden stud, also consistent with being a direct shot.

MS. O'BRIEN: Okay.

MR. BARR: Okay.

MS. O'BRIEN: And is the area there that the cursor is by here – I'm just indicating – is that what you're referring to as the wood fibres?

MR. BARR: Yeah, it's what appears to be wood fibres embedded in the hollow-point nose of the bullet.

MS. O'BRIEN: Okay.

MR. BARR: So these bullets have a hollow point on the nose which is a cavity on the very front end of the bullet. So when hollow-point bullets go through different materials and do not expand as they're designed to do, what happens is that hollow point actually picks up and collects the material that it's gone through. And in this case it appears to be wood fibres.

MS. O'BRIEN: Okay.

And you're saying appears to be because I understand you didn't do any analysis of the fibres themselves, you just are looking at the photograph in – you know, making an identification based on what you're seeing in this picture.

MR. BARR: Yeah, it's based on experience, the scene bullets having gone through the same thing.

MS. O'BRIEN: Okay.

MR. BARR: Yes.

MS. O'BRIEN: All right and so you're also saying this would also be consistent with a direct shot?

MR. BARR: Yeah, so it shows that the bullet is actually flying nose first in a stable fashion when it goes through the – at least the wood. Yes.

MS. O'BRIEN: All right, thank you.

So now we're going to go to the third paragraph of this section of your report, 4.2. But I'm going to ask Madam Clerk to bring up P-0763 because this is where you get into the trig-elliptical method of bullet impact angle determination.

And I understand from this – and it's there on the last paragraph in section 4.2 of your report. But what you're about to describe for us is that you had the trajectory analysis that was done by Sergeant Saunders, that we've heard evidence of, you've just referred to it. But you did another form of analysis to determine a trajectory and then compared your form of analysis to that that Sergeant Saunders did.

MR. BARR: That's correct.

MS. O'BRIEN: Okay.

Can you explain – and I thought this picture might be helpful for you to do that. And this is actually from your working file. I got this page from your working file. Can you explain to the Commissioner, please, what you did?

MR. BARR: Sure.

So this is just another method that is available to evaluate the angle of bullet impacts in certain materials and drywall happens to be one of those materials that it's conducive to. So having gone through Sergeant Saunders's report about how he did the trajectory, I really had no concerns about it.

But since there were some photographs available, I did employ this method also as a second method in an attempt to validate the results that Sergeant Saunders documented, you know, and further give some credibility to his evidence that I was relying upon. So I employed a method, it's termed the trig-elliptical method of bullet impact angle determination.

So what's done in this case is with a good photo of the bullet impact, an ellipse is formed around it using a common elliptical tool and many, many drawing programs. It doesn't matter which one you've used but when you zoom in on the photograph of the bullet damage you can start to fit an ellipse around the, in this case, the right side or entry side of the bullet hole where the actual ellipse is in the wall.

The reason that I use an elliptical tool is because when you – when bullets strike a surface such as drywall like this, on the entry side you get a nice elliptical shape to the bullet hole but on the opposite side you usually don't get the rest of the ellipse depending on the angle.

MS. O'BRIEN: And can you just – am I pointing to the correct side here with the cursor there, Mr. Barr? Is this what you're talking about on the side you get the more defined elliptical –

MR. BARR: No, it's actually the opposite side.

MS. O'BRIEN: Okay, so this side here?

MR. BARR: That side there. Yes.

MS. O'BRIEN: Okay, so you're fitting to this side here.

MR. BARR: Right.

THE COMMISSIONER: Okay, now just explain to me which – one side is what and the other is ...?

MR. BARR: So if you look on the right side of the photo where the label B is.

MS. O'BRIEN: You can make that bigger.

THE COMMISSIONER: Yes.

MR. BARR: That would indicate the entry side of the bullet. So it's going on the screen from right to left.

THE COMMISSIONER: It's going from right to left?

MR. BARR: Yes.

THE COMMISSIONER: Okay.

MR. BARR: And slightly down.

THE COMMISSIONER: And so it's – where it enters is where you have the elliptical shape?

MR. BARR: On the right-hand side is where –

THE COMMISSIONER: On the right-hand side?

MR. BARR: – it would make first contact, yes.

THE COMMISSIONER: Okay.

MR. BARR: So what this allows is to take the portion of a bullet hole, which has the partial ellipse and it – by using the elliptical tool, it will – it automatically fills in the rest of what would be an ideal ellipse. You just don't get that in the real world with the bullet holes.

And using that, using the measurements of that ellipse, you employ some trigonometry, a trigonometric function, taking the small axis of that ellipse, divided by the large axis of the ellipse. And you take the inverse sign of that and that's going to result in an angle.

MS. O'BRIEN: Okay.

MR. BARR: Okay?

MS. O'BRIEN: We're not going to ask you to do the calculation.

MR. BARR: Okay. They've been done.

THE COMMISSIONER: I think I have to point out – I never thought it would happen. I've been on the bench 28 years and I think it's my first ability to use trigonometry, although it might have occurred in a construction job.

But my granddaughter found my report card from grade 11, which would be back in 50 years ago, and she noted that I received a hundred in trigonometry. And I think the math test was divided: trigonometry, geometry and something else.

MR. BARR: Nice.

UNIDENTIFIED FEMALE SPEAKER: Algebra.

THE COMMISSIONER: However, I have to recognize that was 50 years ago and what I remember about trigonometry could be put in a very small bucket.

MR. BARR: Well, it hasn't changed, that's the good news and –

THE COMMISSIONER: Pythagoras is still with us?

MR. BARR: Yes. Yes.

So I employ this method on this photograph and I came out with a result that was –

MS. O'BRIEN: And your result is down here, I think, at the bottom.

MR. BARR: Oh it is, which is –

MS. O'BRIEN: And this – was this photograph a suitable photograph for you to perform this method on?

MR. BARR: Yeah it was.

Yes, it was.

MS. O'BRIEN: Okay. All right.

And so here are your results here. So can you just explain what those results were and how they compared to the results that Sergeant Saunders had obtained using the method he used in the room that night?

MR. BARR: Sure.

So I'm going to skip to the horizontal angle here because that's what we were just talking about. So the horizontal angle I calculated was 36.5 degrees. Now that angle that we're talking is the angle between – if you look at – I think we could use that diagram over there to –

MS. O'BRIEN: Yes.

MR. BARR: – explain it easier.

MS. O'BRIEN: The map.

MR. BARR: If you look at the west wall where that Sergeant Saunders has the red line of the trajectory.

Okay, so the –

MS. O'BRIEN: This one?

MR. BARR: Yeah.

And so if you angle your pen towards that red line, that's the angle we're talking about, which is 36.5 degrees I calculated.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. BARR: Now, I compared that – I don't know if you noted but Sergeant Saunders didn't actually calculate that angle in his trajectory. He had the measurements of his trajectory and the room measurements, so I took what essentially is that diagram and calculated his angle. So the angle that you're seeing on that diagram would be 39.6 degrees and my calculated angle using this other method is 36.5, so it's within 3.1 degrees –

MS. O'BRIEN: Okay.

MR. BARR: – which is of no concern. The usual degree of uncertainty, when we do a trajectory analysis at a scene, is plus or minus five degrees.

MS. O'BRIEN: Okay.

MR. BARR: So it's well within that anyway.

MS. O'BRIEN: So as long as your results came within plus or minus five degrees of Sergeant Saunders, you would consider that to be confirmatory of his results. Is that what we're saying?

MR. BARR: Yeah. Even if it was out a little more, I wouldn't have too much concern about that.

MS. O'BRIEN: Okay.

MR. BARR: They're two different methods that we're comparing here don't forget.

MS. O'BRIEN: Okay.

And what about the vertical angle, how did your work compare with his on the vertical angle?

MR. BARR: So the vertical angle – now we're talking about the vertical angle of that trajectory. So, on that photograph, it's fairly straightforward to calculate.

In this case, based on these photographs, I had used the wallpaper pattern to find a horizontal line. So if we look on that photo you'll see a long red horizontal line which overlays one of the darker lines in the pattern of the wallpaper.

MS. O'BRIEN: Okay.

MR. BARR: Using that as horizontal, it's the closest to horizontal that we have in that photograph, you simply bisect that ellipse along the long axis and you determine that angle, at which I determined to be 11.4 degrees downward. So that would be the downward trajectory of that bullet path –

MS. O'BRIEN: Okay.

MR. BARR: – calculated using this method. And Sergeant Saunders had reported an angle of 10 degrees downward when he did his trajectory analysis on the scene, so it's within 1.4 degrees of his results.

MS. O'BRIEN: Okay.

And we heard evidence from Sergeant Saunders that he'd used a level to anchor his horizontal – you know, the horizontal line there is what he used; a special type of level. You're saying that you used the line in the wallpaper?

MR. BARR: Yes.

MS. O'BRIEN: And so your result would assume that the wallpaper was hung straight.

MR. BARR: Yes.

MS. O'BRIEN: Okay.

MR. BARR: Yes.

MS. O'BRIEN: All right and so but you were – your calculation still came out within 1.4 degrees.

MR. BARR: It did.

MS. O'BRIEN: Okay.

And – okay and you said that 5 per cent is acceptable error in trajectory analysis.

MR. BARR: Yeah.

When you're doing a –when you're doing an actual trajectory analysis on the scene, it should always be referenced with a degree of uncertainty, like any measurement is. And in the case of trajectory it's plus or minus 5 degrees.

So I just want to state that when doing this exercise, doing the actual trajectory at the scene with trajectory rods and tools is always better than employing a method like this. So this method was developed as an alternative method when the first method wouldn't be available. So I'm simply using it here to –

THE COMMISSIONER: As a backup?

MR. BARR: – validate his work and really look for any red flags. So, in other words, if my results were way off from Sergeant Saunders I would have some concerns. If they're anywhere close, I would really have no concerns and I would rely on his measurements more so, in the end.

MS. O'BRIEN: Okay. Thank you.

I'm going to go back to your report now, P-0759, and go to page 7. And we're moving on to section 4.3 of your report.

And, again, you might want to have your paper copy in front of you, Mr. Barr, because in explaining this we're going to start looking at the bullet that was retrieved from the chair in this section. And I'm going to bring up a couple of photographs that you refer to in your report to

assist with your description. So if you want just – this is the section I’m going to ask you to talk about.

And if you want to get it up there, it’s 4.3 here. If you want to get it up paper-wise because I’m going to bring – ask Madam Clerk now to very quickly bring up P-0010, Photo 181, which is going to show the bullet as it was found in the chair.

And the evidence that we’ve had, Commissioner, is that this photograph was taken after the fabric of the chair was pulled back. And there was a small, just a very thin layer of cotton batting over that bullet that was pulled away to take this photograph. When the photograph we have – when the cotton batting was in place, you could see a dark area where the bullet was beneath the cotton batting.

So what did you conclude from your analysis of these photographs, Mr. Barr?

MR. BARR: Okay.

From Section 4.3 of my report: The bullet from the chair in which Mr. Dunphy was located had been recovered in the filler material just beneath the exterior fabric cover and displayed significant impact damage. “The described shallow penetration of the chair and the visible impact damage to the bullet are consistent with the bullet having struck an intermediary target prior to impacting the chair.”

MS. O’BRIEN: So I’ll bring up the photograph of the bullet so you can describe the impact damage. But, first, if you just want to explain how this photograph helped you.

MR. BARR: Sure, yeah.

There are actually two photographs that I referenced here.

MS. O’BRIEN: I do have the next one and I can bring it up whenever you want.

MR. BARR: Sure. We can bring that up too. Yeah.

MS. O’BRIEN: Okay.

You’ll have to remember what this one looks like and then bring up P-0010, Photo 182.

Okay.

MR. BARR: So this photo here shows the damage a little more.

Yeah, so basically to summarize that, what I’m referring to here is that the damage to this bullet, combined with its location where it was found just under the surface of the fabric of the chair, is not consistent with a direct shot. Okay?

So that type of damage is not going to occur from this filler material in the chair or the fabric cover. That is quite severe damage for a fired bullet so that indicates to me that it had likely struck something prior to hitting the chair.

MS. O’BRIEN: Okay.

MR. BARR: Okay? So the cotton batting of the chair is not enough to stop that bullet.

MS. O'BRIEN: Okay.

And this was just found just very, you know, underneath – just underneath, really, the fabric of the chair. So if this was a direct shot, I take it what you're saying is it would have gone right through the chair or at least much further into the chair. Am I right (inaudible)?

MR. BARR: I mean norm – yeah, normally the chair, even with the wood framing, if it had struck that it would go right through the chair if it was a direct shot.

MS. O'BRIEN: Okay.

And then when you're talking about the damage here, to be clear of what we are seeing, I think in this photograph is – and please correct me if I'm wrong but I understand what we're seeing here is the copper casing of the bullet. And the damage that you are referring to is here we can see the lead interior of the bullet that has –

MR. BARR: It's exposed.

MS. O'BRIEN: – become deformed and exposed. Is that right?

MR. BARR: That's correct.

MS. O'BRIEN: Okay.

So you said this was consistent with the bullet having struck an intermediary target. So then, maybe moving on to your next section under 4.3, can you tell us what your conclusions were with respect to that intermediary target?

MR. BARR: So there was one wound on the right side of the head of Mr. Dunphy described as having in quotes from the autopsy report, "a configuration of an exit wound." And the bullet recovered from the chair was located in the top area of the chair to the right of the centre.

Three bullets and their corresponding impact damage or wounds have been accounted for; therefore, it leaves to reason that the bullet that exited the right side of the head of Mr. Dunphy is likely the same bullet that was recovered from inside the chair, with the head of Mr. Dunphy acting as an intermediary target to the chair.

"This association would account for one (1) gunshot bringing the total number of gunshots based on impact damage and wounds to four (4), which is further corroborated by the number of fired cartridge cases and bullets recovered."

MS. O'BRIEN: Okay.

And we have heard from the chief medical examiner who's gone through his autopsy report with us. So we have – already have evidence of this, the exit wound configuration. But just to be clear, the three other bullets that you're referring to, as we understand, that two bullets were retrieved from inside Mr. Dunphy's body. And that we know that a third bullet was retrieved from the wall in the front porch.

So this would be – those would be the other three that you're saying were accounted for. So this, then, is why –

MS. CHAYTOR: (Inaudible.)

MS. O'BRIEN: Sorry, did I say – I was holding up two fingers. I might have said the word “three” but two from inside his body.

MR. BARR: That’s correct.

MS. O'BRIEN: One from the wall in the porch which accounts for the three you – the three others you mentioned here.

MR. BARR: Previously accounted for, yes.

MS. O'BRIEN: Okay, yes. Thank you.

Okay.

Now go back to your report and look at section 4.4. And – well, actually, before we just go there, there’s a photograph that might help us explain this, that’s a public photo, Commissioner, and I’ll bring that up; P-0010 at 142.

Okay, so this is not a confidential photo so I did bring it up. But we can see here, this is a portion of Mr. Dunphy’s head and here’s the hole. So this is what you’re referring to there?

MR. BARR: Yes.

MS. O'BRIEN: Okay. Thank you.

Now, I’m going to go back to your report and look at section 4.4. And your report is Exhibit P-0759 and 4.4 is on page 7.

And I don’t think it will take you very long to explain this section, Mr. Barr. But looking at section 4.4, can you explain your conclusions as expressed in that section?

MR. BARR: Sure.

The direction of the gunshot wounds into the body and head of Mr. Dunphy are described as “front to back and left to right” from the autopsy report, with two of the three wounds further described as “down.” If Mr. Dunphy was seated or nearly seated in the chair in the living room at the time of the gunshots that caused those wounds, then those gunshots were fired in a southwest direction relative to the scene.

MS. O'BRIEN: Okay.

And we’ve already heard evidence from Dr. Avis about what his front to back, left to right, and how he accounts for those when he’s doing an autopsy, but that’s where you got that information from?

MR. BARR: That’s correct.

MS. O'BRIEN: Okay.

And those would be anatomical positions that you’re referring to, I understand here.

MR. BARR: Yes.

MS. O'BRIEN: Okay.

MR. BARR: Yes.

MS. O'BRIEN: Okay.

We'll go right on, then, to section 4.5, which is a bit of a longer section. So I'll ask you to explain this. And this is when you're getting into the gunshot residue pattern and powder tattooing. So can you explain what your conclusions are here?

MR. BARR: Sure.

No projected gunshot residue pattern was reportedly detected around the areas of the bullet holes in the clothing of Mr. Dunphy indicating that the gunshot that struck Mr. Dunphy in the upper-left chest area was fired from a distance of greater than 76 centimetres in the absence of an intermediary target. And that information is from the RCMP lab report.

MS. O'BRIEN: Okay.

And that's Exhibit P-0320, Commissioner. Okay.

MR. BARR: Now –

MS. O'BRIEN: And that's referring to the clothes. So that was an analysis of the wound to Mr. Dunphy's chest, I take it, that's –

MR. BARR: That was with reference to an analysis of the clothing with the bullet hole in it by the RCMP lab.

MS. O'BRIEN: Okay.

MR. BARR: “None of the evidence reviewed presented itself as a possible intermediary target to the gunshots that struck DUNPHY.” That's just addressing the caveat in the absence of an intermediary target. So there was nothing else that, when I reviewed the evidence, that showed evidence of a gunshot or bullet hole that may have been an intermediary target.

The distance between the west wall against which the chair Mr. Dunphy was reportedly seated in was located, and the east wall where the fireplace mantel at which Constable Smyth reportedly began shooting from is located, is approximately 3.9 metres.

No “powder tattooing” – that's from the autopsy report –

MS. O'BRIEN: Yes.

MR. BARR: – was reportedly observed around the entrance wounds to the body and head of Mr. Dunphy. “Powder tattooing,” also known as stippling, on the skin is caused by unburned gunpowder particles projected from the muzzle of a firearm impacting and causing pinpoint abrasions on the skin. Stippling of the skin generally occurs from distances of greater than contact up to several feet. When present, stippling can be used to estimate the muzzle to target distance at the time of the gunshot or discharge. Due to the absence of stippling, the distance from which the two gunshots into the head of Mr. Dunphy were fired cannot be determined.

MS. O'BRIEN: Okay.

So you're saying you can't determine it exactly, but are we to take from this that if the gun had been within the – you know, you're saying here from a distance of greater than several feet but if

the gun had been very proximate to Mr. Dunphy, you would have expected to see powder tattooing?

MR. BARR: Yes, if it was anywhere from contact to normally within a few feet, you would get powder tattooing.

MS. O'BRIEN: And the more – the closer it was, the more powder tattooing you would get.

MR. BARR: Yes, it would.

MS. O'BRIEN: Is that fair to say?

MR. BARR: Yes.

MS. O'BRIEN: Okay. All right.

And we've heard some evidence from Dr. Avis on that. And Dr. Avis's autopsy report, Commissioner, has been entered at P-0738.

Now, we had some evidence earlier, Mr. Barr, that the gunshot residue testing was not approved by the RCMP lab for Mr. Dunphy's clothing, so thus it was not done. But they did, in their results, P-0320, the lab report you're referring to here, there they do say that there was no gunshot residue pattern around the bullet damage in Mr. Dunphy's clothes.

Can you explain the difference, please, for us in simple terms that we will all understand between gunshot residue testing, which they said they did not approve, and gunshot residue pattern, which they must have done because they gave us conclusions on.

MR. BARR: What must have happened is there must have been another request for gunshot residue testing. Now, there's often confusion about this because there are two different tests that refer to gunshot residue and they're both called gunshot residue testing. So there's obvious confusion and it's ongoing.

So the testing that was done by the RCMP that was reported in the lab report from the firearm's examiner was projected gunshot residue testing, which I was just referring to. So that's the gunshot residue that's projected along with the bullet and gets deposited on the target, and that's used to determine or to help determine the distance of a gunshot.

MS. O'BRIEN: And we'll refer to that as gunshot residue pattern.

MR. BARR: Pattern, yeah or projected gunshot residue, either one.

MS. O'BRIEN: Okay. We've also seen fire residue pattern also used for this, okay.

MR. BARR: Yeah. Okay, so the other type of gunshot residue testing would be the gunshot residue stubs as they're commonly referred to.

THE COMMISSIONER: What? The gunshot residue –

MR. BARR: Gunshot residue stubs.

THE COMMISSIONER: Stubs? S-t-u-b-s.

MR. BARR: Yeah. So what that test is, there's a kit that the police have, which includes a number of basic sticky stubs, and these sticky stubs are used to stub normally the hands and face of a suspect shooter. Those sticky stubs are picking up microscopic particles of gunshot residue. Not the same type of gunshot residue we're talking about for distance determination, these are very unique particles that show that the person who was sampled either fired, discharged a firearm, was in the area of a firearm's discharge or it got contaminated in some other way with these particles.

So that test is normally done when there is a person suspected of firing a gun that is denying it. That test will provide some evidence, can provide some evidence that the person may have fired a gun by picking up gunshot residue. So, yeah, it doesn't surprise me that the RCMP would deny that request on the clothing of Mr. Dunphy because there's no question that he was in the area of a gunshot, right. So it would –

MS. O'BRIEN: And we do understand that was the reason they gave – yeah, it was not –

MR. BARR: Oh, okay, okay. Yeah, there's really no reason for it.

MS. O'BRIEN: Yeah, okay. All right, so thank you for clearing that up for us. You are our, the expert we had in this area.

Okay, so going back to your report. Now, there's just one last section in your analysis of the physical evidence, and that's section 4.6 and it's shown here on the screen. It actually continues on to the next page. Can you explain what your conclusions were in this section?

MR. BARR: Sure. The fired cartridge cases were located in the northwest corner of the living room. A Sig Sauer pistol by design usually ejects fired cartridge cases to the right and often, but not always, to the rear of the handgun during firing under ideal conditions. However, there are many variables in addition to design that can affect the ejection pattern of a firearm, such as the condition of the firearm, the ammunition type, the position of the firearm when discharged, movement of the firearm during firing, the grip with which the firearm is held during firing and the presence of obstacles.

For these reasons, the location of fired cartridge cases is not an accurate indicator of the exact location or position of a firearm or shooter at the time of discharge. Variables that must be considered in this particular analysis is that the scene is a relatively small room containing many obstacles, the most significant of which are walls and furniture. The account of Constable Smyth, that he was moving while firing and was possibly changing his grip on the pistol as it was being fired, and the unknown ejection pattern of the particular subject pistol; although the position of the firearm shooter cannot be determined based on the location of the fired cartridge cases alone, it would not be unusual for fired cartridge cases to end up in the general area of the north side of the living room, given the account of Constable Smyth regarding his location and direction of aim while he was shooting.

MS. O'BRIEN: Okay. So in this case we had, the evidence is that all four cartridge casings from Constable Smyth's pistol were found in the northwest corner of the room there, as shown on that diagram. And I understand from this you're saying while that's not an accurate indicator of where he was or where ejected cartridges are, are not generally accurate indicators of where a shooter was at the time those cartridges were ejected from their weapon, that you did not find it unusual in this case that the ejected cartridges were found in that corner of the room, given what we'll get to as Constable Smyth's statement. Is that fair to say?

MR. BARR: Yes. A cartridge case ejection patterning generally cannot be used to position a shooter very accurately at all. The best that evidence usually can do is eliminate certain possibilities.

MS. O'BRIEN: Okay. And we know here the – for example, here we have evidence that say that any tilt in the floor was not measured, so that might be one factor and you – as you noted. Would you agree that might be a factor? I should get you that.

MR. BARR: It could be a factor if it was severe enough.

MS. O'BRIEN: Right. And there was cats present in the house, so – and we don't know, there might have been cats in the room at some point who may have moved cartridges. And you note here the significance of the walls and furniture here. And I take it that's because a cartridge could bounce off something after it's ejected or during its ejection.

MR. BARR: They do bounce off hard surfaces, for sure.

MS. O'BRIEN: Okay, okay. Now, just to – I know you've used the words here in your report, not unusual. If just to – if the – if the cartridge cases had been found in the opposite corner, if they'd been found in the southeast corner, sort of between the window and the mantel place, would you have reached the same conclusion?

MR. BARR: No, I would consider that to be a red flag against the statement of Constable Smyth.

MS. O'BRIEN: Okay, all right.

Okay, I think before our break we have time to go through the second to last substantive section of your report, which is the elements of the account of Constable Smyth. This won't take us as long.

I understand in this section you've gone through Constable Smyth's statements and his re-enactment and the transcripts and you identified statements he made that referenced the shooting. Is that correct?

MR. BARR: That's correct.

MS. O'BRIEN: Okay. And I'm not going to go through every statement, but here I understand in 5.1 you, you've identified statements he made pertaining to the number of gunshots?

MR. BARR: Yes.

MS. O'BRIEN: And then in 5.2 you identified statements pertaining to the location and position of Mr. Dunphy when the gunshots were fired, and here you've identified a number of statements and you've cited them to the particular document.

MR. BARR: Yes.

MS. O'BRIEN: Okay. And then 5.3 you identified statements Constable Smyth made pertaining to the locations and positions of where he was when the gunshots were fired.

MR. BARR: Correct.

MS. O'BRIEN: Okay. And there's a number of those there and they're all set out in your report.

Were you looking for any – at this point when you're identifying statements here, were you looking for any statements of Constable Smyth, regardless of whether they, they were, they confirmed your physical evidence or were not – were consistent or inconsistent with the physical evidence.

MR. BARR: Yeah, I was looking for any statements with reference to the number of shots or his position and location of either himself or Mr. Dunphy.

MS. O'BRIEN: Okay.

Okay and so this work you did in your phase – or your stage two of your analysis that you described at the beginning of your evidence this morning?

MR. BARR: Yes.

MS. O'BRIEN: Okay. All right.

I don't need to go through all of these statements but I would think, before we get to the conclusion section of your report, it may be helpful to look at some of the still shots that you captured from the re-enactment video. Because I believe they'll be – they were found in your working file and I believe they might be helpful when we get to your conclusions.

I'm going to ask, Madam Clerk, to bring up P-0764. And I'm just going to get you to explain, Mr. Barr, why you captured these images. So it's from page 83 of your working file.

So you have titled it: Elements of the account of Constable Smyth with potential to be either supported or refuted by the physical evidence. And you've captured four figures here; here's number 1, 2, 3 and 4. And I'll ask you to go – I'll go back up now and ask you to explain why you did this work.

MR. BARR: So these are frames from the video of the re-enactment that was done. And these particular frames show the moments where Constable Smyth is describing where he had fired the gunshots from.

MS. O'BRIEN: Okay, so would – is this each of the four shots? Is that the idea, is that why there's four?

MR. BARR: Yes.

MS. O'BRIEN: Okay.

MR. BARR: Yes.

And so his statement is that he began firing from where Figure 1 is listed here.

MS. O'BRIEN: Okay.

MR. BARR: This is the area that he's saying he began shooting from and then he continues on to shot 2, 3 and 4 as he's moving from the fireplace mantel towards the exit of the room.

MS. O'BRIEN: Okay. And we have seen this re-enactment in evidence. It's gone into evidence here and we viewed it in the hearing room.

Okay. All right. Thank you.

Commissioner, I'm going to get into the last section with Mr. Barr which is of his conclusions and opinions. I don't know if you – it's quarter to 11.

THE COMMISSIONER: It's an appropriate place to break, I think. It's quarter to 11.

I'll just get in a little advertisement while I'm here before I forget. One of the roles of the inquiry is to provide some general education to the public about relevant matters. And I don't want to make this all about me but that was the reason I referred to the trigonometry thing earlier.

One of the issues here that I have to consider when we get into scenarios is what do we have in terms of scientific evidence and what only amounts to speculation, and I'd refer anybody who is interested in the scientific method to the science manual for judges which is available online, I understand, the NJI, National Judicial Institute website. The NJI is the body that provides various forms of educational courses for judges. And I think we spent a couple of years, a committee, preparing that manual, and there is a good discussion of what you touched upon in terms of what is scientific methodology.

So, as I say, I encourage anybody who is interested in the field to look at it, but also I'm mentioning the trigonometry and the manual to point out to students who often when they are doing math, they wonder why am I doing this, what's that got to do with the real world. Well, I think we see how pure mathematics can have a very practical use in various incidents that people may run into their lives. Unfortunately, this is a tragic incident, but there are many ways in which so-called pure science which, when they are studying it, might not appear to have much practical value. Later on in life, in very unexpected ways, can have very practical value. So there endeth the lesson.

We'll adjourn for 15 minutes.

MS. SHEEHAN: All rise.

The inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Just before we start, a little housekeeping. I've been asked to publicize the fact that for Thursday's one-day symposium we think, already have posted on the website, an invitation for submissions. Is that correct, Ms. O'Brien?

MS. O'BRIEN: Yes. The invitation for submissions is already posted.

THE COMMISSIONER: It's already posted. And then we have – today, there'll be a form going up. Anybody who doesn't want to do that type of written submissions, there'll be a form available on the website where members of the public can submit questions that they would invite us to consider. I shouldn't say us – the presenters at the panel.

And just to give you the topics that have been suggested, it might be of interest: first, the investigation of officer involved serious incidents in Newfoundland and Labrador and sub-issues in that general topic; treating investigations as criminal until determined otherwise;

investigations of police by police; investigations by civilian-led serious incident response teams; potential for contracting with agencies outside the province. They are suggested topics.

And the second main topic: Police communication – police communications to the public following serious incidents and during active investigations and sub-issues: Balancing the integrity of the investigation with the public's right to know; specifically on the case of Donald Dunphy, could there have been more communication to the public, for example, with the respect to proactive policing, with respect to training and the use of force, with respect to single-officer home visits, with respect to the role of the premier's security unit.

The third main issue: The use-of-force training for police including de-escalation techniques for dealing with people in crisis and – sorry, the fourth main topic: Protecting freedom of expression in an age of social media. The use of social media in promoting the public's right to free expression and as a tool for critiquing government policy and action; the monitoring of and response to social media by government or the Royal Newfoundland Constabulary and, specifically, the potential risk of such activities having a chilling effect on freedom of expression.

So those are topics upon which we invite either written submissions or questions from the public. And that will be starting at 9:30 on Thursday morning, is it?

MS. O'BRIEN: Yes, you have – I know our first session may start at 9, Commissioner, I'm not sure. In front of you, you may have a draft agenda.

THE COMMISSIONER: Okay, one second now.

Yes, Thursday, March 9, just seems that – yes, sorry. It starts at 9 o'clock, we have a schedule. The first topic will be discussed from 9 to 10 o'clock. Okay.

MR. KENNEDY: Commissioner, may I ask a question, Sir.

THE COMMISSIONER: Sure.

Go ahead, Mr. Kennedy.

MR. KENNEDY: I had a look at a couple of these papers last night and one concern I have – and it may not be a concern for you – but that there's actual commentary on the involvement of Constable Smyth and what Constable Smyth did in this particular case. Wouldn't that be somewhat –

THE COMMISSIONER: That was in – in one of the papers I recall seeing that.

MR. KENNEDY: Yeah.

THE COMMISSIONER: Well, I'm treating that sort of thing just as a general topic of – it will not impact upon issues that are significant in, you know, the –

MR. KENNEDY: Yeah, I mean the one I read last night wasn't particularly inflammatory or prejudicial; it didn't cause me any great concerns.

THE COMMISSIONER: Right.

MR. KENNEDY: But, I mean, there would always be that potential or possibility for that and I think that that's something that we should avoid.

THE COMMISSIONER: Well, again, if it was a jury trial I suppose I'd have more concerns than maybe – I've been trying to test the approach that I take on the basis of what a court, what a judge would do in a trial and, normally, that would not be considered a trial.

So if there are specific areas that you have concerns about, you know, if you raise them with us before next Thursday I suppose, but up to next Wednesday, we can ensure that the approach that's taken at the hearing will not – the symposium will not proceed in a fashion to prejudice Constable Smyth or anybody with an interest in this hearing.

I'm seeking the views from the general public regarding general issues under these headings. I'm not asking the public to tell me what I should decide on, you know; the issues that are before us for consideration in the case of Constable Smyth or the RNC or any other party.

Mr. Simmonds, do you have any comment? Anybody?

MR. SIMMONDS: No, not at this stage, Mr. Commissioner.

THE COMMISSIONER: Okay.

So if you have no comment we'll – but, again, Mr. Kennedy, it's a valid point. And I'd ask you to, as I say, note for us the specifics of any paper that would have – I'm trying to think now, the other – we have the presentation of the Ad Hoc Coalition, I think. And I think they might have a

MS. O'BRIEN: Yeah, I'm not sure which –

THE COMMISSIONER: – paragraph or two.

MS. O'BRIEN: – which paper Mr. Kennedy is referring to. The only papers that – most of the papers that are posted on our website as suggested reading for people come from other sources and have –

THE COMMISSIONER: Yeah.

MS. O'BRIEN: – don't have any affiliation at all with this inquiry. There will be three papers posted that do have affiliation; that would be the report of Mr. Gareth Jones which is already posted. We will be posting –

THE COMMISSIONER: Sorry, the report of who?

MS. O'BRIEN: Gareth Jones.

THE COMMISSIONER: Yeah, right.

MS. O'BRIEN: We will be posting the report of Massine and Coleman which has not been posted yet. And the other paper which has been posted was the paper that was written by the Ad Hoc community – or sorry, the Ad Hoc Coalition on – with the interest in freedom of expression and whatnot that you granted standing to at Phase 2.

THE COMMISSIONER: Right.

MS. O'BRIEN: They have prepared a paper and that's been posted. And I don't know if maybe that's the one that Mr. Kennedy is referring to.

THE COMMISSIONER: I think that there is one paragraph or so in that, that may refer specifically –

MR. KENNEDY: A little bit more than that.

THE COMMISSIONER: Was it?

MR. KENNEDY: I will state for the record and, of course, we'll have to spend time on this later –

THE COMMISSIONER: Yeah.

MR. KENNEDY: – but we are objecting strenuously to parts of Coleman's report being utilized.

THE COMMISSIONER: Oh, yeah, but that's what –

MR. KENNEDY: So it shouldn't –

THE COMMISSIONER: (Inaudible.)

MR. KENNEDY: Nothing should be posted until it's determined –

THE COMMISSIONER: Sorry?

MR. KENNEDY: My suggestion is, Commissioner, nothing should be posted in his report until it's determined if the same is even admissible.

THE COMMISSIONER: The – well, I'll consider that but I'm not –

MR. KENNEDY: It's very prejudicial. And we're taking the position that Coleman is not qualified to give this evidence.

THE COMMISSIONER: Yeah and that's – that will proceed in the normal course of the testing of an expert for qualifications and with respect to the content. You have a proposed expert I understand; Mr. Avis has a proposed expert. We've already heard some expert testimony on some of the issues but that's a valid point.

We'll have to – when is Dr. Coleman to testify? It's Wednesday, is it?

MS. O'BRIEN: Wednesday the 8th.

THE COMMISSIONER: We will – we have – is the Coleman – the Coleman report is not up yet? No. That will not be posted, Mr. Kennedy, until after we have the Wednesday consideration of the testimony.

MS. CHAYTOR: (Inaudible.)

THE COMMISSIONER: Sorry?

MS. CHAYTOR: Yeah. We were holding off because we were aware that Mr. Kennedy had (inaudible).

THE COMMISSIONER: Yeah, so counsel says they were holding off posting it until this was dealt with. So it would seem to me that you're making a valid point, that we'll wait and see what

goes in and what doesn't go in with respect to Dr. Coleman's report and what shouldn't go in won't be posted. And, conceivably, you know, if you make the case, maybe none of it will be posted but we'll consider that on Wednesday.

Okay, let's continue with the witness.

MS. O'BRIEN: Thank you.

Mr. Barr, I'll ask you to activate your microphone, please. Thank you.

Now, before we get to the Conclusions and Opinions section of your report, I understand that you've prepared a supplement to your report which is essentially a slideshow presentation that shows a 3-D reconstruction of some of your work. Is that right?

MR. BARR: That's right.

MS. O'BRIEN: Okay.

And I'm going to bounce a little bit back and forth here but I'm going to bring up that slideshow presentation now. P-0760, please, Madam Clerk. And I'm going to take you through a couple of the slides before we return to your written report.

THE COMMISSIONER: What is the number of the exhibit?

MS. O'BRIEN: P-0760.

THE COMMISSIONER: Thank you.

MS. O'BRIEN: And, Mr. Barr, to be clear, I understand that your written report, which has been entered at P-0759, which we spent a lot of time on this morning, that is a stand-alone report. Is that right?

MR. BARR: That's right.

MS. O'BRIEN: Okay.

So what you did here is really just a visual aid to assist us – to assist you in explaining and us in understanding your conclusions?

MR. BARR: Exactly.

MR. O'BRIEN: Okay.

All right, we'll make that the full screen, please, Madam Clerk. Maybe just go up here; there we go, maximize the window.

Okay. So this is just an overview of the report. I'm not going to spend any time here. This is slide 3, or page 3. Can you explain what we're seeing in this slide, please?

MR. BARR: Yes, this slide is just an overview of the scene based on the information from the RCMP investigators who examined the scene. So this is – this model, this is based on a three-dimensional model that I created based on the measurements I was provided; measurements, photographs and video. So this depicts portions of the scene as it was recorded by the

investigators at the time and it does include the trajectory that Sergeant Saunders determined which would be that yellow line.

MS. O'BRIEN: Okay.

MR. BARR: And so this model was created to, as you said, help explain some of the conclusions and opinions in my report. So it only has to do with, again, the gunshot evidence that I had focused on. So you're not going to see every little item re-produced in the model. Only items that – basically, only the main items of the room, particularly furniture and items that may be in the path of the bullet trajectory, and some other items were included just for ease of reference. So it speaks I think in reference to (inaudible) within the scene.

MS. O'BRIEN: Okay. And we heard fairly significant testimony from Sergeant Saunders about how he measured the various items in the room and used triangulation to place them and whatnot. So you would have used all of those measurements of his, is that right?

MR. BARR: That's right, I did, yes.

MS. O'BRIEN: Okay.

All right, and then, I think, in the next slide here we just see the same reconstruction but from a different angle. I don't know if there's anything more you want to say here, but I understand again this is the trajectory that Sergeant Saunders did?

MR. BARR: It is yes, yeah.

MS. O'BRIEN: All right.

Now the next slide focuses on the figure in the chair, and here we have a bit of a close up on that figure. I understand that you used specialized software to create human figures in your recreations. Can you – the position of this figure in the chair; we can see here and we could see there in the previous slide. You would have done this I take it, from the measurements that Sergeant Smyth took. He did take some measurements, he told us, of the body and the photographic evidence. Is that right?

MR. BARR: Yes. Sergeant Saunders and his measurements and – it's a combination of the measurements and photographs of the scene, yes.

MS. O'BRIEN: Okay.

Now, we talked about this trajectory line. We see here you put a yellow dot over the hole in the chair that we've looked at already this morning. Is that right?

MR. BARR: Yes, that's correct.

MS. O'BRIEN: Okay.

And then you have these – a number of very small, sort of truncated rods, each placed at the four areas of bullet damage on Mr. Dunphy's body. Can you just explain? The rods kind of extend a bit from the body and give us some sense of a direction into the body. Can you explain what those are showing?

MR. BARR: Sure.

So those rods into the body of Mr. Dunphy are based on the autopsy report, so measurements in photographs from the autopsy report just describing the location of the gunshot wounds into Mr. Dunphy. So they are imposed on to the character in the scene, representing Mr. Dunphy, just to put the wounds in context with the scene itself as it was found.

MS. O'BRIEN: Okay.

So we heard from – so these are fairly approximate directions, I take it. We heard from –

MR. BARR: Well, as for direction, there's no specific directions. It's pointing out location so ...

MS. O'BRIEN: Okay.

But I understand from the autopsy report they've been recorded as – words like front – the direction of the wound was front to back, left to right.

MR. BARR: That's correct.

MS. O'BRIEN: And that's what you're recording here.

MR. BARR: That – yes.

MS. O'BRIEN: Okay.

So when I say general that's what I mean.

MR. BARR: Okay.

MS. O'BRIEN: It's not very, not – front to back, left to right is not particularly precise is what I was trying to say.

MR. BARR: That's correct.

MS. O'BRIEN: Okay.

Your next slide depicts one of your conclusions but it's not your first conclusion. So we're going to return now to your report momentarily at P-0759 and page 12, please, Madam Clerk.

Okay. If I could get you to review this sort of introductory paragraph, please, to your Conclusions and Opinions section, please.

Mr. BARR: Sure.

According to the account of Constable Smyth, four gunshots were fired in the direction of Mr. Dunphy while Mr. Dunphy was seated in a chair that backed against the west wall of the living room and was located immediately to the south of the living room entrance. Mr. – Constable Smyth's account states that all four gunshots were fired while Constable Smyth was moving from an area adjacent to the north side of the fireplace mantel towards the living room entrance at the west wall.

Given Constable Smyth's account of the relative positions of Mr. Dunphy and Constable Smyth himself at the time of the gunshots and that he fired the gunshots in the direction of Mr. Dunphy, then all four gunshots would have to have been fired in directions between and including west and south; i.e. due west, southwest to some degree or due south.

MS. O'BRIEN: Okay.

MR. BARR: So what that is, is – as I explained earlier as I go through my scientific methodology, at this point I have gone through the account of Constable Smyth, all the documents that were provided to me, and extracted the key points from that account that relate only to the time the shots were fired. And as I stated earlier I formed a condensed, more focused hypothesis to test against the physical evidence and this is what I had just read here.

MS. O'BRIEN: Okay. Thank you.

And you're – now in section 6.1 you get into the physical shooting evidence that you have determined supported Constable Smyth's account. Is that right?

MR. BARR: That's correct.

MS. O'BRIEN: Okay.

So what was the first piece of supporting evidence?

MR. BARR: Okay, so the first point was that the number of gunshots fired was determined to be four which does support the account of Constable Smyth as to the number of gunshots he fired.

MS. O'BRIEN: Okay.

MR. BARR: Yeah.

MS. O'BRIEN: Before we get into the second one we're going to go back to your slideshow because you actually do have a slide to depict this. P-0760 at page 6 – and this is where it again might help you to use your – the paper copy of your report because I'm going to ask you to explain your paragraph 6.1.B while we have up the slide to assist us.

And – sorry, page 6, Madam Clerk.

Okay, so please explain for us.

MR. BARR: Okay.

So the second element, paragraph 6.1.B states that a bullet was fired directly into the west wall of the living room and was fired from within an area that includes some of the area between the fireplace and the living room entrance, which supports the account of Constable Smyth as to the approximate locations of Constable Smyth when some of the gunshots were fired.

So in the visual and in the scene model, the image on the left-hand side depicts the bullet path or bullet trajectory as determined by Sergeant Saunders, which is the solid yellow line down the middle. What I did was I added basically a cone which is the yellow cone around that. And that represents the area of uncertainty that I associate to any bullet path analysis which is plus or minus five degrees.

So when a bullet path analysis is conducted, the result at the time is going to be a very defined line or path depicting the bullet path. That's not exactly going to be the bullet path. There is some degree of uncertainty associated with that type of analysis and so I depict that as the sort of translucent yellow cone there. So in effect –

MS. O'BRIEN: Okay, so that gives us our margin of error.

MR. BARR: Yeah, it can be considered a margin of error.

MS. O'BRIEN: Okay.

MR. BARR: So the entire cone would be the possible areas for the location of the gun at the time of that particular gunshot.

MS. O'BRIEN: Okay.

MR. BARR: Okay?

So that was determined before looking at and considering the account of Constable Smyth.

MS. O'BRIEN: Okay.

MR. BARR: That was predetermined.

The second figure on the right-hand side is depicting the correspondence between that finding and a portion of Constable Smyth's statement about where he was when he was firing the shots. So as I previously stated, Constable Smyth's version is that he began shooting from near the fireplace mantel on the east wall and moved towards the entrance at the west wall as he was firing.

So this shows the coincidence between the bullet trajectory of that particular shot and his path at the time Constable Smyth is firing the shots.

MS. O'BRIEN: Okay.

So here we see essentially you taking the physical evidence that's shown here and doing a comparison with the statement of Constable Smyth as to where he was when he was firing.

MR. BARR: That's correct.

MS. O'BRIEN: Okay.

For your next conclusion at 6.1.C you also have a slide.

MR. BARR: Yes.

MS. O'BRIEN: So if maybe you could explain that section of your report with reference to the visuals we have.

MR. BARR: Sure.

The correlation between the location of the exit wound in the right side of the head of Mr. Dunphy and the location of the bullet impact in the top of the chair, and the condition of the bullet recovered from the chair, support the account of Constable Smyth that Mr. Dunphy was seated or nearly seated in the chair at the time of this gunshot.

So what the image depicts on the left-hand side, there is the image representing Mr. Dunphy with the one particular gunshot wound to the right side of his head as described in the autopsy report. So that was predetermined prior to considering the account of Constable Smyth. That's just from the autopsy report alone. It has a path where the bullet is entering the front of the head and exiting the right side, going from front to rear.

So the next image depicts one possibility of how the same bullet may have caused that particular wound to Mr. Dunphy and ended up in the chair. Okay? And I do state in that image that the exact body position cannot be determined at the time of that gunshot. That's just showing one possibility that the two could be related.

MS. O'BRIEN: Okay.

So what I understand here is that you've essentially connected the – what was determined to be the entrance wound by Dr. Avis to the exit wound by – identified by Dr. Avis and then lined those up with the hole that was found on the chair. Is that right?

MR. BARR: That's right.

MS. O'BRIEN: Okay. Now, is this a trajectory analysis?

MR. BARR: No, it's – that's not a trajectory analysis.

MS. O'BRIEN: Okay.

MR. BARR: This is showing a correlation between, specifically, the exit wound in Mr. Dunphy's head and the bullet in the chair. So there – if it – in some cases, I'm able to position the exit wound specifically into a bullet path but only if I had a bullet path to start with.

In other words, if there was a bullet path from the chair, a good bullet path, it would then be possible to place Mr. Dunphy specifically within that bullet path. But, still, you wouldn't be able to find the exact position; it would have to be somewhere along that path.

So in some cases it's possible to narrow down the possibilities of the position of the person who has been shot. In this case, no. There's still a lot of possibilities; this is just showing one way that the two could correspond.

And in the conclusion in particular, when comparing it to the account of Constable Smyth, in Constable Smyth's statement he states that Mr. Dunphy was seated or nearly seated in that chair while he was firing his shots. And this is just one way that it can be supported.

MS. O'BRIEN: Okay.

MR. BARR: Yeah.

MS. O'BRIEN: So I understand what you – what we saw when we had that very definite trajectory analysis that was done by Sergeant Saunders and then verified or checked by you, that's a true trajectory analysis. That is not what you've done here.

This is more just if – please confirm that I'm understanding correctly – just a visual aid to describe how the statement of Constable Smyth, as to – that Mr. Dunphy was seated or nearly seated in the chair could line up with where the wounds are and the bullet hole in the chair.

MR. BARR: That's correct. Yeah.

MS. O'BRIEN: Okay.

And I understand to get this image here – and please correct me if I'm right – the figure that you had previously shown in the chair as being – as it was measured and photographed on the night

of in this position, you repositioned that body in order to give us this image that we're seeing here on the right-hand side of the screen. Is that right?

MR. BARR: That's right. I had to – I manipulated the position of the head and the body slightly to make the coincidence between the exit wound and the bullet in the chair.

MS. O'BRIEN: Okay.

MR. BARR: So I'm not making any assumptions that that shot happened while he was in the final position he was found. Right?

MS. O'BRIEN: Okay.

Okay, all right.

The next – you don't have a slide for the next one but we maybe just can keep this image up there as you go through it. But there's no particular slide for 6.1.D of your report but can you explain what your conclusion is in that case?

MR. BARR: Sure.

The directions of the gunshot wounds into the body and head of Mr. Dunphy are consistent with the gunshots having been fired in southwest directions if Mr. Dunphy was seated in the chair at the time of those gunshots – as demonstrated by conclusion 6.1.C that we were just looking at for one of those gunshots – supporting the account of Constable Smyth as to the relative locations and positions of Constable Smyth and Mr. Dunphy at the time of the gunshots.

So the wounds into Mr. Dunphy, as described by the autopsy report, are from front to back. There might be – it may be – it may be better to show one of the later slides, like, from an overhead view. Yeah, like that.

MS. O'BRIEN: Okay. And this one I was going to go to for 6.1.E but if it assists you with 6.1.D as well.

MR. BARR: Yeah, this one's to help explain it –

MS. O'BRIEN: Okay.

MR. BARR: – if it needs some more explanation.

So the gunshot wounds into the body and head of Mr. Dunphy are consistent with having been fired in southwest directions if Mr. Dunphy was seated in the chair at the time, as Constable Smyth stated he was. So when you look at Mr. Dunphy seated in the chair facing the opposite end of the room, that yellow square outlines an area of the room, a certain area of the room.

Now, based on the autopsy report, the gunshot wounds were fired either somewhere between directly west or south.

THE COMMISSIONER: Where is the yellow square you're referring to?

MR. BARR: Right –

MS. O'BRIEN: Oh, here. Sorry.

MR. BARR: It looks – yeah, right there. So –

THE COMMISSIONER: This greenish yellow we're seeing, is it?

MS. O'BRIEN: Yes, this is what he's referring to.

THE COMMISSIONER: Okay.

MR. BARR: So if Mr. Dunphy is seated, ordinarily seated in the chair like that, the wounds that he received would have to be fired from somewhere within that yellow area. It's probably a little over half the room it depicts, if that, and then that way you would get shots going either directly west, directly south or somewhere in between.

MS. O'BRIEN: Okay.

And this is – are you saying this is because the wounds, the entrance wounds to his body were – well, he has one entrance wound to the front of his head and then the other two are on the left-hand side of his body.

MR. BARR: Yes, they were just –

MS. O'BRIEN: Is that what you're referring to here?

MR. BARR: Yes and they're described as coming from front to back, left to right.

MS. O'BRIEN: Okay.

MR. BARR: And so where those bullets would have originated from would be anywhere within that yellow area.

MS. O'BRIEN: Okay.

And then this side may then again help you explain the next section of your – the next conclusion which is 6.1.E.

MR. BARR: Right.

And so somewhat related is the next conclusion that states: The distance between the muzzle of the pistol and Mr. Dunphy is consistent with having been greater than 76 centimetres at the time of discharge for the gunshot that stuck Mr. Dunphy in the upper left chest based on the fact that no projected gunshot residue pattern was detected on the clothing. This supports the account of Constable Smyth that he was at the mantel of the fireplace when he began firing the first of two shots intended for the centre of mass of Mr. Dunphy as Constable Smyth moved towards the living room entrance.

So, again, the shot could come from anywhere in that yellow area, excluding the sort of faint blue area described as 76 centimetres from Mr. Dunphy, because if it were closer than that there would have been gunshot residue present.

MS. O'BRIEN: Okay.

So let's just make sure I'm understanding here, Mr. Barr. What you're saying is assuming Mr. Dunphy was in his chair or, you know, seated or near seated in his chair when he was shot, given the position of the wounds, that the shots would have originated somewhere within this greeny

yellow square, that rectangle that's depicted here in your diagram. And given the fact that there was no gun residue pattern or tattoo – powder tattooing, you're saying that that evidence tells us that the gunshot originated from further away than 76 centimetres.

MR. BARR: Correct.

MS. O'BRIEN: So putting these two things together, the physical evidence is showing you that if Mr. Dunphy was in his chair when he was shot, the shooter was somewhere within this greeny yellow rectangle minus that little corner.

MR. BARR: That's correct. Yes.

MS. O'BRIEN: And then in this position here you've put in a figure representing, I guess, approximately the area where Constable Smyth reported he was when the first shot was fired. Is that fair to say?

MR. BARR: That's correct, yes.

MS. O'BRIEN: Okay.

And I – all his – and as we saw in – I thought this is where that page from your report might be helpful where you took the still shots of where Constable Smyth has reported he was when he fired all four shots were within this approximate area.

MR. BARR: Yes.

MS. O'BRIEN: Okay.

And the last conclusion you have is 6.1.F. And I do not have a slide for that but could you just explain that to the Commissioner?

MR. BARR: Sure.

“The location of the fired cartridge cases in the northwest corner of the living room does not eliminate the possibility of the gunshots having been fired in a southwest direction from the general areas of the living room in which” Constable SMYTH described he fired the shots.

MS. O'BRIEN: Okay.

And I think we've already had evidence on that, on the cartridge casings, Commissioner. So I don't know if there's any need to go further with that with you, Mr. Barr, now.

I'm going to go back to your report at 7 – P-0759, please, page 13.

So what we've just gone through, Mr. Barr, to explain is you've just gone through, I think, the six pieces of physical evidence that you concluded supported elements of Constable Smyth's statement.

MR. BARR: Yes.

MS. O'BRIEN: Okay, so that's what the six we just did.

And can you just now explain the last two paragraphs here of your report, your conclusions, 6.2 and 6.3, please.

MR. BARR: Sure.

6.2 states that: “No elements of the shooting related evidence were identified that refute the account of” Constable Smyth.

MS. O’BRIEN: Okay.

MR. BARR: 6.3 states that: “There is often more than one scenario that the physical evidence may support. It is not the intent of this report to offer a definitive scenario of the events relating to the shooting death of” Mr. Dunphy. “This report is intended only as a comparison of the physical evidence to one scenario provided and should not be interpreted as the only possible scenario.”

MS. O’BRIEN: Okay.

Can you – I think that last point is a very important part, so maybe if you give us a little bit more explanation on that.

MR. BARR: It – yeah, it is important.

Getting back to the scientific method, one thing that needs to be understood is that science and any scientific methodology does not have the ability to prove something. What science does, in any capacity, is science can offer support to a theory, or a statement in this case.

Science can offer evidence that supports certain things; it does not ever have the ability to prove something as absolute. So science, in its very basic nature, is always open to new evidence and reinterpretation should new evidence be provided that may change a theory, for example.

So it’s important to understand that science cannot prove something definitively. It will offer support but the one thing that science can do effectively is it can eliminate certain possibilities and scenarios. It can effectively do that.

So going through a statement like this and comparing it to the physical evidence, the most definitive evidence that the, or that the most definitive conclusion that the evidence can provide is really falsifying a statement. It has the ability to do that. If it doesn’t do that, it can offer support but it’s still not going to say this is definitively what happened.

MS. O’BRIEN: Okay, so you could – if I’m understanding correctly so your work could prove somebody was wrong but you can’t prove somebody is right. Is that fair to say?

MR. BARR: Essentially, yeah, that’s it.

MS. O’BRIEN: Okay.

MR. BARR: (Inaudible.)

MS. O’BRIEN: And so – and just to put that another way just so everybody is clear on it, you’re saying everything that you saw in the physical evidence was consistent with how Constable Smyth reported it. Constable Smyth may have given another reporting of how events went down that was also consistent with that – with the physical evidence. There could be other scenarios that you could also find to be consistent with the physical evidence.

MR. BARR: Certainly.

MS. O'BRIEN: Okay.

And just to help us just one last question: Can you give us an example of physical evidence that if it was found – so this is a very hypothetical here – if the physical evidence, if it was found that would have refuted Constable Smyth's statement. And I'm asking this question just so, just to help make sure everybody understands what your work is and what you've done.

MR. BARR: Yeah, absolutely.

Because I went through that exercise with all of these elements of evidence because I had to because I – when I'm doing my comparison, my analysis, I'm actually trying to disprove Constable Smyth's statement. That's really my goal. I'm going to see if there's something I can disprove because that's the easiest thing to do.

So, for example, let's take the trajectory into the wall. If we look at the gunshot into the wall, there's quite a specific area that that relates to where that gunshot came from. It's not definitive in one spot but it's narrowed down to that area of that yellow cone in my diagram.

And having said it supports Constable Smyth's statement, you saw the coincidence of that cone and part of his path as he moved across the room. That's the support of his statement. That could have easily refuted his statement if that trajectory even was – even if the bullet hole was in the same place but the trajectory came from the opposite end of the room, for example.

MS. O'BRIEN: So the trajectory showed the shot was fired, for example, over in the corner between the window and the fireplace, the (inaudible).

MR. BARR: Yeah, for example.

MS. O'BRIEN: Okay.

MR. BARR: That would have absolutely negated his statement. So that's one example. You know if we found more – if there were more bullets and cartridge cases found at the scene to show more shots – fewer or more shots. That's a pretty straightforward one but kind of obvious.

MS. O'BRIEN: Okay.

MR. BARR: But if we only found two cartridge cases and two bullets, something is not making sense either, right?

MS. O'BRIEN: Okay, well, thanks.

Those are the questions I have for you, Mr. Barr. Other counsel will likely have questions and the Commissioner may have further questions for you.

Thank you.

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

Now, do you have any questions? You can proceed with the trigonometry for this visit first.

Mr. Simmonds, you're the sacrificial lamb.

MR. SIMMONDS: Yeah, looks like it.

THE COMMISSIONER: Go ahead.

MR. SIMMONDS: It looks like it, Mr. Commissioner.

Good day, Mr. Barr.

MR. BARR: Hi.

MR. SIMMONDS: I just have a couple of questions for you. Firstly, your analysis deals with the actual times of the shots, so they're moments in time?

MR. BARR: Exactly.

MR. SIMMONDS: You're not saying what happened before or after or in between I think is what you – is the phraseology.

MR. BARR: Exactly. Yes.

MR. SIMMONDS: Yeah, okay.

Number two, your analysis recognizes at the end that this is not the only scenario. This is a possible scenario. There may be others. Is that correct?

MR. BARR: That's correct. Yeah.

MR. SIMMONDS: Okay.

Number three, your scenario doesn't give any – is not able to, and that's not a criticism, it's just a statement of reality – of what happened directly before the first shot. Your analysis starts at the time of the first shot.

MR. BARR: Correct.

MR. SIMMONDS: And it says, then, based upon what Officer Smyth says, there's nothing here that clearly refutes what he's saying.

MR. BARR: That's correct. Yes.

MR. SIMMONDS: Fourthly, Officer Smyth – you've reviewed his state – the statements and the re-enactment, and Ms. O'Brien covered this in your interview which I think was done by telecommunication.

MR. BARR: Telephone, yes.

MR. SIMMONDS: Yeah.

Officer Smyth said that he fired four shots in all.

MR. BARR: Correct.

MR. SIMMONDS: The first two were to centre mass which is the largest part of the body; the next two were to the head. And we've heard a lot of evidence about what the protocol is and use of force is but that was his evidence. He said he believed – his belief was he missed with one of those shots. You're aware of that from a review of his statements.

MR. BARR: Yes.

MR. SIMMONDS: Okay.

The shot that he believes he missed with was the shot to the head. Yet when we look at the autopsy, we see that there's one shot to the body and that there are indeed two shots that impacted with the head of Mr. Dunphy.

MR. BARR: Correct.

MR. SIMMONDS: Does that not offer some concern or some degree of, well, that's not really lining up with what Officer Smyth said he tells us happened.

MR. BARR: Yeah, I put thought into that when I read that in his statement. The thing about that is when you're going through somebody's statement of what they believed happened, when it comes to shootings in particular, if you notice when I summarized his statement into a very focused hypothesis, it just said he fired four shots in this particular direction as he moved from A to B.

MR. SIMMONDS: Right.

MR. BARR: So the reason is –

MR. SIMMONDS: Go from the mantelpiece to going out the room.

MR. BARR: Yes.

So the thing you have to consider is when you're shooting and where you're intending on aiming is not always where the bullet ends up. So the problem is he may have thought he was aiming at one particular area of Mr. Dunphy, but that's just not where the bullet ended up.

And I can give you an example of why that's critical and it happens all the time when, not only police, but anybody is shooting at a target range. Everybody is aiming for the centre bull's eye of their target.

MR. SIMMONDS: Right.

MR. BARR: And if you look at those targets, the shots end up all over the place.

So when I'm evaluating somebody's statement about where they – specifically where they were shooting, I can only fairly consider the general direction that they were shooting.

MR. SIMMONDS: Okay.

MR. BARR: It wouldn't be fair to consider that specific, unless we had a really unusual case of, say, a sniper that's mounted and everything else and you can get very specific. But, in general, the bullets just aren't always going to go where you're – exactly where you're aiming. So that's –

MR. SIMMONDS: And when you used the word "sniper," that was going to be kind of my next question. Does your analysis change where we're dealing with a trained police officer who has taken target practice, who has been introduced in lifelike circumstances on the range to these kind of – of a target moving or a target being seated and having to fire two shots, analyze or assess and then two more shots.

When that – when you factor that in and the fact that the centre mass is the biggest part of the body and there's no concern voiced by him in his statements that he hit centre mass with the two shots, does that not – when it's the third shot that – when there's obviously two shots that hit the head and only one that hit the body?

MR. BARR: Yeah. Well, first off, to address your first question: No, my analysis doesn't change because even with trained police officers, in my experience, I've seen police officers shoot at vehicles and miss a vehicle. So when we start getting specific to these smaller areas, it's just not – it's just not valid to get that specific on that particular point.

MR. SIMMONDS: Even in a small room?

MR. BARR: Even in a small room. I mean they train at relatively short distances normally.

MR. SIMMONDS: Uh-huh.

MR. BARR: But I – the problem is there's no way to – there's also no way to sequence the shots. So just by looking at the gunshot damage or the bullet wounds, there's no way to actually sequence those shots, to tell which once came first, second, third and fourth. If there was, there might be some more that could be said about that.

MR. SIMMONDS: Hmm.

MR. BARR: But, unfortunately, there's no way to do that.

MR. SIMMONDS: So if you could sequence them and indeed were sure that it was the third shot –

MR. BARR: Well, if we could sequence the shots and say that the first shot happened at the mantel and he's – and Constable Smyth says while I was at the mantel I was aiming here, then we would know where that bullet actually went.

MR. SIMMONDS: Okay.

MR. BARR: You know what I mean?

MR. SIMMONDS: Yeah.

MR. BARR: Yeah.

MR. SIMMONDS: Okay.

Thank you very much, Mr. Barr.

THE COMMISSIONER: Thank you.

Mr. Kennedy.

MR. KENNEDY: Thank you (inaudible).

Good morning, Mr. Barr. My name is Jerome Kennedy; I'm counsel for Constable Joe Smyth. I missed the first hour of your testimony, Sir, so if I repeat anything just please tell me and we'll move on.

I want to start, Sir, with the comments in your report when you talked about the fact that the scene had been – the trajectory analysis had been properly done by Sergeant Saunders.

MR. BARR: Yes.

MR. KENNEDY: In fact, you seemed to indicate in your interview with Commission counsel that it was very well done and it allowed you to do your work.

MR. BARR: That's correct.

MR. KENNEDY: Secondly, Sir, I understand that you did your analysis without – first, without the statements of Constable Smyth.

MR. BARR: That's right.

MR. KENNEDY: So you do your – you look at the physical evidence and do an analysis. Correct?

MR. BARR: I did, yes.

MR. KENNEDY: Then you look at the statements of Constable Smyth.

MR. BARR: Correct.

MR. KENNEDY: Yeah.

So, Sir, because I'm quite interested in what you talked about the scientific method and can – I don't know what the definition would be but using your words, would the scientific method be to try to disprove that something happened or that the version of events is not correct? And the converse of that is that if you don't achieve that, it could be, it could be accurate.

MR. BARR: That's exactly right. Yes.

THE COMMISSIONER: Yeah, to falsify, I think, is the –

MR. KENNEDY: Yeah.

MR. BARR: Exactly.

MR. KENNEDY: So –

THE COMMISSIONER: Sorry, go ahead.

MR. KENNEDY: So unlike certain analysis that we do where we look – we start out trying to support something, you're trying to disprove it.

MR. BARR: Yeah, that's right.

I mean if you're going to do something scientifically and objectively, you can never start out with a theory. You don't start with a theory and then collect and analyze evidence that's going to fit that theory. That's the wrong way to do it, okay? You need to look at what you have as evidence and then you test your theory against that.

MR. KENNEDY: And so the objectivity involved would be, as we've indicated, physical evidence first, then compare to Constable Smyth.

MR. BARR: Yes.

MR. KENNEDY: Try to disprove what Constable Smyth is saying as being correct.

MR. BARR: That's right.

MR. KENNEDY: And that didn't happen in this case, did it? You didn't disprove what Constable Smyth was saying as incorrect.

MR. BARR: Correct.

MR. KENNEDY: In fact, Sir – and there can be, I guess there's all kinds of possibilities and we get into probabilities. But in science what are you looking for? Is it – and I know you took out, I think it was the reasonable degree of certainty. You took that term out, did you?

MR. BARR: Yes, I did. Yes.

MR. KENNEDY: Okay.

So what are you looking for? Is there a standard that you apply or is it something that complies with logic and common sense?

MR. BARR: Well, honestly, I'm not looking for anything.

MR. KENNEDY: Okay.

MR. BARR: I don't look for anything. I'm presented with evidence and whatever that evidence tells me is what I get and that's what I use to test the statement against. So I'm not looking for anything; there's no preconceived notions or outcomes.

MR. KENNEDY: Okay.

And, Sir, in this particular case you also viewed the re-enactment videos, did you?

MR. BARR: I did, yes.

MR. KENNEDY: Yeah.

So when you then get to your analysis and you've done up your, we've seen your charts, what you're looking for is evidence which supports or refutes the version of events that you have. Correct?

MR. BARR: Correct.

MR. KENNEDY: And you've given an example of a couple of things that could cause you to question Constable Smyth's statement such as the trajectory, if he was at the mantelpiece as opposed to where he said he was.

MR. BARR: Yes.

MR. KENNEDY: The number of bullets or cartridges, somewhat simplistic but, again, an example.

MR. BARR: That's right.

MR. KENNEDY: The less than 76 centimetres would also be a good example, wouldn't it?

MR. BARR: Yes.

MR. KENNEDY: If there was gunpowder residue that would tell you that he's closer than 30 inches.

MR. BARR: That's right.

MR. KENNEDY: So that would refute what he's saying.

MR. BARR: If there was projected gunshot residue on any of the gunshot wounds, that's right, that would refute what his statement was.

MR. KENNEDY: Because that would show you because if I remember your – and we don't need to bring it up but if I remember your – I'm not good with my – it's not a circle, it's a –

UNIDENTIFIED FEMALE SPEAKER: Semicircle.

MR. KENNEDY: Yeah.

UNIDENTIFIED MALE SPEAKER: Arc.

MR. KENNEDY: The angle that you have in the –

MR. BARR: Yes, yes.

MR. KENNEDY: – in the cone and then you had another angle with 76 centimetres in it.

MR. BARR: Yes.

MR. KENNEDY: Yeah.

If someone was within – they have to be within the 76 centimetres. If you shoot someone from there you're going to leave gunshot residue, aren't you?

MR. BARR: It's expected, yes.

MR. KENNEDY: So that's an example that could refute.

MR. BARR: That's a – that is an example of that.

MR. KENNEDY: Okay, let's just keep going. Is there any other example that could refute what Constable Smyth is saying? Anything else that jumps to your ...?

MR. BARR: Well, I mean there's multiple examples. I mean looking at the evidence I examined in particular, another – it's probably an obvious one but if the four cartridge cases were found in another room.

THE COMMISSIONER: Sorry, the ...?

MR. BARR: If the four cartridge cases in the corner, if they were located in another room. It's kind of obvious but that would refute his statement as well.

MR. KENNEDY: Okay.

See, because this becomes important when you say that what you've put forward is one scenario. But you put forward a very likely scenario or one that's supported by the evidence. Correct?

MR. BARR: Well, I'll correct you a little bit on that.

MR. KENNEDY: Okay, sure.

MR. BARR: I'm not putting forth any scenarios. I am only testing a scenario –

MR. KENNEDY: Okay.

MR. BARR: – someone else's statement.

MR. KENNEDY: Okay. So let's look at the scenario that's put to you. There are six elements of physical evidence which support what Constable Smyth says.

MR. BARR: Correct.

MR. KENNEDY: There is nothing in the physical evidence that refutes what Constable Smyth says.

MR. BARR: Correct.

MR. KENNEDY: So when you get, then, to your statement at 6.3, there's often more than one scenario, is that sort of put there just to show that you can't establish to certainty or absolute certainty what occurred?

MR. BARR: That's exactly why that's there.

MR. KENNEDY: But in this particular case, everything that you see supports what Smyth said and nothing refutes it.

MR. BARR: Correct.

MR. KENNEDY: Okay.

When Mr. Simmonds asked you a couple of questions of the – and as opposed to using my definition, Commissioner, again, I don't know if this was dealt with earlier – and I know you've done a lot of work in this, Commissioner – but let's not use my definition of scientific method, a somewhat inarticulate definition.

How would you define a scientific method? I know it is in the – I think in the Morin report, Commissioner, Commissioner Kaufman defines a scientific method. But how would you define it, Sir?

MR. BARR: Well, in general, any scientific method; the key to it is that it's objective, okay? So you need to do the analysis objectively with no preconceived notions, no expectations. And that's the key to any scientific method.

And when you're going to design methodology and how – you have to keep all that in mind. No matter what method you specifically use, that's going to be the core of it.

MR. KENNEDY: Okay

Because Mr. Simmonds asked you, well, if he's shot here – and you said one shot missed the head. I guess the – I don't know if he asked you this particularly but the implication was that, well, he should have known that happened, or he shouldn't have missed because he's a trained police officer.

Did you understand the question to be something along those lines? And Mr. Simmonds can correct if I'm wrong, obviously.

MR. BARR: Right.

MR. KENNEDY: Yeah.

MR. BARR: Yeah.

MR. KENNEDY: And you indicated that you've seen cases that, or you – lots of cases where the shots don't go where they're –

MR. BARR: Intended.

MR. KENNEDY: Yeah.

MR. BARR: Right.

MR. KENNEDY: And, Sir – and, again, Commissioner, I don't know if I can even ask this question because I know it was taken out Corporal Knapman's evidence in terms of the – what the physiological or the stress adrenaline that a police officer would be under. That was –

THE COMMISSIONER: Well, let's try it. Just give me the question first and –

MR. KENNEDY: Yeah, I was going to ask this –

THE COMMISSIONER: – and I'll consider it before the witness answers it.

MR. KENNEDY: Yeah.

I was going to ask this witness whether or not he, in his experience as an expert, would consider that there are – or does he have any knowledge if there are physiological effects upon a police officer in a shooting situation where stress and adrenaline can –

THE COMMISSIONER: You're going to talk about memory distortion now.

MR. KENNEDY: No, no, just can result in terms of shots not going where they're expected to go.

THE COMMISSIONER: Oh sure. Yeah.

MR. KENNEDY: In other words that, that stress and the adrenaline that's flowing, could that affect the –

THE COMMISSIONER: Yeah, okay.

Well, I guess that would have to come from your experience rather than your training, would it, or study?

MR. BARR: Yeah, I wouldn't –

THE COMMISSIONER: If you're able to.

MR. BARR: No, I wouldn't offer anything on it.

MR. KENNEDY: Okay, that's fine.

MR. BARR: It's not my area of expertise.

MR. KENNEDY: We, Sir, yesterday heard from a use-of-force expert from the RCMP who said, again, the numbers were –

THE COMMISSIONER: You might – by the way, before you leave that, that might be a case of where the ordinary individual –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – might be able to draw inferences based upon common stock of knowledge of humanity.

MR. KENNEDY: Yeah.

And also, too, I think the short time frame; that was going to be my next question, Sir. The use-of-force expert who testified yesterday for the RCMP, we talked about how long it takes to get the gun out of the holster and shoot four shots. He said the whole thing could take place in a couple of seconds. Does that sound right to you in your experience?

MR. BARR: It's certainly possible in a few seconds, yeah.

MR. KENNEDY: Yeah.

So what we're dealing with is a – from the time that first shot or the holster, the drawing of the – taking the gun out of the holster, the firing of four shots could take place in a couple of seconds.

MR. BARR: Sure.

MR. KENNEDY: A very short time frame isn't it.

MR. BARR: Yes.

MR. KENNEDY: Okay, those are my questions.

Thank you, Sir.

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MR. SIMMONDS: Oh, sorry.

MR. AVIS: No questions, Commissioner.

THE COMMISSIONER: Thank you.

Mr. Drover, do you have any?

MR. DROVER: Yes, just something very quick since we're on the topic of scientific method.

And so I want to take you to – this is the text that the Commissioner referenced earlier today and it's the *Science Manual for Canadian Judges* from the National Judicial Institute. And this would be page – let me find that page again.

THE COMMISSIONER: Yeah, that's the one where I was on a committee of, I don't know how many, eight or 10 judges, I think, from across Canada. We brought in scientific experts to help us understand the scientific method. There's a recognition that this is one of the most difficult areas for judges to understand and apply how the scientific method works.

And just so we don't think it's too easy, the Supreme Court of the United States, when they got into their decision on which – Daubert, I think it was 1991 or 1992. And they adopted the philosophy of Karl Popper and his theory of scientific method for novel science, being that it has to be a theory that you can falsify. There has to be – you have to be able to possibly find something that would refute it. And it stays there until it is refuted but, ultimately, there's no absolute certainty it could be refuted.

But when the majority adopted this philosophy – a philosophy, by the way, which has been challenged by other philosophers of science, so right from the get-go we have a bit of a shaky foundation. But I think it's worthy of note that the chief justice of the United States who was on that case, and at least one other judge, threw up their hands and said they didn't have a clue as to what the scientists were talking about, that the only reliable theory is one that's falsifiable. It runs sort of counterintuitive.

Anyhow, Mr. Drover, sorry to interrupt you.

MR. DROVER: I just, I guess for the benefit of the public who are watching who might not have as much understanding about scientific method.

THE COMMISSIONER: No, this is an educational process as well as everything else. Yeah.

MR. DROVER: And so I just want to take you to some statements in this text from the National Judicial Institute. And this is page 53 and perhaps you can comment or elaborate, or agree or disagree with some of these statements from the National Judicial Institute.

They start out by saying – this is paragraph 3 on page 53: "Science is distinguished from other modes of inquiry principally by a more or less universal method" called "the scientific method." Do you agree with that?

MR. BARR: Yes.

MR. DROVER: Can you offer any comment on it? I mean, would all scientists use the same scientific method? Or if they step outside that is there a problem, then, with their work?

MR. BARR: All scientists will use basically the same foundation, the same scientific foundation of objectively testing hypotheses. So, yeah, I agree. I do agree with that.

MR. DROVER: And proper application of that scientific method results in the accumulation over time of observations that are either consistent with or support, inconsistent with or refute, or irrelevant to the particular scientific hypotheses. Correct?

MR. BARR: I agree with that. Yes.

MR. DROVER: And, over time, these observations can move from one class to another; that is, that observations that were once considered irrelevant all of a sudden become pertinent and vice versa. Correct?

MR. BARR: Yes.

MR. DROVER: So during your analysis was there information that you thought was irrelevant that became pertinent over time or vice versa?

MR. BARR: No, there wasn't in this case. No.

MR. DROVER: An application of the scientific method then resulted in knowledge that is purported to differ from other types of knowledge, arguably qualitatively in that it's more objective, it has greater objectivity. Is that correct?

MR. BARR: Yes.

MR. DROVER: Okay.

So that means that you have no investment in the outcome. You're just going to look at the evidence and test the hypothesis.

MR. BARR: Absolutely.

MR. DROVER: And it makes no difference to you which way it goes.

MR. BARR: No, it doesn't.

MR. DROVER: In fact, it's probably the most exciting time for a scientist is to be able to disprove somebody else's theory.

MR. BARR: Absolutely, it would be. Yes.

MR. DROVER: So the scientific method – finally, a scientific method must include in that it has to be – it has to have a scientific hypothesis that is something that you can test, that you can either prove or refute. Correct?

MR. BARR: Correct.

MR. DROVER: And you have to have systematic observations in the context of a study or an experiment, which I assume you did in this case?

MR. BARR: Well, if you want to relate that to this type of analysis that would refer to the underlying analysis that would have been done by the lab or the trajectory analysis, so all these individual components that have already been studied and validated who are brought together.

MR. DROVER: So this would be the science over time since the invention of the gun. I'm pretty sure that not long after the invention of the gun there was probably some science around ballistics.

MR. BARR: Well, I can tell you, yeah, there probably has. But in particular to do with crime scene and shooting reconstruction analysis, that's been going on for over a hundred years.

MR. DROVER: Okay, so for over a hundred years. So for a hundred years the science that you relied on to test the evidence and come to your conclusions is based on a hundred years of science?

MR. BARR: At least.

MR. DROVER: At least.

MR. BARR: Yes.

MR. DROVER: And so that's a hundred years of scientists all over the world trying to disprove each other.

MR. BARR: Correct.

MR. DROVER: To come to what has become sort of a stable basis of science. Correct?

MR. BARR: Yeah, that's right.

MR. DROVER: Okay.

And, finally, using the scientific hypothesis and using your systematic observations, you can make inferences from that.

MR. BARR: Yes.

MR. DROVER: And that, that is the scientific method.

MR. BARR: It is. Yes.

MR. DROVER: Okay. Thank you.

Those are all my questions.

THE COMMISSIONER: I guess it's fair to point out I believe, Mr. Barr, that scientists are not always that objective in protecting their pet theories. I think a good example might be the doctor that came forward with the theory that ulcers, or at least a large percentage of ulcers, are caused by bacteria.

And he was almost driven out of his profession, as I understand it, by the other scientists who supported the mainstream view at that time, disbelieving him and criticizing him for an invalid theory. Whereas in fact, ultimately, they had to concede that, yeah, it was scientific and, yes, it was a valid theory and they had to adopt it, you know.

So it's not always as clean as might appear from reading a book on the scientific method, would that be fair?

MR. BARR: No, that's for sure.

THE COMMISSIONER: Yeah. They get pretty nasty at times when they believe that their own theories are being challenged.

Okay, I think – do we have another witness? Well, it's quarter after 12.

The – sorry, I'm sorry, did I finish asking everybody if they had questions?

Nothing from the RCMP counsel?

Mr. Avis, do you have anything?

MR. AVIS: No, no.

THE COMMISSIONER: Okay.

Mr. Drover, you're finished and Mr. Kennedy is finished. So I don't see anybody else behind the monitors so I guess we're finished.

Thank you, Mr. Barr, very interesting.

Any – what are you proposing now, that we have another – we're going into the applications, are we?

MS. O'BRIEN: We are. The next would be the applications and we're 15 minutes away from our lunch break, so whether we want to –

UNIDENTIFIED FEMALE SPEAKER: I usually go (inaudible).

THE COMMISSIONER: Well, just let me ask a few –

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. O'BRIEN: Oh yeah, we might go to one. That's right.

UNIDENTIFIED FEMALE SPEAKER: On Friday, we go to –

THE COMMISSIONER: Sorry?

MS. O'BRIEN: Ms. –

UNIDENTIFIED FEMALE SPEAKER: On Friday we go to 1:30 if everyone –

THE COMMISSIONER: Well, let me just – I'm not sure there will be a lot of time required.

Mr. Barr, sorry, you can step down. We're getting into another area now. Thank you very much.

Just a couple of preliminary questions, I guess, and then we'll see whether we have to break or maybe not. And I'm not sure if I should put this to Mr. Kennedy or Mr. Avis first, but one question I have is whether both your experts are necessary.

And I don't know, Mr. Kennedy, do you want to comment on that in terms of what you see your expert bringing?

MR. KENNEDY: Yeah. Well, I think they're – they approached from a different perspective –

THE COMMISSIONER: Yeah, we haven't seen or I haven't seen. I don't know if you've put in the CVs.

MR. KENNEDY: Yeah, I finally – no, I got the act – I sent the report. It was prepared in 24 hours but I –

THE COMMISSIONER: Do we have the report?

MR. KENNEDY: Of Dr. Hart, yes. It's been sent to everyone by email.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MS. O'BRIEN: I think Diane was, as we were leaving to come up here, she was –

MR. KENNEDY: No, no, I sent it to everyone –

MS. CHAYTOR: (Inaudible) sitting here?

MR. KENNEDY: I sent it to everyone – yeah, before I came out. I sent it to everyone at

MS. O'BRIEN: When we left I think that's what Diane was doing, putting together for us. Yeah.

THE COMMISSIONER: I guess we definitely will be adjourning then until he –

MR. KENNEDY: One second, Commissioner.

THE COMMISSIONER: – until you give us a chance to read it, yes.

MR. KENNEDY: Yeah, I sent it at 10:25.

THE COMMISSIONER: Okay.

MR. KENNEDY: Yeah.

THE COMMISSIONER: We've been basically in here apart from the break –

MR. KENNEDY: Yeah, so.

THE COMMISSIONER: – and I don't –

MR. KENNEDY: Yeah, so.

THE COMMISSIONER: – didn't realize to check (inaudible).

MR. KENNEDY: I sent it to everyone's emails.

THE COMMISSIONER: Okay.

MR. KENNEDY: Yeah.

MS. CHAYTOR: All right.

MR. KENNEDY: Except you, Commissioner.

THE COMMISSIONER: Well, we'll be adjourning shortly then to look at the report and so forth. Yeah.

MR. KENNEDY: Yeah. I think it's important to look at the report. You'll see –

THE COMMISSIONER: And it will give me an idea, a better idea of –

MR. KENNEDY: You'll see that Dr. Hart's approach is a different approach than that taken by Sergeant Lenehan. In fact, one I would refer to as an operational approach, what police officers do, how they approach it.

THE COMMISSIONER: Right.

MR. KENNEDY: Whereas Dr. Hart offers the different – he offers descriptions of threat assessment, what a threat assessment is, what a risk assessment is, he talks about his qualifications which are quite extensive.

And there were six particular questions put to him by myself, Commissioner, that he responded to as best he could. The letter only went to him yesterday morning and he was on a flight to England so he wrote this up overnight. And he indicates that obviously it's perhaps not as thorough as he would like it to be –

THE COMMISSIONER: Sure.

MR. KENNEDY: – but in terms of the time frame, it gives you a good idea, I think, of what he could testify to.

THE COMMISSIONER: Right. Okay.

Mr. Avis?

MR. AVIS: Thank you, Commissioner.

Again, we were looking at this together. And with respect to Sergeant Lenehan, there is no body before you that does protective service work. He's the only person that does that and I believe he's an expert in it.

I'm really trying to make his evidence very discrete. You know, I don't know if you've had an opportunity or what opportunity you've had to review, say, his CV. He could be a use-of-force expert and so on but we've had enough of those.

THE COMMISSIONER: Is he being brought in or is it a teleconference?

MR. AVIS: Well, he can do it by telephone or –

THE COMMISSIONER: He's going to do it by –

MR. AVIS: – you were mentioning videos, Skype?

THE COMMISSIONER: Skype.

MR. AVIS: Yes.

THE COMMISSIONER: But we don't need to get too fancy if we don't need to so ...

MR. AVIS: Right. And the objective is his evidence is really discrete.

THE COMMISSIONER: Right.

MR. AVIS: It's up to the door. He could – you know, leave him within his expertise, we've got no one who works in that kind of unit. And I believe he'll give a different perspective, practical perspective, to the threat and risk assessment which Constable Smyth did.

And so while there's a little overlap, he brings a very practical perspective that I think would be of great assistance to the Commission.

THE COMMISSIONER: Okay.

All right, so we'll – if it's allowed then, we'll be hearing his by teleconference.

MS. O'BRIEN: Madam Clerk has your binder there, Commissioner.

THE COMMISSIONER: Sorry?

MS. O'BRIEN: Madam Clerk has your binder. It arrived that fast.

THE COMMISSIONER: Oh, okay. Thank you.

The – sorry. Okay, well, we'll be – we'll break and look at Mr. – Dr. Hart's opinion and I'll consider – I don't think it should take too long unless I'm missing something. But what time do you want to break for? Until ...?

UNIDENTIFIED FEMALE SPEAKER: 1:30?

THE COMMISSIONER: Okay, well – 1:30, okay.

Yeah, all right. We'll break until 1:30.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Okay, we're ready to go.

Okay, Mr. Kennedy.

MR. KENNEDY: Yes, Commissioner, what I put before you and I apologize for the lateness but it's all been happening – it's all been happening this week fairly quickly, Commissioner.

It was after we received the report of Dr. Coleman I had very significant concerns about the extent to which Dr. Coleman had gone, and especially in relation to what appeared to be, to me, in my inexpert analysis of the confusion between risk assessments and threat assessments. Although as the – as you pointed out, Commissioner, on numerous occasions those are terms that have not been defined, I guess, with any great deal of –

THE COMMISSIONER: I have a lot – I have, I think at the present time at least three if not four different –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – interpretations in my mind from what various witnesses have said.

MR. KENNEDY: Yeah. So even though –

THE COMMISSIONER: And I'll be looking at that.

MR. KENNEDY: So even though we had – I was aware, obviously, of the JOPIS report, or I don't know if the report was in at that point, I knew that the –

THE COMMISSIONER: So which one are you ...?

MR. KENNEDY: JOPIS the OPP report. I knew that Mr. Avis was in contact with the OPP in terms of their – the justice protection unit, that that was looking at what I would refer to as an operational perspective.

So then quite frankly, Commissioner, we looked at, well, you know, we've got to find someone with the – to look at the academic side of this who – because we're going to have a sergeant of the OPP going up against an individual who's a former police chief and Ph.D.

And so I said there's only one – what we have to do is look at finding an academic who could hopefully provide some guidance to us. I was familiar with Dr. Hart's name from some previous discussions when I – back a couple of months ago but, in any event, there were never any discussions with him.

So we went to Dr. Hart. You'll see from the – I can tell you the sequence of events is that I contacted him, provided him a copy of Dr. Coleman's report. There were some discussions with him on Wednesday. Then on Thursday, yesterday morning, there was a letter sent to him outlining the six questions that he's reproduced in his report.

Recognizing that there wasn't a lot of time, there was a statement of facts done up which was provided to him with some references to the exhibits on the Commission website and there were also excerpts from the testimony of Constable Smyth provided to him. He, simply as you'll see from his report, didn't have time to deal with the –

THE COMMISSIONER: He's noted all that in the –

MR. KENNEDY: Yeah.

So I guess the question – I don't plan to go into the law, Commissioner. We've dealt with this on a number of occasions in terms of application of the Mohan criteria and the second step as outlined in White Burgess and confirmed in Bingley.

So in terms of the necessity of this evidence I would suggest to you it's as follows, Commissioner. From day one, almost within days of this incident, one of the questions or the primary – or one of the primary questions that seemed to surface among members of the public is: one, why did Constable Joe Smyth go out to Donald Dunphy's house over this tweet; and two, why did he go there on Easter Sunday alone?

So, Commissioner, those themes have been out there in the public from, as I think you're aware, from day one and they have been repeated throughout this inquiry. Up until last week we're continuing to hear questions: Well, why did Constable Smyth go out there? What was the urgency? Why did he have to go out there alone?

When we then get – and you've heard what the various police officers have said so I'm not going to go through that, but then – and you've heard Constable Smyth's testimony. But then, when we get Mr. Coleman or Dr. Coleman's report, it adds now a whole, I would suggest, a different scenario because Constable Smyth hasn't done anything right, according to Dr. Coleman. And that's an issue; we'll deal with his report somewhat later so –

THE COMMISSIONER: I'm not sure that's correct but you can –

MR. KENNEDY: That's –

THE COMMISSIONER: We'll look at it. Go ahead.

MR. KENNEDY: So basically I go to Dr. Hart, and you see the questions that have been outlined. And those questions, Commissioner, were put together very quickly; they were put together with a view to: Can he offer assistance in this inquiry.

If you look at his qualifications, Commissioner, I would suggest that he is one – he is qualified to give the opinion. We would seek to qualify him as an expert and I would suggest it would be in the areas of threat assessment, whether you call that threat management (inaudible) and risk assessment of violence –

THE COMMISSIONER: Let's go – sorry now, just go slowly.

MR. KENNEDY: I'm at page 2 of his report –

THE COMMISSIONER: Page 2, right.

MR. KENNEDY: And I would seek to qualify him to give expert evidence – expert opinion evidence.

THE COMMISSIONER: Where have you – are you taking that –

MR. KENNEDY: Page 2 under qualifications.

THE COMMISSIONER: No, are you taking it directly from his report now?

MR. KENNEDY: That's where I'm taking it from, yeah.

THE COMMISSIONER: And which paragraph?

MR. KENNEDY: Paragraph 2, you see qualification –

THE COMMISSIONER: With respect to my qualifications et cetera.

Okay, my work is – okay, so that’s a clinical forensic psychologist?

MR. KENNEDY: With a special focus on threat assessment.

THE COMMISSIONER: With a special focus on threat assessment.

MR. KENNEDY: They are also known as –

THE COMMISSIONER: Threat management, violence –

MR. KENNEDY: Risk assessment. Yeah.

THE COMMISSIONER: – risk assessment and violence risk management?

MR. KENNEDY: Yes.

THE COMMISSIONER: We have to be precise in these areas.

Okay. Go ahead.

MR. KENNEDY: So you’ll see, Commissioner, that he’s outlined his qualifications in terms of the – both in his curriculum vitae and also here he summarized them in this particular report. I would suggest to you that he certainly has the necessary qualifications to offer opinion evidence, that his evidence would be necessary in dealing with what I suggest to is still a very live issue at this inquiry in terms of what is a threat assessment.

And, Commissioner, one important – I’d like to jump ahead to just give you an example of what I think that Corporal –

THE COMMISSIONER: You know – sorry. Just hold that thought for a second, Mr. Kennedy.

I’m not sure that we’re talking here about that that opinion is necessary with respect to what is a threat as much as we’re talking about whether it’s reasonable for a police officer to take a certain approach to threat management. And it seems to me, again, I’m not foreclosing your suggestions, but it may come down to that we’ve got different opinions and I’ll be left with maybe two or three, for that matter, opinions on certain issues.

And I may have to apply, in addition to the opinions that I have, whatever I can do in terms of common sense and experience and add that to the mix and just decide, you know, how I’m persuaded one way or the other. It’s not going to be – I’m not passing this over to the expert with the highest qualifications or the issue on which we have the most experts agreeing; it’s not going to be a numbers game. You know, I’ve got to, I think, focus on some of these questions that you’re putting but I don’t want to lay them out.

MR. KENNEDY: But –

THE COMMISSIONER: But isn’t that, isn’t that really –

MR. KENNEDY: Yeah, well, Commissioner, we’ve had –

THE COMMISSIONER: – what I’m being asked to do?

MR. KENNEDY: We’ve had approximately 20 – I don’t know, I could be wrong, 20. It could be 10, could be 12 polices officers who have come in and said –

THE COMMISSIONER: I've forgotten too. I know we've had 50 witnesses.

MR. KENNEDY: Who have come in and say I would have done the same thing Constable Smyth did that day.

THE COMMISSIONER: Right.

MR. KENNEDY: Yet, the only individual or expert, if you can call him that at this point, without being qualified, is this Dr. Coleman who comes in and basically says: I have a Ph.D., so therefore I know more than the rest of these practising police officers, so therefore take what I have to say. That's the reality of it.

THE COMMISSIONER: Well, that's what – that's the realities, I guess, in most cases where you have experts called on both sides. But at the end of the day the trier of fact, whether it's the judge at the trial or the commissioner of an inquiry, has got to – I'm just –

MR. KENNEDY: Commissioner, I –

THE COMMISSIONER: – has got to make a decision. I'm just focusing now on when you say that an opinion is necessary, you know, in terms of the academic concept of what is a threat or what is a risk. I'm not sure –

MR. KENNEDY: No, the difference –

THE COMMISSIONER: I'm not sure that that's the – you didn't say risk, in your case you kept it a threat. Yeah, that's fine.

MR. KENNEDY: Yeah, the difference, Commissioner, is that – and this is what I would suggest to you, is that there's a confusion here between a personal risk assessment that takes place in criminal offences that are being investigated after something has occurred, as opposed to a threat assessment which occurs in the context of protective services.

THE COMMISSIONER: Yeah, I know that's – yeah, he's made that point in his –

MR. KENNEDY: And in fact he goes on to state it's –

THE COMMISSIONER: But I'm not – I'm not sure that I agree that it's that restrictive, you know. It may include that –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – but I'm not sure it excludes the types of things, the opinions that Dr. Coleman is giving by virtue of his experience if not –

MR. KENNEDY: And I'm not sure what experience he has. This is the problem with Dr. Coleman.

THE COMMISSIONER: Well –

MR. KENNEDY: We don't have the experience for him to be offering this kind of –

THE COMMISSIONER: Is he the one who's 12 years or something, 10 years as a chief of police in ...?

MS. CHAYTOR: In Moose – yes, in Moose Jaw.

THE COMMISSIONER: Moose Jaw.

MS. CHAYTOR: And he was also –

THE COMMISSIONER: You know, I’m –

MS. CHAYTOR: He was a police officer since 1969 –

MR. KENNEDY: And he’s (inaudible).

THE COMMISSIONER: Hmm?

MS. CHAYTOR: – with the Calgary – and he was with Calgary service as well.

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: It’s a while ago since I read it and I don’t recall but though I have –

MR. KENNEDY: But I guess on one basic principle, Commissioner, if the – and we went through this with Dr. Collins and I didn’t – you made, you know, you made your position clear on that. But how can it be fair? Because fairness is what we’re dealing with here and that you’ve made that point from day one.

The Commission is going to call an expert who we say is not an expert, yet we can’t be provided the opportunity to prevent – present our own expert on this issue? That, to me, seems somewhat unfair, Sir.

THE COMMISSIONER: Possibly it would be if that’s the way it was framed but the – your – I think, in determining what’s necessary, we’re at the stage now we’re not into – we’re not into the decision as to the qualifications. And at this stage, I’m just asking you to determine what the issue is, or at least one of the issues and –

MR. KENNEDY: The issue is we do not accept it –

THE COMMISSIONER: You’re saying –

MR. KENNEDY: We do not accept anything – we do not accept that Dr. Coleman is an expert in this area. We do not accept what he’s saying. We do not accept his objectivity.

THE COMMISSIONER: All right and I’ll hear your –

MR. KENNEDY: And so we want to counter that.

THE COMMISSIONER: I’ll hear your, I’ll hear your submissions on that at the appropriate time.

MR. KENNEDY: But Dr. Hart can give you evidence on what constitute what an expert should have in this area is one of the points I’m making, the qualifications that an expert should have in this area.

If we’re going to be dealing with threat assessments – Constable Joe Smyth worked in a Protective Services Unit.

THE COMMISSIONER: Well –

MR. KENNEDY: Threat assessment and threat management was part of what they did. It's different than normal police work and risk assessment.

THE COMMISSIONER: Does he deal with – does Dr. Coleman, I'm sorry, not – Dr. Hart deal with why we shouldn't hear from Dr. Coleman on the point based if not on his academic training as I said, based upon his experience.

MR. KENNEDY: He doesn't say you shouldn't hear from him but at – one of the questions I put to him and I know it's an unusual question but this is a very unusual situation we find ourselves in. I asked him: Could he comment on the appropriate – page 7, the relevance or appropriateness of the Dr. Terry Coleman's qualifications. And he does make certain –

THE COMMISSIONER: Page 7 –

MR. KENNEDY: Page 7 and 8 he outlines certain –

THE COMMISSIONER: Item 5 you mean, yeah.

MR. KENNEDY: He outlines certain areas –

THE COMMISSIONER: Yeah.

MR. KENNEDY: – from what he can see in terms of Dr. Coleman's opinion and Dr. Coleman's resume.

THE COMMISSIONER: Well, I mean – well, with respect to his first, his first sentence there, with respect to Dr. Coleman. his primary area of expertise appears to be in the field of management?

MR. KENNEDY: Yeah, it is.

THE COMMISSIONER: And when he's, what, got 10-plus years as a police chief? I mean –

UNIDENTIFIED MALE SPEAKER: Which is management.

MR. KENNEDY: It's management. That is management.

THE COMMISSIONER: But that's not only management, Mr. Kennedy. But anyhow –

MR. KENNEDY: Okay –

THE COMMISSIONER: – it will make for an interesting presentation. But let's –okay, what we're dealing with right now is whether we should be hearing Dr. Hart.

MR. KENNEDY: Correct.

THE COMMISSIONER: And the – I'm at the stage, you said you – we got to – it's necessary to hear from as to what is a threat. And –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – I'm wondering if that's in fact so.

MR. KENNEDY: Yeah, okay.

THE COMMISSIONER: You know, from an academic point of view, I'm wondering if it's really a matter of if he's called it would be to deal with the reasonableness of Constable Smyth's approach to –

MR. KENNEDY: No, actually, if I could just ask you to look at page –

THE COMMISSIONER: Yeah, okay. Go ahead.

MR. KENNEDY: That's page 5.

THE COMMISSIONER: Page 5.

MR. KENNEDY: What is a threat is a very important – Constable Smyth gave a lot of the same evidence and it seemed to be because, well, because – I'm not saying you're saying this, Commissioner, but because it's coming from Constable Smyth, he has to justify his actions.

Constable – or, Dr. Hart on page 5 before the heading 2, he talks about: One point is worth clarifying here. A common misconception is that threat assessment in the context of the protection of public officials, refers to the evaluation of utterances that communicate intent to harm those officials, a threat.

THE COMMISSIONER: Okay, now I just lost that. Was that – is that in page 5?

MR. KENNEDY: Page 5, just before the two.

THE COMMISSIONER: Is that the last paragraph or the second last?

MR. KENNEDY: No, the last part before two, the heading 2, Commissioner.

THE COMMISSIONER: Oh, okay. All right.

MR. KENNEDY: One point is worth clarifying there.

THE COMMISSIONER: Evaluation of utterances. Yeah.

MR. KENNEDY: A common misconception is that threat assessment in the context of the protection of public officials –

THE COMMISSIONER: Right.

MR. KENNEDY: – refers to the evaluation of utterances that communicate intent to harm those officials. Instead, threat assessment refers to the evaluation of a situation in which there is potential for harm to public officials which may or may not involve utterances that communicate intent to harm those officials.

That's an important distinction, Commissioner, because this whole issue of was it a threat, did – were they disconcerting comments, was it a tweet of concern –

THE COMMISSIONER: Yeah, but I have – has anybody said that that's all that is involved in the threat assessment, just looking at the utterances? I mean it's the utterance is in context, isn't it?

MR. KENNEDY: But the position seems to be put forward, and I keep hearing it from counsel for Ms. Dunphy and the coalition, that Mr. – Constable Smyth should not have gone out there that day, that he should have not gone in by himself, he should not have gone on Easter Sunday because there was nothing to go over, the tweet meant nothing; there was no reason to go out there, it wasn't a threat.

THE COMMISSIONER: Well, that's one submission, yeah, but others have taken different positions, as you have for example. But I'm not – I'm just looking now at Dr. Hart's and maybe we'll – it's more appropriate to wait until I hear from him if he's submitted.

But I'm questioning some of the things in his report here. If you go down, number two there, the second paragraph after number two: In the context of criminal investigations, the primary concern is to determine whether an offence has occurred and if so, to gather sufficient evidence to clear that offence.

Well, that –

MR. KENNEDY: Through arrest, charge or conviction.

THE COMMISSIONER: Sorry?

MR. KENNEDY: Through arrest, charge or conviction.

THE COMMISSIONER: Right, but –

MR. KENNEDY: Yeah.

THE COMMISSIONER: And, again, I recognize the short time in which Dr. Hart had to prepare the report but it seems to me that in the context of criminal investigations, the primary concern may include whether an offence is about to occur or is about to be committed –

MR. KENNEDY: Not in criminal investigations, Commissioner.

THE COMMISSIONER: Why not?

MR. KENNEDY: Because in a criminal investigation a complaint is made.

THE COMMISSIONER: Well, you're now – now you're referring to the formal criminal investigation.

MR. KENNEDY: In a criminal investigation a complaint is made and that's what's investigated. You're investigating after the fact as opposed to the protection of public officials where there's intelligence –

THE COMMISSIONER: That's in – yeah, you're taking a restrictive definition of criminal investigation.

MR. KENNEDY: I don't know other kinds. It would be a criminal invest –

THE COMMISSIONER: Sorry?

MR. KENNEDY: It wouldn't be a criminal investigation, Commissioner, unless there is an allegation that there's a criminal act.

THE COMMISSIONER: Well, I think in ordinary language if someone says the police officer has got to go out and check and make sure that because of A, B and C that an offence is not going to occur – for example, a threat of a public official – that will be viewed as part of police work, wouldn't it?

MR. KENNEDY: But there's a different – but the point that Dr. Hart is making here and a point that we still seem to, I would suggest, Commissioner, still hasn't been totally clarified and defined in this inquiry is the difference between policing on a daily basis, the general criminal investigation, as opposed to the public service or the protection of – excuse me, public officials, the protection of public officials that involves proactive policing or intelligence-led policing where you're trying to prevent a crime from being committed.

THE COMMISSIONER: And you may be correct there. That's dealt with in paragraph 3 there after the heading 2.

MR. KENNEDY: All my questions to Dr. Hart were put in the context of the protection of public officials because what we're saying, Commissioner, is that this is a specialized area that you can't simply apply, as Dr. Coleman has done, normal risk assessment type of scenarios.

THE COMMISSIONER: Right.

MR. KENNEDY: That's the issue here. All of the questions, if you look at them, are in the context of the protection of public officials. It's never like would you do a – what's a personal risk assessment, it's in the context.

And what we've seen here, and what Dr. Hart can tell you, is that this is an area that has evolved over the last number of years. It's now – in fact, last week, Commissioner, the – I forget the name of the FBI document that came down; Dr. Hart sent it to me. But there is a, not a managing threat violence but there's some kind of document that came down last weekend from the FBI in this whole area that we're talking about here.

THE COMMISSIONER: Right.

MR. KENNEDY: So it's –

THE COMMISSIONER: Some sort of public advisory, I suppose, is it?

MR. KENNEDY: No, similar to the manual of Targeted Violence but it's a different type, it's an FBI report –

THE COMMISSIONER: Right.

MR. KENNEDY: – dealing with the protection of –

THE COMMISSIONER: Public officials. Okay.

MR. KENNEDY: – whatever term they use. I'm not sure the term they use, Commissioner.

THE COMMISSIONER: Right.

MR. KENNEDY: So I'm suggesting to you that these are issues that are very real here that we need to clarify because Constable Smyth's actions are going to be judged, to a great extent, by the context in which he worked. As Justice Iacobucci said, you have to put yourself in the shoes of that police officer on the date in question.

THE COMMISSIONER: Not just the police officer; in the case of the alleged offender or person of interest as well.

MR. KENNEDY: Oh but, you know, yes, everyone. Yeah, I'm not just – I'm just using the police officer as an example.

THE COMMISSIONER: Right.

MR. KENNEDY: And so that how do we examine Constable Smyth's actions? We have to look at them not only in what other police officers would do but in terms of what does the academic or scientific literature teach us about this. And this is where Dr. Hart can talk about what's – this is not a situation that's unique to Canada; this is happening in the rest of the world.

We have an individual who was the – he's in all these threat assessments professional groups. And I think at some point, Commissioner, yeah, he was the – he is the editor of the *Journal of Threat Assessment and Management*, co-editor and editor of the *International Journal of Forensic Mental Health*, on the editorial board of nine other journals, has presented in more than –

THE COMMISSIONER: It looks like he hasn't spent much time at home, judging by the size –

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: – of the CV in recent years.

MR. KENNEDY: Yeah, so it's – well, these CVs seem to grow. We've seen the same thing I think –

THE COMMISSIONER: Well, I'm impressed that he was able to produce that paper while flying across the Atlantic. I have to confess I think I would be taking a nap. But anyhow –

MR. KENNEDY: So all of –

THE COMMISSIONER: If you could give me your –

MR. KENNEDY: Yeah, but –

THE COMMISSIONER: – submissions –

MR. KENNEDY: Yeah, well my position is, Commissioner –

THE COMMISSIONER: – and I'll hear from other counsel.

MR. KENNEDY: Yeah.

THE COMMISSIONER: Sorry, go ahead.

MR. KENNEDY: My position is, is that this can be – and I don't know what you're going to do with it at the end of the day; that's going to be up to you how you view the evidence. The weight to be given to any evidence is up to you.

THE COMMISSIONER: Let me tell you I'm going to try and avoid being left with a black hole, you know, in terms of any questions I might have.

MR. KENNEDY: I think there's a black hole here right now in terms of the confusion between risk assessment, risk management, threat assessment, threat management.

THE COMMISSIONER: And I should say one further thing, I'm not going to be restricted by semantics so it's going to have to be the, you know.

MR. KENNEDY: No, not the semantics but it's important to understand, I would suggest, Commissioner, the actual terms as they're used and specialized terms, you know, in terms of – risk assessment has been talked about here throughout this matter by various police officers but there's different kinds of –

THE COMMISSIONER: You know something, whatever they call it, Mr. Kennedy, I suspect at the end of the day – and I'll keep an open mind, I'll hear from Dr. Hart if this application is approved. But at the end of the day it seems to me, I've got to look at it with common sense and experience and say, you know, is this – was it reasonable for Constable Smyth to perform A, B, C, D, E or was it not?

MR. KENNEDY: Well, that's why –

THE COMMISSIONER: And, you know, the odd criticism of here or the odd criticism there is not going to sway –

MR. KENNEDY: That's where expert opinion can help you, Commissioner.

THE COMMISSIONER: – or carry the day.

Sorry?

MR. KENNEDY: That's where expert opinion can help you. What weight you give to it is up to yourself but –

THE COMMISSIONER: Right and this is where I have the feeling that it may come down again. I say I'll keep an open mind on it. It may come down to weighing –

MR. KENNEDY: Yeah, I agree.

THE COMMISSIONER: – the opinions that are given, you know.

MR. KENNEDY: I'm just concerned, Commissioner. Fairness and the principle of fairness in terms of – there is an expert who Commission has retained who will be giving evidence in terms of areas where we have concern and I'm just suggesting to you that that's – for that reason alone we should be allowed to answer that expert.

THE COMMISSIONER: Yeah. I would possibly – I'm not saying your argument is not sufficient to persuade me. I'm going to take a when I – after I hear from counsel, taking a short break to just think through it. But I would give more consideration to that submission if it were shown to me where the evidence that was put forward by Dr. Coleman was incomplete or inadequate.

MR. KENNEDY: Well, I agree.

THE COMMISSIONER: And I take it that that's part of what you're doing here, is you're pointing to –

MR. KENNEDY: He used terms like Constable Smyth was negligent. I mean that's –

THE COMMISSIONER: The, well –

MR. KENNEDY: These are terms for you to determine.

THE COMMISSIONER: Hmm?

MR. KENNEDY: I mean that's – to me, it's inflammatory. It questions the, not only the objectivity of the witness but we also now have another expert who's saying he doesn't even have the qualify – he may not have the qualifications to give these opinions.

So I'm suggesting that we – that's –

THE COMMISSIONER: Which would – which, again, might be –

MR. KENNEDY: I don't think it is.

THE COMMISSIONER: –might be going a bit far.

MR. KENNEDY: I don't think it is, Commissioner, based on –

THE COMMISSIONER: We'll see.

MR. KENNEDY: – on what I'm seeing –

THE COMMISSIONER: Well, we'll see. We'll see.

MR. KENNEDY: – of this Dr. Coleman.

THE COMMISSIONER: Yeah. So anyhow –

MR. KENNEDY: He does have a –

THE COMMISSIONER: Basic – in fairness, you're saying where the – where there's one expert to be called by the inquiry counsel or have to be put forward by inquiry counsel, you're saying your client wishes to supplement what comes from that particular evidence and possibly to counter some of the points made there.

MR. KENNEDY: But also I'm suggesting that the Mohan criteria are satisfied, that the second prong of that test as outlined in White Burgess and in Bingley is satisfied and that in all of the circumstances of this case, that the evidence is such that it could reasonably assist the Commissioner, yourself, in making the determinations where such a key issue here is: Why did he go there on that date in question? Why did he go there himself? Why didn't he pass it off to someone else? Why didn't he wait until later in the week?

These questions still reverberate, Commissioner, not only in this room but outside in the public. Every week we're reading articles about journalists criticizing what Constable Smyth did. So it's important that you have, I would suggest – and I'm not saying you don't – a full understanding or a full opportunity to consider all of the evidence put forward. And I'm suggesting that in those circumstances, the evidence of Dr. Hart can reasonably assist you in terms of making that determination.

THE COMMISSIONER: Okay.

All right. Thank you.

Mr. Simmonds, probably, I should hear from you I think first. Just one second now, I'll finish my note here.

And how is it you're proposing that he testify? By teleconference, is it? Sorry, Mr. Simmonds.

MR. KENNEDY: It's early in England so we would have to if we've – there's been some discussion of Skype.

THE COMMISSIONER: Well –

MR. KENNEDY: If there was a – if the right connections could be made as opposed –

THE COMMISSIONER: Right.

MR. KENNEDY: – to simply Wi-Fi that Skype could potentially work there. Yes.

THE COMMISSIONER: If Skype can't work, teleconference?

MR. KENNEDY: In terms – you mean telephone?

THE COMMISSIONER: Pardon?

MR. KENNEDY: Do you mean telephone?

THE COMMISSIONER: Right.

MR. KENNEDY: Yeah, well, that's what we'd have to do. Yes.

THE COMMISSIONER: Yeah, that's it.

MR. KENNEDY: Yeah.

THE COMMISSIONER: Okay, Mr. Simmonds.

MR. SIMMONDS: Mr. Commissioner, my comments will be brief. You know, we've – this has come on very quickly. We did get – I don't even have a hard copy of the report that Mr. Kennedy has provided. He did send it at 10:26 but it was hard to get a hard copy here in –

THE COMMISSIONER: Well, we can get you a hard copy in minutes if you want one.

MR. SIMMONDS: But I think I can make my comments without it, without the (inaudible).

THE COMMISSIONER: Yeah, it could have been obtained over lunchtime, though, if you needed it, Sir.

MR. SIMMONDS: You know we're not going to try and argue that Dr. Hart doesn't appear to be qualified. I mean what we did have is a copy of his curriculum vitae which is some – his curriculum vitae alone is 59 pages.

THE COMMISSIONER: Uh-huh.

MR. SIMMONDS: And I think it's fair to say, without having reviewed it in significant detail, just a very cursory review of it, that his opinion is the converse of Dr. Coleman's. We take no issue with Commission counsel deciding to go to Dr. Coleman but Dr. Coleman – we did not select Dr. Coleman or Mr. Massine – Massine, I believe it is.

We didn't even know it was really an issue until the report was received and Mr. Kennedy indicated that he felt it was an issue and now he's retaining his own expert. I think it's fair to say that there's no similar expert in the province that we would be able to turn to and, you know, I'm sure Mr. Kennedy would acknowledge this and I'm sure you've seen it, Mr. Commissioner.

But it is very clear in using an expert in litigation that to cross-examine that expert, to ensure that you have a meaningful ability to ask appropriate questions to determine both sides of an issue and flesh out the detail, that if you don't call your own expert, at least you have to be advised by an expert in that area to allow you to be properly prepared to cross-examine him. We don't have that luxury on the time frame. I believe, if I'm not mistaken the time frame Mr. Kennedy spoke of was Tuesday afternoon?

THE COMMISSIONER: Is it Tuesday? Oh, it's on a Tuesday, is it?

MR. SIMMONDS: Tuesday afternoon. You know this is Friday afternoon; this is Tuesday afternoon. As I said, I mean I'm not going to argue that this Dr. Hart, certainly from his CV and the articles he's written – Ms. Breen was able to get one article off, I mean: Risk Assessment of Public Figure Stalkers – he appears certainly to be qualified in this area.

But the – as quite often happens with respect to expert evidence, I expect – I suspect that there are competing camps and competing polls. And at the very least, we would want to be versed in how we could properly examine or cross-examine this expert to ensure that the relevant points come out that show any weaknesses, that show any divergence in opinion, that show any differences in conclusions that he's reached and the basis for those.

Go ahead, Commissioner.

THE COMMISSIONER: Mr. Simmonds, I'm just wondering, in terms of the impact upon your – I'll say your case, you know –

MR. SIMMONDS: Sure.

THE COMMISSIONER: – Ms. Dunphy's –

MR. SIMMONDS: Position.

THE COMMISSIONER: – case, how does it make a significant difference on many of these items if Constable Smyth made an error with judgment in, you know, ending up at Mr. Dunphy's house?

MR. SIMMONDS: Uh-huh.

THE COMMISSIONER: You know, it seems like the doctor – the things that Mr. Kennedy is concerned about are criticisms by Dr. Coleman of Constable Smyth going – like going alone at that particular time, et cetera. It –

MR. SIMMONDS: Well –

THE COMMISSIONER: Sorry, go ahead.

MR. SIMMONDS: Well, there are two points at issue here and I operate from the position that I haven't – we've been in here most of the time, I have not had time to review this information in detail. But from I understand there's going to be issue with and there is issue with respect to the steps taken to go where he ended up at the door of Mr. Dunphy's house that day, number one.

THE COMMISSIONER: Right.

MR. SIMMONDS: And number two, when he was inside, did he utilize the proper training, experience, knowledge, proper procedures, protocols when an issue arose as to whether he should have left before that. So there's two distinct issues here.

I understand that –

THE COMMISSIONER: Whether – well, sorry. Go ahead.

MR. SIMMONDS: I understand there is some crossover and overlap between the two experts but these are two very real issues. To make sure that we're getting what we believe to be the real, raw, hard information, you know, it would be foolish for me to say we're equipped to try and examine or cross-examine that expert right now.

I also suspect it'd be fair if I said, well maybe I can phone up Dr. Coleman and he'll give me a hand, but Dr. Coleman is not my witness, Dr. Coleman doesn't know me and he's likely not – he's going to be very reluctant to provide me with information before we start to examine or cross-examine.

THE COMMISSIONER: Yeah, okay.

So I understand you feel that you need some assistance –

MR. SIMMONDS: Absolutely.

THE COMMISSIONER: – some opinion in terms of preparing the proper questions for –

MR. SIMMONDS: (Inaudible.)

THE COMMISSIONER: – challenging Dr. Hart.

MR. SIMMONDS: Yeah. And there's two questions that come with this and I don't know the answer to these. I did have a brief discussion with counsel, Commission counsel, lunchtime but – and I think you've perhaps answered one of them because you said you're going to take a short break and hopefully come back and give your decision this afternoon so – because we're on such a short time frame that –

THE COMMISSIONER: I know, I know.

MR. SIMMONDS: – you know, we've got to start to work from whatever you decide –

THE COMMISSIONER: I'm treating this as though it were a jury trial basically. And you have to make your evidentiary decisions fairly quickly or the thing could be prolonged forever.

MR. SIMMONDS: Yeah.

And the second thing is: Who pays for this? You know, I'm looking at Mr. Kennedy now and seeing if it's coming out of his wallet for Mr. Hart, for Dr. Hart. But we know who paid for the matter where we were going to call Dr. Czarnuch, that the Commission gave us –

THE COMMISSIONER: A preliminary amount to –

MR. SIMMONDS: A preliminary amount to –

THE COMMISSIONER: Right.

MR. SIMMONDS: We got it, we paid him and that's all fine and dandy. I don't know who's paying for Dr. Hart and I don't know who would pay if we were to say we were able to – Dr. Hart's out of British Columbia, say we could get someone out of Alberta or Ontario that has some of this area of expertise to equip us to properly examine who is going to pay for that. And I expect asking someone to drop whatever they're doing at the time –

THE COMMISSIONER: Okay, right. You're talking about practical things and frankly you might have – as you might have gathered, I have a degree of reluctance to get into moving three or four or five months past the time when this report –

MR. SIMMONDS: No –

THE COMMISSIONER: – is supposed to be submitted. I don't think it's of any benefit for the general public and I don't think it's any benefit for Ms. Dunphy, I don't think there's any benefit for Constable Smyth to have this dragging on so I'm going to deal with it.

But what I was getting – wanted to get at is if I accepted everything that Dr. Hart sets out in his report –

MR. SIMMONDS: Okay.

THE COMMISSIONER: – how does that make a significant difference to the position that you're putting before the inquiry or, you know, you have been putting and will continue to put before the inquiry? The –

MR. SIMMONDS: Again – okay, go ahead. I'm sorry.

THE COMMISSIONER: It strikes me that the crucial thing here is the decision regarding the credibility of Constable Smyth and did things occur the way he sets out.

MR. SIMMONDS: That's one of the issues we've taken.

THE COMMISSIONER: All right.

MR. SIMMONDS: That we don't accept his –

THE COMMISSIONER: Well, what are the other issues in terms of –?

MR. SIMMONDS: But isn't it a holistic approach here? You know, are we not – one of the functions that this Commission has is to comment upon the propriety of going up there the way he did, you know.

THE COMMISSIONER: There may be but I tell you now, it's not enough because there might be a less-than-perfect recommendation and that sort of general –

MR. SIMMONDS: No, but I –

THE COMMISSIONER: – and that sort of general point to warrant, you know, an extended delay or additional –

MR. SIMMONDS: No and I'm not asking –

THE COMMISSIONER: – significant cost in the inquiry.

MR. SIMMONDS: I'm not asking for an extended delay, I'm asking –

THE COMMISSIONER: You're not asking for it but, Mr. Simmonds, my eyes are wide open and I've been there and I know what happens. And I can tell you probably there will be a delay if you're –

MR. SIMMONDS: Well –

THE COMMISSIONER: – if you're seeking to retain an expert. You're not going to have him in here by the 10th of March, are you?

MR. SIMMONDS: I would be –

THE COMMISSIONER: Him or her I should say.

MR. SIMMONDS: Today's the 3rd; it would be unique circumstances where you could get someone with the necessary credibility and expertise, experience qualifications.

THE COMMISSIONER: Just before university exams, if he is teaching at a university –

MR. SIMMONDS: Then I'll be coming into –

THE COMMISSIONER: – et cetera, et cetera.

MR. SIMMONDS: Well, there's another month before university exams so I don't think that would be a huge worry. But it is –

THE COMMISSIONER: Well, he's preparing the exams now.

MR. SIMMONDS: But it is quite possible that someone like that, if we were given a modest period of time, we could get in contact with, get the necessary advice, have them look at it in a very short period of time.

I mean I think the report that Mr. Kennedy was referring to that came down by the FBI is – just to give an idea of how much material there is on this: *Making Prevention a Reality: Identifying, Assessing and Managing the Threat of Targeted Attacks*. I mean it's an inch thick. I have –

THE COMMISSIONER: Anyhow, anyhow that's my – you understand my point here now. Whereas if I look at, if I look at the impact of these matters on Constable Smyth's side, they may be of much greater significance –

MR. SIMMONDS: Significance, I agree.

THE COMMISSIONER: – because of the effect they might have on future career and so forth, you know –

MR. SIMMONDS: I agree.

THE COMMISSIONER: – and the reputation in the community and so forth. So I’m just balancing.

MR. SIMMONDS: I understand.

THE COMMISSIONER: As part of the process I think I have to engage in, I have to consider the significance, the importance of the material. And if I were to conclude that Dr. Hart should be heard –

MR. SIMMONDS: Yeah.

THE COMMISSIONER: – and he’s heard and Dr. Coleman is there, you might feel that you would rather have more – sorry, go ahead.

MR. SIMMONDS: But you have to add, I mean –

THE COMMISSIONER: You haven’t heard me all here but, yeah.

MR. SIMMONDS: But Mr. Kennedy has made it very clear, he’s going to have a two-pronged attack on Dr. Coleman and the first one –

THE COMMISSIONER: First, his qualifications and it’s like every –

MR. SIMMONDS: He’s not even qualified – not even qualified.

THE COMMISSIONER: – like every case. Okay, so they’ll have to be dealt with. You’ll –

MR. SIMMONDS: But that, but that’s a bit – if indeed –

THE COMMISSIONER: You’ll deal with that, I’m sure.

MR. SIMMONDS: If indeed that happens –

THE COMMISSIONER: Right.

MR. SIMMONDS: – and you say he’s not qualified, then, we really are left in a position that – and an unfair position – that we don’t have any of the assets necessary to properly examine –

THE COMMISSIONER: Well, I don’t know, you have the – whatever Dr. Hart says as being the ideal PSU approach. You have common sense and experience in terms of –

MR. SIMMONDS: What do I hold that up against?

THE COMMISSIONER: Sorry?

MR. SIMMONDS: What do I use as a ruler? What do I use to measure that as appropriate, a proper, comprehensive correct statement? Where is my yardstick that I can go to? Whereas if I have another expert or at least if I have the advice and ability to cross-examine Dr. Hart, based upon being properly prepared for it, then, yes, I think there’s a far greater chance.

THE COMMISSIONER: Well, I think, and you're probably as well qualified as Dr. Hart to talk about whether or not it makes sense for an officer to show up on an Easter Sunday afternoon in rural Newfoundland.

MR. SIMMONDS: Well, there seems to be – to be fair to Mr. Kennedy's point, that seems to be a real issue that we've been hearing.

THE COMMISSIONER: And it will have to be dealt with if a decision is to go with Dr. Hart.

MR. SIMMONDS: Yeah, but I –

THE COMMISSIONER: But anyhow that's your – go ahead.

MR. SIMMONDS: I don't intend to belabour it.

THE COMMISSIONER: Sure.

MR. SIMMONDS: But that's where we're coming from. And I'd just take one of the quotes from Ratushny that I think touches on the fairness issue and this is on –

THE COMMISSIONER: What page is that?

MR. SIMMONDS: – page 241.

THE COMMISSIONER: Right.

MR. SIMMONDS: Or 242-41, Marshalling the Evidence: “The challenge in doing so was described recently by the Supreme Court of Canada:

“Unlike an ordinary lawsuit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure (because commission counsel, at least at the outset, may have little to disclose) and relaxed rules of evidence. The hearings will frequently unfold in the glare of publicity. Often, of course, at least some of the participants will know far in advance of the commission counsel what the documents will show, what the key witnesses will say, and where ‘misunderstandings’ may occur. The inquiry necessarily moves in a convoy carrying participants of widely different interests, motives, information, involvement, and exposure.”

And then it goes on: “A commission of inquiry may not have the benefit of civil pre-trial procedures but it has the power to compel the production of documents and the testimony of witnesses. These powers are often persuasive in encouraging cooperation from parties and witnesses prior to the actual hearings.

“In marshalling the evidence for presentation at ... hearings, commission counsel should strive to avoid them becoming a ‘multi-party examination for discovery’ by providing maximal pre-hearing disclosure. A commission of inquiry should be governed by the principle of complete and open disclosure in the absence of exceptional circumstances. In some circumstances, this may” not only be desirable but be “required by the principle of fairness. This requirement was examined recently in relation to a New Brunswick inquiry into allegations of sexual abuse in the Kingsclear Youth Training Centre.”

THE COMMISSIONER: I would say that – and probably from what I’ve seen so far in other inquiries, I’d rank this one up there if not – well, I’d say at the top but if not, pretty close to the top in terms of the extent of the disclosure that’s been given –

MR. SIMMONDS: Oh.

THE COMMISSIONER: – to counsel up to this point. Now –

MR. SIMMONDS: And this is not a criticism of Commission counsel.

THE COMMISSIONER: Yeah, but just to, just to finish my point there, we are now getting near the closing days, hopefully, after a lengthy period of preparation and hearings.

MR. SIMMONDS: Uh-huh.

THE COMMISSIONER: And we’re now down to where the – we have a report which is late in the game but that’s explainable by the fact that the report of the experts – two experts that were requested to prepare it by Commission counsel, was not ready before last week, I guess it was, and for various reasons. But anyhow, there’s still been time to look at that from your perspective.

Now Mr. Kennedy is making a case for pointing out that because of certain criticisms of his client he would like to have another expert. And, again, I don’t see, I’m having difficulty seeing where there would be very much in the way of prejudice to yourself or to Ms. Dunphy, you know.

MR. SIMMONDS: If you mean by prejudice, Mr. Commissioner, strictly that we don’t accept Officer Smyth’s rendition of what happened in the confines of that living room –

THE COMMISSIONER: Right.

MR. SIMMONDS: – I would agree with you.

THE COMMISSIONER: Right.

MR. SIMMONDS: That these experts, to some degree, are not going to impact that.

THE COMMISSIONER: Right.

MR. SIMMONDS: But from the large point of view of how this whole matter unfolded, how her father has been portrayed, how – what took place in that room, the evidence of leading up to that and the evidence that I understand – and it’s only a bare understanding of what Dr. Hart is going to say – is going to be at odds largely with what Dr. Coleman is going to say. That’s important if, indeed, we want to put forward the full picture and we want to make sure we have an educated part in presenting the full picture.

I’m not, I’m not asking you to delay this. I understand and you’ve made it very clear that timing is important here, cost is important. All we’re asking is that if, indeed, Dr. Hart is going to be granted the right to give evidence here, that we be given some modest period to be able to prepare for that. Now that may mean moving Dr. Hart’s testimony from Tuesday afternoon to Thursday or Friday of next week, but –

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. KENNEDY: Yeah, he can't do it on Friday because he's travelling back to Canada and there's a 3½ hour time difference, Commissioner. So by the time you actually got his testimony, 9 o'clock here, it will be 1 o'clock in England and he'll be on a plane.

MR. SIMMONDS: I understand. Well –

MS. CHAYTOR: And Thursday is Phase –

THE COMMISSIONER: Thursday is a seminar on Phase 2 symposium there, yeah.

MR. SIMMONDS: Well, therein lies –

MR. KENNEDY: I mean Friday – to be fair, I mean Friday would be, if there was a way of doing it on Friday. I mean Tuesday is, you know, we've only contacted Dr. Hart in the last three or four days so I mean we're just trying to fit it into the Commission schedule. I wouldn't mind an extra couple of days but –

MR. SIMMONDS: Yeah, and I'm not trying to screw up the Commission's schedule but I don't think in any real way we can be prepared, in what the legal definition of that is, to deal with the evidence of Dr. Hart. And that becomes even more an extenuating – or a difficult circumstance if indeed your ruling –

THE COMMISSIONER: Well, it – again, and I point it out, what is it or where is it you feel that Dr. Coleman's report does not – is not adequate for your purposes?

MR. SIMMONDS: Well, twofold; firstly, Mr. Kennedy is going to try and have him disqualified.

THE COMMISSIONER: Well, that's fine.

MR. SIMMONDS: No, I know that.

THE COMMISSIONER: That's –

MR. SIMMONDS: It's the name of the game.

THE COMMISSIONER: You know that's it.

MR. SIMMONDS: That's the name of the game. I understand.

THE COMMISSIONER: Suck it up as they say.

MR. SIMMONDS: I can –

THE COMMISSIONER: Get over it, you know.

MR. SIMMONDS: (Inaudible) build a point, yeah. I hear you.

THE COMMISSIONER: Get past it.

MR. SIMMONDS: But he is going to try and do that. If he is successful in doing that, we are left with one doctor's evidence and we're not even going to be in the position to be fully prepared to effectively and meaningfully cross-examine him.

Now, that's what it's going to mean at the end of the day, Commissioner. You're going to have one piece of evidence before you, it's going to be Dr. Hart and it's really going to be uncontested evidence because –

THE COMMISSIONER: You're going to have, you're going to have Dr. Coleman as well.

MR. SIMMONDS: No, if Dr. Coleman gets ruled – if indeed his qualifications are limited or he is not granted expert status, then you're going to be left with one doctor and you're going to be left with counsel –

THE COMMISSIONER: It will be like the Germans, there will be – we got three Ph.Ds. it will be doctor, doctor, doctor. So, yes, you can find one like that. But okay, I got your –

MR. SIMMONDS: We'll hear what –

THE COMMISSIONER: I hear you, Mr. Simmonds. Thank you.

MR. SIMMONDS: You're welcome.

THE COMMISSIONER: I may consider it. So I'm not going to break before I hear the – wait, sorry, Mr. Simmonds, I forgot to ask you. Where do you stand as far as Mr. Avis's proposed expert is concerned?

Are you objecting – that's all I want – are you objecting to his being heard?

MR. SIMMONDS: Could I have one moment?

THE COMMISSIONER: Sure.

MR. SIMMONDS: Ms. Breen makes a fair point, it is. It's just the same concern now – could we much quicker, is it possible, perhaps, in a shorter timespan get prepared to deal with Mr. Avis' expert, yeah. But the same issues that I've set forth which apply, would apply too, you know.

THE COMMISSIONER: All right.

Now, Mr. Avis, you're applying, I take it, to have Mr. Linehan –

MR. AVIS: That's correct. That's Sergeant Linehan –

THE COMMISSIONER: We have – I know where Mr. – I take it, Mr. Simmonds is objecting, but not violently. It's more; it's more a request for more time.

MR. AVIS: Well –

THE COMMISSIONER: Go ahead.

MR. AVIS: As I know, I was told, I believe, that Sergeant Linehan is tentatively scheduled for Friday. It was my intention to be discussing with Sergeant Linehan over the weekend the matter, but now it's been moved to Friday and I have half a dozen fires to put out.

But I did mention to Sergeant Linehan –

THE COMMISSIONER: I'm not – we're not –

MR. AVIS: I'm sorry, I –

THE COMMISSIONER: I'm not following things here.

MR. AVIS: Forget it, sorry.

THE COMMISSIONER: Okay.

MR. AVIS: Unnecessary background.

I spoke to Sergeant Linehan, I said it may be, you know, maybe that counsel may wish to speak to him. He's open to the idea; it's just the question of how it may be achieved.

So if Mr. Simmonds really wants to talk to Sergeant Linehan, we might be able to set up a teleconference to that effect. But it has to – it really relies on Sergeant Linehan's ability to be free to do it.

THE COMMISSIONER: But that has to do with preparing –

MR. AVIS: Yes, that –

THE COMMISSIONER: – for the interview, preparing for the cross-examination of Linehan, is it, if he's admitted.

MR. AVIS: Well, it may also, I don't know, be of some assistance with – I'm just putting that out there. That's all I can do, but he indicated a willingness. It would just be how we go about it and when we can do it.

THE COMMISSIONER: But anyhow, he knows that he's right now scheduled to appear, if admitted –

MR. AVIS: Yes, for Friday –

THE COMMISSIONER: If approved –

MR. AVIS: – morning, I was told.

THE COMMISSIONER: – on Friday, is it?

MR. AVIS: Yes. And he can do Skype, whatever.

THE COMMISSIONER: Right.

MR. AVIS: It's going to work out. Preferably, it would be nice to see pictures –

THE COMMISSIONER: So you're talking about what might be involved in terms of assisting Mr. Simmonds and Ms. Breen to prepare for the examination of Mr. Linehan on – or Sergeant Linehan on Friday.

MR. AVIS: And it may be of some assistance to talk to him about – in some kind of assistance with Dr. Hart. We're just trying to, you know, he could maybe make –

THE COMMISSIONER: Well, that would be up to –

MR. AVIS: – make the arrangement that weekend. That’s why my unnecessary preamble was he has time, but we can use it because I have to try to –

THE COMMISSIONER: Yeah, let’s hear Mr. Simmonds talk about that if I agree to it. Anyhow –

MR. AVIS: Okay.

THE COMMISSIONER: – you’re asking for – you’ve submitted the brief report of Sergeant Lenehan with the covering letter from Chief Hawkes, is it?

MR. AVIS: Yes.

THE COMMISSIONER: Or Commissioner Hawkes, I guess, is the term, to Chief Janes and the report of Patrick Lenehan being a total of nine pages and with a CV. And I’m hearing from Mr. Simmonds that as far as the contents is concerned, he’s not concerned other than that he doesn’t feel he’s had enough time to adequately –

MR. SIMMONDS: Certainly not as concerned as we are with respect to Dr. Hart.

THE COMMISSIONER: Okay. So I take it there was no other counsel that has a concern with hearing from Dr. Lenehan – or from, sorry, from Sergeant Lenehan, is it? No other counsel is expressing ...?

Mr. Kennedy, you have no problem with ...?

MR. KENNEDY: No.

THE COMMISSIONER: All right. Okay.

If there’s anything further you want to say, Mr. Avis.

MR. AVIS: Well, just a few points, Commissioner. Just a few –

THE COMMISSIONER: I’m going to break in a few minutes and then decide on both.

MR. AVIS: Sure.

I just point out on pages 1 and 2, you know, JOPIS is “a specialized unit to ensure the safety and protection of the men and women responsible for the administration of justice in Ontario.” We need – I think it would be of great benefit to the Commission to hear from someone who pretty much works every day in that unit.

There are other questions that inquiry counsel have asked: Why do they have such a thing? Do we need such an entity? I haven’t sent him, you know, all the materials, but in speaking to him, he’s able to field questions on the run, you know, like maybe as to the future of the unit, how it might look, I mean, in this province. He can answer some questions and I have –

THE COMMISSIONER: So long as he can do it within the time constraints that we have is fine. We get into the –

MR. AVIS: Well, if I can –

THE COMMISSIONER: It would – yeah, sorry, go ahead.

MR. AVIS: But my intention there is, the reason I've done it the way I've done, I assure you that my intention is to, while I say throw him up on the stand or put him on the phone, I'm going to try and be finished in a half an hour and let other – not go through all the variations on the facts because that only takes time, and let all counsel – if I'm permitted to lead him, then counsel will have – let's say it's a morning – you know, two-plus hours –

THE COMMISSIONER: Well, you'll be permitted to lead on things that are non-controversial or non-contested issues.

MR. AVIS: Right, well, it won't take that long.

THE COMMISSIONER: But any of the vitally –

MR. AVIS: Yes.

THE COMMISSIONER: – significant differences that you might have, you know, we'll do it in a normal way.

MR. AVIS: Yes.

But anyway, in particular, you know, and I think to pick up on Mr. Kennedy's point, there is something unique about the way they do things. I realize – I'm going to use the word, never mind the definition, a threat or risk assessment. All officers do it, but they have a different approach and a different reason and there's reasons why they don't wait that don't necessarily apply to other kinds of investigations. We haven't heard from anyone who works in a preventative unit and so on.

THE COMMISSIONER: Well, you've heard from Constable Smyth.

MR. AVIS: Well, yes, but –

MS. CHAYTOR: (Inaudible.)

THE COMMISSIONER: Sorry?

MS. CHAYTOR: And Doug Noel and also Sergeant Benoit.

THE COMMISSIONER: Benoit. Yeah.

MR. AVIS: Right, but that's the RCMP who are under constant criticism, you know, like they're in partnership.

MS. CHAYTOR: No, Benoit is RNC.

THE COMMISSIONER: Correct. Thank you.

MR. AVIS: Same thing. Sorry I – you know, one of my points is the public wants to – does not necessarily trust – nothing to do with you, Sir, but the public concern is the RCMP and the RNC are looking after each other, so we step outside. That's what we've done here. It brings, I think, an objectivity to the issue and will be of great assistance to the Commission whichever way you go with it.

I don't plan to go through the law 'cause I can't possibly assist you in the law. I think Sergeant Lenehan has, you know, an extensive CV, which is a practical CV. This is a man who does this on a daily basis and I believe for that reason.

Now, I would also just like to comment on Dr. Hart. You know, we do have – I guess the Commission has hired a – let's just call them big CV's, heavy hitters, you know, people who have the substantial backgrounds. And so part of the discussion was we'll bring a person with some practical background and we support Mr. Kennedy's, but Dr. Hart will also bring help, like I guess with the academic perspective as well. You know and – sorry?

UNIDENTIFIED MALE SPEAKER: Coleman has both, doesn't he?

MR. AVIS: Yes, and Coleman has, as my friend – Coleman has both, you see.

THE COMMISSIONER: Hmm?

MR. AVIS: Coleman has some experience and academic, so we're trying to combine the two; it just happens to come in two people.

Thank you, Commissioner.

THE COMMISSIONER: All right.

Okay, let's break. We'll take – we'll say it's for 15 minutes. It may be a few minutes longer.

MR. DROVER: Can I –?

MS. SHEEHAN: All rise.

This Commission of Inquiry is now recess.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

THE COMMISSIONER: Sorry.

Okay, do we have everybody here?

This is my decision on the application by Mr. Kennedy, counsel for Constable Smyth, on the – for the admission of an expert opinion report by Dr. Stephen Hart, following the report by Dr. Terry Coleman, which was provided to counsel, I think, on – do we have a date? February –

MS. CHAYTOR: February 26.

THE COMMISSIONER: – 26, 2017, which was a report on the preparation by Constable Smyth for a personal risk assessment prior to his attendance at Mr. Dunphy's house and his attendance at the house leading up to Constable Smyth's use of lethal force. This is a report requested by Commission counsel, the one from Dr. Coleman.

And Constable Smyth has requested leave to admit the evidence of Dr. Hart, a clinical forensic psychologist with a special focus on threat assessment – give me a second now until I refer to the opinion so I get it right – a special focus on threat assessment, a field also known as threat management, violence risk assessment and violence risk management.

And I have noted Dr. Hart's extensive curriculum vitae, which notes his education and training and many publications, and I think Mr. Simmonds pointed out one in particular which appears to be relevant dealing with the – what was the topic again? The stalking of public officials, wasn't that ...?

MR. SIMMONDS: "Risk Assessment of Public Figure Stalkers."

THE COMMISSIONER: Public figure stalkers. Okay, we have a new entity at large, very good. At least a new title for them; I think they've been around a long time.

Counsel for Ms. Dunphy has requested more time to consult with experts and prepare questions to test the qualifications of Dr. Hart and to properly prepare for cross-examination. Counsel for Mr. – for Ms. Dunphy received the report, as I noted, on February 26, so there have been approximately five days during which there could be preparation. And Dr. Hart is proposed to testify on – what date are we talking about?

MS. CHAYTOR: Dr. Hart is going to testify on March 7. The report of Coleman was received February 26. The report of Dr. Hart was received today.

THE COMMISSIONER: Just today, I was going to note that today.

Sorry, Ms. Breen, were you about to say something about that?

MS. BREEN: I was just going to note that, Mr. Commissioner, we received Dr. Hart's preliminary report today. I think you said –

THE COMMISSIONER: Oh, yes, that was coming up and was just noted by counsel.

The report of Dr. Hart, that was my next sentence, was only received today and I have to apply the criteria for admitting expert evidence as set out in Mohan and White Burgess, and recently confirmed in Bingley, all of which have been previously cited in rulings before the court – before the inquiry, I should say.

The two key issues – or three key issues, really, are the relevance and necessity of the opinion, and whether the probative value outweighs any potential prejudicial effect.

Dr. Hart has proposed he'd be available to be heard on March 7, 2017, so no significant delay will arise which might negatively impact the inquiry, the inquiry process. The evidence which Dr. Hart will provide challenges the qualifications of Dr. Coleman insofar as Dr. Coleman may give an opinion on violence/risk/threat assessment, particularly in the context of the protection of public figures. And I noted that violence/risk/threat is yet another title for the classification of what is involved here and maybe that may be the fourth possible different definition I've had with respect to threat and risk.

But in any event, I accept that Dr. Hart's opinion will be relevant and necessary and that it assists me in understanding – or it should assist me in understanding the nuances of threat assessment in the context of preventing violence against public figures. I am satisfied also that the probative value of the report will outweigh any prejudicial effect. I must note that the prejudice to Constable Smyth, if it is not admitted, would be significant, as I mentioned, regarding the impact

upon reputation, career and so forth, while as far as I can see the impact upon the case presented by Ms. Dunphy would not be that significant.

I am not prepared to delay the hearing of Dr. Hart to permit counsel for Ms. Dunphy to have more time to prepare; I am, however, prepared to allow counsel a reasonable amount to be established with Commission counsel, or to be established in consultation with Commission counsel, to permit the obtaining of advice to assist in the preparation of appropriate questions for the examination of Dr. Hart and the testing of his qualifications. And counsel for the Commission, as I say, may be contacted to establish what would be reasonable in these circumstances.

So my ruling is that the opinion of Dr. Hart will be admitted and we'll proceed to hear from him on – what's the date again? – March 7, and I propose to reserve further to prepare full written reasons in this regard.

With respect to the second application, which is an application for the admission of opinion by Sergeant Lenehan taken by Mr. Avis for the RNC, I'm requested by counsel for the RNC to admit the testimony of Sergeant Lenehan regarding whether the threat-risk investigations of Constable Smyth were appropriate in the circumstances. I'm satisfied the opinion is relevant and necessary and that it would help me better understand what is involved in threat and risk assessment in the context of the protection of public figures; and I am also satisfied the probative value outweighs any potential prejudicial effect. And again, I will withhold – reserve a decision in this matter to permit full written reasons.

So is there anything further, any questions before I adjourn?

MR. KENNEDY: I just have one issue, Commissioner, that is not related to this.

THE COMMISSIONER: Go ahead.

MR. KENNEDY: Yes, Commissioner, we will note that Constable Smyth is scheduled to take the stand, to be recalled, on Monday morning.

THE COMMISSIONER: Right.

MR. KENNEDY: And I've had some discussion with Commission counsel, I'm sure you're also aware, but I would suggest that –

THE COMMISSIONER: Don't always assume that, Mr. Kennedy. They're fairly coy in what I get released – in what is released to me and what's not.

MR. KENNEDY: Yeah, in terms of the cross-examination, I would assume that it would be circumscribed as necessary to the credibility relating to those particular text messages that we are dealing with.

THE COMMISSIONER: All right, there's that – I guess there's only one issue that I can think of which has to do with the cellphone, but that counsel –

MR. KENNEDY: I have no problem, but he'll answer that, yes.

THE COMMISSIONER: – at some point to explain where it is or what happened –

MR. KENNEDY: Yes.

THE COMMISSIONER: – or what happened to it. Is that ...?

MR. KENNEDY: Yeah.

MS. CHAYTOR: That's right. It's to speak to the BBMs, which were discovered after he –

THE COMMISSIONER: Right, I understand that. So, but –

MS. CHAYTOR: Yeah, so there's four lots of BBMs. And it's also with respect to the existence of the phone or not and what happened to the phone and any issues related to why the BBMs were deleted or any explanation along those lines.

MR. KENNEDY: Yeah.

THE COMMISSIONER: Right.

MS. CHAYTOR: I've spoken with Mr. Kennedy. He understands that.

THE COMMISSIONER: And Mr. – see, I hadn't been told that, Mr. Kennedy.

Mr. Simmonds, do you have any comments in that regard? Mr. Kennedy – or Ms. Breen, I should say, whichever one of you. Mr. Kennedy is seeking to have the examination of Constable Smyth on recall restricted to – limited by the issues that have been discussed there.

MR. SIMMONDS: In the process of cross-examining, it may be necessary to refer to events that have gone on previously or positions put forward previously to contrast them as to what's said in the BBM messages.

THE COMMISSIONER: Well, you know, what's reasonable in that regard.

MR. SIMMONDS: Yeah.

THE COMMISSIONER: But we're not going to go back for –

MR. SIMMONDS: No –

THE COMMISSIONER: – you know, a day or two days of re –

MR. SIMMONDS: No, no.

THE COMMISSIONER: – cross-examination again –

MR. SIMMONDS: I understand.

THE COMMISSIONER: – on points that have been fully dealt with. So –

MR. SIMMONDS: I understand.

THE COMMISSIONER: So that – yeah, okay.

So there's no problem there? All right.

So, Mr. Kennedy, that will be the understanding, that Constable Smyth is to be recalled to be questioned concerning the BlackBerry messages, five or seven of them?

MS. CHAYTOR: I think there are four that were –

THE COMMISSIONER: Oh.

MS. CHAYTOR: They were the ones discovered with Doug Noel, Heather MacLean, a friend of Mr. – or Constable Smyth's whose name is not released, and the fourth one is escaping me right now, but I believe there are –

UNIDENTIFIED MALE SPEAKER: Tim Buckle.

MS. CHAYTOR: Tim Buckle, right, so Tim Buckle.

THE COMMISSIONER: So you're – they're four groups of texts, are they?

MS. CHAYTOR: Correct.

THE COMMISSIONER: Yeah.

MS. CHAYTOR: BBMs, yes.

THE COMMISSIONER: Yeah.

MS. CHAYTOR: Yes, so it's just the content with respect to those BBMs and the issues around the phone and that's it. But there are – and I think Mr. Simmonds's point is that cross-examination, if there were any inconsistencies in that with other evidence that's already been given by Constable Smyth.

MR. KENNEDY: I think, again, we've got to restrict that somewhat. My client was on the stand for six days, Commissioner. If this had been – if we had known about this in the normal course of events, it would have been asked about during there.

THE COMMISSIONER: What is the last point that Mr. Kennedy is concerned about?

MS. CHAYTOR: The last point was – Mr. Simmonds's point is that, for example – and I don't know what he is thinking, but I'm thinking anything that is in the BBMs that may suggest inconsistency with what Constable Smyth has already said that he would be able to put the prior evidence to him. That's what I understand him to be saying, but it would be limited to the content of those BBMs and not other issues. That's what I think the point is.

THE COMMISSIONER: And your point, Mr. Kennedy?

MR. KENNEDY: No, that it's very important, Commissioner, because – that it be restricted, and again, we have to see what happens. I just ask you to be –

THE COMMISSIONER: Well, we've agreed it's going to be restricted, so we're trying to now make sure we understand it.

MR. KENNEDY: I just ask you to be –

THE COMMISSIONER: Sorry?

MR. KENNEDY: Yeah, I just ask you to be aware of it as we're going through it.

THE COMMISSIONER: And there may be – you know, I may have to make some certain rulings, you know, if – if you have concerns that it’s going back further or dealing with matters that weren’t contemplated, I’ll make a ruling at that time.

MS. CHAYTOR: And if I may, Commissioner, we have three hours set aside for this to happen.

THE COMMISSIONER: I know, I know.

MS. CHAYTOR: Because we have a witness who is going to be giving evidence by teleconference that afternoon, so I would ask counsel to keep that in mind.

The other thing I would also say is that, through kiteworks, counsel can now – we just received during the break the report of Kevin Ripa who is the computer-evidence-recovery expert that the Commission retained to look at the issues surrounding the phone and the BBMs.

THE COMMISSIONER: And there’s basically, as I understand, nothing of significance (inaudible).

MS. CHAYTOR: Nothing further of significance was discovered and there is a written report that counsel would now have, so they can check kiteworks.

THE COMMISSIONER: Okay.

Okay, Mr. Avis.

MR. AVIS: Just one point with respect to Sergeant Lenehan. Counsel will note that he was given a limited amount of information. I am forwarding him a few other documents, but if – where he’s not going to be here, if counsel –

THE COMMISSIONER: I have a room full of binders you’re welcome to.

MR. AVIS: Sure, but he’s not going to be – if counsel want him to see a particular exhibit, perhaps they could let me know in advance. He has access to the kiteworks, so please just email me and I will pass it on to him.

THE COMMISSIONER: He does have access to kiteworks, does he? Okay.

MR. AVIS: Yes, but –

MR. DROVER: No, it’s the website.

MR. AVIS: The website, I’m sorry.

THE COMMISSIONER: The website, okay.

MR. AVIS: But if not, one way or the other I would get it to him, if counsel would let me know as soon as they can.

THE COMMISSIONER: Okay.

Ms. Chaytor, you have –? You’re looking worried there.

MS. CHAYTOR: No, I'm just making sure that – of course counsel is making sure that the appropriate undertakings for confidentiality are signed by anyone who is receiving any documentation from the Commission.

THE COMMISSIONER: Right, so you –

MR. DROVER: He meant the public exhibits, on the public (inaudible.)

THE COMMISSIONER: Right.

MR. AVIS: But – no, both – there were two or three people at JOPIS that signed it because there was even a discussion.

THE COMMISSIONER: I understand.

MR. AVIS: I just got to get those back to you.

THE COMMISSIONER: Yeah.

MR. AVIS: But I appreciate counsel's comment there.

THE COMMISSIONER: Okay. Thank you.

Do you have a – I thought I noted on my left side there, sorry.

MR. SIMMONDS: I mean, I'm not trying to belabour it, Mr. Commissioner, but in the process of cross-examining Constable Smyth, it is going to be necessary to contrast some of the things that were said there about positions taken previously by him during his testimony. There's –

THE COMMISSIONER: And I think – I thought that was made clear, but it's going to be limited and you'll –

MR. SIMMONDS: Oh, yes, absolutely.

THE COMMISSIONER: You know, it will be limited and Mr. – I'm sure there will be some disagreements, but I'm going to have to make rulings. But I will stress again that you've got three hours, basically, and that should be plenty of time. But we're going to have to get on with the next witness after three hours, whether you're finished or not.

In terms of where – you know, what happens then, we'll decide. But I ask you both – all of you to keep that in mind, anyhow.

All right, so we'll adjourn now until 9:30, is it, Monday?

MS. SHEEHAN: All rise.

The Commission of Inquiry is now closed.