



COMMISSION OF INQUIRY  
RESPECTING THE DEATH OF DONALD DUNPHY

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Transcript

Volume 36

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*Commissioner: Honourable Justice Leo Barry*

Monday

6 March 2017

**MS. SHEEHAN:** All rise.

I declare this Commission of Inquiry in session.

Commissioner Leo Barry presiding.

Please be seated.

**THE COMMISSIONER:** Good morning.

Now, I was waiting for Mr. Drover. Any word on him?

**MR. KENNEDY:** Apparently he has a brief court appearance and is going to be late.

**THE COMMISSIONER:** Oh, did he? Okay, thank you, Mr. Kennedy.

Before we start and hear from Constable Smyth who's been recalled to deal with a number of specific issues, I want to refer Mr. Kennedy to the email that I've just seen that you sent to Commission counsel. It appears as though you're seeking to have this inquiry extended somewhat. I'm reading this – you've –

**MR. KENNEDY:** Which – I'm sorry, which –

**THE COMMISSIONER:** It's the email of Sunday, March 5 sent out at 10 p.m. after I'd closed down my emails, to both Commission counsel and a copy to all other counsel. And first of all, you seek clarification who wrote –

**MR. KENNEDY:** Oh yes, I –

**THE COMMISSIONER:** – which part of the report, and that's good, valid enough. Did you get that information yet by the way? It's coming. I understand Commission counsel will be following up on what I say here this morning with a draft email or an email.

But just for the record – you might note them now if there's any delay in getting to the emails – Dr. Coleman's input was pages 1 to 14, and 44 to 64, and Sergeant Massine's was pages 14 to 44. Now, I'm sorry, go back to Coleman for a second, when I said 44 to 64, it's the top line only on page 64 that relates to Dr. Coleman.

**MS. CHAYTOR:** (Inaudible.)

**THE COMMISSIONER:** No, 44 to 64, it's only the top line on 64 that is Doctor Coleman's.

**MS. CHAYTOR:** Oh, that's right.

**THE COMMISSIONER:** And Sergeant Massine's, again, to repeat, 14 to 44 and all of page 64 except for the top line.

So I can understand your needing some clarification because when I was going through it, I had to go back and read it very carefully to clarify who was saying what. But in any event it's proposed they'll be – it's a joint report and they'll be here to answer questions regarding it.

Now, it's with respect to your email where after you say: I would have thought that considering the separate issues they were reviewing that Coleman and Massine would have each written separate reports. Well they didn't, this is a joint report.

Although my issue is more with Coleman than Massine, and you're not speaking for the RNC or the RNCA, you say: I have to object to the report as a whole in these circumstances. Now, I'm not sure what the circumstances are that would entitle you to object to the report as a whole.

And then you say: While Mr. Avis will be leading the argument on qualifications on behalf of Constable Smyth I will be challenging Dr. Coleman's expertise, qualifications and objectivity.

You give no basis for that. And as I think we sent out an email a day or so ago, if I'm getting into legal argument, I'm going to want you to give me some cases ahead of time. And I've just about wasted I guess would be the word, from trying to give decisions on evidentiary issues within a reasonable period of time without having notification of the cases upon which counsel may be relying. So I want to avoid it in this case. We're down to the last week of scheduled hearings and if we delay or have to delay any of these witnesses, we're likely to be unable to complete the hearing on the date scheduled.

So as I understand the law and I think there will be some communication by counsel with you in this regard, the Supreme Court of Canada has said that in terms of questions regarding qualifications, whether it be expertise or objectivity or other questions regarding qualifications, it will be only in very rare cases that this will be a basis for excluding the expert at the qualification stage. And there has to be some reason produced for – some specific reasons for considering that there's a basis for exclusion at the admissibility stage.

You go on. You say in my report, in my report – in my opinion his report is clearly biased. Now, again, there's no specifics with respect to where in the report. He engaged in speculation and makes prejudicial comments which are not supported by the evidence. Well, again, there's no detail provided.

And you say: Having regard to the importance to this evidence and the need for a hearing on his qualifications, I think it unlikely that we will finish Coleman in one day, let alone finish both Coleman and Massine. So that, again, seems somewhat premature to me. In light of the laws, I understand it, in the Supreme Court of Canada, and, again, if you have cases to –

**MR. KENNEDY:** I will still provide you with cases.

**THE COMMISSIONER:** Sorry?

**MR. KENNEDY:** I will provide you with cases.

**THE COMMISSIONER:** Yeah, ahead of time but give me a reasonable – I know you've got your hands full, you've got other things to do, but I want to have a reasonable period of time to consider them. But the – I believe you have to kind in mind a couple of things; one being that this is an inquiry, it's not an adversarial litigation, although I know the concerns you have with respect to the impact upon Constable Smyth.

So I'm not saying that you're not in a unique position compared to – somewhat unique anyhow, compared to the position of other counsel, other parties. But, again, at this stage, there's two things: one is the potential impact upon Constable Smyth, but there's also the information-gathering stage that we can get as much information as we can to make sure that this sort of thing doesn't happen anymore. And it's in this intelligence-gathering, information-gathering stage that it is useful for the Commission to have the co-operation of all counsel in terms of seeing that information is provided freely and in a timely fashion.

Here, I'm left with the impression, and I want to be scrupulously fair in terms of not cutting off cross-examination when it's unreasonable to do so, but we all have to recognize there's such a

thing as proportionality as well in terms of allocating time for various aspects of an inquiry. And the other point that has to be noted is – if I haven't mentioned it already – is keeping in mind that while you may have challenges that you want to put to a report, an expert's report, it may be a matter of accepting that an expert has general expertise adequate to testify on the facts and issue, and that it may be a matter of weight to be given.

For example, I'm sure you'll be making the argument that your Dr. Hart, who we'll be hearing from – is it tomorrow or Wednesday? Tomorrow – by the way, is that lined up? Do we have all the technologies in place?

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

**THE COMMISSIONER:** Okay good.

Yeah, I didn't get a chance to speak to counsel about it this morning. In any event, we'll be hearing from your Dr. Hart. I'm sure you'll be making the case that, you know, my expert is better than your expert. But when I say that keep in mind the – and that's another point that has to be kept in mind.

In an inquiry situation, it's not Commission counsel's expert, it's not my expert, it's the Commission's expert that's being called and Commission counsel, in presenting it, has to remain neutral insofar as that's possible. And you're bringing forth your expert or your witnesses because there are you believe, presumably that in this case, the information to be obtained from Dr. Coleman and Sergeant Massine is inadequate for the points that you want to make. So – but in any event, go back, you'll be saying that you should give more weight to my expert than you should give to the experts that are being called by the Commission.

That's fair enough but this means that there should be some – in order to expedite matters, there should be some highlighting of the objections that you have, the areas of objection that you have. And if we don't have the specifics, if you're just going with a broad brush: oh, this expert doesn't have the expertise, qualifications and objectivity, you shouldn't hear from him at all, that's a problem in terms of trying to, if nothing else, trying to schedule how much time is going to be needed.

I'm going to be proposing, and we'll get this confirmed by an email – I'm going to be proposing that when we get to Dr. Coleman and Sergeant Massine and their report, we have a full day scheduled, which as far as I'm concerned from what I see now particularly is more than enough time. I would suggest that there be an allocation of one hour for the qualification submissions, and based upon what I understand to be the qualifications of both Drs. Coleman and Massine, it probably should not take that much time to deal with the question of absolute exclusion at the qualification stage.

And, frankly, from what I have at this date, I see nothing, absolutely zero, zilch provided in terms of why these experts should not be qualified to testify. So I look forward –

**MR. KENNEDY:** I'll be making the argument.

**THE COMMISSIONER:** Yes, I'll be –

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

**THE COMMISSIONER:** I suspect you, I guess, hinted at that, or more than hinted at it.

**MR. KENNEDY:** I have – if it will help you – I can have by tomorrow or Wednesday, I can have a full written brief for you on this matter as to why they should be excluded.

I do accept, Commissioner, that there's an issue of weight and the absolute exclusion – there are certain comments in that report that should not be there.

**THE COMMISSIONER:** Well, that may be, there may be –

**MR. KENNEDY:** The difficulty, Commissioner –

**THE COMMISSIONER:** Yeah.

**MR. KENNEDY:** – is there's no voir dire process here. Everything is done publicly so that we – if you exclude certain comments, they're heard by the public anyway.

**THE COMMISSIONER:** Well, that's again not, I don't think, totally correct because we have on one case had a session in camera in private. And if there is a valid reason, based on prejudice – excessive prejudice to your client for example, that's something that could be considered in terms of a further period of a hearing being held in camera. But you haven't put forward anything for me that I'm aware of that would –

**MR. KENNEDY:** Commissioner, we got the report last week. I've been out; I started on Wednesday, or Tuesday or Wednesday, trying to find a threat assessment expert. We filed a report by Friday that the expert filed within 24 hours.

**THE COMMISSIONER:** I'm not saying you haven't had lots to do. I agree, Mr. Kennedy but –

**MR. KENNEDY:** You know, I – so it's – the time frame has been dictated by the receipt of the Massine-Coleman report. They've been working on this; they've been retained for months I can see from the letter of retainers, so why we're getting the report a week before the Commission is supposed to close –

**THE COMMISSIONER:** Well, again, in other commissions of inquiry there have been experts examined with no reports filed. You know, the precedents are there where, as far as I understand it, there's no absolute requirement that there be a report filed. I proceed on the basis wherever we can be helpful and get it to you, to assist in your presentation, we'll do it. But we released it, I think, basically as soon as we obtained the final report so it wasn't delayed in our office.

But in any event, Mr. Kennedy, you're going to have to give me chapter and verse in terms of, you know – and I'm stating this now to give you time to prepare for it. But the Supreme Court of Canada seems to be pretty clear in terms of what we're talking about.

Go ahead.

**MR. KENNEDY:** Commissioner, we get – I write Commission counsel yesterday and say: Well, what is it you're seeking to qualify Dr. Coleman in? He appears to have an expertise in de-escalation in mental health crisis.

**THE COMMISSIONER:** Yeah.

**MR. KENNEDY:** I'm not disputing that expertise. That's not the opinion he's given in this case. Commission counsel comes back and he's going to give a – qualified as an expert on strategies and something else –

**THE COMMISSIONER:** Well, it's clearly set out in the report there. Part A of his report he indicates is going to be the threat assessment relating to officer personal safety.

**MR. KENNEDY:** He has no expertise in threat assessment.

**THE COMMISSIONER:** Well, there, Mr. Kennedy – and, again, you may – that's why I mentioned you're a bit premature here. And maybe, Ms. Chaytor, the quicker we get Dr. Coleman's specific qualifications in that regard the better; we'll get it to Mr. Kennedy.

**MS. CHAYTOR:** Commissioner, if I may-

**THE COMMISSIONER:** I suspect you have the same problem that I did in terms of trying to extract from the papers that he's written and some references to positions he's held – a police man, a police woman would probably be able to understand it immediately but I had to ask counsel to have clarification of, well, what does this mean? What was he doing when he was in this position or that position?

And there's been information that's been provided in the last day or so that, again, as far as I can see, we're going to wait and just deal with it in having Dr. Coleman expand on his credentials in the course of being presented as an expert and his qualifications will be set out.

But, anyhow, there will be more detail more specifics available and they'll be provided to you today so that you'll have an opportunity to see. But there's – we have basically a person who's been police chief for how many years?

**MS. CHAYTOR:** He was 10 years chief of police and he was with the –

**THE COMMISSIONER:** Ten years chief of police. He's been on the – he's been a patrol officer in the course of his career –

**MS. CHAYTOR:** He was with Calgary Police Service from 1969 to 1996, rose to the rank of inspector, then went for 10 years to the Moose Jaw Police Service.

**THE COMMISSIONER:** Okay, I won't go into it; you'll give Mr. Kennedy chapter and verse. But bottom line is as a police officer on patrol, as a supervisor, an instructor of police men and police women, there's no – there doesn't seem to be any question in terms of what I have at this stage, subject to what you can provide in terms of what you need.

Sorry?

**MR. KENNEDY:** There's a difference between risk assessment and threat assessment.

**MS. CHAYTOR:** That's right.

**THE COMMISSIONER:** Sorry, couldn't hear you.

**MR. KENNEDY:** There's a difference between risk assessment in terms of a police officer investigating a criminal offence, what they do on a daily basis, versus a threat assessment in the context of the protection of public protection.

**THE COMMISSIONER:** And where did – I don't know where you're getting the impression that there's anybody questioning that, that there might be more involved in the threat assessment that's involved for the protection of public officials. But that doesn't mean that, to some extent,

there's an overlap and that much of what's done in terms of individual officer safety is not relevant.

It may be that Constable Smyth, in his role with the PSU, had to consider further factors and this is what I think your Dr. Hart is going to be testifying to. Again, I've got a real big question mark for your Dr. Hart, last page, in terms of where he's questioning Dr. Coleman's qualifications before really having it expanded and explained as to what –

**MR. KENNEDY:** It shouldn't have to be expanded, Commissioner. We've got a 50 –

**THE COMMISSIONER:** Well, that will be your argument down here, you –

**MR. KENNEDY:** – or 60-page report that when we bring up the issues here now, all of a sudden – the report itself should be clear. There's a commingling here of risk assessment, threat assessment. It's not clear what this man is doing.

**THE COMMISSIONER:** It's not commingle, it's completely –

**MR. KENNEDY:** He makes prejudicial comments –

**THE COMMISSIONER:** It's completely separate. It's completely separate in a report, it's kept separate. And you will be – that's all positions for argument that you're going to be making and I'll be happy to hear those submissions.

But to just say that: having regards to the importance of this evidence and the need for a hearing on his qualifications, I think it unlikely that we'll finish Coleman in one day. I mean that's taking it upon yourself to set the schedule for the inquiry, Mr. Kennedy. No?

**MR. KENNEDY:** Commissioner, we have spent, in this inquiry, days on witnesses that are almost irrelevant. And now we have an important witness come forward –

**THE COMMISSIONER:** From your perspective, yeah. You –

**MR. KENNEDY:** No, Mr. – no, Commissioner. I would suggest when you go back through this – through the transcripts of this hearing, and I can take you through them, when you look at some of the witnesses that the time that's been spent on them and now we get an important –

**THE COMMISSIONER:** So who's the important witness that you're talking about that rises as head and shoulders above –

**MR. KENNEDY:** Dr. Coleman; Coleman and Massine.

**THE COMMISSIONER:** – above everybody else?

**MR. KENNEDY:** Coleman and Massine are important witnesses and we should be given the opportunity to fully question and examine them.

**THE COMMISSIONER:** And you're going to. You're going to have the opportunity.

Now here's – I started on the rough suggested schedule, and this is open both in terms of the order of counsel and the times to be adjusted. But in terms of a day, if all of counsel here can't see Dr. Coleman and Sergeant Massine being dealt with in a day, I am – I'll be quite surprised, I'm missing something.

Okay, so I suggested that the submissions on qualifications of the experts from 9:30 to 10:30. I'm suggesting that the examination by Commission counsel would start after break. We'll take the morning break and start at 10:45, go on for an hour to 11:45. I'm suggesting that – now I've gotten Mr. Avis, you in there, but we could deal with another counsel. But I thought yourself and Mr. Kennedy seem to be the main players in this – at this point in these issues, not exclusively.

But I've suggested examination by Mr. Avis on behalf of the RNC, 11:45 to 12:30, and then 1:30 to 2 o'clock, so that's about an hour and 15 minutes. I've suggested Mr. Kennedy from 2 to 4 p.m., two hours, and examination by other counsel I've left roughly 45 minutes. Now, that can be adjusted, that can be –

**MR. KENNEDY:** No, that's fine for me.

**THE COMMISSIONER:** Pardon?

**MR. KENNEDY:** That schedule is fine for me.

**THE COMMISSIONER:** Yeah, okay but –

**MR. KENNEDY:** I'm not going to take more than two hours on the – once we get beyond the qualification stage, I won't be more than two hours.

**THE COMMISSIONER:** That's why I'm surprised. Why I'm raising this today because – and I realize, you know, it's an email, you're in the process of course management is anything –

**MR. KENNEDY:** Commissioner, I reviewed Constable Smyth's testimony last night.

**THE COMMISSIONER:** Sorry?

**MR. KENNEDY:** I reviewed Constable Smyth's testimony last night.

**THE COMMISSIONER:** Yeah.

**MR. KENNEDY:** Mr. Flaherty for the coalition was longer or as long almost as Mr. Simmonds. Mr. Flaherty has been 45 minutes regularly in cross-examining witnesses. Mr. Simmonds has been – and, again, he's outlined his position but – so how can – my point is, is that we should not be strict on –

**THE COMMISSIONER:** One second, Mr. –

**MR. SIMMONDS:** No, no, am I to take it that Mr. Kennedy is now going to dictate the amount of cross-examination –

**THE COMMISSIONER:** Everybody – one second, hold everything –

**MR. SIMMONDS:** – because I've just about had enough of it.

**THE COMMISSIONER:** We're going to do this in order. Please be seated.

Mr. Kennedy is not finished. I'll hear from you then.

Go ahead.

**MR. KENNEDY:** So basically we should not be restricted with a major, a main witness put forward by the Commission as an expert. That's my only point –

**THE COMMISSIONER:** And I take it that – well, you just acknowledged you're not being restricted, you believe you have enough time to deal with – in the two hours. Two hours is a long time for examination.

**MR. KENNEDY:** That's enough time for me.

**THE COMMISSIONER:** This is after – and by the way, this can be cut back by leaving more questions for you and the Commission counsel not presenting. What Commission counsel has been doing is presenting questions that will expedite the examination of the witness and then as other counsel come into play to examine.

Now, first of all and well now, specifically, what do you want to address, Mr. Flaherty?

**MR. FLAHERTY:** I just want to address that I don't appreciate the unhinged rants. And secondly –

**THE COMMISSIONER:** Okay, can take it outside with –

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

**THE COMMISSIONER:** Take it outside with Mr. Kennedy if you felt –

**MR. KENNEDY:** Yeah. If he's got something to say, say it to me outside.

**THE COMMISSIONER:** Okay, Mr. Simmonds –

**MR. FLAHERTY:** One second now, is he threatening me now? Do you want to go outside, Mr. Kennedy?

**THE COMMISSIONER:** Now, come on.

**MR. FLAHERTY:** What are you saying? You're unhinged.

**THE COMMISSIONER:** Mr. Flaherty, Mr. Flaherty, for heaven's sake.

Mr. Simmonds?

**MR. SIMMONDS:** I don't appreciate Mr. Kennedy's comments but hey, take it outside, fair enough.

**THE COMMISSIONER:** All right.

**MR. SIMMONDS:** I don't have a problem with the – I suspect our questions of the two experts that you referred to would be very short in light of the comments that would be made by – or the questions that were asked by Commission counsel.

**THE COMMISSIONER:** Commission counsel, right.

**MR. SIMMONDS:** So I don't think we'd be into an extended period. But, you know, we don't even have that. I'm not saying Mr. Kennedy did that –

**THE COMMISSIONER:** Have what?

**MR. SIMMONDS:** We don't have that email that he –

**THE COMMISSIONER:** Well, I've just given you – that's it. I've read everything that's in the email and –

**MR. SIMMONDS:** No, I thought he sent it to everybody. We just –

**THE COMMISSIONER:** And that to be fair to Mr. Kennedy now, it was 10 last night and he's trying – just looking ahead and he was giving Commission counsel a heads up.

**MR. KENNEDY:** Absolutely.

**THE COMMISSIONER:** And all I'm doing here today is giving everybody a heads up that I want to know specifics. If there's objections to experts, I want to know the specifics of what they are and I want to know what the case law is to support the submissions.

**MR. SIMMONDS:** And, Mr. Commissioner, not a problem, we got your memo yesterday or your email from Ms. Chaytor yesterday that you wanted the case law. I understand Mr. Kennedy's position that time has been in very short supply to try and deal with these things –

**THE COMMISSIONER:** Well, look at the – you know, since the appointment now – October, November, December, January, February – we're almost into six months, so, right. And I've kept a pretty tight schedule and I understand that counsel have felt the weight of that at times. And believe me, I've felt it and Commission counsel have felt it. We've been working evenings and weekends and pretty well –

**MR. SIMMONDS:** I realize that.

**THE COMMISSIONER:** And I'm sitting here from 9:30 to 5 o'clock unable to move, basically. It's like spending, getting a two-month jail sentence, basically so far, while the hearing is ongoing.

But anyhow, we've done very well; I'm appreciative of all counsel in the way that they have helped to move this ahead. And I'll just ask one thing, and that's not to prejudice your clients or to avoid the necessity of a thorough investigation of witnesses, but I ask all of you to keep in mind we have a very tight schedule and if we're going to meet it and finish on this Friday, which I'm still aiming for, some co-operation, some slight co-operation may be needed in terms of helping us meet that schedule.

Now, I'm going to move on and get into the further questioning of Constable Smyth, unless there's any counsel. Mr. Kennedy, do you have any final –

**MR. KENNEDY:** Yeah, Mr. Commissioner, those comments by Mr. Flaherty are unprofessional, they are absolutely uncalled for. And this is the kind –

**THE COMMISSIONER:** Well, it's my fault. I'm going to blame it on myself for the comment: Take it outside. I didn't mean to take it out, you know. If you're in a bar on George Street and you say, take it outside, you know what you mean.

But if you're in a courtroom or an inquiry room, when I say take it outside I mean take it outside the public hearing and deal with it as a private matter, unless you have something further that you want the Commission to deal with. But I used the term and then you used the term, picking

up on me, and then Mr. Flaherty read something into it, so which arguably should not have been read into. So if we can move on.

I think, what we've done is stimulate everybody to first recognize what the issues are; and secondly, hopefully get everybody involved in a co-operative approach to seeing the inquiry finished. And remember again, for the last time, I'm trying to right now, at this stage, there's been a lot of specific information gone in concerning the circumstances of Mr. Dunphy's death.

There's been a lot of – Mr. Kennedy, I can say that some of the witnesses have taken a fair bit longer than I expected, but there was considerable detail in many occasions where people had to get in and put their questions to the witnesses. So hopefully we'll be able to proceed smoothly to finish on Friday, the 10th of March.

All right. Thank you.

**MS. CHAYTOR:** Commissioner, the next witness as you know is Constable Joseph Smyth. Good morning, Constable Smyth.

**CST. SMYTH:** Good morning.

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

**MS. SHEEHAN:** Do you solemnly affirm that the evidence you shall give shall –

**THE COMMISSIONER:** That's okay, he's been affirmed. Thank you.

I'm sorry; I should have picked up on that. The affirmation doesn't wear off, Constable Smyth, so I'm told. You've been affirmed already.

Go ahead.

**MS. CHAYTOR:** Okay. Thank you.

Commissioner, there are a couple of new exhibits, please, that I would ask to have entered: P-0774, 0788 and 0789.

**THE COMMISSIONER:** So ordered.

**MS. CHAYTOR:** Thank you.

Constable Smyth, as you are aware, since your evidence before the Commission, further disclosure has been made from you cellphone records, and these include BlackBerry Messaging between yourself and several other people, including some that have been witnesses before this Commission, in particular Donna Ivey, Heather MacLean, Doug Noel and Tim Buckle. And as well there are BB messagings between yourself and a friend who has not been a witness.

The RCMP has advised that these BBMs were missed during the original disclosure, and an issue that was identified was the date of the last activity, having predated the date to which you consented to have your records searched. And for example, if we could bring up, please, Madam Clerk, P-0581. And these are the BBM exchanges between yourself – if we could go to page 3 please. So when you see the first here is with Donna Ivey and the last activity date is showing to be March 24, 2015. And then if I look at page 4 of the document, we have an exchange with a Catherine Evans as well which is March 25, 2015. And then with respect to Heather MacLean the last activity date is March 26, 2015.

And as I'm going through the questioning today, Constable Smyth, I'll point out similar issues with respect to the other BBMs.

Are you able to provide any explanation why the last activity date with respect to these sets of BBM messaging appears to be incorrect insofar as the actual exchange that then takes place; for example, if we come down here with Heather MacLean, you're having an exchange with her on April 6, 2015, so the last activity not being March 26. Are you able to offer the Commission any explanation?

**CST. SMYTH:** Sorry, first, Mr. Commissioner, is it okay if I refer to the actual exhibits that I've printed?

**THE COMMISSIONER:** Yes. There's no objection there counsel?

**MS. CHAYTOR:** No problem. You have the actual exhibit? That's fine.

**CST. SMYTH:** Yeah, but in relation to your question I don't think I need to. I can't offer you any reason for that.

**MS. CHAYTOR:** Okay.

**UNIDENTIFIED MALE SPEAKER:** I can't hear the words he's saying.

**THE COMMISSIONER:** Couldn't offer any opinion regarding that. So that's the discrepancy in times, is it?

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** That's the last activity date. This is an explanation that one of the issues that the RCMP identified and so I'm asking whether or not Constable Smyth would know anything about that. So –

**THE COMMISSIONER:** How long ago was that?

**MS. CHAYTOR:** Okay so, for example, the last activity here for Heather MacLean is March 26, 2015, whereas the exchange with her, there's an exchange here beginning April 6. And we'll see as we go through, Commissioner, that there are other dates subsequent to April 6 as well.

And so the RCMP did not discover these BBMs, and one of the issues or irregularities or anomalies that they had noted was last activity date. And so they thought that was outside the time period that they were permitted to search because the consent from Constable Smyth was limited to within April month.

**CST. SMYTH:** Should note, Ms. Chaytor, that was the consent that was requested of me. I wasn't asked to consent for any period outside of that.

**MS. CHAYTOR:** Okay. Okay, well, that's important to know too. So you didn't put that limit on there, that's –

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

**MS. CHAYTOR:** And who did that then, Constable Smyth? Who suggested those dates to you?

**CST. SMYTH:** They were provided to me by Corporal Burke.

**MS. CHAYTOR:** Okay. And you would have been prepared to search whatever dates within your phone?

**CST. SMYTH:** At that time, sure.

**MS. CHAYTOR:** At that time.

**CST. SMYTH:** Yeah.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** We had a pretty explicit discussion around, you know, consenting the phone. I had no issue with providing the phone. He had articulated to me quite clearly that they were only interested in material that was relevant to the investigation, so that gave me some comfort in providing the device as well as opposed to, you know, examination of social commentary.

**MS. CHAYTOR:** Okay.

All right, now, Constable Smyth, did you do anything or cause anything to be done that would have created this anomaly in the dating of the last activity with respect to these messages?

**CST. SMYTH:** Certainly not intentionally. I have no idea where that – I assume that’s related to some sort of software extraction which while I know that that process can be done, that’s the extent of my expertise in that area. I’ve been involved in cellphone extractions insomuch that I’ve seized the actual device and I’ve provided to our computer forensics section.

Outside of knowing that it can be done, I have – I cannot comment on the ability to, I think, alter time. Is that what you’re asking?

**MS. CHAYTOR:** No, I just wonder if whether or not you did anything, or asked anyone else to do anything to your phone while you still had it in your possession, before you passed it over to the RCMP, which would have caused this anomaly?

**CST. SMYTH:** So you’re asking did I do it intentionally to avoid –

**MS. CHAYTOR:** Well, do you have reason to think there may have been unintentional action on your part or someone else’s part?

**CST. SMYTH:** No, I don’t, but I’m just trying to clarify. You’re asking did I –?

**MS. CHAYTOR:** Did you –

**CST. SMYTH:** – do something intentional with my phone.

**MS. CHAYTOR:** I’m asking you –

**CST. SMYTH:** So that the RCMP couldn’t –

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** Yeah. No.

**MS. CHAYTOR:** Well, let's start there, intentionally.

**CST. SMYTH:** No, if I was going to do something intentional, I would have dropped it in St. John's harbour.

**MS. CHAYTOR:** Did you do anything unintentionally?

**CST. SMYTH:** If I did, I'm not aware of it.

**THE COMMISSIONER:** If you did – sorry, I didn't hear. If you did –?

**CST. SMYTH:** If I did do something unintentional –

**THE COMMISSIONER:** Right.

**CST. SMYTH:** – I have no idea what I did.

**THE COMMISSIONER:** Don't know what it is.

**MS. CHAYTOR:** Were you aware of any such issue, prior to this being brought to the Commission's attention?

**CST. SMYTH:** Never.

**MS. CHAYTOR:** Okay.

A significant number of these messages as well were deleted from your phone, and I'll point out some of that as we go through. Did you delete the messages?

**CST. SMYTH:** I probably did, yes.

**MS. CHAYTOR:** Okay.

Can you tell the Commission why you would have deleted these messages and when you deleted them?

**CST. SMYTH:** I don't know specifically when. I know we had a similar discussion in my original testimony around there being deleted messages and the same answer, in essence, would apply, especially as it relates to BBM.

In the BBM platform I had on that phone in particular, it was an old, obsolete phone with a very small screen. It was a BlackBerry Pearl. That was, probably, stopped being manufactured five years previous to this date. And the more conversations you have opened, the more cumbersome it becomes in your screen. I always had a habit of deleting and removing conversations to just – for simplicity.

**MS. CHAYTOR:** Did you intentionally delete any of the messages that may relate to the issues before the Commission, in terms of the – your meeting with Mr. Dunphy and anything in the aftermath of Mr. Dunphy's shooting?

**CST. SMYTH:** Absolutely not.

**MS. CHAYTOR:** Did you delete any of these messages after the shooting?

**CST. SMYTH:** I suspect I probably did, yes.

**MS. CHAYTOR:** And before you passed your phone in to the RCMP?

**CST. SMYTH:** I would suspect I did. Again, as a matter of routine, I didn't think for one second that a conversation with a friend would have any relevance to the actual investigation. One, that would probably not be my thought process, that there might be something in a conversation with a friend that would be relevant to the RCMP investigation; number two, I am also acutely aware that when I pass in my phone over for cellphone extraction, that deleted material is irrelevant.

Once I provide the device and I unlock the device for the RCMP, that's the key part to the BlackBerry encryption, is that once the user unlocks it, it affords their technical staff a significant amount of ability to enter the device and extract data inclusive of deleted data. If they were to have to go to, in this case the BlackBerry server with a judicial order, extracting that data is near impossible.

**MS. CHAYTOR:** Constable Smyth, we understand the BlackBerry Pearl that you're referring to that you were using on April 5, 2015, and that the time these BlackBerry messagings – communications occurred, that was a cellphone issued to you by your employer. Is that correct?

**CST. SMYTH:** They provided the service. The cellphone, the actual cellphone itself was one that – the device itself had been mine previously.

**MS. CHAYTOR:** Okay, so you had purchased that phone?

**THE COMMISSIONER** Sorry, they gave you access to the service. Is that what you're saying?

**CST. SMYTH:** It was – yes, it was a phone that I had owned personally and our IT section basically wiped it and were able to put on access to our internal systems by that route.

**MS. CHAYTOR:** Okay, so it's a phone that you had purchased?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** And then your employer didn't compensate you for it?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay, so you then continued to use it. It was wiped by your IT people before you started to use it as your employer-issued phone at that point?

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay.

And I understand that you turned that phone over, as we said, on I believe it was April 24, 2015, to the RCMP as part of its investigation.

**CST. SMYTH:** Yes.

**THE COMMISSIONER:** What was the date it was turned over to the RCMP?

**MS. CHAYTOR:** April 24, 2015. That's my recollection.

**THE COMMISSIONER:** Okay.

**MS. CHAYTOR:** Constable Smyth, did the RCMP give you back that phone?

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

**MS. CHAYTOR:** And can you tell us what date you got the phone back?

**CST. SMYTH:** I cannot.

**MS. CHAYTOR:** Was it during or prior to the conclusion of the RCMP investigation?

**CST. SMYTH:** So the – when they officially concluded their investigation and announced their findings on September 2016?

**MS. CHAYTOR:** Correct.

**CST. SMYTH:** It was well before that.

**MS. CHAYTOR:** Well before that.

**CST. SMYTH:** It was, I'm thinking, probably May or June of 2015.

**MS. CHAYTOR:** Okay, so they only kept it a month or a couple of months?

**CST. SMYTH:** Right. Once they had all the data extracted, my understanding there was no value in the actual device to them and they advised I could take it back.

**MS. CHAYTOR:** What happened to the phone after it was returned to you?

**CST. SMYTH:** My son played with it for probably a couple of weeks after I reset it and you enter the password incorrectly 10 times and it resets the BlackBerry so you can no longer access it. And then after that, it found its way to the garbage.

**MS. CHAYTOR:** Did you bring that phone back in to your IT to have it wiped?

**CST. SMYTH:** No, I did that.

**MS. CHAYTOR:** Pardon me?

**CST. SMYTH:** I did that.

**MS. CHAYTOR:** Okay, so you brought it in to IT and it was wiped.

**CST. SMYTH:** No, I wiped it myself.

**MS. CHAYTOR:** Oh, you wiped it.

**CST. SMYTH:** Yeah.

**MS. CHAYTOR:** Okay. And you're able to do that?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Did anyone from the RNC ask you about that phone and the data on that phone?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Did anyone ask you whether or not you had in fact wiped the data from the phone?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay.

Why did you throw the phone away?

**CST. SMYTH:** Because it was garbage.

**MS. CHAYTOR:** And why is that?

**CST. SMYTH:** It was an old, obsolete phone and I had no purpose to keep it. I wish I did. You'd be more than welcome to have it, again, as I've passed over –

**MS. CHAYTOR:** No, not again. I've never had it but ...

**CST. SMYTH:** Oh, okay.

**MS. CHAYTOR:** Okay.

In terms of a new phone having been issued, I understand, to you by the RNC after this – the one that we're speaking of was seized from – by the – or taken by the RCMP for its investigation, you were issued a new phone.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Was the data from your old phone transferred to your new phone?

**CST. SMYTH:** No.

**MS. CHAYTOR:** And how about that phone? Where is that phone?

**CST. SMYTH:** You have that phone.

**MS. CHAYTOR:** I don't have that phone.

**MR. KENNEDY:** Commissioner, Commission counsel knows exactly where that phone is. Back in September – or October, November, whenever it was – I wrote the Commission counsel. I have that phone in my possession. They were looking for the phone. I have that phone in my possession, do you want it? The issue arose again, approximately a month ago. So the phone – there's a correspondence to the Commission from myself on behalf of Constable Smyth saying that phone is there, do you want it?

**THE COMMISSIONER:** Okay.

**MS. CHAYTOR:** Okay, so wait now –

**THE COMMISSIONER:** Counsel?

**MS. CHAYTOR:** – this is the phone, this – we didn’t ask for this phone. The phone we were seeking was the phone that he was using on April – in April of 2015 and Mr. Kennedy did write and say that they have –

**THE COMMISSIONER:** And that’s the phone that’s been –

**MS. CHAYTOR:** Right.

**THE COMMISSIONER:** – disposed of.

**MS. CHAYTOR:** Which had no – right, that’s the one we were seeking. The phone that was reissued to him, it did not have the data transferred over from the old phone.

**THE COMMISSIONER:** Right.

**MS. CHAYTOR:** So it was of no relevance to us –

**THE COMMISSIONER:** Right.

**MS. CHAYTOR:** – in terms of the information that we were looking for. So, Mr. Kennedy, I just want to be correct on what happened there.

**THE COMMISSIONER:** Well, but you just – but you’ve just asked the witness: Where is that phone?

**MS. CHAYTOR:** Correct. And if I could do my follow-up question.

**THE COMMISSIONER:** But you know where the phone is, do you? You accept that that’s the one that Mr. Kennedy has?

**MS. CHAYTOR:** I don’t have that phone. Constable Smyth thinks that we have that phone.

**THE COMMISSIONER:** No, but he threw –

**MS. CHAYTOR:** I do not have that phone.

**THE COMMISSIONER:** Yeah, okay, but it’s gone to – you know that it’s gone to Mr. Kennedy?

**MS. CHAYTOR:** It had been at that point in time. I don’t know where it is now.

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

**MS. CHAYTOR:** But, yes –

**THE COMMISSIONER:** – okay, just let Mr. Kennedy –

**CST. SMYTH:** I was left with the –

**THE COMMISSIONER:** Mr. Kennedy has clarified that he had – you still have that phone? Okay.

**MR. KENNEDY:** Well, I had it at the time that it was – I had written Commission counsel. There's boxes of documents in my office, Commissioner. I assume it's still there. I went to look for it a few weeks again when the issue came up, and it was clear to Commission counsel that that phone was available.

**CST. SMYTH:** I had been left with the understanding, Mr. Commissioner –

**THE COMMISSIONER:** Go ahead.

**CST. SMYTH:** Sorry – that the phone had been left at the front desk of Mr. Kennedy's office for pickup on behalf of Commission counsel.

**THE COMMISSIONER:** Okay.

**CST. SMYTH:** So I assumed you had it (inaudible).

**THE COMMISSIONER:** All right. If there's any – let's clarify that at the break if there's any, any, anything to be clarified, but do you have, do you have a question?

**MS. CHAYTOR:** My question, yes –

**THE COMMISSIONER:** Go ahead.

**MS. CHAYTOR:** – if I may, please.

So, Constable Smyth, was that, was that phone in good working order?

**CST. SMYTH:** Not good working order, no.

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

But that phone wasn't –

**CST. SMYTH:** It did work.

**THE COMMISSIONER:** That's the new one that, that the RNC gave you?

**CST. SMYTH:** Yes.

**THE COMMISSIONER:** Or the, or the –

**CST. SMYTH:** Right.

**THE COMMISSIONER:** – the new old, the new old one I take it.

**CST. SMYTH:** And it wouldn't be fair to say it was in good working order. It had to be plugged into the wall, and even then, because it had been dropped and some of the keys were missing off it, and it had to be plugged in in order to work, and it often had to be reset a fair bit. I had a – and you were given that immediately because I didn't use the phone other than to sometimes check work email. I had returned to iPhone last summer.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** And so I, I didn't use the phone.

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** So you purchased another phone, an iPhone?

**CST. SMYTH:** Personal phone.

**THE COMMISSIONER:** You purchased an – I'm sorry, an another phone –

**CST. SMYTH:** Yes.

**THE COMMISSIONER:** – last summer?

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

**MS. CHAYTOR:** Okay.

So the phone that was issued to you after the second – the second phone that you would have had as a work-related phone after the April 2015 phone, that phone is not in good working order, but that phone still exists?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** You didn't discard that phone?

**CST. SMYTH:** No, I honestly thought you had it, and if you don't –

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** – then I –

**MS. CHAYTOR:** That's fine.

**CST. SMYTH:** – guess it's still at Mr. Kennedy's office.

**MS. CHAYTOR:** Do you – have you ever discarded any other iPhone, other than the one that was in your possession in April of 2015?

**CST. SMYTH:** iPhone?

**MS. CHAYTOR:** Yes, any phone.

**CST. SMYTH:** Any phone?

**MS. CHAYTOR:** Any cellphone.

**CST. SMYTH:** Since –

**MS. CHAYTOR:** Any cellphone, iPhone – that was a BlackBerry.

**CST. SMYTH:** There were older BlackBerries that I don't think were used in that period that I had that, that did get disposed of, I believe. There's been cellphones kicking around our house that have definitely been discarded. I, I –

**MS. CHAYTOR:** Okay. So that's not an unusual thing for you? Like some people don't – some people recycle their phones, or some people have them, drawers full of them. So I'm just wondering, for you, it wouldn't have been an unusual thing for you to throw out a phone, that's what I'm asking.

**CST. SMYTH:** No, definitely not.

**MS. CHAYTOR:** All right.

If we could look then, please, to page 3 of the document that I have here, I think this is 0581. The very first entry here, Constable Smyth, is a communication between yourself and Donna Ivey, who, of course, we've heard from, and it's April 4, 2015 at 5:07 p.m., that's UTC time, so we back it up two-and-a-half hours, it's approximately, I believe, 2:37 p.m. Newfoundland and Labrador Time.

She writes to you: Joe, the Minister's EA is Ryan Osborne. I don't have – and this is blocked out but I understand that to be his email – I've sent him a detailed BBM. And as well, Ralph Tucker, chair of WHSCC asked you to send him an official email – and she gives you his address – and he will have someone on this right away.

Constable Smyth, at the time that you gave your evidence, did you recall this at all in terms of her communicating with you about the minister's EA being Ryan Osborne?

**CST. SMYTH:** I don't remember them providing, her providing that specific information. I did recall having some communication with Heather MacLean, and I believe I had given evidence to that and I was actually confused that it wasn't in email. My recollection of whatever communication we had was actually email.

**MS. CHAYTOR:** Okay, now this is Donna Ivey. This is not Heather MacLean.

**CST. SMYTH:** Oh, sorry.

**MS. CHAYTOR:** This is Donna Ivey, see?

**CST. SMYTH:** Gotcha.

**MS. CHAYTOR:** Okay.

Now, the minister's EA is Ryan Osborne, I understand that minister is Sandy Collins, is that correct, at the time? This was Sandy Collins who was being referred to here?

**CST. SMYTH:** I don't know who, whose EA Ryan Osborne is? So I'm, I'm not sure.

**MS. CHAYTOR:** Okay. Well then I've spoken with Mr. Osborne, he has confirmed that he was – that was Minister Collins. And I believe – and I'm sure I can be corrected by someone if it's not correct – but I believe Heather MacLean also confirmed that.

Did you make any contact with Ryan Osborne during – at the time period in which you're looking for information regarding Mr. Dunphy?

**CST. SMYTH:** No, I didn't. This is the first I recall seeing the name.

**MS. CHAYTOR:** Okay.

Do you, did you have any communications with Sandy Collins?

**CST. SMYTH:** Definitely not, no.

**MS. CHAYTOR:** Okay.

Did you receive any information back from Ms. Ivey, either by telephone or otherwise, with respect to any message from Ryan Osborne?

**CST. SMYTH:** Not that I can recall, no. Like I said, it's the first time I've seen his name.

**MS. CHAYTOR:** Okay. So can you shed any light on to why Ryan Osborne would be contacted in the context of your investigation into finding information for Mr. Dunphy, it appears?

**CST. SMYTH:** The only thing I can suggest is that perhaps the minister responsible was for – the minister responsible for Workplace NL and that would be the connection there and how they were getting access to Mr. Tucker, et cetera. That would be my only guess.

**MS. CHAYTOR:** Okay.

Going to continue on down then to page 4, and these are your messagings with Heather MacLean.

And again, Constable Smyth, I want to allow you an opportunity that these communications that we have here, did you recall these with Ms. MacLean at the time that you first gave your evidence?

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

**MS. CHAYTOR:** Are you able then to confirm to the Commission that the Commission now has all information regarding any communications that you had with Heather MacLean or any member of the premier's office regarding this matter?

**CST. SMYTH:** I don't know. There was once a time where I would have said, yes, absolutely, but I have no idea.

**MS. CHAYTOR:** Okay, fair enough.

Okay, so on April 6, 2015, there are a number of messages that I'll take you through and these are on the 6th, 7th and 10th of April 2015. On this particular one you write to her. And I understand that if we do the time conversion this would be 12:35 p.m. Newfoundland and Labrador time.

You write: Hey, anything I can help you with, with the scrum? And of course this is the time that the premier did the media scrum with respect to this matter.

So, Constable Smyth, why are you reaching out to see if there's anything you can do to help with that media scrum?

**CST. SMYTH:** Just to offer any potential insight as to what the reasoning was, why we go there, what the – how the investigation started, those kinds of things.

**MS. CHAYTOR:** So what did you think you could appropriately contribute to a media scrum on the shooting of Mr. Dunphy?

**CST. SMYTH:** I'm not looking to necessarily contribute anything to the media scrum itself but to perhaps offer some insight and understanding to the person giving the media scrum so they can better articulate their position.

**MS. CHAYTOR:** Okay.

Ms. MacLean replies and says: "Sorry could not pick – in scrum. Went well. You doing ok? Tough stuff ...." And you'll recall, Constable Smyth, that when you gave your evidence we did have your telephone records. And I think if we – and we don't need to bring it up, Madam Clerk, but I believe your telephone records are P-0549.

And what we would have seen is you'll recall there was a telephone call at 3:04 p.m. UTC time or 12:34 p.m. where you called to initiate a call to Ms. MacLean. So it appears that was done one minute before you then, I guess, decided to send a BBM. So I think that might put that telephone call in context for you.

**CST. SMYTH:** That makes sense. Yes.

**MS. CHAYTOR:** That makes sense? Okay.

And her reply to you here – here now is about 20 minutes later or thereabouts. She couldn't pick up, 20 minutes later. And then you say: "Indeed, how is everybody? I'm free to talk to anybody that wants to."

And, Constable Smyth, what is it that you felt you were free to talk about and who is the anybody that wants to? Who are you referring to? So who and what are you referring to that you could talk about?

**CST. SMYTH:** I think it was the same offer I had made to Joe Browne that if there was anybody within their staff that were having difficulty with this situation, that I would be prepared to speak and, you know, from a debriefing-type of perspective.

**MS. CHAYTOR:** Okay. And this is before you gave your statement to the RCMP.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Later that day we reviewed your phone records last time and you did have a seven-minute conversation the same day with Heather MacLean. So does that help with recollection in terms of what you and Heather MacLean would have spoken about it? Did you provide her a debriefing?

**CST. SMYTH:** On the telephone? No, there was no provided details of the actual incident themselves. It would have been conversation around how's everybody doing, how are you doing? That's it.

**MS. CHAYTOR:** Okay. So what you're saying is you were prepared to provide a debriefing but that didn't happen.

**CST. SMYTH:** No.

**MS. CHAYTOR:** And when you say on the telephone, was there any other communication or meeting with her in which that occurred?

**CST. SMYTH:** I don't recall any meeting. I didn't recall any of this and I didn't recall the telephone call with her until you were able to provide me with this to refresh my memory.

**MS. CHAYTOR:** Okay.

And on April 7 there's a further exchange between yourself and Ms. MacLean and we'll see it here on the screen. Did you come across any other correspondence from DD, who's she's testified is Donald Dunphy, when you were looking into him?

So Heather MacLean is asking this of you and you reply: "Not outside of social media ... I would have gone looking for it ... To form part of a full threat assessment."

Constable Smyth, what steps did you take to look for correspondence regarding Mr. Dunphy or from Mr. Dunphy as part of your threat assessment?

**CST. SMYTH:** Well it was just as I stated here. Outside of social media I hadn't done anything up to that point other than what we've testified here.

**MS. CHAYTOR:** Okay, but what – let me just go through it. Did you come across any other correspondence from DD when you went looking into him? You said: "Not outside of social media ... I would have gone looking for it." Now I see there's an f there after that, "I would have gone looking for it."

So my question is: Did you look for any other correspondence from Donald Dunphy as part of your threat assessment? I've read this to say that I would have gone looking for it to form part of a full threat assessment. So did you go looking for other correspondence from Mr. Dunphy outside of social media as part of your threat assessment?

**CST. SMYTH:** Again, other than the initial very cursory background checks I had done, no. This is to basically state that should the threat assessment had continued, which of course it didn't because the subject of the matter was deceased, I would have gone for looking for other correspondence with other ministers, that type of information, to form part of a full threat assessment.

**MS. CHAYTOR:** Okay.

So what you're – what you're saying here or intending to say here to her is that I would have gone looking for it but I didn't get an opportunity to do that piece.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** And in terms of doing your threat assessment, would that normally occur before you go to visit the person or does that happen afterwards?

**CST. SMYTH:** I think it depends on the situation. I mean every situation is so different. It can – it could be either-or depending on what the circumstances are.

**MS. CHAYTOR:** So we – so we know that you did look at social media communications, though, of course.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay.

And we know of course – and the Commission does have correspondences where Mr. Dunphy wrote to the government about his grievance. You did not find those.

**CST. SMYTH:** Not, you know, in the days, 24 hours leading up to my meeting with Mr. Dunphy, no. I wasn't aware that they existed.

**MS. CHAYTOR:** Okay.

And you've already testified that you weren't aware of any communications with Minister Kent either.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay.

At this point in time when Ms. MacLean is asking this of you, Constable Smyth, this is two days after the shooting. And you are aware that there is an active police investigation happening at this time and you're the subject of that investigation and, of course, a key witness. Do you think it is appropriate for you to be providing any information to Ms. MacLean about any steps that you took in that investigation?

**CST. SMYTH:** No, I don't think it's inappropriate.

**MS. CHAYTOR:** I'm sorry? You don't think it's ...?

**CST. SMYTH:** I don't think it's inappropriate. No.

**MS. CHAYTOR:** You don't think it's inappropriate?

**CST. SMYTH:** No, to speak about steps that we would take in a threat assessment so people have a broader understanding of what that process involves and entails. No.

**MS. CHAYTOR:** Okay.

And why would the – why would the premier's office be entitled to any information with respect to Mr. Dunphy or any steps you took in your investigation?

**CST. SMYTH:** Well, I think it directly affects them. You know, in light of what occurred and the fact that they're – she's a communications staff member that's tasked with having to answer questions on the subject, I think there's a benefit that they're armed with that kind of information. As much as I think that the general public are well served to be armed with that same level of information.

**MS. CHAYTOR:** Okay.

She – you – she continues on and you ask her: "all ok?" And she says: "Yes- talking to Cochrane this am. He may file ATIPPA request on correspondence/contemplating story on common nature of threats."

And then she asks you: "Police record?" And you reply: "No record."

Why would the communications director of the premier's office be entitled to this information about Mr. Dunphy?

**CST. SMYTH:** For the same reason, I guess. You may get into, you know, a privacy issue there where it's getting a little bit specific. So that may be starting to get into the area of inappropriate, sure.

**MS. CHAYTOR:** Do you think it was appropriate or in keeping within your duty of secrecy to provide this information to Heather MacLean?

**CST. SMYTH:** That's a little bit of a loaded question. When you're talking about secrecy there is a responsibility as well and I'm not – I'm trying, I'm certainly trying to think how it might apply here, the balance between providing information like a person's background, whether somebody has a history of violence. It was of common practice and routine for us to provide information such as that to the premier, the premier's staff related to persons of interest to as part of job and our mandate. I don't necessarily see this as being a whole lot different, but in light of the fact that we're talking about a deceased person, it may border in the area of being unnecessary.

**MS. CHAYTOR:** Continue then on page 6 where she's talking about Mr. Cochrane. And you say: "I wish I could talk to him."

"Would love them to have insight into intelligence based investigations."

"And threat assessment."

And she advises you: "He is putting call into Jason Sheppard." And you say, I can't, "I know I can't while an investigation is ongoing, but I could so easily answer their questions." And she says: "Hear you..." and that's the end of your BBM communications with her on April 7.

The next communication is on April 10, 2015, after Mr. Cochrane has your email that you wrote on that day. And you're asking her: "Has Cochrane said what he's doing with it?" And, of course, this in reference – ultimately, you did write the email that you distributed broadly within the RNC. And that reporter that it's ultimately leaked to is David Cochrane.

And, Constable Smyth, there are many points that you do address in that, but two of the points that you did address in your email on April 10 were some of the information that you wanted to get out there in terms of, in particular, threat assessments and intelligence-based investigations, two of the points that you mentioned in this exchange with Ms. MacLean that you wished that you could have expressed directly to Mr. Cochrane but felt because the matter was undergoing an investigation, that it wouldn't be appropriate.

Did you provide the April 10 email to Ms. MacLean prior to it going public?

**CST. SMYTH:** No.

**MS. CHAYTOR:** What communication would Ms. MacLean have had between you and Ms. MacLean for you to know, or be able to ask her the question: "Has Cochrane said what he's doing with it?" So what communications did you and Heather MacLean have for you to know that she would know anything about the email?

**CST. SMYTH:** I don't know. There would have to be, I would think, something previous to that from Heather MacLean that references specifically the email. I have no question that, that's what we're talking about but I don't see why we would start a conversation with that.

**MS. CHAYTOR:** Okay.

And she says: "Have not heard.. have not spoken with him. Believe he was dealing direct with RNC." You say: "Ok, thanks."

And then you say: "Do you have a cell for Cochrane? I want to at least thank him for not releasing my name. This may save my family a lot of grief." And then she provides a phone number for Mr. Cochrane.

And I'm just wondering here then, in terms of your asking for the phone number for Mr. Cochrane or contact for him, I had understood from your evidence on January 23, pages 7 and 8, that Mr. Cochrane was already in your contacts.

**CST. SMYTH:** Was he already in before this?

**MS. CHAYTOR:** That's what I'm asking you. I had understood from your evidence that he was someone who you would have had. Remember he was in your contacts as DD –

**CST. SMYTH:** DC, yeah.

**MS. CHAYTOR:** DC, sorry, DC. And but it appears here you're receiving a contact from Health MacLean. So was Mr. Cochrane already in your contacts prior to Ms. MacLean giving you the phone number?

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

**THE COMMISSIONER:** Sorry, what'd you say?

**CST. SMYTH:** I'm not sure. I would have had his cellphone number at times. I don't know if I put it in my phone. I've had business cards of various political reporters for different reasons at different times and some of them may have been put in my phone and so others not.

**MS. CHAYTOR:** Okay.

And in terms of any other communications between you and Heather MacLean – and all we would have of course are your cellphone records – there's other ways of communicating obviously with a person. But the only other, and I would bring you to – I don't know that we need to bring it up but we can reference your cellphone records at 549 and at page 2 of that document.

On April 10, 2015 – we don't need to bring it up unless the witness would like to see it, but at 2:39 p.m. UTC time, nine minutes afternoon. So nine minutes after noon on April 10, there is a nine-minute telephone conversation between you and Ms. MacLean at that point in time. And so that would be before your BBM exchange.

**CST. SMYTH:** Okay.

**MS. CHAYTOR:** Okay. So does that help in your recollection of any communication you had with Heather MacLean and the purpose of you nine-minute call with her?

**CST. SMYTH:** Well, it certainly explains, I guess, how that BBM conversation started. We obviously talked about the email. I don't – I have no recollection specifically what was said in that conversation.

**MS. CHAYTOR:** Okay.

If we could now bring up then, please, P-0440. And these are your BBM discussions with Doug Noel, unless there's anything else, Constable Smyth, on the Heather MacLean exchange before we leave it.

**CST. SMYTH:** I'm okay.

**THE COMMISSIONER:** So you're moving on to what?

**MS. CHAYTOR:** Communications with Doug Noel – Sergeant Noel. It's P-0440. And we'll need page 6 of this document, please. Okay. So page 6 in my document.

Okay, if we just scroll down here and I'll find our reference here. Yes, here it is, okay.

And some of this, Constable Smyth, I'm not going to take you through. It's the first time that you would have seen it in this order, but we did have in your last reference the communications with Doug Noel. And at that particular point in time it had been cut and pasted into an email. Do you remember that? When we went through, it had been cut and pasted by Doug Noel into an email to his superiors?

**CST. SMYTH:** Right.

**MS. CHAYTOR:** All right, so that's this exchange here.

On my way – he asked about the Twitter guy: “On my way to Mt. Carmel to see him now.”

And then you hadn't seen the premier it says here. And then over onto page 7 Doug Noel says to you: “Drop me a line after you're done with buddy. He sounds a bit loose.” And you say: “Oh yeah!” And that's in reference to Mr. Dunphy. Yes?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Yes, okay.

And then you contact him after the shooting: “Doug, was just involved in a shooting. Dunphy is deceased. He pulled a firearm on me. FYI.”

And then if we go over then to – and the next section, I'm going to take you I believe to be new. Page 9, top of the page, and this is in reference to the premier.

Doug Noel – actually, the bottom of page 8, Doug Noel says to yourself: He just dropped off the P – who we understand is the premier.

And “I'm with Ed Benoit in the AM. Gonna have two for a while.”

And then you say: “Ok, how's he doing? He called me a few mins ago.”

So, Constable Smyth, this would be the timing, I guess, of when the premier had called you. Even though it says April 6, 2015, it is just after midnight on April 6 UTC time, so this exchange would, in fact, be happening around 10:30 or so the night before. Okay?

So this is the premier. You're saying: “He called me a few mins ago”?

**CST. SMYTH:** Sounds like that, yes.

**MS. CHAYTOR:** Okay.

And if we continue on down with the exchange there's reference here, then, to – on the bottom of page 8 where you're talking about the Yukon.

You tell him: "I suspect we'll have the Yukon back tomorrow." And, Constable Smyth, where did you get that information? Why did you suspect that the Yukon would be given back? And –

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

**MS. CHAYTOR:** – again, that would be April 6th.

**CST. SMYTH:** Yeah, I really don't know.

To be honest with you, Commissioner, when I first saw this entire exchange, I found it fairly incredible some of the things that I was saying and appeared to think, or have some desire to still be engaged in managing and supervising that unit.

When I think back on that, it – I'm not sure why. I don't know, I must have, you know, been compartmentalized what was going on there, because I don't know why it hadn't set in why I cared what was ever going to happen to that Yukon again, or whether or not they were going to be picked up at the airport by the OPP. I was – it was incredible. I wish I had the opportunity to speak to all this stuff when you first got it but, of course, I didn't.

**MS. CHAYTOR:** Okay.

And is there – and why is that, then, Constable Smyth? Why is it that you wish you'd had an opportunity to speak to it?

**CST. SMYTH:** Well, in the same reason that I got to speak to it all back in December. If we go back through our transcripts in our December conversations, you were the one that pieced together almost that entire week for me. There was very little that I remembered, and you asked questions like: Did you remember? Who did you speak to on Sunday? And I was able to provide a couple of names. Who did you speak to about your notes and your narrative and I was able to provide a couple of names.

But when – then we did what we're doing right now, and it was able to refresh my recall and I was able to speak specifically, you know. And in particular, for example, when you asked me about the day after the shooting, I didn't know when I met with the RCMP. My recollection was that it was mid-morning. And you asked me what else I did that day and I said: I don't remember anything. You asked if I had met with a psychologist. I said: Yes, it was later that week, Wednesday or Thursday. But later in our testimony I learned that – or I recalled that in fact it was two hours that day –

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** – that I met with a psychologist. That, that is significant in my life, sitting down with a psychologist for two hours. I had never done that before and I didn't remember it.

**MS. CHAYTOR:** Okay.

And so then what you're saying is the more information that you see, the better your recall is?

**CST. SMYTH:** Sure –

**MS. CHAYTOR:** Yes, okay.

All right, fair enough.

**CST. SMYTH:** As you walk me through this I'm better able to recall the events of that week. Some of these things are, you know, in particular, these conversations with Doug Noel would generally be a matter of routine that I wouldn't remember specifics of it anyway.

**MS. CHAYTOR:** Right.

**CST. SMYTH:** But, so when you put it in front of me and we're able to talk about it, then I can piece that together.

**MS. CHAYTOR:** Right, okay.

**CST. SMYTH:** But, so I wish that I had this before, because when it came out in February under the guise of new information, it was still the phone that I had consented to. It was information that I provided, but yet CBC reports that I'm misleading the inquiry. That's tough to take.

**MS. CHAYTOR:** Okay.

All right, fair enough.

So documentation does – what you're saying is the documentation helps with your recall. And any kind of documentation would help, and that's the importance of having, I guess, documentation.

**CST. SMYTH:** Sure, it's vital. Every – I got, I think, probably 40 tabs aside there in the transcripts from December of our conversation that outlined the aspects of that week that I didn't recall and that you were able to refresh and we were able to broaden a conversation on it because of the electronic records, phone records, BBMs, conversations in emails. All of which I volunteered and provided to the RCMP. Inclusive of what we have here in front of us today.

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

And then you're still referencing, in the middle of the page here, the Yukon. "Don't imagine there is any forensic value in it." And then Doug says: "Okay. Good." And then he also says –

**THE COMMISSIONER:** Just before you move on from that.

**MS. CHAYTOR:** Yes.

**THE COMMISSIONER:** You had a file folder you say that you brought in to Mr. Dunphy's residence and you had a few notes on it, I think you had a copy of the tweet inside that folder. Did you – there seemed to be at some stage, some reference to your being concerned that there were documents left in the Yukon, relating to the Dunphy file, or some file – do you recall anything about that?

**CST. SMYTH:** I've heard – I've been asked that: Were there documents in the car? And I'm unsure if there was a point in time where somebody had referenced that I had asked about documents. I don't recall having anything specific to the Don Dunphy matter. There may have been other documents in the car related to other persons of interest files.

**THE COMMISSIONER:** We don't seem to have – I think there's a bit of a – unless I'm forgetting – we don't have any evidence that there were any documents ever found in the car, were there?

**MS. CHAYTOR:** Nothing recovered, no, no.

**THE COMMISSIONER:** Which is why I had the impression from either your testimony or the testimony of someone who was speaking with you, some officer who was speaking with you at the scene I believe on the 5th, there was some indication that you believed you might have left some documents in the Yukon and you wanted it secured basically.

**CST. SMYTH:** I think secured – I think there may have been other documents related to our work that might have confidentiality issues but unrelated –

**THE COMMISSIONER:** Yeah, that's what I was figuring but I never – there's nobody ever said they found – as a matter of fact, the indications were that there were no such documents found by whoever ultimately went and picked up the Yukon.

**MS. CHAYTOR:** That's correct. Ed Benoit and Doug Noel had no recollection of having found anything in the Yukon.

**THE COMMISSIONER:** Right.

**MS. CHAYTOR:** And I believe there may have been some communication with the officers who were meeting, I believe, my recollection is –

**THE COMMISSIONER:** Yeah, it's not a big deal. It's just that's it a bit of a loose thread that I –

**MS. CHAYTOR:** Right. But I believe that we did ask about that on your original evidence, whether or not you were aware of anything left in the vehicle.

**CST. SMYTH:** And they may not have even been there. But it wasn't uncommon for me to have a folder that contained, in particular if we were visiting a certain region or a certain event, to have what would potentially be confidential documents in relation to either an event, our practices, procedures, protocols or personal information related to a persons of interest.

**THE COMMISSIONER:** Are you just –

**CST. SMYTH:** I might have it in a yellow folder.

**THE COMMISSIONER:** But you can't remember ...?

**CST. SMYTH:** No, no.

But it would be very normal for me to have that there. So I think if I was asking about that, that's the only thing I can recall that I would have been concerned about from the perspective that there's a potential confidentiality issue and it was more, I think, probably a call for the RCMP to secure that.

**THE COMMISSIONER:** Okay.

Thank you.

**MS. CHAYTOR:** Okay. And in terms of your comment then: “Don’t imagine there is any forensic value in it.” What did you mean by that?

**CST. SMYTH:** Well, I guess in light of what happened, I didn’t see any value to that vehicle for their investigation so I didn’t – I suspected that they would, as Doug noted, they would plot it for the scene. I suspected that they would have looked in it and it would probably be released very quickly. I didn’t see there being any reason to keep it. Mr. Dunphy and I never came close to the vehicle at any time. So I didn’t see – knowing what I knew, which was everything, there was no relevance to it and they would likely arrive at the same conclusion and the vehicle would likely be released in short order.

**THE COMMISSIONER:** Ms. Chaytor, it’s about time for the morning break I think, quarter to eleven. How are you doing? I realize I took up some of your time at the beginning that you’re going to blame me for, but how are you doing?

**MS. CHAYTOR:** I’m halfway.

**THE COMMISSIONER:** Halfway, that’s not bad.

**MS. CHAYTOR:** I’m halfway, yes.

**THE COMMISSIONER:** All right. We might be able to pick it up a bit.

**MS. CHAYTOR:** I will do my best.

**THE COMMISSIONER:** Okay.

Thank you.

**MS. SHEEHAN:** All rise.

The Commission of Inquiry is now recessed.

**Recess**

**MS. SHEEHAN:** All rise.

I declare this Commission of Inquiry in session.

Commissioner Leo Barry presiding.

Please be seated.

**THE COMMISSIONER:** Go ahead when you’re ready.

**MS. CHAYTOR:** Give me P-0440 up again, please, continuing on with your BBM exchanges with Doug Noel. And page 10, please, Madam Clerk.

And this is where we left off here, Constable Smyth: And once they plot its location, it should be it. Are you aware of whether or not – did anyone communicate anything further on that issue of whether or not the RCMP actually did anything to plot the Yukon’s location.

**CST. SMYTH:** No, I have no idea.

**MS. CHAYTOR:** Okay.

And then this comment that you make here to Doug Noel – and this, again, if we bear in mind, this is April 5, 2015, so the night of the shooting and it's approximately 10:30 p.m.

I'm sorry, this one right here where you to Doug Noel: "I'm only starting to get my head straight now." And I'd like to offer you an opportunity to speak to that and how you were feeling at this point in time.

**CST. SMYTH:** Well firstly, I don't think it's an accurate reflection of what was actually happening because I think it was some time after that before my head ever got straight as I have it put there. But I'm just trying to say I've started to calm down and compose myself.

**THE COMMISSIONER:** What time is that?

**MS. CHAYTOR:** This is the evening of the shooting. This would be 2½ half hours earlier so it's about 10:19 p.m., I believe, thereabouts.

Okay. So I take it though, Constable Smyth, in terms of what you'd been feeling earlier that day, at this point in time you were feeling somewhat better but still, as you're saying, as time goes on you probably didn't realize how much you still were not okay.

**CST. SMYTH:** Yeah, absolutely.

I guess I felt better than I had hours previously, but to make any suggestion that I was back to normal, or back to baseline, you know, feeling and –

**MS. CHAYTOR:** Yeah.

**CST. SMYTH:** – I wasn't there.

**MS. CHAYTOR:** And no, you say I'm only starting to get my head straight now, so you're only starting. So it didn't, certainly didn't seem like you were fully back to yourself.

Okay. The bottom of the page then, there's some discussion here about – between Doug Noel and – sorry, Doug Noel to you. And he says: Joe Browne and the premier were excellent. And over to the top of the next page: Okay, no concerns on their end?

What were you thinking of here in terms of asking what concerns on the part of Joe Browne or premier, what were you asking about?

**CST. SMYTH:** I'm not really sure to be frank. I think, just based on what I'm seeing the rest of the conversation is maybe related to the actual PSU and how they were being deployed following that incident.

**MS. CHAYTOR:** Okay.

And he replies to you: "No. No concerns with them" and you say that I was worried that unwanted attention getting out on the detail. I take it meaning the PSU?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay.

And then he tells you about: “Lots of attention. It’s gone national on the news ....”

And then if we come down to the bottom, Doug Noel makes the statement: “But it does show how we are needed.” And over to the next page you say: “Fair point.”

Constable Smyth what about this situation with Mr. Dunphy did you feel shows that – the PSU, I guess, you mean by the we – we are needed?

**CST. SMYTH:** Well, I think it’s a snapshot of reality, of what elected officials are subjected to and have to deal with, and the work that goes on behind the scenes to try to assure – ensure, sorry, some semblance of peace of mind for these people to do their work unencumbered by concerns for their safety and security. So it’s – that’s it, that’s just what the remark is.

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

And then he says: The P is not concerned; the premier is not concerned about that part. You say: “That’s good.” And he says: “No worries Joe, all good!”

And then this is you to Doug Noel: “I told him we need to be cautious of potential sympathizers.” And Doug Noel says: “Well that message took! That’s what they were talking about.” And you say: Good, “I told him we need to be cautious of potential sympathizers.”

Did you tell that to the premier? Is that who you’re referring to here?

**CST. SMYTH:** I don’t remember saying that but it’s definitely something I would say, so ...

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** And if the timing is correct, and I’m assuming from you that it is, that the conversation that Doug and I are having now is subsequent to the conversation I had with the premier.

**MS. CHAYTOR:** That’s correct, because remember earlier in the BBMs you told Doug Noel that you had just spoken with him. So this is coming a few minutes later.

**CST. SMYTH:** Right. So, again, I don’t remember specifically saying this, but it makes complete sense that I would. Sympathizers to the issue at hand, that sometimes this can incite other people that may have already been, felt aggrieved or had a particular issue with government, this type of incident can incite those people and create a heightened security concern following –

**MS. CHAYTOR:** So potential sympathizers to Mr. Dunphy’s situation?

**CST. SMYTH:** Correct, yes.

**MS. CHAYTOR:** Okay.

And I’m sorry, maybe I cut you off, but why would they have to be cautious of potential sympathizers?

**CST. SMYTH:** And the difference between how we would refer to in this context –

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** – we’re not talking about anybody who has great concern or is worried about his family or sympathetic to his situation. That’s completely understandable. It’s those that feel incited to commit acts of violence because of being sympathetic.

**MS. CHAYTOR:** Okay.

And if we can just move on to, then, I think the next reference, page 14 and the middle of this page. And so one thing, while we’re still thinking of that – so this is a comment that although you don’t remember having said it to the premier, to Paul Davis at the time, the fact that it is close in time that you’re telling this to Doug Noel, would it seem reasonable to conclude that you had said something along those lines to the premier?

**CST. SMYTH:** Where’s this, sorry?

**MS. CHAYTOR:** The sympathetic – cautious of people being sympathetic comment.

**CST. SMYTH:** Are you asking if it’s likely that I said that to him?

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** Yeah, I just said that.

**MS. CHAYTOR:** Okay.

And is there anything else then in terms of – does that help you recall anything else that you may have discussed with the premier that evening?

**CST. SMYTH:** A little bit more just – and even from seeing my messages to Doug that I seemed – I was still very much in a work mind set and while I shouldn’t have been, that was clearly my mind set was to continue to see that the work being carried out by that unit was done unfettered, I guess, by what had occurred and I was still applying the thought process to the incident that had occurred as if somebody else had done it.

So I think maybe some of the conversation with the premier would very much have been around, you know, we can’t be complacent at this time. This incident, while very much a rarity, we have to be cognizant of the fact that it can have an impact, especially in the immediate days following, of somebody being motivated by it to carry out an act of targeted violence.

**MS. CHAYTOR:** Okay. Because the last time when you gave your evidence on that point it was very much – your conversation with the premier was brief, he was just checking in to see how you were doing. But this helps you remember that there may very well have been discussion around the PSU and issues that may arise in terms of security for the premier?

**CST. SMYTH:** It sounds like those are things I would have said to him.

**MS. CHAYTOR:** Okay. All right. And is there anything else that you can recall now in terms of your conversation with Paul Davis that evening?

**CST. SMYTH:** No, I do have a clearer memory of it being very matter of fact from my end.

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

The middle of page 14, and at this point in time now is the next day and Paul Davis is giving his interview with the media and Doug Noel is telling you: “He’s having a scrum right now where he normally does.

“In the media center downstairs.”

And then onto page 14, it looks like you’re trying to get into the building. You’re going to get to the elevators. And then Doug Noel tells you: “They are asking him if he spoke to you, how you are.” And you’re a little bit upset obviously about that, it appears. “... He probably should not of called.” And then Doug Noel says: “Naw he handled it. Said brief convo. No details.”

Constable Smyth, what was your concern about the premier speaking publicly about the fact that he had had a conversation with you?

**CST. SMYTH:** I was concerned for him, for the optics and political fallout that would be perceived from that. I really appreciated the call that he made, and I’m glad he made it, but at that time I’m clearly still in work mode. And I wish he hadn’t a done that because it’s a complication for him.

**MS. CHAYTOR:** Okay.

Is there anything in your discussion with Paul Davis on the evening of April 5 that you were concerned that he may speak of publicly?

**CST. SMYTH:** No, no. I hadn’t given any thought to that.

**MS. CHAYTOR:** Okay, on to page 16, towards the bottom of the page.

And, Constable Smyth, if there’s anything in between that you want to speak to – I know you have a hard copy there, so by all means you can let me know. I’m just trying to flag what seems to be most relevant here.

And is this page 16, Madam Clerk? Okay. Oh, yes, here it is. Here’s the reference.

Okay, so this is Doug Noel, telling you about the RCMP news release. “Just go the latest rcmp news release. Very detailed (gun was 22 and loaded) and positive.” And you reply: “Good to hear... Was just chatting to Monty about it too.”

Constable Smyth, is that Monty Henstridge from the RCMP that you’re referring to?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. And what did you discuss with Monty Henstridge that you’re referring to here.

**CST. SMYTH:** I don’t know.

**MS. CHAYTOR:** Okay. And he would have taken a statement from you the day prior to this. This is now April 7.

**CST. SMYTH:** Yes. Perhaps – I think I might have gotten a heads up from the RCMP that the media release was coming out, and he may have verbalized some of the things that was being said in that. And I don’t know that for sure, I don’t remember if it was Monty or not.

**MS. CHAYTOR:** Do you recall whether or not you initiated the call to –

**CST. SMYTH:** No, I don't remember.

**MS. CHAYTOR:** – Monty Henstridge or the other way around?

**CST. SMYTH:** I don't remember. It's probably in my phone records.

**MS. CHAYTOR:** Okay. And do you recall was it a phone or was it in person?

**CST. SMYTH:** I don't recall. If I said – I don't remember having a meeting with Monty after our initial interview, and if I said just chatting I, I think that would be verbal so likely a phone call versus email or text.

**MS. CHAYTOR:** Okay. And if we continue on then to page 17 is the next reference I wanted to ask you about.

Doug Noel asks you – I have it, Madam Clerk – “Were ya talking to Rod Tiller?” And you replied: “Treated me very well and were complimentary of the process.” And then on the other side you say: “Saw tiller briefly in Holyrood.”

And then Doug Noel tells you “We had a good chat today, good positive feed back from the community and his Brother.” And we've had clarification from his brother Bert that this would not have been him. “Whatever happened in that house was Don's fault.”

The comment you make here Constable Smyth: “Treated me very well and were complimentary of the process.” Are you referring to Rod Tiller at that point in time or is that the people who took your RCMP statement?

**CST. SMYTH:** I don't know. I don't remember Rod Tiller saying a whole lot to me at –while I was in Holyrood, so that might have been more of a paraphrasing of what I had sensed from other conversations.

**MS. CHAYTOR:** Okay.

And then you go on to Doug and say: “Nice to hear the family perspective is supportive.” And then he says to you: “Yes. Tiller said they were understanding. No animosity at all!”

Other than what we see here, did you have any discussions with Doug Noel or any other member of the RCMP in terms of anything that might have been relayed to them from members of Mr. Dunphy's family?

**CST. SMYTH:** No, and I think in hindsight that Doug was probably looking to pacify me. He knew it was a big concern of mine. It's become quite clear that the community is not supportive and I don't think it would be fair to put those words in their mouths.

**MS. CHAYTOR:** Okay.

Those are the questions I had on the exchange with Corporal Noel, unless there's anything else that you wanted to address. If not, I'll go on to your exchange with Tim Buckle. If you want – if there's anything in your notes and if not, probably other Counsel, you'll be asked questions by others.

So we'll go to P-0500 now, please. And I'm going to start on the bottom of page 3 of this exhibit, please.

**MR. KENNEDY:** Page 3 will be the green number, is it?

**MS. CHAYTOR:** Correct, yes, the green number. It's actually page 49 in the document itself.

And I'll just take you back actually, Constable, to show you that this is your exchange with Tim Buckle and these are the BBMs.

**MR. KENNEDY:** Okay, I thought there was supposed to be a – you go back to page 1, Ms. Chaytor?

**MS. CHAYTOR:** Okay. Yes, Mr. Kennedy, there is and we'll come to that, but it was too late in the day –

**MR. KENNEDY:** Okay, that's fine.

**MS. CHAYTOR:** – for it to be redacted before it was put back in, so it's in another exhibit. And I will ask your client about that.

Okay so page 3. And down towards the bottom of the page, this is April 6, and it's 12:39 p.m. UTC time, and so that would be about 10:09 a.m. in the morning on April 6. And you tell Sergeant Buckle: "Making notes now."

So this is the time period, I believe that, Constable Smyth, you're working on your case summary notes? Is that correct?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. And so is that what you're referring to here: "Making notes now"?

**CST. SMYTH:** Yes, it was ultimately the narrative report that I had submitted on our ICAN system.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** But Dr. Coleman has expressed concern around my use of the word "notes," but that is what I'm referring to.

**MS. CHAYTOR:** Okay.

And I understand, of course, you've had an opportunity to look at this now, but did you consult with Sergeant Buckle or have advice or input from him in drafting those notes?

**CST. SMYTH:** Not drafting the notes, no.

**MS. CHAYTOR:** Okay.

And did you consult with him regarding your notes?

**CST. SMYTH:** I did not recall any consultation until I saw this. There was certainly no consultation about any of the facts from anybody. And as I had indicated back in our December interview, I did clearly say that I may send – I may have sent that document to supervisors and –

**MS. CHAYTOR:** Yes, which you did. We had an email where you did do that.

**CST. SMYTH:** And I also indicated that I speak to Tim Buckle regularly, and it's a matter of routine, and that I may have discussed this matter with him. I did say that in those December interviews.

**MS. CHAYTOR:** About the notes?

**CST. SMYTH:** Yes, about the notes.

**MS. CHAYTOR:** Okay. Do you want to read out that section then –

**CST. SMYTH:** Sure.

**MS. CHAYTOR:** – that's there in your December interview specifically about the notes?

**CST. SMYTH:** Sure, it's – this particular note is page 281 to 284 of the December 26 transcript.

And Ms. Chaytor says –

**THE COMMISSIONER:** That's the interview with counsel?

**MS. CHAYTOR:** This is the interview transcript, yes.

**CST. SMYTH:** Ms. Chaytor says: Okay, did –

**MR. KENNEDY:** What day is that?

**CST. SMYTH:** December 22.

**THE COMMISSIONER:** Oh, the 22nd, is it?

**MS. CHAYTOR:** Yes, I was going to say I don't think we met on the 26th, the 22nd.

**CST. SMYTH:** Page 281 to 284.

**MS. CHAYTOR:** Page 281 to 284.

Thank you. Go ahead.

**CST. SMYTH:** Ms. Chaytor says: Okay, did anyone review those with you or did you have anyone review those with you before you went? I said legal counsel did. You said: Just legal counsel? I said: Some, yeah, and he didn't have any advice, he just – and then you stop me. You said: No, that's fine; you don't need to tell me about that.

So anyone else in the RNC ranks, for example, reviewed your notes? I said I don't think so. Like, I may have sent maybe, maybe my supervisors, or – but I don't recall doing that, and I definitely didn't get any advice back on it. And then I clarified that statement: Like, you, and I got in quotation marks trying to refer as if there's a conversation now happening between me and a supervisor. There was nothing along the lines of Jesus, man, you shouldn't say that, or you should say this. There was nothing like that.

Anyone I spoke to about it, including the officers out there, I think were acutely aware that, you know, I really wanted to say whatever I could. And I think they were all of the mindset, like, you

know, hey man, it sounds – and I'm using phraseology that's, I think, just would be very casual but that's the kind of way that it was. They said: Hey man, that's not a pretty situation, just say it how it is.

**MS. CHAYTOR:** Okay. Is there more, Constable Smyth?

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

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** On page 277 of the December 26 conversation you said –

**MS. CHAYTOR:** I'm sorry, which date? Not the 26th.

**CST. SMYTH:** December 22 as well.

**MS. CHAYTOR:** 22nd, okay.

**CST. SMYTH:** And it's page 277.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** You say: And we know the four individuals, the four RNC people that you met with on the evening of. Yeah, I don't remember speaking to Buckle about it in that period, but Tim is a close friend and I'm sure that I would have but, again, I don't remember.

**MS. CHAYTOR:** Okay. And that's not specifically related to your notes, though, is it? That's conversations, I believe, that you had with him?

**CST. SMYTH:** Yes, but the point I'm trying to make there is that me speaking to Tim Buckle has been a matter of routine for the better part of 17 years.

**MS. CHAYTOR:** Yes.

**CST. SMYTH:** And I absolutely do not recall everything we talk about, especially when they are inconsequential, such as they are in this case.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** And while they may not be perceived as being inconsequential, what was said was in reference to articulation, verbiage, nothing about facts. And in fact, I didn't even take his advice.

**MS. CHAYTOR:** Okay and I'm going to take you through that.

Okay and so – and you certainly did make it clear that you've had many conversations with Tim Buckle. And this was particularly though, this line of questioning was particularly in reference to anyone who may have given you any advice on your notes, or anyone you may have consulted with. And so I just want to take you to what you said at the – during your evidence on January 18. And it's page 82 of the transcript. Actually, it begins on page 81.

**MR. KENNEDY:** One second, Commissioner, please.

What page was that, Ms. Chaytor?

**MS. CHAYTOR:** It's January 18, 2017, and it begins on page 81, Mr. Kennedy.

**MR. KENNEDY:** Yeah, just one second.

**MS. CHAYTOR:** You let me know when you're ready.

**MR. KENNEDY:** Can you bring it up on the screen?

**MS. CHAYTOR:** No, I haven't made an exhibit out of it but I can read it out. Why don't I just go ahead and read it out?

**THE COMMISSIONER:** That's the interview with Commission counsel so it's not on the screen.

**MS. CHAYTOR:** No, no, this is the actual – this is the evidence that you heard on January 18.

**THE COMMISSIONER:** Oh, okay.

**MS. CHAYTOR:** Okay? But it doesn't come up on the screen because we haven't exhibited it. It certainly is on the website but we haven't made an exhibit out of it.

Towards the bottom I ask you: And when we look at the video of your statement – and here we're referring, Constable Smyth, to your first statement on April 6.

**THE COMMISSIONER:** Does Mr. Kennedy have it yet? Do you have it yet?

**MR. KENNEDY:** No.

**MS. CHAYTOR:** Do you have it?

**THE COMMISSIONER:** Take your time. Just show it to him.

**MS. CHAYTOR:** You're welcome to share mine if you wish.

**MR. DROVER:** Was it page 87 you said?

**MS. CHAYTOR:** Page 81.

**MR. DROVER:** Oh, page 81 I have it here for him.

**THE COMMISSIONER:** All right.

**MS. CHAYTOR:** John gets the technological award.

**THE COMMISSIONER:** Mr. Drover is the quickest on the draw with his iPad, yeah.

**MS. CHAYTOR:** He is. He's something else, absolutely.

Okay.

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

**THE COMMISSIONER:** I have it.

**MS. CHAYTOR:** Absolutely.

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

**MS. CHAYTOR:** Okay.

So thank you, Mr. Drover.

Do you have it now, Mr. Kennedy? You're good?

Okay, towards the bottom: "And we look at the video of your statement, Constable Smyth, I believe you attend with notes. You do have notes with you.

"CST. SMYTH: Yes."

And I reply: "Okay. And were you permitted to be able to refer to your notes?"

"CST. SMYTH: I don't recall. It was the narrative summary that I prepared that morning at home that was eventually uploaded into our ICAN system."

And then I say: "Okay. So the summary that I, that we looked at earlier today" because I'd already brought you to that document earlier in your evidence.

You said: "Yes.

"MS. CHAYTOR: Okay. And those, those notes then that you have on that day that we can see in the video statement, those are the notes." Answer: "Yes."

"Okay. And so they were – were they prepared, they weren't prepared obviously before you went off your shift on April 5." You say: "No."

And I say: "So those are notes that you had prepared at some point before you gave your RCMP statement."

You reply: "Yes, it was that morning.

"MS. CHAYTOR: Okay. And in terms of the drafting of those notes, did you have any advice or any input into what should go into those notes?" Answer: "No."

"Did you consult with anyone in drafting that document?"

"CST. SMYTH: I did send them to our legal counsel at their request.

"MS. CHAYTOR: Okay."

And then we go on to the cameras after that point. So in terms of your consultation – and I'm using the word "consultation," but in terms of Sergeant Buckle, you sending the notes to him and him sending back some advice to you on it, did you not recall that at the time that I put those questions to you on January 18?

**CST. SMYTH:** Sorry?

**MS. CHAYTOR:** On January 18 –

**CST. SMYTH:** No, I did not. Much of my entire recollection of the sequence of events that day have been predicated under disclosure that you gave me and that we went through in December.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** This was not provided to me.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** It assists now. I still don't necessarily see, even in the answering of that question, as there being an inaccurate statement made by me, but I absolutely did not remember it so it's moot anyway. I could have easily said, in light of what my memory was, a definitive no but I didn't.

**MS. CHAYTOR:** Okay.

So you did remember that you'd sent them to legal counsel and that there wasn't any change from your having sent them to legal counsel.

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay.

So what you're saying is, when I asked: Did you consult with anyone in drafting that document? Your answer is you don't think it's inaccurate because you didn't change anything as a result of any input.

**CST. SMYTH:** But what's the answer to that question?

**MS. CHAYTOR:** I did send them to our legal counsel.

**CST. SMYTH:** Right.

**MS. CHAYTOR:** Right.

Okay. So there's no – nowhere in this exchange do you say that you sent the document to Sergeant Buckle or that you sought any advice, input or consulted with him.

**CST. SMYTH:** Right. So, again, –

**MS. CHAYTOR:** So did you not remember it at the time?

**CST. SMYTH:** No, I did not. The answer to your question at that time remains accurate; however, if I had of said no, because I very well could have, based on the lack of a memory of that exchange, that would be the reasoning for it.

**MS. CHAYTOR:** Okay. So it remains accurate, you're saying. Just explain that, please? Did you consult with anyone in drafting that document? And you referred to your legal counsel.

**CST. SMYTH:** Right.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** So that's accurate. I had sent it to legal counsel.

**MS. CHAYTOR:** Correct.

**CST. SMYTH:** But I don't say no there. Now, it's probably a moot argument because I had said no elsewhere.

**THE COMMISSIONER:** No, to a certain extent it's the obligation to tell the truth, the whole truth is what comes into that sort of thing. So when you say you sent it to legal counsel, by implication, with nothing more – I'm not ignoring what you've pointed out earlier but with nothing more being said the implication would be that it was only sent to legal counsel and ...

**CST. SMYTH:** Sure, an omission and that wasn't my intention. As I said, I didn't remember that conversation with Tim and I think there's a multitude of reasons for it.

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** And when you said if you had said no, you feel that it would have been explained by what you'd earlier pointed out in terms of you regularly consulted with Sergeant Buckle. Is that your ...?

**CST. SMYTH:** Correct.

And, Mr. Commissioner, just for clarification on that, I've even pointed out examples in our December interview where I did say no to that question and I only pointed it out there because I expected that you would probably reference that as being contrary to what we see in this statement. You know, the same applies, is that I didn't remember it.

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

And if we can continue on then, and this is the same line of questioning. I just want to get some detail here now in terms of what actually went back and forth between you and Sergeant Buckle. And I think we're on the top, at this point in time we should be at page 4 at the top.

**THE COMMISSIONER:** That's still Exhibit P-0500?

**MS. CHAYTOR:** Still, yes. Okay.

So then Sergeant Buckle says to you: "Looks good...should you be more specific and say I perceived. A threat of imminent death or gracious bodily harm....to quote the use of force policy?" And then he corrects himself, he means grievous. And you say: "Ok." And then you also say: "But a gun pointed at me is pretty straight forward." And he says: "Using policy line in the circumstances feels ..." – I'm sorry this is you: "Using policy line in the circumstances feel a bit manufactured."

And then over onto the next page he tells you: "It's reflective of the training and articulation. I think it's important to state that." And then he says: "Ok." And then there's: "Read the change." And he says: "Yup, that's better."

Constable Smyth, did you see – regardless of the outcome and whether or not you accepted his advice, did you see that this is getting advice from Sergeant Buckle with respect to your notes.

**CST. SMYTH:** I see it now as it being some advice around verbiage and articulation. It's certainly not advice around the content, what you should and shouldn't say as it relates to the facts.

**MS. CHAYTOR:** Okay.

And this, again, you didn't – but you didn't recall this in any event.

**CST. SMYTH:** I did not recall this, no.

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

And “Yup, that's better.” Okay, so –

**CST. SMYTH:** I don't see anything here that's consequential. I wish I had the opportunity to speak to it before this, when we sat down in December, but I didn't and it's being portrayed in a very negative way because of that.

**MS. CHAYTOR:** Okay.

Constable Smyth, I just want to show you that the exchange here with – let's look at the times in terms of, we have 1:19 p.m. and again this is UTC time, where Tim Buckle says: Looks good but then raises the issue about being more specific about an imminent death or a grievous bodily harm.

So I take it by this point in time, and this again would be 10:51 a.m., you would have sent –

**MR. KENNEDY:** Sorry, Ms. Chaytor, I missed that. So 1:19 UTC –

**MS. CHAYTOR:** Yes.

**MR. KENNEDY:** – is 10:51 –

**MS. CHAYTOR:** a.m.

**MR. KENNEDY:** a.m.

Okay, thank you.

**MS. CHAYTOR:** Am I correct on that, Ms. O'Brien. She's really good with the times.

Okay.

So 10:51 a.m., so by that point in time on April 6 you had sent some version, at that point in time it appears, to Sergeant Buckle. Is that fair?

**CST. SMYTH:** It would appear so, yes.

**MS. CHAYTOR:** Okay.

Okay. And what was your concern about – you say here “the circumstances feels a bit manufactured.” Perhaps you could explain what you mean by that comment?

**CST. SMYTH:** It doesn't sound to me – I think that describes it. It sounds like language that is being very robotic given the circumstances that had occurred.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** I didn't think I needed to speak that way.

**MS. CHAYTOR:** Okay.

And then Smyth to Buckle, Joe Smyth to Tim Buckle, he's saying: It's reflective of your training. You say: Ok. And if we just note the time there is 1:28 p.m., which I understand to be 10:58 a.m. Newfoundland Time. And then at 1:35 p.m. UTC time, which would be 11:05 a.m., seven minutes later: "Read the change."

So I take it by this point in time you've sent back another document to Sergeant Buckle. You're directing him to read the change. Does that seem fair?

**CST. SMYTH:** It would appear so, yes.

**MS. CHAYTOR:** Okay.

And then he replies at 1:39 p.m. UTC, 11:09 a.m. Newfoundland Time: "Yup, that's better." Are you able to say what the change was that he thought was better?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay.

So sometime – if we've done our timing here right, Constable Smyth, sometime between 10:58 a.m. and 11:05 a.m. there's a change made to the document that Constable Smyth thought was better.

**CST. SMYTH:** That Sergeant Buckle thought was better.

**MS. CHAYTOR:** Constable – Sergeant Buckle, I'm sorry, yes.

So sometime between – when I look at the times it's a – sometime in between there's – that change has happened.

**CST. SMYTH:** I think I'd used – tried some of the language he had said and ultimately never used it.

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

Okay, so I just want to keep in mind the time periods that we're talking about here. And if we bring up then, please, P-0788. Okay.

Now, Constable Smyth, these are emails that were provided to us on February 17, 2007, from – you had sent them along to your solicitor and he sent them along to us. And there are two email and, actually, we'll begin with the first one, this one – we'll begin with the first one.

Here we go. And this is at 9:41 a.m. and it's an exchange from you to Tim Buckle at 9:41 a.m. April 6, 2015.

Those are both Word document attachments to both of those emails. And what I will take you through, which I'm sure you're aware, are two email that you've been able to locate on that morning; one is 9:41 a.m. and the next one is 10:05 a.m. And this one is thoughts and the other one is re: change, the later one.

And those, again, were provided through your counsel on February 17, 2017, after the BBMs came to light. So are you able to say why, Constable Smyth, that the Commission did not receive those email pursuant to your search for relevant documents when your original documentation was produced?

**CST. SMYTH:** I didn't find them. They were contained in a folder that was the same folder that I had for my counsel at the time was Brad Wicks.

**MS. CHAYTOR:** Okay.

Those are Word documents, the attachments were Word documents. Were any changes made to the attachments prior to them being produced to the Commission on February 17, 2007?

**CST. SMYTH:** No, once they're attached to the email I don't have the capacity to change that document. What I forwarded you was the email with the attachment. So while, yes, I could take the – remove the attachment, make alterations and send you a new attachment, it would have to be a new email. That was a forward of the original email that included the attachment.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** So whatever the attachment was sent to you is the exact same one that was sent to him on that date.

**MS. CHAYTOR:** Okay.

All right.

And if we can look at then – I'm going to start with the second one or I'm sorry, it's the first one here. That's fine, Madam Clerk, I'll just find my place here.

When I look through it, Constable Smyth, and you could probably correct me if I'm wrong or if there's some other change, but the only change that I could see on the 10:05 a.m. – so the 9:41 a.m., this is the first draft, and then we go back to the later one which is 10:05 a.m. And this now, your subject is change. And the only thing that I could see changed was in this paragraph – I'm going to do a comparison – this sentence right here: "I felt an imminent threat to my life and immediately went for my firearm and put my left hand up in a 'stop' motion."

Constable Smyth, have you compared the two documents and do you agree?

**CST. SMYTH:** No, I haven't compared them.

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

**THE COMMISSIONER:** Sorry, what page is that one?

**MS. CHAYTOR:** This is on page 3 of the exhibit. And this is the document that gets forwarded to Sergeant Buckle as re: change. And when I compare the documents this seemed to be – and by all means, you know, I could have missed something, but this sentence here, "I felt an imminent threat to my life and immediately went for my firearm and put my left hand up in a 'stop' motion."

And then when we look at the other document, so at page 6 of the same exhibit, I don't see that sentence. You have: "I immediately went for my firearm and put my left hand up in a 'stop' motion."

**CST. SMYTH:** Right.

**MS. CHAYTOR:** Okay.

So the idea of an imminent threat to your life, that part seems to be a change that you made at 10:05 a.m. and sent back to Sergeant Buckle.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** And that would be similar to his advice to you in terms of making the point about concern for grievous bodily harm.

**CST. SMYTH:** His recommendation was to use some of the language that we're taught in use-of-force training and, you know, legal articulation.

**MS. CHAYTOR:** Okay.

Now, Constable Smyth, when we see your final version of what actually got sent, and that is an exhibit as well and we don't need to bring it up right now but I may need to refer to it in a minute. But what actually does get filed or sent or put on ICAN – and that did not include this wording that I just pointed out to you.

**CST. SMYTH:** Yes.

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

**THE COMMISSIONER:** Of the imminent threat?

**MS. CHAYTOR:** And that would be P-0128.

**THE COMMISSIONER:** Are you saying that the reference to imminent threat was not included in the final?

**MS. CHAYTOR:** Correct. In fact –

**THE COMMISSIONER:** And what was the exhibit?

**MS. CHAYTOR:** That's P-0128. And, actually, let's bring it up, please, Madam Clerk, so we can show.

Okay and it's page 3, please, of this document.

And when we look at the same section in the report you can see right here in this paragraph: "I immediately went for my firearm and put my left hand up in a 'stop' motion."

So that additional wording that you had sent along to Sergeant Buckle at 10:05 a.m. doesn't appear in the version that you appeared to have openly adopted and filed with your employer.

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Correct. Okay.

So, Constable Smyth – and correct me if I'm wrong, so any advice that it appears you may have received from Sergeant Buckle and thought about in sending back to a change to him, ultimately you deleted that from your final version.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** I have a history of not listening to good advice, apparently.

**MS. CHAYTOR:** Constable Smyth, in terms of – and I understand what you're saying in terms of not even having remembered this whole exchange with Sergeant Buckle at the time. Now having had your memory refreshed on it, is there any reason why you adopted the first version or didn't follow his advice in that regard? Or can you not speak to that because you don't recall?

**CST. SMYTH:** No, I mean I don't recall it specifically but I know what my thought process was and it's just I don't feel it's how I would speak in that more frank narrative of what occurred.

**THE COMMISSIONER:** You're saying you felt that the language was a bit artificial?

**CST. SMYTH:** Yes, and for that type of internal report it's almost a statement versus a, you know, what I might write as a report for the Crown. Or how I might speak here is not how I'll speak – if I spoke like this sitting around my kitchen, people would shake their head at me and ask what was wrong with me.

**MS. CHAYTOR:** Constable Smyth, did you feel an imminent threat to your life at the time that Mr. Dunphy produced his firearm?

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

**MS. CHAYTOR:** My other question for you on this – and if we can just reflect back then to the time frame. And if we could go back just to, please, the BBMs at P-0500. And just bear in mind the time frame for – you sent the first version, according to the emails to Sergeant Buckle, 9:41 a.m. The re-change email was 10:05 a.m.

In searching your email after these BBMs came to light, so your recent search in February of 2017, did you find any other email communications with Sergeant Buckle on this issue or any other issue related to the shooting of Mr. Dunphy?

**CST. SMYTH:** With Sergeant Buckle?

**MS. CHAYTOR:** With Sergeant Buckle.

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** It was in a folder that was in conversation with my legal counsel.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** And there were a few emails from him and a few emails from Tim, sent and received.

**MS. CHAYTOR:** Okay. So it was only the two emails ...?

**CST. SMYTH:** It was only two emails that I sent to Tim, that was it.

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

And I just want to take you through the timing then at the top of page 5, please, Madam Clerk.

So your original email went to him at 9:41 a.m. The email with the change was 10:05 a.m. And if we look at the timing here where he says: Yup, that's better. Read the change. Yup, that's better. Okay. And right here: Read the change.

So this would be at – if I'm doing the timing right there, Ms. O'Brien, – 11:09 a.m. "Yup, that's better," 1:39 p.m., 11:09 a.m. And you had your conversation talking about the change that you're going to make, happens at 10:58 a.m.

So was there further documents sent in between at 10:58 a.m. and 11:05 a.m.?

**CST. SMYTH:** It would appear so from this, yes.

**MS. CHAYTOR:** Okay. And that email you don't have?

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

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** Between 10:58 and 11:09, is it?

**MS. CHAYTOR:** And 11:05 a.m.

**THE COMMISSIONER:** 05. I had 9:41, 10:05, 11 – that should be 11:05?

**MS. CHAYTOR:** Yes, now it's an hour later, 11:09, actually, Commissioner, 11:09 a.m.

**THE COMMISSIONER:** That's what I had 11:09.

**MS. CHAYTOR:** 11:09 a.m.

So the emails are 9:41 a.m., 10:05 a.m., and then the BBM exchanges.

**THE COMMISSIONER:** So you're suggesting that there seems to be –

**MS. CHAYTOR:** Another email or some other communication that –

**MR. KENNEDY:** Commissioner, could we just get some clarification on the time frames here? If I go to page 3 of this document, we'll see that there's – at 06/04/2015 12:38:39, there's the – at 12:38 UTC time.

**MS. CHAYTOR:** Correct.

**MR. KENNEDY:** So that is what time in Newfoundland?

**THE COMMISSIONER:** Two-and-one-half hours, I think.

**MR. KENNEDY:** So it's two-and-one-half hours, is it?

**MS. CHAYTOR:** Yeah.

**THE COMMISSIONER:** Is that correct, Ms. –

**MS. CHAYTOR:** That's right.

**THE COMMISSIONER:** Ms. O'Brien is our resident expert on Newfoundland Time.

**MR. KENNEDY:** So that would be what time?

**MS. CHAYTOR:** Well, two-and-one-half hours, so 10:08 a.m.

**MR. KENNEDY:** Because the problem I'm having, if you look at 12:39: "Making notes now." We know that, if that's 10:09, we know that Constable Smyth sent an email at 9:41.

**MS. CHAYTOR:** Correct.

**MR. KENNEDY:** So it appears to be he's saying: I'm making notes now. And that's at 10:09 Newfoundland and Labrador time, whereas we know from the email, that he sent an email at 9:41. So something seems to be a bit screwy with the time frames here, Mr. Commissioner.

**MS. CHAYTOR:** I agree.

I agree, but he's still making his notes at this point in time as well though, right?

**THE COMMISSIONER:** Yes, that's a valid point.

**MS. CHAYTOR:** He's still making his –

**THE COMMISSIONER:** There had been anomalies.

**CST. SMYTH:** It may be a daylight saving times issue.

**THE COMMISSIONER:** Sorry.

**CST. SMYTH:** It may be a daylight saving times issue. I don't think it's always captured in –

**MS. CHAYTOR:** No, I think we've had that confirmed by the RCMP that it is the two-and-one-half hours. At this particular time in the year this is two-and-one-half hours, so that –

**THE COMMISSIONER:** So we're saying –

**MS. CHAYTOR:** So what, Mr. Kennedy, is saying is that this reference to: "Making notes now."

**THE COMMISSIONER:** Making notes now, that's at 10:09?

**MS. CHAYTOR:** 10:09 a.m., and he'd already sent an email at 9:41 a.m. And, Constable Smyth, is there any reason to think the timing on your emails would not be correct?

**CST. SMYTH:** I don't think so. I think Gmail captures accurate local time.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** But, no, I can't explain that

**THE COMMISSIONER:** So where – just give me that making notes.

**MS. CHAYTOR:** Right here, Commissioner, where I'm showing the –

**THE COMMISSIONER:** Making notes now, just go back up a bit, please? That's up too far.

“Making notes now.”

Well, I guess we'll have to hear submissions on it in closing if anybody can figure it out.

**MS. CHAYTOR:** Yes.

**THE COMMISSIONER:** We've looked at it, if I can recall, several which ways.

**MS. CHAYTOR:** That's true.

**THE COMMISSIONER:** Or as they say, every which way but Sunday. On some of these – there was another anomaly earlier, I think.

Go ahead.

**MS. CHAYTOR:** Okay.

And at the end of the day, Constable Smyth –

**THE COMMISSIONER:** If you can verify it, Mr. Kennedy, we'll look forward to it.

**MS. CHAYTOR:** Yes.

And at the end of the day, Constable Smyth, there was no change made to your notes on the basis of any consultation with Sergeant Buckle?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay.

Okay, and if we could look, then, on page 6, please, of this document. Okay, and this is continuing on with your BBMs with Tim Buckle.

And you say to him: “Should tell Fred Hutton to talk to the brother. Lives next to the deceased.” And this conversation is happening on April 6. And at this point in time this is similar, we saw it in your direct evidence or your original evidence, Constable Smyth, that you had told similar to James MacLeod, the reporter from *The Telegram*.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** And to speak to the brother. And I recall that you admitted in your testimony previous that you didn't think that was an appropriate thing to have done.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** Okay.

And in similar then here, you know this matter is under investigation by the RCMP at this point in time. Do you think it was appropriate to direct Sergeant – or to ask, I should say – Sergeant Buckle to speak to a reporter and pass along to talk to the brother?

**CST. SMYTH:** I don't think it would have any impact on the investigation, but it remains inappropriate, yes.

**MR. KENNEDY:** Commissioner, just to complicate things a little further. Someone just sent me a text, I don't know who it is, saying the current difference between Newfoundland and Labrador time and UTC is three point five hours.

**MS. O'BRIEN:** Yes, it changes with daylight saving time, Mr. Kennedy.

**MS. CHAYTOR:** It changes with daylight saving time, Mr. Kennedy.

**THE COMMISSIONER:** That's related to the daylight savings, I think, but ...

**MS. CHAYTOR:** This is prior, yes. It changes with daylight savings.

**MS. O'BRIEN:** That's what we have anyway from the RCMP (inaudible).

**MS. CHAYTOR:** That's what the RCMP told us, and all other times have added up.

**THE COMMISSIONER:** There is evidence on that, Mr. Kennedy. I don't recall it, frankly.

**MS. CHAYTOR:** Yeah.

**THE COMMISSIONER:** It's a long time ago, but it's there in the transcript which I'll check.

**MS. CHAYTOR:** Yes. Okay.

And that is correct with daylight saving times factored in, but I know the other times that we have had in terms of conversions of UTC have matched up with what we've been advised by the RCMP on the two-and-one-half hours.

Anyhow, I'll continue on.

**THE COMMISSIONER:** Well, as I say, we have at least 200,000 investigators out there and they'll all email you, Mr. Kennedy, with their proposed times.

**MS. CHAYTOR:** Okay.

And this continues on then, your discussion with Sergeant Buckle, and this is prior, I understand, to – if we look at – prior to your meeting with the RCMP. Is that correct, Constable Smyth?

**CST. SMYTH:** Sorry, are you asking me – the conversation?

**MS. CHAYTOR:** Your communications that continue on here. We have 4 p.m.

**CST. SMYTH:** That's UTC, yeah. So that would be –

**MS. CHAYTOR:** You tell him you're going to be meeting with the RCMP at 4 p.m.

**CST. SMYTH:** Yes, that would be before 4.

**MS. CHAYTOR:** Okay.

Let me just find that here for you if you wish.

**CST. SMYTH:** No, that's fine.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** The meeting with the RCMP was just before 4 p.m.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** So this was well before that.

**MS. CHAYTOR:** Okay.

And then if we look at April 7 and this would be on page 9 of the document. Okay. And this continues on to page 10 as well.

This is Sergeant Buckle mentioning to you about the RCMP release. And he's saying it was a "Good press release from RCMP." You tell him you "Haven't seen it."

"Outlines the incident, backs you up significantly." And you say: "Great, good to hear" and you ask if it – I think that means online. And he tells you: "Yup, CBC is covering it."

"Should be all positive news coverage tonight."

You say: "hopefully so."

"Yeah, they said what the Chief should have said...."

And you "Still get the Twitter trolls alleging a conspiracy ...." Okay.

So this conversation here – and it continues on the bottom of the page to where you make a comment to Tim Buckle: chief was brutal – is this in relation to the RNC release or the RNC Chief Bill Janes and his communications to the public on the issue?

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

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** What did that relate to?

**MS. CHAYTOR:** That's the Chief Janes –

**THE COMMISSIONER:** The RCMP press release?

**MS. CHAYTOR:** Right. So they're –

**CST. SMYTH:** No.

**MS. CHAYTOR:** So no, the RCMP, they're talking about the release being quite detailed.

**THE COMMISSIONER:** Right.

**MS. CHAYTOR:** But the comment regarding chief being brutal, Constable Smyth is saying that's in relation to his speaking to the public, the RNC chief.

And my question then for you on that, Constable Smyth, is – and I think Sergeant Buckle is who makes the point that the RCMP said what the chief should have said. Okay.

**CST. SMYTH:** Well, I don't think there was an expectation that the RNC chief of police really release specifics to the incident, but they did have some things to say more generally around policing, I believe.

**MS. CHAYTOR:** Okay.

And what did you think? Why did you describe what the chief said as being brutal? What did you mean by that?

**CST. SMYTH:** I thought it was a poor job.

**MS. CHAYTOR:** Pardon me?

**CST. SMYTH:** I thought it was an extremely poor job at addressing our community in such a serious time. I've said that during this inquiry. I've articulated it in an email directly to the chief that, that thought process started that day and it remains today.

**MS. CHAYTOR:** Okay.

Now, we did have – since you were here last the chief did give his evidence. And we did have a copy of his speaking notes that day and it did mention certain things such as the PSU in that, and he thought he would have spoken to some of those issues. But your impression at the time was still that you didn't think it went far enough. Is that what you're saying in terms of addressing the issues?

**CST. SMYTH:** Yes, I did not think it was a good job.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** Or more colloquially I would describe it as brutal.

**THE COMMISSIONER:** Say again.

**CST. SMYTH:** I said or in this case more colloquially I described it as brutal.

**MS. CHAYTOR:** All right.

Okay, I'll return – I'll continue on then with your communications with Sergeant Buckle, page 10. The next comment is: "Arrested Abbass under MHCTA." And what do you understand that to be, Constable Smyth?

**CST. SMYTH:** *Mental Health Care and Treatment Act.*

**MR. KENNEDY:** Excuse me, could we just go back to the top of that page for a second?

**MS. CHAYTOR:** Right here?

**MR. KENNEDY:** I'm looking for that word "brutal" which he –

**MS. CHAYTOR:** It comes down further. Right here: "Chief was brutal."

Okay, so arrested Abbass under the Mental Health Care and Treatment Act and your reply to that was: "Saw that! Nice."

Sergeant Buckle tells you: "He's at hospital now" and you reply with: "Loser."

So, Constable Smyth, you're speaking about an individual who rightly or wrongly, you're being told, had been detained under the *Mental Health Care and Treatment Act*. You've portrayed yourself to the Commission as being sensitive and empathetic to vulnerable persons and those with mental health issues.

I'd like to offer you an opportunity to explain why you would speak of a person in Mr. Abbass's situation as being a loser and thinking that it was nice that he had been arrested?

**CST. SMYTH:** Sure.

Am I to speak about the individual reference here specifically, because his identification in this whole process has caused a lot of concern for my family and I, from a security perspective. I don't know if he's – am I to refer to him specifically? I don't know if he's been identified.

**MS. CHAYTOR:** Well, I've certainly just –

**THE COMMISSIONER:** His name has come up and there have been communications between him and – not directly with me but the office. There's been emails from him.

**MS. CHAYTOR:** Yes, he actually applied –

**THE COMMISSIONER:** Because he originally, anyhow, was of the viewpoint that what had happened to him in terms of the home visit was similar to what had happened to Mr. Dunphy. Now –

**MS. CHAYTOR:** He actually, Commissioner, you recall –

**THE COMMISSIONER:** Now, there are significant issues there that we're not dealing with. He's been in court hearings relating to his detention, I believe. I think it might even have gone to the Court of Appeal. I've stayed away from it.

I don't know whether the Court of Appeal has rendered a decision on it or whether there's anything happening downtown in court in terms of that, but, basically, that's the situation. That's all I can –

**CST. SMYTH:** He's raised great concern with being identified and he's posted things online inclusive of his discharge papers. He's had – and I agree that, I mean, we would never normally release the identity of somebody detained under the *Mental Health Care and Treatment Act* so I have a fundamental, I guess, issue with – aside from the fact that it's caused me great concern.

**MS. CHAYTOR:** Well, Constable Smyth, Andrew Abbass actually identified himself to the Commission and applied for standing.

**THE COMMISSIONER:** Yes, I forgot that. He was here.

**MS. CHAYTOR:** He applied for standing to this Commission and gave the Commission information regarding his detention, so I would like you to answer the question in terms of why –

**CST. SMYTH:** Sure.

**THE COMMISSIONER:** Yeah, I had forgotten. I should mention that to you.

**MS. CHAYTOR:** Yes.

**THE COMMISSIONER:** That was in a public hearing. There was an application made by Mr. Abbass for standing. It was refused but it was suggested that – and that was at an early stage in the inquiry. It was suggested that we would keep under consideration whether he should be called as a witness.

**MS. CHAYTOR:** Yes.

**THE COMMISSIONER:** And then there were subsequent communications, some of which were, I could appropriately describe as way out there and that's about all I can say. We're not – I'm not aware of any active issues with Mr. Abbass and the inquiry right now.

**MS. CHAYTOR:** Right.

So my question is in terms of your characterization of Mr. Abbass as being – and a person who's been detained for mental health, apparently mental health issues, or that's the premise on which he's been detained. So why are you speaking of him in those terms?

**CST. SMYTH:** Well, my thought process at the time, personally, it's an extremely emotional response, it's an emotional period. I was aware of the communications that he was having with the premier's office, communications via social media that was causing security concern and he had a lot of personal things to say directed at me.

While my identity wasn't released at that time, there was a reference to me, there was reference to being, you know, tied to the premier's office directly in being sent to see an individual so – or sent to see Mr. Dunphy by them to carry out a specific act.

There was a lot of really unkind things said in general, and a lot of time spent on social media doing just that. This was an emotional response to that and inappropriate. In a private conversation, sure; infinitely inappropriate when it's released in this form, absolutely.

**MS. CHAYTOR:** Okay.

Constable Smyth, in terms then of – in terms of your comments then that you've said here, are you saying that the comments about you by Andrew Abbass happened before you made these comments?

**CST. SMYTH:** Yes, I did. And I guess I should also add, given that you've brought up that I've portrayed myself as somebody who is empathetic –

**MS. CHAYTOR:** Yeah.

**CST. SMYTH:** – and would treat somebody in his situation with respect, my private conversations with a friend don't correlate to how I would treat somebody in a professional capacity, and that stands to this day.

If Mr. Abbass, or anybody else found themselves in need of policing services, I assure you they would get the professional service that they deserve from me.

**MS. CHAYTOR:** Constable Smyth, do you think that your private conversations with someone that you're quite comfortable with may reflect an attitude towards certain individuals?

**MR. KENNEDY:** Commissioner, I don't know if this is an appropriate time but this issue of the nature of private communications is something that the Supreme Court of Canada has ruled on, on a number of occasions recently. I don't know if this is more for argument or at this point.

And they have distinguished – the Supreme Court of Canada has distinguished between private conversations, private information on a computer or a cellphone in the context of what takes place at the time.

And maybe it's for argument, Commissioner, but I really think it's important to recognize that our Supreme Court has dealt with this issue a number of times, and recognized in here on privacy issues.

**THE COMMISSIONER:** All right.

I think, Mr. Kennedy, it's probably for argument. You can bring out whatever you want to when you examine Constable Smyth; however, you won't be limited.

So I'm unfortunately going to have to break for five minutes. I'd ask, as much as you can, to remain ready to go again in five minutes because we don't want to lose too much time. So we'll take a five-minute break.

**MS. SHEEHAN:** All rise.

The Commission of Inquiry is now recessed.

### Recess

**MS. SHEEHAN:** All rise.

The Commission of Inquiry is now in session.

Please be seated.

**THE COMMISSIONER:** Okay, go ahead, Ms. Chaytor.

**MS. CHAYTOR:** Thank you, Mr. Commissioner.

Before the interjection by my learned friend I had asked you a question, Constable Smyth, and you didn't get an opportunity to provide your answer.

And my question was whether or not your remarks in a private conversation with a close friend may be reflective of an attitude?

**CST. SMYTH:** I don't think they are.

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** I'm sorry, what was the end of your question? Whether close conversation with a friend ...

**MS. CHAYTOR:** Yes, Constable Smyth had mentioned what he would say to a friend –

**THE COMMISSIONER:** Or a family, yeah.

**MS. CHAYTOR:** – in a conversation would not be how he would actually interact with a person.

**THE COMMISSIONER:** Right.

**MS. CHAYTOR:** And I asked him whether or not what he might say in a private conversation such as what we have here with Sergeant Buckle might be reflective of an attitude.

**CST. SMYTH:** No, I don't think it is. I think you're – well, perhaps, right at that moment in time my attitude – and he would know that because he's close enough to me to know what my personality is and what my attitude then at that time was. He was probably upset, a little bit angry about what was happening in the community and about the comments that were being made by Mr. Abbass that weren't – you know, they weren't truthful, they weren't factual.

And so that was just strictly an emotional response and what you're missing there is, of course, the context. You're missing the tone that two people who know each other very well understand and recognize, and they understand and recognize the language you would use and what you mean by a certain term. It's certainly not something I would say to a broader audience but ...

**MS. CHAYTOR:** If we could go back then, please, around the same exhibit. And we're now at – I believe we're on page 13 of the exhibit, please. Is this where we are? Yes, okay, towards the end of the exhibit here.

And, Constable Smyth, I just want to bring it to the last communication here on September – or, sorry, April 7, 2015. It's a communication with Sergeant Buckle as well; all of these are of course. And then there's a gap here and then there's some more communication, two or three more after on April 11.

And I noted in reviewing these that it appears everything April 7 and above are deleted. They're all deleted, including the exchange that I just took you through about Mr. Abbass and including the exchange that we looked at earlier with respect to your notes.

And, again, your phone was passed in on April 24 or thereabouts, we understand. So in the time frame from April 7 when those notes or those communications happened until April 24, did you delete those notes, those BBMs?

**CST. SMYTH:** I suspect so, yeah. It would be a full conversation. And as I've said before once my screen got full of conversations, I would, as a matter of routine, delete those.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** But, again, I know what is involved in cellphone extraction. I realize that they're – they would get access to all of that once I unlocked my phone for them and provide that to them.

**MS. CHAYTOR:** Did Sergeant Buckle provide you any advice in terms of deletion of any of these messages with him?

**CST. SMYTH:** No. No.

**THE COMMISSIONER:** Sorry, just give me a moment there now, please.

Okay, go ahead when you're ready.

**MS. CHAYTOR:** Okay. Thank you.

If we could bring up P-0789 and this is page 2 of this exhibit. And this is actually, Constable Smyth, still a – this is still your BBM messaging with Sergeant Smyth.

**CST. SMYTH:** Sergeant Buckle?

**MS. CHAYTOR:** Sergeant Buckle, I'm sorry. Yes, Sergeant Buckle.

And on the bottom of this page – so what we have here are two pages with a – this portion had been extracted or, sorry, redacted and we've put back in. So we created a separate exhibit so that you could see those two pages. We'd already had our exhibits created and your counsel had asked that redactions be put back in. So I just want to bring you to this.

And, again, this is your – this is Sergeant Buckle to yourself. And this exchange is happening April 1, 2015: "Not concerned at all about that, nothing there ...." And then there's a "Roy posted a couple comments on the VOCM story."

And, again, this is, of course, before the shooting. And then he's – it's LOL from Sergeant Buckle. And then you reply: "He's a lunatic by."

And my questions for you here, Constable Smyth: Do you know who the person is? Is this a friend of yours, the person, Roy, who's being referred to here?

**CST. SMYTH:** No, it was an individual who was posting comments on media outlets, in particular, I believe. And I don't think they had their – a full name there. I think it might have been just Roy, or Roy Newfoundland, something generic.

They appeared to be pro-police commentary, so we had talked about wondering who Roy was because you don't get a lot of pro-police commentary. But they didn't seem to be so informed that it would be a police officer, so we thought maybe a relative of a police officer. Some comments would indicate that they were, they had some information that would show a relationship to a police officer but likely not enough to say they are a police officer.

So we often talked about it, but there was an individual who ranted a bit, and while they seemed to genuinely try to, I think, help the police perspective, they didn't always necessarily do it through how their language came across.

**MS. CHAYTOR:** Okay. And in reference to, or use of the word lunatic in this context, what did you mean by that?

**CST. SMYTH:** Somebody who's just ranting and raving.

**MS. CHAYTOR:** Okay.

Okay, and if we could have, then, P-0774 please. And we're going to begin, please, with page 3 of that document. And this is the last series of BBMs that I'm going to take you through

Constable Smyth. And these are your communications with your friend, and I understand that this is a close personal friend of yours?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. And he's a well-educated professional person?

**CST. SMYTH:** He is.

**MS. CHAYTOR:** Okay. And do you, from time to time, confide in him, or each other, in terms of your work and back and forth, that you confide in one another in terms of everyday stresses of your work and that type of thing?

**CST. SMYTH:** I don't think there's anything confiding in terms of details or anything like: you wouldn't believe what I saw today. These kinds of things, but there's definitely – we are – you know, he has a stressful job that sees a darker side of humanity as well, so there is a tendency to use some gallows humour or dark humour in our conversation that you wouldn't – that could be deemed as inappropriate if it was opened to public consumption but ...

**MS. CHAYTOR:** Okay. And so in terms of – I'm going to start with the first reference here on page 5. Actually, I think we'll back up to page 4. And this is your communication that I'm going to take you to begin on April 4, so the day before the shooting.

“On the road yet? Aren't u working?” He says that he's headed to the gym. And you tell him that you're on your way home.

And then if we come down to page 5, he says: “I think we are trying to leave by 2. What is work situation?” And you tell him: “Shouldn't be more than a few hours.” And so this is April 4 and we've already had evidence from you, Constable Smyth, that you were working on April 4 and doing work on your investigation of Mr. Dunphy. Is that correct?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay. And “If I'm done in time, I may do a quick gym visit to try and shed some of the fluid ....”

And if we come over to the next page: “You are off in the pope mobile?” he asks you. And you say: “Yup.”

And I take it, is that the Yukon that is being referred to in this exchange?

**CST. SMYTH:** Yes.

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

And then if we come down again, this is still April 4, and it's approximately 4 p.m. UTC time. And you tell him: “Gotta go deal with some lunatic threatening the premier etc.” I just want to stop there for a moment. Is this exchange in reference to Mr. Dunphy?

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

**MS. CHAYTOR:** Okay. And this is the 4th, so the day before you actually visit him. Did you make any attempt to visit Mr. Dunphy on April 4th?

**CST. SMYTH:** No, I didn't. I think at the time of having that conversation I didn't know where Mr. Dunphy lived. It was a possibility that he might have lived in downtown St. John's and I could have gleaned enough information to go visit him that afternoon, but at that time, I believe I may have just been cycling through his social media feed. I don't believe I had gotten beyond that at that stage.

**MS. CHAYTOR:** Okay. And what did you mean with go – I'm going to break down the words here but: Gotta go deal with. What did you mean by: Gotta go deal with?

**CST. SMYTH:** Well, that in the general sense, I've got to conduct a threat assessment. And by go deal with, at that point in time, I intended on going to visit him.

**MS. CHAYTOR:** Okay.

And then the next piece is, I just want to speak to the threatening the premier et cetera. And of course you've repeatedly stated to the Commission that you didn't consider what Mr. Dunphy was saying to be threats or – and we have the evidence of others who spoke to you after the event where they understood you were investigating similar to what we see here: threats against the premier.

So I want to ask you then, what did you mean in telling your friend that you were going to go deal with someone threatening the premier?

**CST. SMYTH:** Again I, as I've given testimony to, it is language that I would use as a matter of simplifying an area of policing that few understand or are aware even exists.

I don't – if I were to say to, in this case, a close friend that I had to go deal with someone to initiate a contemporary threat management process, I don't think it would have the same effect in just trying to be simple. It might generate more questions, which to be quite frank, I wasn't interested in.

**MR. CHAYTOR:** Okay.

And then, of course, we have the word, "some lunatic threatening the premier." And what did you mean in referring to Mr. Dunphy as some lunatic?

**CST. SMYTH:** The exact same way I had used it in the previous context. At that point I did not know who Mr. Dunphy was, I was going by his social media feed. So in that context it's somebody who's ranting and raving, they're off the wall, I guess for another term. That based on the culmination of what you see in their social media feed it's – I would never use the term lunatic to describe somebody that has mental health issues, I've referred to my own counsel as a lunatic and it's not meant to be derogatory.

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

**MS. CHAYTOR:** Twice in one day, Mr. Kennedy?

**THE COMMISSIONER:** Sorry, I missed that. What happened?

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

**THE COMMISSIONER:** Something I should know about?

**MS. CHAYTOR:** Oh no, no, he just said he refers to his own counsel as a lunatic, so I think he was –

**CST. SMYTH:** It's not meant to be derogatory. I realize that the word "lunatic" in its perhaps older definition refers to somebody with mental health issues, but I think in actuality if you were to see the word "lunatic" now in a mental health diagnosis, we would be offended that a medical professional would use the term officially because it's no longer accepted that way.

**MS. CHAYTOR:** Okay.

Constable Smyth, and in terms of what information up to this point in time on the 4th that you would have had about Mr. Dunphy, to characterize him in the way that – and, you know, your explanation as to what you mean by the term, what information would you have had regarding him up to this point in time on the 4th?

**CST. SMYTH:** Just what you see in social media. You know, I think maybe if I was to take this comment out of a private conversation with a close friend and I was in this room and somebody said what are you doing today, I might say: I have to go speak to an individual who has been ranting and raving on social media with commentary directed towards the premier. That is in essence, a translation of what I am saying there in a more politically correct way.

**MS. CHAYTOR:** Okay.

Constable Smyth, I guess, then, a key question would be when you did ultimately meet with Mr. Dunphy the next day did you, in terms of your approach towards him, make any indication along the lines that you would consider his ranting, raving, use of social media as being something that could characterize him as being a lunatic?

**CST. SMYTH:** No. No, I would never do that. And I've dealt with people on many occasions who strictly were what, you know, we refer to in the training as being a howler, it's the person that just – they rant and they rave and they're off the wall. They're constant, inappropriate communications, but when you delve into the matter you are able to quickly determine that that's all they are, there is no other reason to be concerned.

Even in those cases where that person is strictly somebody who is ranting and raving on social media, I would never use the term lunatic in their presence to describe what it is they are doing. In Mr. Dunphy's case, I absolutely would have never used the term because immediately on seeing his living conditions and his – he earned some history on his injury, there was very, very legitimate concerns.

So while there might perceivably even now, based on what we know being social media, some ranting and raving, there was a lot of heartache, a lot of articulation of his pain, and his concerns and disgust with government that were clearly founded in a legitimate grievance. So I would definitely not use that term at any point in time to his face, and I would never use it at any point after, after you see the poor state that he was in.

**MS. CHAYTOR:** Okay.

And, Constable Smyth, in your communications with him, did you say or do anything to leave him with the impression that you thought his use of social media's and prolific use of Twitter was inappropriate, that the communications were inappropriate?

**CST. SMYTH:** That's possible. You know when we're discussing what he had to say, I think it – I did tell him why I was there. We did get to the point to discuss those particular tweets that

we've seen here. Whether or not I specifically said they are inappropriate, I can't remember that specifically, but the message would have been gotten across.

If there's a police officer, I think, standing up in your living room and he's now told you and disclosed I'm here to talk to you about these particular comments, I don't think you need to necessarily say a whole lot more to permit that person to understand that you believe their comments were inappropriate.

**MS. CHAYTOR:** Okay. If we continue on, then, with your communications here: Cool, I'll have a beer waiting for you. And I understand from your evidence that you were headed out of town to meet up with your friends that night. Is that correct? And so that's what would be being referenced here?

**CST. SMYTH:** Yeah, his only interest in this entire conversation is when are you going to be here for supper?

**MS. CHAYTOR:** Okay. And then you say: "If I have to arrest him then I'll be late."

**CST. SMYTH:** So that's just a – talking about the general unpredictability of policing. That's something that certainly anybody who is close to me would recognize that if I'm dealing with somebody – or because normally I'm not in a front-line position, my schedule is a little more definitive. But in other front-line positions, such as patrol, everybody recognizes that five minutes before you're supposed to get home, something catastrophic might happen and you might be very, very late.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** It's just a reference to the unpredictability of the situation that we may be going to deal with.

**MS. CHAYTOR:** So on April 4 –

**THE COMMISSIONER:** Just we're gone five or six minutes past lunchtime. How do we stand there, Ms. Chaytor?

**MS. CHAYTOR:** I'm probably another 10, 15 minutes.

**THE COMMISSIONER:** Yeah. Okay, we're going to have to break for lunch.

**MR. KENNEDY:** Commissioner, could I just make a point.

**THE COMMISSIONER:** Sorry, go ahead, Mr. Kennedy.

**MR. KENNEDY:** I don't want to belabour the point that was made earlier today, but I forget which day it was, I think it was Friday last week you'd indicated that there was three hours there for Constable Smyth's examination and that would be it. And so my concern is this, again, illustrates the difficulty with setting time frames, like you've set time frames for Thursday –

**THE COMMISSIONER:** I know. They're approximate to the best we can do. Now, to be fair to Ms. Chaytor –

**MR. KENNEDY:** Lost a half hour, yeah.

**THE COMMISSIONER:** I took half an hour at the beginning to try and encourage us to stay on schedule. I hope it wasn't counterproductive but I think there were issues that had to be dealt with to get us ready for Wednesday. Ms. Chaytor is now roughly, what, 2½ hours into her presentation –

**MS. CHAYTOR:** I think less than that when we talk about our breaks.

**THE COMMISSIONER:** – less than that probably, and so she is not far off schedule.

**MS. CHAYTOR:** No.

**THE COMMISSIONER:** So I have to accept responsibility for that lost half hour but hopefully it's a half hour that will be more than made up for on Wednesday because of my comments. But, specifically, what is your concern Mr. Kennedy?

**MR. KENNEDY:** Well, my concern is –

**THE COMMISSIONER:** When we get back, you'll have – you know, we'll just have to play it by ear in terms of how much time is needed, but go ahead.

**MR. KENNEDY:** Yeah, no, my only concern is as illustrated here we're not even at cross-examination yet, we're almost up to the three-hour mark, and yet there's a time frame set for Thursday and we're moving towards the end of the inquiry. So if something happens how do we – you know, how do we finish it?

**THE COMMISSIONER:** There's nothing going to happen.

The point should be made that we're talking approximate times. And the point should also be stressed, continuously stressed which I haven't done, is that a lot of your cross-examination has been dealt with by the, you know, the way in which, I think, counsel has put the questions and given Constable Smyth every opportunity to comment. And I'm sure you'll have very little left to deal with Mr. Kennedy.

**MR. KENNEDY:** Actually, I don't have much to deal with.

**THE COMMISSIONER:** That's what I thought.

So Mr. Simmonds would be the main antagonist or Ms. Breen, I suppose. And, again, we're not going to be going back over what's already been gone over, so it will be restricted to, you know, the examination pretty much that we've had this morning.

Am I missing something here? Do you have any rough idea in terms of scheduling, Mr. Simmonds? Very rough, I don't want to pin you down. If you want to wait until after lunch to tell us, it's fine.

**MR. SIMMONDS:** No, I mean, you know, to be frank, Ms. Chaytor has hit on many of the areas, but I do believe there's still information that's appropriate for cross-examination.

**THE COMMISSIONER:** All right. That's –

**MR. SIMMONDS:** Half an hour, three quarters of an hour.

**THE COMMISSIONER:** I'm assuming – yeah, I'm assuming there will be something.

Go ahead.

**MS. CHAYTOR:** Commissioner, perhaps we could take an abbreviated lunch and the other –

**THE COMMISSIONER:** No, I don't – that's not fair to the parties, I don't think.

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

**THE COMMISSIONER:** We're going to go with –

**MS. CHAYTOR:** And the other, the other –

**THE COMMISSIONER:** We'll come back – it will be abbreviated, we're going to come back shortly after 1:30 basically.

**MS. CHAYTOR:** I'm prepared to sit down is the other issue, but I think in fairness to Constable Smyth I should finish taking him through the rest of the BBMs. But if there's preference that I sit down and let the cross-examination begin, I'm in your hands.

**THE COMMISSIONER:** Well, we'll discuss it over lunch –

**MS. CHAYTOR:** Okay.

**THE COMMISSIONER:** – and maybe we can shorten it a bit. But the bottom line is we have another witness that we'll just have to do the best we can in terms of our scheduling. So we'll break until an extra 10 minutes after 1:30, 1:40.

**MS. CHAYTOR:** Thank you.

**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:** I was unnecessarily concerned in terms of timing before lunch, I think, because I hadn't realized that Ms. Hughson is not to start – of ASIRT, is not to start until 2:30, I believe she's scheduled for. So let's see how well we do before that.

Go ahead.

**MS. CHAYTOR:** Thank you.

Good afternoon, Constable.

Could we bring back up, please, P-0774. And we're at page 6, I believe, when we broke.

Page 6, okay. No, this is correct. Thank you.

So, Constable, when we broke we were talking about the comment: “If I have to arrest him then I’ll be late.” At this point in time, April 4, 2015, were you contemplating arresting Mr. Dunphy?

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

**MS. CHAYTOR:** And, again, perhaps you could explain. Why do you use the word “arrest”?

**CST. SMYTH:** Well, in that particular case it’s simply to explain the unpredictability of policing. If I’m going to visit somebody, regardless of what it’s for, there are elements of everything we do that we cannot foresee and predict. And the reality is whether or not it’s pulling over a vehicle on the side of the road or going to do a home visit, a home visit that is at first thought to be benign, can turn into something else very rapidly and very quickly without any indication of such.

**MS. CHAYTOR:** Okay.

And then it continues on. You say: “Too much paper work.” And your friend suggests: “Give him a warning or bring him in for a psych assessment.” And you say: “Not a bad idea.”

Constable Smyth, did you believe that Mr. Dunphy was exhibiting behaviours, based on the information that you had of him at this point in time, that might warrant you bringing him in for a psych assessment?

**CST. SMYTH:** No, I’m patronizing a friend who is starting to become a nuisance as it relates to text.

**MS. CHAYTOR:** Okay.

And if we go on to page 8 – I’m sorry, just find my place here now. It’s page 8, Madam – okay. Okay, towards the top actually.

He writes to you again, then later that day: “What up? We have arrived.” You say you’re “Just about to leave work.” And then if we come down towards the bottom, there was no time for the gym: “Got delayed with work.” And this is now at just after 7 p.m. UTC time.

What – this is the day that you would have been doing your – started your investigation and made inquiries about Mr. Dunphy. And so is that – was it your investigation or inquiries regarding Mr. Dunphy that delayed you with work that day?

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

**MS. CHAYTOR:** Okay.

And was there anything in particular, in terms of the inquiries you made, what was it that prevented you from getting on the road as to when you thought you might have?

**CST. SMYTH:** I think largely it was the significant amount of commentary on social media that took me some time to go through versus what originally could have been maybe an analysis only of his originally – of the tweets that were originally sent to me and maybe some basic background checks. But in order to go back through some of his history and then to try to get a bit more context of that through WorkplaceNL in speaking to Tom Mahoney, that delayed me.

You know, it didn’t take very long to sift through Mr. Dunphy’s social media profile and realize there was, from a threat assessment perspective, a lot here that needed to be reviewed.

**MS. CHAYTOR:** Okay.

And then on the top of page 9 he asks: Did you arrest – and he corrects himself, buddy; did you arrest buddy. And you say: “Nope, tomorrow.”

And, again, was it your contemplation on April 4 that you were going to arrest Mr. Dunphy the next day?

**CST. SMYTH:** No, absolutely not. It’s an answer to – I realize his question is: Did you arrest buddy? However, I know why he’s asking it because he wants to know am I going to be late. He could care less what it is I’m actually doing.

My answer perhaps should have been elaborated a bit more with hindsight, but what it should read is: No, I don’t intend to arrest this individual, I’m going to visit him tomorrow as I had previously indicated that I might visit him today. But for the purposes of that private conversation, it served its purpose in letting him know I was currently on schedule if you will.

**MS. CHAYTOR:** Then he writes – or I’m sorry, this is you continuing on. You say: “Got all the background etc done.” And at this point in time on the 4th, what background did you have done on Mr. Dunphy?

**CST. SMYTH:** I was just referring to having reviewed some of the social media feed. I think at that point I might have spoken to Tom Mahoney and –

**MS. CHAYTOR:** Did you have your CPIC and PROS checks done at this point in time?

**CST. SMYTH:** I didn’t have the CPIC done but I think I was able to determine that there were a number of Don Dunphys, and I may have even by then firmed up which one it was, but I hadn’t done any – I hadn’t done CPIC or any of those. I think I had just come to the conclusion of who he was and where he was.

**MS. CHAYTOR:** So did you believe on April 4 when you’re saying “Got all the background etc done,” that you had at that point in time sufficient background checks on Mr. Dunphy to go visit him?

**CST. SMYTH:** I had certainly enough to confirm my original belief that there was an issue here that I needed to look into further and that I needed to visit him. I didn’t necessarily take into consideration in this comment that I had additional officer safety background checks to do that, albeit would play part of a threat assessment there, are not what’s being referenced here.

**MS. CHAYTOR:** Okay.

And, Constable Smyth, I noticed here as well that all the messaging with this individual appears from at least – this is April 4 you’re having this conversation, you pass your phone in April 24, and all the messaging with this individual, similar to Sergeant Buckle, up to April 7 appears to have been deleted. Again, did you delete these messages from your phone?

**CST. SMYTH:** I’m sure I did. It’s – again, you don’t delete in BBM as with most modern smart phones’ messages, individually. While I know in current phones you have that option, I don’t believe it was even an option in a BBM conversation. You delete the entirety of the conversation or nothing at all.

So it was, again, a matter of routine for me to delete that. And I think you’ll see as you go later into that exhibit, there’s the remainder of the conversation I don’t think is deleted.

**MS. CHAYTOR:** No, it's before April 7 is where I see, but I could be wrong if you want to point it out when we're going through.

**CST. SMYTH:** No, that's fine. I'll refer later in the exhibit.

**MS. CHAYTOR:** Page 10, but anyway – he writes: “But anyway. I am three beers in, get on the road.” I need – okay, so these are just – he's telling you, I guess, that he's arrived and you tell him that you're “Leaving shortly.” And so that's at 7:16 p.m. on April 4, so you're leaving then to head out for your evening with your friends.

**CST. SMYTH:** Correct.

**MS. CHAYTOR:** And if we could have page 16, please. And this next section I'm going to take you through, Constable, is the requalification at the firing range which referred from your other evidence that that happened of course and from other's evidence, April 9.

And this is you speaking to your friend – sorry. He asks you: “Much on the go today?”

“Naah, requalified on the range this morning.”

He says: That's weird. Aren't you still on leave? “I would think holding a gun while on leave might be traumatic for some. You're too macho man! How did it feel?”

And you tell him: “Pretty good actually, nice to know I can pull the trigger.” I did it under my own volition.

He asks you: “No flashbacks?” And you say: “They were issuing me a new firearm and I asked to bang off a few rounds.”

And he replies “I know you would not be pushed into something ...” so I took that as being you telling him that you did it on your own volition. Is that correct?

**CST. SMYTH:** Yes.

You should note that the comment where he said “You're too macho man!” like there's – knowing the individual, it's just a sarcastic comment. It's not a suggestion that – of what you might take from that without the tone. It's just sarcasm.

**MS. CHAYTOR:** Okay. Fair enough. And if there's anywhere else along here that you'd like to stop, by all means let me know.

Okay, so we just did the full course of requalification and of course we've heard before you did this with Sergeant Buckle and “I wondered about that. I sort of figured they would not have u carry that gun around anymore, if for no other reason than it would be a reminder.” And then he asks you: “Same type of gun or different model?” And you tell him it was the same.

And then you tell him: “That gun is seized, but I will get it back if I want it.

“Which I do.

“Worked for me the first time ... So ....”

And he says: Fair enough. You'll have to go a few rounds just to make sure it still works.

Constable Smyth, why would you want that gun back?

**CST. SMYTH:** I don't actually. The entire conversation is immature, it's bravado and it's inappropriate.

**MS. CHAYTOR:** Okay.

What did you mean by: "Worked for me the first time ..."?

**CST. SMYTH:** Well, it means exactly what I said: It worked.

**MS. CHAYTOR:** In what respect?

**CST. SMYTH:** It means I was faced with being killed and I had to use that gun as a response to that and it functioned properly.

**MS. CHAYTOR:** And if we could have, please, page 18. And this is you discussing with your friend the fact that you've got to go back to Mitchells Brook. This is now on the 10th when you have to do the re-enactment again. And over onto the next page or that, that you – I shouldn't say you have to do it, you agreed to do it.

I sent to – you're talking now about the email that you sent to the entire RNC staff, some veterans and some RCMP.

Did you send this email to your friend as well, to this friend that we're speaking of here?

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

**MS. CHAYTOR:** Okay.

And then if we could come over to the bottom of page 21, please. And before I leave that, Constable Smyth, in terms of, we looked at some messaging there between your friend and yourself in terms of him encouraging you to get on the road and, you know, not be delayed, that type of thing. Were you in any kind of a hurry on April 5 when you met with Mr. Dunphy? Were you under any timing restrictions that day?

**CST. SMYTH:** No.

**MS. CHAYTOR:** Okay.

**CST. SMYTH:** None whatsoever. I wasn't under time restrictions on April 4.

**MS. CHAYTOR:** Right.

Okay, so you didn't feel any pressure –

**CST. SMYTH:** No.

**MS. CHAYTOR:** – or under any time restraints, anything –

**CST. SMYTH:** None whatsoever.

**MS. CHAYTOR:** – on either day?

**CST. SMYTH:** Neither.

**MS. CHAYTOR:** Okay.

The bottom of page 21 and I think this is – you’re head on, headed to Florida. And your friend asks you: “Did u buy a texting plan?” And you say: No, it’s a work plan, “And I don’t care.”

I just want to – this is your work cellphone that you had at the time of the incident that we spoke about when we began this morning in questioning. Did you take that phone to Florida?

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

**MS. CHAYTOR:** Okay.

And were the RCMP aware that you were going to be taking your phone?

**CST. SMYTH:** I believe they were, yes.

**MS. CHAYTOR:** And nobody had any concern about that I take it.

**CST. SMYTH:** No, if –

**MS. CHAYTOR:** Nobody expressed it to you anyhow.

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

**MS. CHAYTOR:** Okay.

And after returning then from Florida, that’s when you passed your phone in to the RCMP?

**CST. SMYTH:** Yes.

**MS. CHAYTOR:** Okay.

Those are all the questions that I have. And some of my colleagues may have questions.

Thank you, Constable Smyth.

**CST. SMYTH:** You should note that the: I don’t care comment is related to the text plan. It wasn’t on my list of concerns at that time.

**MS. CHAYTOR:** Okay. Fair enough.

Thank you.

**THE COMMISSIONER:** Mr. Simmonds, when you’re ready.

**MR. SIMMONDS:** Constable Smyth – Constable Smyth, today we’ve – what Ms. Chaytor has taken you through have basically been emails or BBMs that were all deleted by you –

**CST. SMYTH:** They weren’t all deleted by me, no.

**MR. SIMMONDS:** The majority of them were deleted by you on your phone and, again, the majority of those we only became aware of recently. Correct?

**CST. SMYTH:** I believe that's correct. Yes.

**MR. SIMMONDS:** Yeah.

Now, I want to take you to Exhibit 0581 on page 6. It's April 7. Page 5 and 6, actually, where it starts off MacLean: "Yes – talking to cochrane ...."

I think it's up a little before that. No, come down. Indeed – yeah, okay, you just passed it, Madam Clerk. I'm sorry.

**THE COMMISSIONER:** "Indeed, how is everybody?"

**MR. SIMMONDS:** It's further down actually.

**UNIDENTIFIED FEMALE SPEAKER:** What did you say it was?

**MR. SIMMONDS:** Yeah, okay.

**THE COMMISSIONER:** Right there: Talking to Cochrane this a.m.?

**MR. SIMMONDS:** No, it's at 12 – actually, at 12:35 or 12 – I'm looking at the time or 3 – if you look at the time that's there, it's 3:05, Madam Clerk. That's it right there.

**THE COMMISSIONER:** Right there: "Hey, anything I can help you with for scrum?"

**MR. SIMMONDS:** Right on. Yes, that's it.

**THE COMMISSIONER:** Okay.

**MR. SIMMONDS:** And MacLean: Yes, talked to Cochrane this a.m. He may file an ATIPP request on correspondence contemplating story on common nature of threats.

She asks you: "Police record?" You say no and then you say: "I wish I could talk to him."

"Would love them to have insight into intelligence based investigations" and threat assessments.

She says: He's putting a call into Jason Sheppard. You replied: "I know I can't while investigation is ongoing, but I could so easily answer their questions."

**MR. KENNEDY:** Excuse me, Mr. Commissioner, it's nothing to do with Mr. Simmonds's question, but the – we have text with no tone, no context, so when Mr. Simmonds is putting it, he's putting a tone and context into it as opposed to the –

**MR. SIMMONDS:** And I understand that's my right. Like, during Ms. Chaytor's examination, Mr. Kennedy stood up just about every point and stopped when there was, what I believe was a crucial point. Now I'd ask if that's not – would not happen right now.

**THE COMMISSIONER:** Thank you.

We'll keep an eye on that, Mr. Simmonds. Go ahead with your question.

**MR. SIMMONDS:** Thank you.

Smyth: "Has Cochrane said what he's doing with it?"

MacLean: Haven't heard. Haven't spoke with him. Believe he was dealing direct with RNC.

And then this is on the 7th. And then on the 10th the email gets leaked to Cochrane, but you don't know anything about that, Officer Smyth?

**CST. SMYTH:** About it being leaked to Cochrane?

**MR. SIMMONDS:** Yeah.

**CST. SMYTH:** No, I've been asked that multiple times here.

**MR. SIMMONDS:** You haven't even asked –

**CST. SMYTH:** So you can continue to ask it again –

**MR. SIMMONDS:** And I'm asking you again: You know nothing about it? You can offer no further insight?

**CST. SMYTH:** No. Those are not the answers I would provide to a broad audience such as the general public.

**MR. SIMMONDS:** If we could go to Exhibit 0774 and 8:41:26. I think it's on page 19, actually.

Yes. Okay. Thank you very much, Madam Clerk.

Trevor talks to you about harassing you having a dirty truck. You say: "Thanks... Fucking can't win this shit ...." And then he says, Trevor says: "Ha, did u send it to everyone? So no way to figure out who leaked it?" You reply: "No way, I sent to the entire RNC staff."

And you again continue on: Some veterans, some with the RCMP, unless some dummy actually forwarded it from his work account.

So there you're having a conversation, you're assuring your buddy that, no, nothing I did would have done it, but it gets leaked. And you can't offer us any insight into that, can you, Officer Smyth, what that conversation means?

**CST. SMYTH:** Into what, sorry?

**MR. SIMMONDS:** Into the conversation you're having there where you're assuring your buddy there's no way it can be traced back to where it was leaked from because that's what you're saying.

**CST. SMYTH:** No – no, it's not.

**MR. SIMMONDS:** Well, that's what he said: Did you send it to everybody? "So no way to figure out who leaked it?" That's plain English, Officer Smyth. That's what he said to you. You reply.

**CST. SMYTH:** That's your interpretation of it.

**MR. SIMMONDS:** No, no, Officer Smyth.

**CST. SMYTH:** Okay.

**MR. SIMMONDS:** It's not my interpretation. It says: "Ha, did u send it to everyone? So no way to figure out who leaked it?" That's the words on the page.

**CST. SMYTH:** He's asking a question.

**MR. SIMMONDS:** Right.

And you reply: No way, I sent it to the entire RNC staff, some veterans, some RCMP. Unless some dummy actually forwarded it from his work account.

**CST. SMYTH:** Right so there it would be the potential ability for them to source where it came from. So when you say there's no way to figure it out –

**MR. SIMMONDS:** No, you said –

**CST. SMYTH:** – that's what I've said. No, in actuality I –

**MR. SIMMONDS:** You said there was no way –

**CST. SMYTH:** I've provided him –

**MR. SIMMONDS:** – for them to figure it out.

**CST. SMYTH:** – some information as to how you would do that.

**MR. SIMMONDS:** It appears clear here, you're talking about it being leaked and you're giving him an assurance that there's no way the leak can be traced. Now I think that's the plain reading of that for anybody that reads it.

Do you agree Officer Smyth?

**CST. SMYTH:** Well, no, I don't agree.

**MR. SIMMONDS:** Okay. Fair enough. But that's your position to the Commission.

**CST. SMYTH:** What is?

**MR. SIMMONDS:** That that's not the plain reading of it? That you're saying that there's no way the leak can be traced.

**CST. SMYTH:** Right there I say the words "no way."

**MR. SIMMONDS:** You do indeed. And then you go on to a list of who you sent it to so it would make it impossible to trace the leak.

**CST. SMYTH:** It would be very challenging I suspect.

**MR. SIMMONDS:** Yeah.

**CST. SMYTH:** Unless some dummy actually forward it from their work email.

**MR. SIMMONDS:** (Inaudible) exactly. But you had no hand in the leak and you know nothing about the leak.

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

**MR. SIMMONDS:** And you didn't purposely send it to all these people so that the leak couldn't be found. That wouldn't have been your purpose, would it? Because that's certainly what it reads here, that that was your purpose to send it to all these people, so no way you can find out the leak.

**CST. SMYTH:** Where does it say that, sorry?

**MR. SIMMONDS:** It says that there when it says: No way, I sent it to the entire RNC staff, some veterans, some RCMP, some dummies actually – unless some dummy actually forwarded it from his work account.

**CST. SMYTH:** No, sorry, your suggestion was that I sent it to all these people –

**MR. SIMMONDS:** Yes.

**CST. SMYTH:** – so that it couldn't be traced.

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

**CST. SMYTH:** Okay.

**MR. SIMMONDS:** That is my suggestion. Do you agree that that's what you're saying there –

**CST. SMYTH:** Do I –

**MR. SIMMONDS:** – that the reasonable reading of that is you're saying it can't be traced because I made sure I sent it to all these people.

**CST. SMYTH:** No, that is absolutely not what I'm saying.

**MR. SIMMONDS:** Okay

Can we go to exhibit P-0500?

**CST. SMYTH:** You should know, Mr. Simmonds, that those messages are not deleted.

**MR. SIMMONDS:** Can we go to exhibit P-0500, Madam Clerk? This is an exchange with Tim Buckle, and Ms. Chaytor touched on this this morning, it's at 3:58:53.

Now, there's just been a death, there's a criminal investigation and you're telling your good friend Sergeant Tim Buckle to go and contact Fred Hutton, to go and have a conversation with the people next door. And did I understand you to say this morning you didn't see anything wrong with that?

**CST. SMYTH:** No, I didn't say that.

**MR. SIMMONDS:** What did you say?

**CST. SMYTH:** I said it was inappropriate. It wasn't releasing specific information, but it was inappropriate.

**MR. SIMMONDS:** It clearly is inappropriate. It shows a disregard for the investigation and it shows you and Officer Buckle being in league together to do it. Correct?

**CST. SMYTH:** No, I don't think so. It was a request by me to him –

**MR. SIMMONDS:** Right.

**CST. SMYTH:** – that my understanding is, went unfulfilled.

**MR. SIMMONDS:** Well, he says: “Will do.”

**CST. SMYTH:** I know what he said.

**MR. SIMMONDS:** That's what he says. Should tell Fred Hutton to talk to his brother. Lives next door to the deceased. Buckle: “Will do.”

So that seems two of you, the plain reading of that, to the average person I believe, would be the two of you are in league to make sure this information gets to Tim Buckle, when you know there's an RCMP investigation – or goes to Fred Hutton – when you know there's an RCMP investigation on the way. And that's inappropriate and improper.

**CST. SMYTH:** I said that.

**MR. SIMMONDS:** And in breach of – I would expect – of your duties as a police officer.

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

**MR. SIMMONDS:** You don't know whether that's in breach. You don't know –

**CST. SMYTH:** I didn't release any specific information.

**MR. SIMMONDS:** You don't know whether suggesting or conspiring to have information like that –

**MR. KENNEDY:** Conspiring, Commissioner. I mean –

**MR. SIMMONDS:** – released would be –

**THE COMMISSIONER:** Sorry?

**MR. KENNEDY:** He used the word conspiring?

**THE COMMISSIONER:** Well, he's suggesting that, yes, it could be, if himself and Constable Buckle in concert agreed to do certain things, an argument might be made, but I'll hear it in submissions.

Carry on, Mr. –

**MR. SIMMONDS:** Thank you.

So you and Officer Buckle together are going to make sure this information – and he's a Sergeant – this information gets out to Fred Hutton, which I put to you is clearly in breach of your duties as a police officer, particularly one who's being investigated. Do you not agree?

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

**MR. SIMMONDS:** You don't know. Okay.

**CST. SMYTH:** You can make a complaint to the RNC. I'm sure they'll investigate it fully.

**MR. SIMMONDS:** No, no. That's fine. If you don't know, you're the officer, you're giving testimony, and you don't know if that's within your duties to release information or to insight someone, to suggest that someone go and give information to a reporter in a situation that's under investigation by the RCMP.

**THE COMMISSIONER:** I think he's given you the answer to that, Mr. Simmonds. You're –

**MR. SIMMONDS:** It's don't know. I accept.

Do you recall in your prior testimony, Ms. Chaytor asking you about your consumption of alcohol, Officer Smyth?

**CST. SMYTH:** Generally speaking or in related to a specific evening?

**MR. SIMMONDS:** Generally speaking and in relation to the time frame that we're speaking of here: 3rd, 4th, 5th of April, 2015. Recall that?

**CST. SMYTH:** I think she may have asked, yeah.

**MR. SIMMONDS:** And would it be fair for me to say that you left a clear impression that on the night of the 4th you only had a couple of glasses of wine.

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

**MR. SIMMONDS:** That you had no excessive use of alcohol.

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

**MR. SIMMONDS:** In fact, I think January 17, 2017 on page 39:

“MS. CHAYTOR: Okay. What time did you finish your shift on April 4th and then what did you do that evening?”

“CST. SMYTH: I think I finished up maybe around 5:30 or 6 o'clock. And I went to a friend's cabin for Easter where my children and family were and we had Easter supper.”

“MS. CHAYTOR: Okay. And where was that cabin?”

“CST. SMYTH: Whitbourne.”

“MS. CHAYTOR: Whitbourne. Okay.”

“Did you consume any alcohol or use any recreational drugs that evening?”

“CST. SMYTH: I didn't use any drugs, but I did have a couple of glasses of wine.”

“MS. CHAYTOR: Okay, a couple of glasses of wine.

“CST. SMYTH: Yes.

“MS. CHAYTOR: And that’s it?

“CST. SMYTH: That would be it.”

I’d ask to go back to exhibit P-0774, page 5 at 2:40:08.

Trevor: I think we’re trying to leave by 2. What is the work situation?

You reply: Shouldn’t be more than a few hours. You continue on: If I’m done in time, I may do a quick gym visit to try to shed some of the fluid I’m currently retaining. You continue on: From days of drinking.

Trevor replies: Ha, may as well wait one more.

Then at 17:14:44, a little later that afternoon. Trevor says: I’m three beers in, get on the road.

You reply: Sweet.

So the general impression left there is that there had been significant drinking for a period of days before. And it’s likely going to continue that night. But you told – you left the impression clearly, during your first bout of testimony, that you had two glasses of wine.

**CST. SMYTH:** Well, this firstly is in reference to the days before when that night was referred to.

**MR. SIMMONDS:** From days of drinking, I understand that.

**CST. SMYTH:** So that’s before that.

**MR. SIMMONDS:** Right.

**CST. SMYTH:** Secondly, it’s a jocular conversation that’s making reference to the retention of fluid before going to a formal workout.

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

**CST. SMYTH:** I assure you I didn’t embark on days of drinking and then proceed to the gym for a lengthy run.

**MR. SIMMONDS:** Well, I can only go on what you’re saying.

You know, you’ve taken today every single point that’s been raised and said, no, no, you’re misconstruing it, you’re misunderstanding it; that’s not how it’s meant. Now, you know, the Commissioner and the public will determine how it’s meant or how they believe it comes across and how it’s meant.

You say right here: “... try and shed some of the fluid I’m currently retaining ... From days of drinking.”

Then you continue on down a little farther. He says: “I am three beers in, get on the road.”

You say: “Sweet!”

He makes the comment: “... might as well wait one more day,” clearly leaving the impression between you and your very, very good friend that this is going to be another night of drinking. That’s the reasonable reading of it, I believe, Officer Smyth.

**CST. SMYTH:** Sure, it is. That’s his –

**MR. SIMMONDS:** Okay.

**CST. SMYTH:** – his suggestion.

**MR. SIMMONDS:** Okay. Fair enough.

It is the reasonable reading of it. Thank you.

**THE COMMISSIONER:** I think one reasonable reading, Mr. Simmonds.

**MR. SIMMONDS:** Yeah, it’s –

**THE COMMISSIONER:** There are a number.

Just incidentally, might there not be evidence there regarding the intention or non-intention to arrest when – what is the time there –

**MR. SIMMONDS:** Which I’m going to go to those –

**THE COMMISSIONER:** – that he’s on the road.

Sorry?

**MR. SIMMONDS:** I’m going to come back to the arrest ones in a minute if you –

**THE COMMISSIONER:** No, that’s fine.

**MR. SIMMONDS:** Okay.

**THE COMMISSIONER:** Okay.

Just – I just wanted, before I forget, to –

**MR. SIMMONDS:** Because he answered my question there –

**THE COMMISSIONER:** – have someone note that sequence. I saw something there.

**MR. SIMMONDS:** No, I’m going to go through those in a little bit of detail.

And I’m sure you recall, you were asked it numerous times, but certainly by Ms. Chaytor in your original testimony: Did you ever tell anybody you were investigating a threat? And you said no.

And further, you recall you stated, if you were investigating a threat, particularly a threat against the premier, you would have acted differently.

Do you agree?

**CST. SMYTH:** If I was investigating a criminal threat?

**MR. SIMMONDS:** Yes, you would have – you told Ms. Chaytor that you never told anybody you were investigating a criminal threat originally. They may have come to that conclusion, but you didn't tell them that. And if indeed it had have been a threat to the premier, you would have – you would have handled it differently.

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

**MR. SIMMONDS:** Correct?

**CST. SMYTH:** Yes.

**MR. SIMMONDS:** Okay.

She asked you on January 17, 2017, at page 33: "All right, did you interpret what Mr. Dunphy was saying as a threat?"

Officer Smyth: "No. "

Ms. Chaytor: "At any point in time do you recall telling anyone you were investigating threats?"

Officer Smyth: "That is probably language I would use as a means of simplifying what it is we're doing, but I don't recall telling people specifically. I was generally careful not to confuse the situation ...."

Your quote: "I was generally careful not to confuse the situation, but also not to over complicate it."

And that's – then on the next page she takes you to the fact, well, gee, Officer Cox had in his notes: He informed Officer Cox "that he was going to the residence of Donald DUNPHY ... as he had to speak to him about threats that he made against the Premier."

And you explained that by saying: "I think that would likely be an interpretation that he made of me telling him I'm doing a threat assessment. Some people infer ...."

So that's how you explained away Officer Cox thinking you were doing a threat – investigating a particular threat against the premier. Correct?

**CST. SMYTH:** Well, I've said both. I've said that I've used the language such as you've identified here in my exchange with Trevor –

**MR. SIMMONDS:** But I don't think –

**CST. SMYTH:** – and you've – and I've referred to times when I probably used language that said the threat assessment and somebody might infer it. So I've used it both ways.

**MR. SIMMONDS:** No, but your –

**CST. SMYTH:** And I would probably be less inclined to use the terminology threat assessment with somebody that doesn't have any experience in policing, if I'm, you know, letting them know what I'm doing that day. If there's no connection to the legal community or policing, then I would probably be even more inclined to use that language.

**MR. SIMMONDS:** Well, I can only go from what you say yourself at page 33: "... but I don't recall telling people specifically. I was generally careful not to confuse the situation, but also not to over complicate it."

Now, you're talking to a police officer and he's left with the impression that you were investigating threats against the premier. That's a trained RCMP officer. Agreed?

**CST. SMYTH:** He's a trained RCMP officer?

**MR. SIMMONDS:** And that you left him with that impression. That's what his note said.

**CST. SMYTH:** That's the impression he had, yes.

**MR. SIMMONDS:** Yeah. Okay.

And you also tell Ms. Chaytor at page 37: "If there had been a definitive threat ... then I would have to take into consideration that we may also be making an arrest, whether that be an arrest and release or an arrest followed by detention. But if there was any possibility of criminal charges being laid, then I would take additional resources. In which – in that, in that case, I would want a uniformed officer."

Do you recall telling that to Ms. Chaytor?

**CST. SMYTH:** Yes.

**MR. SIMMONDS:** And in fact your own counsel on January 25 at page 65, Mr. Kennedy asks: "You've maintained, I think you've testified on numerous occasions, that you had no intention or reason to arrest Donald Dunphy on that day ...."

Officer Smyth: "No, I did not."

Can we go to Exhibit 0774 again, please, at about 4:01:12 on page 6. That's it, right there.

You state, or Trevor states to you – and this is – if I understand, without going into this gentleman, but he's well educated, highly aware of your work and a very good friend, I think your next-door neighbour.

**CST. SMYTH:** No, that's not correct.

**MR. SIMMONDS:** He's your next-door neighbour?

**CST. SMYTH:** Pardon me?

**MR. SIMMONDS:** He's your next-door neighbour or your neighbour?

**CST. SMYTH:** He's a highly educated person, but he's not familiar with my work.

**MR. SIMMONDS:** He's your next-door neighbour?

**THE COMMISSIONER:** We get into –

**MR. SIMMONDS:** I'm sorry.

**THE COMMISSIONER:** – is there any point in identification there –?

**MR. SIMMONDS:** You have a close relationship with this person?

**CST. SMYTH:** I'm his close friend, yes.

**MR. SIMMONDS:** Okay.

Trevor: "You are off in the pope mobile?"

"Yup."

Trevor: "Turn the lights on so u can go after." And then he corrects it and says: "Faster."

And then you say: "Gotta go deal with some lunatic threatening the premier ...." Now, that's your words, the same – he's getting the impression from that I would – from those words that you're dealing with someone who's threatened the premier, the same impression that Officer Cox had.

He replies: "Cool, will have beer waiting for u."

You state: "If I have to arrest him then I'll be late." You're the one that brings up the subject of arrest, not him.

And then you say: "Too much paper work."

"Give him a warning." And Trevor says: "Or bring him in for a psych assessment."

And you say: "Not a bad idea."

A bit harsh, do you agree?

**CST. SMYTH:** Sorry, a bit harsh?

**MR. SIMMONDS:** Bit harsh, your language, your empathy.

**CST. SMYTH:** When it's out of context, you're not aware of who – the familiarity between the two people and what the relationship is, sure it looks harsh, in this form.

**MR. SIMMONDS:** At 7:03, he asks: "How is the gym? Girls are gone to the supermarket."

You replied: "No time ... Got delayed with work."

"At home," he inquired. "Did you arrest ... Buddy?"

"Nope, tomorrow."

And then you continue on: "Got all the background etc done."

So you clearly, as opposed to not talking about threats to the premier, have told this good friend of yours, who's highly educated, that you were going investigating a threat in relation to a lunatic in relation to the premier and that you were considering going to arrest him, and while you hadn't done it that day, you had all your background work done and you were going to go the next day to arrest him.

Isn't that the clear interpretation from those – from what I've read there?

**CST. SMYTH:** That is unquestionably interpretation of it, and I explained it here this morning and I'm more than happy to explain it again if you would like.

**MR. SIMMONDS:** Did you have any reason to leave your friend with faulty or untrue impression?

**CST. SMYTH:** What I didn't have was a reason to get into a lengthy description –

**MR. SIMMONDS:** I'm asking what you did have.

**CST. SMYTH:** – of what I was doing.

**MR. SIMMONDS:** My question was: Did you have any reason to leave your friend with unclear, incorrect impression of what you were doing?

**CST. SMYTH:** Yes.

**MR. SIMMONDS:** You did?

**CST. SMYTH:** He had no necessity for that information.

**MR. SIMMONDS:** Okay.

**CST. SMYTH:** It was irrelevant to him. He was concerned was when I was arriving that evening, whether I was going to –

**MR. SIMMONDS:** But you're the one that brings up: I'm going to arrest him and then it's too much paperwork and then I'll do it tomorrow.

**CST. SMYTH:** Well, no, that's not how it got brought up, but –

**MR. SIMMONDS:** I'm sorry?

**CST. SMYTH:** That's not exactly how it got brought up. In the original comment, it states, if I have to arrest him, I will be late. That statement within itself, I'm speaking to the unpredictability of policing, that if I'm going to visit somebody, there's a possibility that it could take longer because an arrest may come from that, regardless of what the reasoning is. It could be completely benign, but we have to accept that there are a multitude of unpredictable elements associated to everything we do. The next comment is initiated by him: "Did u arrest ... Buddy."

**MR. SIMMONDS:** I would agree when you're referring to the guy as a lunatic who threatened the premier that circumstances may arise, but you're the one that goes on with this conversation. You could have simply indicated: I have some work to do; I'll get back to you. That could have been a very simple, to the point, straightforward answer as opposed to, "Gotta go deal with some lunatic threatening the premier," when you've told us you never, ever would be un-empathetic to say something like lunatic, you never considered him a threat and it particularly wasn't against the premier. Now, that's been the tenor of your evidence.

Do you agree?

**CST. SMYTH:** Not completely, no.

**THE COMMISSIONER:** Mr. Simmonds, I don't mean to interrupt, but we're going to have a witness on the telephone, I think it is – is it a telephone, a teleconference, we're expecting? At 2:30?

**MS. O'BRIEN:** We're actually going to be doing it over Skype.

**THE COMMISSIONER:** Oh, Skype, all right. We're getting all the technology now.

What I'd suggest, I don't know how much more you have to go, but we can break and have – come back after the witness.

**MS. O'BRIEN:** To be clear, Commissioner, I know our office is watching as well as the other office in Alberta, so if we don't start right at 2:30, we'll still be able to have the session when we –

**THE COMMISSIONER:** Thank you, okay.

Do you have – how are you doing on your schedule?

**MR. SIMMONDS:** About halfway through.

**THE COMMISSIONER:** Okay.

We have – some other counsel may have questions, as well. I'm not forgetting that.

Go ahead.

**MR. SIMMONDS:** Okay, Officer Smyth, I'll move on.

Officer Smyth, do you remember me inquiring as to your abilities of recollection and memory under my original cross-examination of you back in January?

**CST. SMYTH:** Not specifically, no.

**MR. SIMMONDS:** Have you reviewed the transcripts of the evidence you gave back in January?

**CST. SMYTH:** I've reviewed some of them; I didn't make it to yours.

**MR. SIMMONDS:** Okay.

This is January 23, on page 94. I ask: "Officer Smyth, do you have any doubts about any of the evidence you've given?"

Constable Smyth: "No."

I repeat: "No?"

Constable Smyth: "No."

I ask: "Have you suffered as a result of this incident or from the result of anything else any memory problems or anything of that nature?"

**CST. SMYTH:** I readily admit that assigning definitive time frames to meetings leading up to and thereafter have been challenging, yes.”

I ask: “Any other memory problems outside of that?”

You reply: “I don’t think so, no.”

I say: “You don’t think so?”

You answer: “No.”

I ask: “And you have no problem remembering here and now at the inquiry for the Commissioner?”

Answer: “No.”

And I ask: “And there’s no reason for you to make a mistake on any point?”

Answer: “I don’t think so.”

I state: “Okay.

“And you give evidence – I think your position is – with certainty?”

You ask: “Pardon me?”

And I repeat: “You’re giving your evidence with a large degree of certainty?”

Your reply: “As best I can. I realize there was – incorrect in how the firearm was facing in terms of how I recalled it in the recreation and how I recalled it after.”

I state: “But anything that you’ve given us that you haven’t corrected, you’re certain about, you’ve had time to reflect on and this is your evidence.”

You answer: “Yes.”

So I took from that that you had no memory problems, your recollections were good, outside of some of the details with respect to times and things of that nature. Was that a fair thing to take from the answers you gave the Commission at that time?

**CST. SMYTH:** I think so, yes.

**MR. SIMMONDS:** Okay. But yet, you had no recollection of deleting these BBMs?

**CST. SMYTH:** Well, I don’t think that falls into the category of a memory problem.

**MR. SIMMONDS:** Okay.

**CST. SMYTH:** I think –

**MR. SIMMONDS:** Well, that’s –

**CST. SMYTH:** I think conversation or things happened two years of routine nature are probably, for the most part, fall within –

**MR. SIMMONDS:** You deleted –

**CST. SMYTH:** – what may be normally – normal memory issues. I don't –

**MR. SIMMONDS:** You deleted big portions–

**CST. SMYTH:** – classify as strictly as memory problem.

**MR. SIMMONDS:** You deleted big portions of these BBMs, correct?

**CST. SMYTH:** Did it all the time, yes.

**MR. SIMMONDS:** Yep. Okay.

And you had no recollection in your communication with Tim Buckle, Sergeant Buckle, your best buddy. You had no recollection of communications with him in relation to your notes.

**CST. SMYTH:** No.

**MR. SIMMONDS:** Okay.

And you indicated – and I won't go through all of them, but at page 66, on January 18, Ms. Chaytor asked: “So there are some deleted and some not. Are you able ... can you offer any explanation for that, Constable Smyth?”

Constable Smyth: “No, I can't. I don't recall deleting these specific messages and as I stated there was periodically, and I still have the habit of swiping” – or wiping – “and deleting messages just to get them off my screen, to create room or, in some cases, storage. There's – I mean, they're benign in their nature. And the rest of the conversation's there, I would have no nefarious reason to delete them.”

So they're benign and you have no nefarious reason to delete them.

On the next –

**UNIDENTIFIED MALE SPEAKER:** What page was it?

**MR. SIMMONDS:** That is page 66.

**THE COMMISSIONER:** Sixty-six.

**MR. SIMMONDS:** Page 68, Ms. Chaytor says: “Now this particular message, of course, would have been relevant to the RCMP in terms of the police investigation I would think.”

And the Commissioner asks: “Which one are you referring to now?”

Ms. Chaytor says: “I'm right at the top, Commissioner, the very first one.”

And the Commissioner says: “Okay. Now where is it noted that it's deleted?”

Ms. Chaytor says: “Right over on the far right, over here.”

And the Commissioner says: “Oh yeah, okay, at the top there.”

Ms. Chaytor says: “Okay? Whereas the other emails in the chain are not.”

And the Commissioner says: “Yeah. Okay.”

“MS. CHAYTOR: Okay?” and “... at this point in time, of course, the matter would be under police investigation.”

And you reply or you state: “Oh, I don’t know. It doesn’t say when it was deleted.”

“MS. CHAYTOR: Okay. But in terms of it had to happen, I would think, between April 5 or the date of when this was made. Did you delete it before then going to Mr. Dunphy’s? Is that what you’re thinking?”

“I don’t know. I don’t remember deleting the email.”

“MS. CHAYTOR: You don’t remember deleting that one.”

Then again on page 77, Mr. Chaytor says, she puts to you, she’s quoting something, says: “I wish so much that I could. Good luck. And he says: I totally understand. Thanks for replying all the same. And we see some of these messages again are deleted ... but not your full communication with him. So nothing more there than you are trying to clear space on your phone?”

Your answer: “I don’t know. I don’t recall deleting them ....”

So you deleted blocks of emails, some of which clearly do have relevance of this matter, in whichever way you want to look at it, but you had no recollection of that when talking to Commission counsel previously. Correct?

**CST. SMYTH:** Mr. Simmonds, you just said a lot.

**MR. SIMMONDS:** No, what I said, Sir, is there’s blocks of your messaging deleted, some of which I think is prejudicial to your position, and you seem to have no recollection of deleting it or why you would have deleted it.

**CST. SMYTH:** I’ve given an explanation on that as to why I periodically deleted conversations such as these and that stands.

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

**CST. SMYTH:** And while it may be deemed relevant for this inquiry, I certainly –

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

**CST. SMYTH:** – firstly, wasn’t aware such commentary was even contained within those conversations. And I also don’t see – didn’t see any relevance to it to the actual RCMP investigation.

**MR. SIMMONDS:** You didn’t see any relevance to the fact – well, I’ll take you to that in a minute about your notes.

So no specific purpose in deleting these messages. That’s what you’re saying here, Officer?

**CST. SMYTH:** No.

**MR. SIMMONDS:** Okay. Nothing nefarious whatsoever.

**CST. SMYTH:** Nefarious?

**MR. SIMMONDS:** Nefarious, yeah.

**CST. SMYTH:** No.

**MR. SIMMONDS:** No. Okay.

Don't even remember deleting them, correct?

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

**MR. SIMMONDS:** So you forget. They get deleted. Sergeant Buckle has no memory. Now you have no details of why they got deleted, but indeed they contradict evidence you gave at interviews in December and some of the evidence you gave this inquiry.

Don't you think that's an odd set of coincidences there?

**CST. SMYTH:** No, I don't. Which portion contradicts it? Because –

**MR. SIMMONDS:** Well, I'll get to that right now. That's a good question. I'll get to that right now.

Why don't we go to your conversation – or not your conversation, your evidence back on January 18, 2017, at page 81.

“CST. SMYTH: No.”

Then Ms. Chaytor says: “Okay.

“Let's just turn then and ... just one second.”

Then there is an unidentified female speaks, and then Ms. Chaytor says: “Okay, so I ... want to turn now then to the statement that you gave to the RCMP on April 6. And do you recall what time of day you gave that statement?”

“CST. SMYTH: I believe I arrived, arrived down there around 3:30 in the afternoon.

“MS. CHAYTOR: Okay, and you say you arrived down there, so it was (inaudible).”

Constable Smyth, you replied: “Sorry, RCMP headquarters in St. John's.

“MS. CHAYTOR: RCMP headquarters, okay. And other than legal counsel, did you receive any advice from anyone prior to giving that statement?”

Is that a difficult statement, a difficult question, to comprehend?

**CST. SMYTH:** No, it's not, Mr. Simmonds, but –

**MR. SIMMONDS:** Is it – would you say –

**CST. SMYTH:** Let me finish, please.

**MR. SIMMONDS:** – it’s a straightforward question?

**CST. SMYTH:** Let me finish, please.

The question and my response to those largely on the disclosure that was provided to me by counsel. We spent three days in December examining partially that very question, what happened that day. When I was first asked when I went to the RCMP headquarters for my interview, my response was around 11 o’clock in the morning. I completely forgot sitting down with a psychologist for two hours that very same day.

But we were able to, with Commission counsel, piece together that day and many parts of the rest of that week by going through phone records and various components of other disclosure, and in the exact same way we’re doing it here now with this so-called new information that I provided to the RCMP two years ago.

**MR. SIMMONDS:** Officer Smyth, I asked you about your memory; you said you had no problems. You made it very clear, number one. Number two, Ms. Chaytor’s questions to you are very clear when she puts this to you. Number three, you had a lengthy set of communications with Sergeant Buckle with respect to your notes. And I’m going to continue on.

The question she asked you: “And other than legal counsel, did you receive any advice from anyone prior to giving that statement?”

You answer: “No.”

That’s incorrect. Do you agree?

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

**MR. SIMMONDS:** Okay.

“MS. CHAYTOR: And we saw that you spoke or had numerous” conversations “with various persons, but nobody else gave you any input in terms of your statement or anything along those lines.”

“No.”

That’s incorrect. Agreed?

**CST. SMYTH:** Yes.

**MR. SIMMONDS:** Okay.

“MS. CHAYTOR: And did you intend – did you attend any meetings at RNC prior to giving the statement?”

Answer: “No.”

“MS. CHAYTOR: And when we look at the video of your statement, Constable Smyth, I believe you do attend with notes. You do have the notes with you.

“CST. SMYTH: Yes.

“MS. CHAYTOR: ... And were you permitted to be able to refer to your notes?

“CST. SMYTH: I don’t recall. It was a narrative summary that I prepared that morning at home that was eventually uploaded into our ICAN system.”

Now, you recall you prepared it at home that morning, you prepared it at home that morning and had communications with Officer Buckle, but that doesn’t cross your mind?

**CST. SMYTH:** No.

**MR. SIMMONDS:** Okay, good.

So that’s exhibit P-0128.

“MS. CHAYTOR: So the summary that I ... looked at earlier today.

“CST. SMYTH: Yes.

“MS. CHAYTOR: ...And those ... notes then that you have on ... that day that we can see in the video statement, those are your notes.”

Your answer: “Yes.”

“MS. CHAYTOR: Okay. And so they were – were they prepared, they weren’t prepared obviously before you went off-shift on April 5.

“CST. SMYTH: No.

“MS. CHAYTOR: So those are the notes that you had prepared at some point before you gave your RCMP statement.”

“Yes, it was that morning.”

So again you refer to that morning when you put these together, without any reference to your communications with Sergeant Buckle. Correct?

**CST. SMYTH:** Yes, I wasn’t aware of them.

**MR. SIMMONDS:** Okay.

“MS. CHAYTOR: Okay.”

Now, she’s already asked this once, but she’s being doubly careful. She comes back to it.

“Okay. And in terms of the drafting of those notes, did you have any advice or any input into what should go in those notes?”

Answer: “No.

“MS. CHAYTOR: Did you consult with anyone in drafting that document?”

You reply, so you certainly understood what she was saying: “I did send them to our legal counsel at their request.”

“Okay.”

At no point, at no point at all while she goes through it at least twice, if not three times, do you – and you reference when you did them – do you make any reference whatsoever to talking to Sergeant Buckle, who gave you a hand with doing this.

**CST. SMYTH:** Mr. Simmonds, she could have did it 50,000 times and my answer wouldn't have changed. I did not recall. It was a –

**MR. SIMMONDS:** So are we to take –

**CST. SMYTH:** I'm not finished my answer.

He kept – my conversations with Tim Buckle, as I've stated here time and time again, were of a very routine nature and happened on an almost daily basis –

**MR. SIMMONDS:** No –

**CST. SMYTH:** I'm speaking. And I was not –

**MR. SIMMONDS:** With the greatest of respect –

**CST. SMYTH:** You have no respect.

**MR. SIMMONDS:** With the greatest of respect –

**THE COMMISSIONER:** Just one second now, okay.

Mr. Simmonds, I think Constable Buckle was not finished – Constable Smyth was not finished. But Constable Smyth, again, you're tending to go on a bit more than you have to in terms of answering the question. So if we both sort of get back to –

**MR. SIMMONDS:** No, I'm not going to have the witness provide a lecture to me –

**THE COMMISSIONER:** No – well, no one – one second now, Mr. Simmonds. You got to – these things happen in the course of both court and inquiries and ...

**MR. SIMMONDS:** I understand.

**THE COMMISSIONER:** So we'll just – everybody settle down and we'll – you put your question –

**MR. SIMMONDS:** Thank you.

**THE COMMISSIONER:** – and let the witness complete his answer. And, Constable, you try and address the answer and not go on in a narrative or a monologue.

Okay.

**CST. SMYTH:** Yes, Sir.

**MR. SIMMONDS:** She asks you on two, if not three, separate occasions. You reference the time when you did it; you reference making your notes. She specifically asks you did anyone have any input, and you at no point reference the significant input and communications you had with Sergeant Buckle that morning.

**CST. SMYTH:** He did not have significant input, and I did not remember it. It didn't matter how many times she asked me; I did not remember it.

**MR. SIMMONDS:** So are we to take from that that if you can miss something that big, that you may have missed something that happened in the living room at Don Dunphy's? Your memory is that bad?

**CST. SMYTH:** I think that's two very different things.

**MR. SIMMONDS:** Is that what the Commissioner is to take from this?

**CST. SMYTH:** I do not think so.

**MR. SIMMONDS:** Oh, you do not think so. So what kind of yardstick is that? We're dealing with evidence here with respect to a deceased man who was shot three times. You've told me that your memory was pretty much perfect. Now we've seen –

**CST. SMYTH:** I never said that.

**MR. SIMMONDS:** – big blocks where it's not.

So I ask you: What stick does the Commissioner have to measure it by? The stuff that happened in the living room was fine, that's accurate, but the stuff that happened that morning when I made up my notes, no, I forgot about that. Is that what you're saying?

**CST. SMYTH:** Sorry, I don't know what you're saying anymore.

**MR. SIMMONDS:** Oh, I think you do, but in any event I'll repeat it: What yardstick is the Commissioner to measure by to know that, oh no, I didn't forget anything that took place in the living room, but I did forget the things that happened with Staff Sergeant – or with Sergeant Buckle?

**CST. SMYTH:** As it relates to that specific comment, I did not remember it. And there are a myriad of examples contained within the conversation that I had with Commission counsel in December that are the exact same thing in nature.

**MR. SIMMONDS:** But let's read them as a (inaudible) to see how bad your memory must have been to forget it. Exhibit 0500 at 12:39:16.

At page 3, actually, at 12:39:16. Ah, there we go. Thank you.

It's on April 6 and this would have been about 10:10 our time.

Smyth: "Making notes now."

A little farther – and this is a 19-minute exchange between you and Buckle, if you add up the times from 10:51 to 11:10.

Buckle: "Looks good ...." You could be more specific and I say perceived "A threat of imminent death or gracious bodily harm.....to quote the use of force policy?" Buckle corrects himself and says: "Grievous."

And then you say: "Ok." And then you say: "But a gun pointed at me is pretty straight forward."

Smyth: “Using policy line in the circumstances feels a bit manufactured.”

Buckle: “It’s reflective of the training and articulation. I think it’s important to state that.”

Smyth: “Ok.”

You go on: “Read the change.”

Buckle: “... that’s better.”

Smyth: “Thanks!”

Buckle: “A word was misspelled before ‘MHA.’”

Smyth: Fix and email it back to me, would you? I’m driving.

Buckle: “Kk.”

Buckle: “U must have fixed it....can’t find it now.”

Smyth: “Send it anyway would you.”

Buckle: “... to what address?”

“Gmail.”

He replies: “Sent it to ur work before I saw ur msg.”

Smyth: “No worries.”

So that’s a conversation that’s just changed off of – or communications that’s just change off of 30 minutes, but you forget all about that, both at your interview in December and when you’re giving evidence here in direct.

**CST. SMYTH:** That’s correct.

**MR. SIMMONDS:** But that should not be reflective of your memory in general. Is that what you’re telling the Commissioner?

**CST. SMYTH:** I think it’s fairly normal to not retain this type of information long term.

**MR. SIMMONDS:** No, it’s fairly normal. You’ve been in a situation just days before where a man has been shot three times. You’ve been – you’re going down to give a statement to the RCMP. You’ve had discussions with your lawyers. You’re now having a 30-minute communication with your best friend on the West Coast and yet you have no recollection of that whatsoever when you subsequently give evidence.

That’s fairly normal?

**CST. SMYTH:** Well, I gave evidence in December that he is somebody that I would probably speak to. I didn’t remember specifically, but I made it very clear in that interview that, yes, he is somebody I would speak to on a regular basis. I do not remember specifics and I did not remember it until you showed me.

**MR. SIMMONDS:** Okay.

On January 25, 2017, on page 49, Mr. Kennedy asks you: “Sir, if I were to ask you to describe some of the traits of a good police officer, what would you say?”

You replied: “I think empathy, intelligence, common sense, honesty.”

At page 54, Mr. Kennedy says: “Sir, in terms of demeanour and dealing with people, is there any particular approach that you’ve attempted to develop or cultivate over the years? And I’ll give you just a couple of examples: we can have a calm, conciliatory police officer; we can have the more aggressive police officer; we could have a tough, no-nonsense police officer or individuals in general. Is there anyone that you lean towards more than the other?”

“CST. SMYTH: Absolutely. For me, what comes naturally is the calm approach, empathetic and trying to relate to the individual; apply elements of reciprocity. Anything else for me is an act and most people can, can pick up on the act.”

Tell me, Officer Smyth, were you being empathetic trying to relate when you told your friend: “Gotta go deal with some lunatic threatening the Premier ... too much paper work” to arrest him? Your friend says: Bring him in for a psych assessment. And you say: “Not a bad idea.”

Is that empathetic?

**CST. SMYTH:** I wasn’t speaking to Mr. Dunphy in this case.

**MR. SIMMONDS:** Was that empathetic?

**CST. SMYTH:** I gave my explanation of what that comment was.

**MR. SIMMONDS:** I’m asking you was that empathetic?

**CST. SMYTH:** Was it empathetic to Trevor?

**MR. SIMMONDS:** Was it empathetic in relation to the personality you’ve told us in Commission you are?

**CST. SMYTH:** I don’t think that reflects on my professional work. It’s a conversation in private. It’s a social-commentary paradox in the same way you would sit in front of a room of people and say that your motto is innocent until bankrupt. It’s fine in that context, but when you put it out into a broader audience it may appear to be inappropriate.

**MR. SIMMONDS:** Can we go to Exhibit P-0500?

**THE COMMISSIONER:** How are you doing, Mr. Simmonds?

**MR. SIMMONDS:** I’m very close to the end.

Do you know what the purpose of the *Mental Health Care and Treatment Act* is?

**CST. SMYTH:** Generally speaking, yes.

**MR. SIMMONDS:** Okay.

If I said to you according to section 3(b): “to protect a person with a mental disorder from causing harm to himself or herself or another and to prevent a person with a mental disorder from suffering substantial mental or physical deterioration or serious physical impairment ....”

That’s a definition set out within the act.

**CST. SMYTH:** Okay.

**MR. SIMMONDS:** Okay?

At Exhibit P-0500, at 7:32 – and this has already been brought up – Buckle says to you: Arrested Abbass under the *Mental Health Act*.

Smyth: “Saw that! Nice.”

Buckle: “He’s at hospital now.”

Smyth: “Loser.”

**CST. SMYTH:** That’s not how – the tone you are applying to “nice” is not accurate.

**MR. SIMMONDS:** Okay.

**CST. SMYTH:** What I am saying is nice that there was some action taken.

**MR. SIMMONDS:** It is nice that someone with a mental disorder has been arrested and put in hospital, and he’s a loser because of it.

**CST. SMYTH:** That’s not what I am saying there, no.

**MR. SIMMONDS:** Well, that is exactly what you said.

**CST. SMYTH:** No, it’s not.

**MR. SIMMONDS:** I quote: “Loser.”

**CST. SMYTH:** I didn’t say he was a loser because he had a mental disorder or that he was detained.

**MR. SIMMONDS:** Would the following be another example of your empathy, trying to relate to the individual approach that you’ve told the Commission about? Exhibit P-0774, at 3:00:34 hours. Page 16 – no, if you could go back a little? No, you have it right there. Perfect.

It starts off with Trevor: “Much on the go today?”

Smyth: “Naah, requalified on the range this morning.”

Trevor: “That’s weird! Aren’t u on leave still? I would think holding a gun while on leave might be traumatic for some. You’re too macho man! How did it feel?”

You replied: “Pretty good actually, nice to know I can still pull the trigger.”

Smyth: “... did it under my own volition.”

Trevor: “No flashbacks?”

Smyth: “They were issuing me a new fireman and I asked to bang off a few rounds.”

Trevor: “I know you would not be pushed into something...”

Smyth: “So we ... did the full course of requalification.”

Trevor: “I wondered about that. I sort of figured they would not have u carry that gun anymore, if for no other reason than it would be a reminder.”

Trevor: “Same type of gun or different model?”

Smyth: “Same.”

Smyth: “That gun is seized, but I will get it back if I want it.”

Smyth: “Which I do.”

Smyth: “Worked for me the first time ...”

Is there anything on any interpretation that is empathetic, appropriate, reasonable about that exchange?

**CST. SMYTH:** No, Sir.

**MR. SIMMONDS:** Then I have no further questions.

Thank you very much.

**THE COMMISSIONER:** Other counsel have questions?

**MR. FREEMAN:** No questions.

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

Mr. Avis?

**MR. AVIS:** No questions, Commissioner.

**THE COMMISSIONER:** Thank you.

**MR. DROVER:** No questions, Mr. Commissioner.

Thank you.

**THE COMMISSIONER:** Mr. Drover.

Mr. Williams.

Okay, I think we have everybody covered.

Mr. Kennedy?

**MR. KENNEDY:** Yes, I have some questions.

Constable Smyth, I want to start with your conversations with your friend Trevor. So you've indicated you and him are close friends.

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

**MR. KENNEDY:** How would you describe your friend in terms of your relationship with him?

**CST. SMYTH:** I think it's one of – it's jocular in nature. We tend to joke around and ...

**MR. KENNEDY:** You've indicated, I think at one point, I don't know if you said he used sarcasm or you used sarcasm.

**CST. SMYTH:** We both do, yes.

**MR. KENNEDY:** In fact, Sir, I would suggest to you some of your commentary is inane babble. Would you agree with that?

**CST. SMYTH:** I would –

**MR. KENNEDY:** Sorry?

**CST. SMYTH:** – say it's immature babble.

**MR. KENNEDY:** Sir, there are – it appears to be somewhat incessant in terms of the nature of it going on between you and Trevor.

**CST. SMYTH:** It can be, yes.

**MR. KENNEDY:** Yeah.

Who was it you indicated in – indicated the sarcasm or used sarcasm? Was that him or you?

**CST. SMYTH:** Him.

**MR. KENNEDY:** Okay.

Sir, you've indicated that there's no tone or content in – or context in these conversations.

**CST. SMYTH:** No.

**MR. KENNEDY:** So is there a conversation there, for example, you could point us to as an example, if you were to put tone and commentary on it as to how it would reflect?

**CST. SMYTH:** Well, I think for example on page 4 he says: "The way u drive u will be back for the start of your shift at 7am."

You know, he's being joking and sarcastic. The truth is he drives like a 95-year-old woman, so anybody that drives normally drives much faster. So there's none of that context there. It might lead you to believe that I drive like a maniac.

**MR. KENNEDY:** Sir, in terms of the – you've indicated the private versus the public nature of the commentary, how does that – what do you mean by that?

**CST. SMYTH:** Sorry, can you say that again?

**MR. KENNEDY:** You've indicated there's a difference between the private – these are private emails – or private text messages or BBMs between yourself and your friend as opposed to public, being I guess made for public consumption.

What do you mean by that?

**CST. SMYTH:** In a relationship between, in this case, two people, it's a very private conversation. You know each other's personalities. You know where sarcasm is going to be picked up. You may share different backgrounds whereby you can use darker types of humour that mightn't widely be accepted outside of that relationship. And as your audience gets broader, you have generally to adjust your – how you speak accordingly. The same would be applied to how I conduct myself at work.

**MR. KENNEDY:** Sir, in terms of – have you ever been in the presence of other people where you've heard inappropriate comments in terms of, for example, a hockey or sports dressing room, friends having a beer, on a hunting trip?

**CST. SMYTH:** Yes, of course.

**THE COMMISSIONER:** Or a lawyer's chambers.

**MR. KENNEDY:** Quite a good example, Mr. Commissioner.

So the kinds of conversation that you're having here, are you saying, Sir – what's the effect of hindsight on them as opposed to being made at the time?

**CST. SMYTH:** Hindsight is a tough one because, even on this, it looks inappropriate because now it's out for public consumption. But there's still an argument of whether or not that conversation is acceptable within the confines of that personal relationship. I think it's a bit of a stretch for me to say everything in here is completely inappropriate. It's definitely immature but –

**MR. KENNEDY:** Is there some bravado in there, too, Sir?

**CST. SMYTH:** Yeah, for sure, absolutely.

**MR. KENNEDY:** Now, in terms of the firearm and going back to the test, had you been advised or given any advice that you should do that as soon as possible?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** And who gave you that advice?

**CST. SMYTH:** I believe it – I don't remember specifically. I think I heard that from a couple of police officers. The thought process was: try to get back on the horse, if you will, as soon as you can. The longer you leave that kind of stuff, the more challenging it becomes to get back into.

**MR. KENNEDY:** Sir, if I could ask – or, Commissioner, if I could ask to have exhibit P-0774 put up at page 14, please.

**THE COMMISSIONER:** Page 14?

**MR. KENNEDY:** Page 14

And before I get to that, Sir, were there conversations during this time frame after the death of Mr. Dunphy where your friend was trying to make you laugh?

**CST. SMYTH:** Oh, all the time. He was ...

**MR. KENNEDY:** In fact, if I could look at 15:11:13 – no, excuse me, Commissioner. It's 07/04/2015 11:13:35 UTC time:

“Thanks for coming for supper. We love you guys and if our shenanigans and tomfoolery is helpful for distraction, we are happy to be of service. What has happened to you is traumatic And the fallout is super shitty! Just know we look at you the same as we did before, with a small side of ‘poor joey’. Can't wait for Orlando! But I may cook butter Panco fish before then.”

Sir, that kind of comment there, the tone I just used, is that the tone Trevor would have used? Or what would he have said? How would he have used that tone?

**CST. SMYTH:** For that particular comment, I think that was fairly accurate. I think it was in recognition that he does use a lot of levity, and I appreciate levity because, you know, it is a challenging job and you see really challenging things, and if you don't have that source of levity, humour, whether it be dark humour or gallows humour, I think you're on a path to being an emotional wreck. Those are the people that often end up with much bigger longer-standing psychological issues from these types of issues.

**MR. KENNEDY:** If you look at your reply, it's: “Lol! It's quite therapeutic!”

See that?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** So, Sir, during that, in the days after the death of Mr. Dunphy, are these the kind of conversations that you and Trevor would have?

**CST. SMYTH:** Yes, definitely.

**MR. KENNEDY:** Sir, would you describe some of the comments as outrageous?

**CST. SMYTH:** Definitely.

**MR. KENNEDY:** How you were responding to him at times?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** If I could now, I want to go, Sir, very quickly, to page 10 of this same transcript. And I know there's a reference. I can take you to it if necessary. It may not be necessary.

It's not page 10, there's the – on a couple of occasions, Mr. Simmonds suggested to you, or seemed to suggest, that you either leaked or were aware of the email being leaked. Is that what you understood him to be saying, Sir?

**CST. SMYTH:** That's what he said.

**MR. KENNEDY:** Somewhere in this email, or there's a couple of different places, there's reference where you refer to the RNC being a leaky sieve, or sieve or whatever it is. Do you remember that?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** And what did you mean by that?

**CST. SMYTH:** I think it's fairly explanatory within itself. It's that the organization, while – has the capacity to leak information.

**MR. KENNEDY:** Now, Sir, you've indicated earlier today that you knew, and you testified to this previously, that all – that there was no deletion, no such thing as information being deleted from your BlackBerry, whether it be emails, texts or BBMs. Is that correct?

**CST. SMYTH:** No, I'm well aware of that.

**MR. KENNEDY:** Were you aware of that when you told the – when you agreed to give –?

**THE COMMISSIONER:** I'm sorry, what was your question there, Mr. Kennedy?

**MR. KENNEDY:** He testified previously and he testified again today that he was aware that all – there was no such thing as deleting information from the BlackBerry in terms of either BlackBerry emails, texts or BlackBerry messages, correct?

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

**MR. KENNEDY:** And you were aware that it could all be recovered?

**CST. SMYTH:** If the user unlocks the phone, yes.

**MR. KENNEDY:** Okay. So when you gave – and I'm not sure of the exact date, and this is an issue that we'll have to look at. I thought it was April 8; I could be wrong. Ms. Chaytor may know. But when you agreed to – when the RCMP – or there was a discussion about providing your phone to the RCMP, did they give you any instructions in relation to the phone or what to do?

**CST. SMYTH:** Well, I had to go down and visit them. I passed them over the phone. I had an explicit conversation with Steve Burke.

**MR. KENNEDY:** And were they aware or did they indicate to you at any time that they were aware that nothing could be deleted, was really deleted from the phone?

**CST. SMYTH:** I don't think we have that conversation, but they would have the same awareness of that as I would.

**MR. KENNEDY:** So when you see some conversations deleted, other conversations not deleted, is there any pattern there? Did you do anything intentionally, as you've been accused of, Sir?

**CST. SMYTH:** I didn't do anything intentionally to mislead the investigation. I knew there was nothing on that phone that was relevant to the – I shouldn't say relevant to the investigation because there's some things that were revealed on that phone that were very beneficial to me that I didn't realize were there. But I knew there was nothing there that would be able to accuse me of wrongdoing.

I know what I did. I know the truth. They can twist it up all they want. It's what it is.

**MR. KENNEDY:** You indicated today, Sir, while you probably – you could have thrown the phone in the harbour, something like that.

When did you go to Florida? What date? April 11, 12, around then?

**CST. SMYTH:** It was that following Saturday, so ....

**MR. KENNEDY:** And you came back the 24th or something like that.

**CST. SMYTH:** It was the 23rd, I think, we returned.

**MR. KENNEDY:** So for a period of 12 days, you're in Florida with that phone that holds the allegedly incriminating information. Correct?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** Yet you brought the phone back and gave it to the RCMP.

**CST. SMYTH:** Yes.

**MR. KENNEDY:** Were you concerned, Sir, that there were materials on that phone that could be incriminating or allegedly incriminating?

**CST. SMYTH:** No. I still don't think there's anything here incriminating from an investigative perspective. It's been superb fodder for character assassination, but I don't see anything relevant to the investigation.

**MR. KENNEDY:** In any event, you didn't destroy the phone; you turned it over to them knowing that everything could be recovered?

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

**MR. KENNEDY:** When you agreed to provide the RCMP with the phone, you consented?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** Did you –

**CST. SMYTH:** It was understanding that it was for the investigation, yes.

**MR. KENNEDY:** Did you consult with counsel or a lawyer prior to obtaining – providing that phone, turning that phone over?

**CST. SMYTH:** No, I didn't.

**MR. KENNEDY:** Other than the –

**THE COMMISSIONER:** Sorry, what was that one?

**MR. KENNEDY:** No, he didn't. I asked him did he consult with counsel prior to turning the phone over; he said no, he didn't.

Other than that first day when you provided your notes to counsel before you gave your statement to the RCMP, all the other statements you gave and the re-enactments, did you consult or seek the advice from counsel at any time?

**CST. SMYTH:** I don't think so. I don't recall speaking to them. If I did, they probably told me not to do it and I didn't listen.

**MR. KENNEDY:** Did you, Sir, put any restrictions on the use of your phone when you consented to it?

**CST. SMYTH:** No.

**MR. KENNEDY:** No.

Sir – I have one last area to go into, Commissioner. I'll be very short.

There's references now to and there have been references today to yourself and Sergeant Buckle, and I guess the conspiracy that you, you know, somehow or other you're conspiring to prevent the Commission from getting information or you're conspiring to delete it – conspiring to do something. You know, you're alleged to have been conspiring, correct?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** You didn't make any changes as a result of what Sergeant Buckle told you?

**CST. SMYTH:** No, I didn't.

**MR. KENNEDY:** So is there a reason that you wouldn't tell the Commission or Commission counsel what they interviewed you about the conversation with Sergeant Buckle?

**CST. SMYTH:** Is there a reason I didn't tell them about that conversation?

**MR. KENNEDY:** Yeah. Well, if no changes were made.

**CST. SMYTH:** Well, the main reason I didn't tell them is because I didn't remember, but ...

**MR. KENNEDY:** So let's talk about –

**CST. SMYTH:** If I did remember, no, there's absolutely no good reason not to tell them. There were no changes made. I think it's completely acceptable for me to have a conversation with Tim Buckle, not just because he's a close friend, 'cause I didn't solicit input from every close friend I have.

Tim Buckle was acting as a former president of the association, he had experience with two previous police shootings and he was the right person to speak to about this. But the bottom line is I didn't remember it, so I couldn't have acknowledged that it occurred.

**MR. KENNEDY:** The general occurrence report or the narrative case history, whatever way we describe or we refer to it, it's the same document, correct?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** Were you compelled or was there any obligation on you to provide such a report to your superiors?

**CST. SMYTH:** I believe there is. It gets a little bit complicated when there's jeopardy or a perceived jeopardy. At that time, I didn't perceive any and my understanding is that you would be obligated to provide that narrative.

**MR. KENNEDY:** You knew there was a police investigation, you were subject to an investigation?

**CST. SMYTH:** Yes, of course.

**MR. KENNEDY:** You just didn't know the specifics at that point?

**CST. SMYTH:** Well, I – no.

**MR. KENNEDY:** So you say you consulted, or one of the reasons you would go to Constable Buckle, or Sergeant Buckle, is because he had been a former president and had been involved in, as the president, a couple of shooting situations.

**CST. SMYTH:** Yes.

**MR. KENNEDY:** Sir, you also had Sergeant Buckle attend, I guess, re-enactment number two with you, correct?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** And he had also reviewed the email of April 10 prior to it being sent out?

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

**MR. KENNEDY:** Yeah.

And you were in Mitchells Brook on the date in question, on April 5. You spoke with Sergeant Buckle that day.

**CST. SMYTH:** Yes.

**MR. KENNEDY:** So he was someone that you had –

**CST. SMYTH:** But I hadn't remembered that either.

**MR. KENNEDY:** Okay.

So he was someone you'd had – would you say daily, weekly? How often would you have contact with him?

**CST. SMYTH:** Pretty close to daily.

**MR. KENNEDY:** So in terms of you forgot speaking to Constable Buckle that day, what other things did you forget on the date of April 5 that you've since learned happened?

**CST. SMYTH:** I forgot almost the entire course of the day, other than providing a statement to the RCMP at some point in time that day. It was the recall that Commission counsel provided in December that I was able to piece it together. I don't think it was until the third day –

**THE COMMISSIONER:** That's the 6th of April, is it?

**CST. SMYTH:** Yes, yeah.

It wasn't until the third day of our Commission counsel interviews in December that I was able to definitively say, based on text messages they showed me between my wife and I, that I did that psychological debriefing with a psychologist. Now, that is a significant event in my life; speaking to Tim Buckle is not.

**MR. KENNEDY:** So in terms of the seeing a psychologist on – you had indicated to Commission counsel you thought that that took place later in the week.

**CST. SMYTH:** Yes.

**MR. KENNEDY:** How long were you with the psychologist?

**CST. SMYTH:** For about two hours.

**MR. KENNEDY:** Had you ever seen a psychologist before?

**THE COMMISSIONER:** He said no.

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

**MR. KENNEDY:** Oh, sorry.

So do you remember if you were in the Confederation Building that day or the next couple of days? Do you have any recollection?

**CST. SMYTH:** I hadn't had the recall. Again, it was later in our meeting that there was some email and some BBM references to conversations that I had with Heather MacLean and Joe Brown that I was able to come to the realization that I was – I went to our PSU office and I had those BBM conversations from there.

**MR. KENNEDY:** Sir, in terms of the cell calls that referred to, I guess, on the 22nd or 23rd with Commission counsel, had you remembered those?

**CST. SMYTH:** Which ones?

**MR. KENNEDY:** The calls, the missed calls to Mr. Dunphy.

**CST. SMYTH:** Up until that point, I hadn't remembered them, no. Now, I brought them up, but it was – but I realized then that I hadn't brought them up in an official capacity in any previous statements before.

**MR. KENNEDY:** And, Sir, in terms of your – and I don't know if this is the re-enactment or the Commission counsel, the interview with Commission counsel, in terms of the white garbage can or the bluish tub, did you remember those until your memory was refreshed or until you saw those?

**CST. SMYTH:** When I saw the blue tub, it was tough for me to say that that was specifically the item the gun was leaning on. You know, in speaking to some psychology professionals, I'm told that that's very normal; you're focused on, in this case, the weapon and you might know that it's sticking up in the air and leaning on something, but it would be very normal to disassociate what's around it. But either way, no, I did not remember that blue box.

**MR. KENNEDY:** And, Sir, in terms of your – you’ve reviewed your conversations with Doug Noel, correct? These were ones that were found subsequently. Corporal Noel.

**CST. SMYTH:** Yes.

**MR. KENNEDY:** Well, Sergeant Noel now.

**CST. SMYTH:** Well, I first saw them when Doug Noel gave testimony.

**MR. KENNEDY:** Yeah. What strikes you about those – anything unusual about those conversations that strikes you today?

**CST. SMYTH:** Well, I brought it up a bit this morning. What struck me as highly unusual that I was almost a full week of seemingly thinking that I was – well, I was still trying to supervise that unit and ensure that it was being handled correctly and travel plans were occurring. I was still trying to make plans with the OPP. I find it hard to look back at that and think that that was my mindset, but I – I don’t know.

**MR. KENNEDY:** So last couple of questions for you, Sir. I want to go to the page 6 of exhibit P-0774, and we’ve gone through this, so I’m not going to go through it in great detail. I just want a couple comments from you.

Exhibit P-0774, the conversations with Trevor.

So I see the line there, “You are off in the pope mobile?” Now, how would Trevor say that to you?

Would it be like that: “You are off in the pope mobile?”

“You were off in the pope mobile?”

Are you off in the pope mobile? How –?

**CST. SMYTH:** It would be just almost sarcasm and condescension, making fun of the job to some degree.

**MR. KENNEDY:** Yeah, and you say: “Yup.”

“Turn the lights on so u can go faster.”

“Gotta go deal with some lunatic threatening the premier ....”

Now, Sir, you’ve used the – you’ve given your description of lunatic as someone who’s ranting or raving. You didn’t even know Mr. Dunphy’s identity when you made that comment, did you?

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

**MR. KENNEDY:** Or you didn’t know where he lived – excuse me, you tell us what you knew. This is at 4:01 UTC time, which puts us around 1:30. What did you know at that point, in terms about Mr. Dunphy?

**CST. SMYTH:** I believe very, very little. I think I had probably not long at in my office and reviewing his Twitter feed.

**MR. KENNEDY:** Did you think this conversation was private when you were having it?

**CST. SMYTH:** Yes.

**MR. KENNEDY:** Then: “If I have to arrest him ... I’ll be late.”

Again, did you have any intention of arresting him?

**CST. SMYTH:** No.

**MR. KENNEDY:** Now, we’ve got the next couple of comments, too much –

**CST. SMYTH:** I’m still thinking at that point I might go down to Water Street and find this guy. I didn’t know his address. It’s still a possibility that I might be able to wrap this entire thing up in a couple of hours.

**MR. KENNEDY:** “Too much paperwork ... Give him a warning.” Trevor makes a number of these comments. Are these the – and you say, “... bring him for a psych assessment ... Not a bad idea.”

What do you mean by that?

**CST. SMYTH:** I’m patronizing Trevor.

**MR. KENNEDY:** And that word. What do you mean by that, Sir?

**CST. SMYTH:** I’m just responding to his text, “... bring him for a psych assessment ... Not a bad idea.” Basically, thanks for your input, now buzz off.

**MR. KENNEDY:** And you said then: “Did u arrest buddy? ... Nope, tomorrow.”

Did you, Sir, at any time, on this particular date, at 1:30, have any grounds for arresting anyone?

**CST. SMYTH:** No.

**MR. KENNEDY:** Had you reached any conclusion that there were threats of any sort to the premier or anyone else?

**CST. SMYTH:** Definitely not. I actually knew very little at this stage.

**MR. KENNEDY:** So my last question, Sir, for you: Can you give an explanation to the Commissioner why you would make those comments?

**CST. SMYTH:** Around the arrest?

**MR. KENNEDY:** Just those comments in general I’ve just referred to.

**CST. SMYTH:** They’re intended for brevity, to let this person know, who I’m speaking to, who I know is only concerned about what time I’m going to be for supper – that’s his only concern. He could care less what I’m doing, whether it be counting pebbles in the parking lot or going to arrest somebody. How long is it going to take me and are you going to be on time? That’s his only concern.

**MR. KENNEDY:** Okay. Thank you very much, Constable.

**THE COMMISSIONER:** Does your counsel have anything further?

**MS. CHAYTOR:** No, Commissioner.

**THE COMMISSIONER:** Okay, I think we've finished everybody.

Thank you, Constable.

So we're going to break shortly for a ten-minute health break.

Mr. Avis, you have –

**MR. AVIS:** Yes, Commissioner, simply advising that, in light of the work I've been doing and have to continue to do, Mr. Kennedy's the same, we will not – I will not be staying for the rest of the afternoon. It's no disrespect but –

**THE COMMISSIONER:** Okay before –

**MR. AVIS:** And similarly tomorrow morning, I'll be working on exhibits for my expert, the kinds of things you're looking for.

**THE COMMISSIONER:** Right.

**MR. AVIS:** And I don't feel the need to have anybody in my place, in light of the nature of the evidence and what I've heard to date. That's all.

**THE COMMISSIONER:** Okay.

Thank you for informing me of this, but I had something I wanted to comment to you about which is, basically, what I mentioned to Mr. Kennedy this morning. You're going to be questioning the qualifications of Sergeant Massine, I understand.

**MR. AVIS:** Commissioner, I had provided notice. I've actually been working on the very kind of document that you were talking about this morning.

**THE COMMISSIONER:** Good.

**MR. AVIS:** Trying to – I've been going a little bit out of my mind trying to identify specific locations where these concerns arise. And we still have the issues that we have with these two witnesses.

And, yes, as it stands now, I have very serious – the RNC has serious concerns about the qualifications of Coleman, Dr. Coleman. And when it comes to Massine, the concern, mostly, is to do with some of his, what I would call, findings of credibility.

**THE COMMISSIONER:** Well, yeah, so you're going to disagree with him, basically.

**MR. AVIS:** Yes.

**THE COMMISSIONER:** But that's a matter of weight. That's –

**MR. AVIS:** Whether you find that sufficient to weight in Massine is a different matter, but with Coleman, right now, yes, we have serious concerns.

**THE COMMISSIONER:** Well, I hope you realize – I don't know if you recall the application you made for disclosure. You're back into the same sort of thing now.

**MR. AVIS:** No, Sir, not at all.

**THE COMMISSIONER:** Well, arguably, if you are successful on challenging the qualifications of Dr. Coleman, you're asking for that report not to be considered by the Commission at all. Not in terms of weighing what one says against the other, but you're asking it not be heard at all.

**MR. AVIS:** No, Sir, there –

**THE COMMISSIONER:** And there's a lot of good information in there for the RNC.

**MR. AVIS:** Yes, not at all, Sir. What I'm objecting to is his evaluation of threat and risk, not his knowledge and background on de-escalation.

And one other thing I've been looking into, which I'm supposed to have a meeting on, is the concessions that we are able to make. And I'd like to get those to everybody, including which recommendations, what comments.

And the de-escalation thing, other than the fact that it may not apply to this situation, precisely, I don't know that we have a lot of grief with the notion that he would be assisting the Commission and everybody else with his experience in de-escalation.

**THE COMMISSIONER:** Right, he would. So the only other area has to do with officer personal safety, as I take it, item (a) and –

**MR. AVIS:** I don't know that he's saying anything different from anybody else, so he –

**THE COMMISSIONER:** And if you look at the – and I don't know if you got – Ms. Chaytor, you were going to, I think, make some comments with respect to the personal experience of Mr. – Sergeant Massine. He has a pretty full CV in terms of his personal experience, what he's been through in – you know, in that – I'm sorry, we're on Coleman now, I apologize.

**MR. AVIS:** Yeah, I –

**THE COMMISSIONER:** And Dr. Coleman, same thing, in terms of when you understand what these articles are dealing with and when you understand where he's worked and what he's done. He's been a patrol officer for – I don't know how many years – a long time. He's been chief of police. He's been supervising, and in order to supervise, you got to have some knowledge of, you know, what you're – where you're – where other people under you may have gone wrong.

So look at it from that perspective, if you would –

**MR. AVIS:** Yes, Sir.

**THE COMMISSIONER:** – if you would, carefully.

**MR. AVIS:** Absolutely. But I will say, you indicated earlier you've been having some difficulty extracting from his CV.

**THE COMMISSIONER:** What –?

**MR. AVIS:** But if I may –

**THE COMMISSIONER:** Yeah.

**MR. AVIS:** The only issue is with respect to threat and risk assessment in the nature of a PSU. We believe that that's the only objection to his qualifications. That he can, perhaps, you know – he's capable of the same kind of regular threat assessment and opinion like everybody else.

**THE COMMISSIONER:** It –

**MR. AVIS:** Obviously, all the officers have been asked that.

**THE COMMISSIONER:** Well, and I have to say, part of my questioning is, well – because I don't really understand where Dr. Hart is coming from, with respect, because he hasn't had a chance to explain it. He will tomorrow, is it? Okay. He will tomorrow.

So I'll hopefully – counsel and myself will be drawing it out in terms of, well, why would not a person who served as a police officer, a uniformed police officer, for a number of years, chief of police for 10 years, supervisor here and there, inspector – or, instructor, sorry. Why wouldn't he or she have an expertise through on-the-job training, if nothing else, in terms of what an officer should do in terms of threat assessment in his or her situation? Acknowledging that neither Coleman nor Massine may have the added touch of familiarization with what's needed for protecting dignitaries. You know –

**MR. AVIS:** Well –

**THE COMMISSIONER:** –in the PSU. But there's a certain foundational knowledge, surely, which has to be there, which is also there in the –

**MR. AVIS:** Well, as I've said –

**THE COMMISSIONER:** –the academic training.

Sorry, go ahead.

**MR. AVIS:** The objection is in relation to the PSU, the nature of a Protective Services Unit.

**THE COMMISSIONER:** And there I'm having difficulty. I'll go back and look at it. I'm having difficulty seeing what Dr. Coleman or Sergeant Massine has said about things that weren't done because it was a PSU or where they gave an opinion regarding the PSU.

**MR. AVIS:** Well, that's why I'm trying to put my notes together and hopefully that will be of assistance to you.

**THE COMMISSIONER:** Sure, so if we don't see you tomorrow morning, we'll see you tomorrow afternoon. Thank you.

Sorry, go ahead, Mr. Kennedy.

**MR. KENNEDY:** Commissioner, if I could just make one comment, too.

Over lunch I had a quick look at some case law in relation to the independence of an expert going to admissibility as opposed to weight. And in *White Burgess*, the Supreme Court of Canada clearly says that independence is an issue that can go to admissibility.

**THE COMMISSIONER:** Yeah, well, there's another case around the same time that you should check out as well: the Quebec right to have a prayer in a municipal council meeting. So you should check that one out as well because it deals exactly with – and pretty amazing, actually. I was surprised when I reread it. I saw it at the time it went through, but it talks about just having a working relationship, for example, is not enough to automatically disqualify.

**MR. KENNEDY:** No, no. My issue on independence is not the relationship with Commission or Commission counsel. That's not the issue.

**THE COMMISSIONER:** What are you speaking about?

**MR. KENNEDY:** The lack of objectivity is in the way the report is written, the conclusionary comments made and what I would refer to as the bias, nothing to do with Commission counsel or Commission.

**THE COMMISSIONER:** Okay. Well, that's the same thing applies.

There are two thresholds. First is the threshold of considering whether a person should be totally excluded from presenting expert evidence because he or she has shown a lack of objectivity, and there the test seems to be as long as the individual is able to attest, as I informed my counsel the witnesses are prepared to do, attest that they can perform their duties of the court of remaining impartial and objective and so forth, their evidence goes in. Then you get the burden on the counsel wanting to keep it out of bringing forward something specific.

But the things that the Supreme Court said is not a grounds for disqualifications. It surprised me unless – look up Saguenay, Mr. –

**MR. KENNEDY:** Well, there's also (inaudible) in there, but White Burgess is 2015. White Burgess is –

**THE COMMISSIONER:** I know, White Burgess is the same year as – it might even have been (inaudible).

**MR. KENNEDY:** And they're clear; I read it over lunch.

**THE COMMISSIONER:** Sorry?

**MR. KENNEDY:** It's clearly stated in that case. I read it over lunch. So we can argue it. I mean, if the Supreme Court of Canada has given – I don't know if they're open to interpretation but –

**THE COMMISSIONER:** Anyhow, we've got another witness coming, so we can't get into it now, but you haven't shown me anything I haven't seen. I read White Burgess, but you've got to go and see Saguenay and there you'll see that you've got a pretty – there's a lot more required than is in your email in terms of pointing out, you know, a basis for –

**MR. KENNEDY:** That email is simply to alert counsel, Commissioner, that we were going down this road.

**THE COMMISSIONER:** Well, at some point, okay, you got to –

**MR. KENNEDY:** I will put to you –

**THE COMMISSIONER:** You're going to do it tomorrow, I take it. Okay, yeah.

**MR. KENNEDY:** Well, it's –

**THE COMMISSIONER:** Or, sorry, whenever you're – that time permits, but you're going to do it before the hearing, I take it.

**MR. KENNEDY:** Yes, Commissioner. We will – I will certainly outline for you how and why I think that this man is biased, yes, I will.

**THE COMMISSIONER:** Well, I look forward to it.

We'll take a 10-minute break and then the Skype should be available, hopefully.

**MS. SHEEHAN:** 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, go ahead Ms. O'Brien.

I hear we're wired for sound here somewhere, are we?

**MS. O'BRIEN:** We are indeed. We are using actually for this session Microsoft Lync. And the witness is Sue Hughson who's with the Alberta Serious Incident Response Team.

And, Ms. Hughson, can you hear me?

**MS. HUGHSON:** Yes, I can.

**MS. O'BRIEN:** Okay.

Now, you're very low here.

**THE COMMISSIONER:** We can barely hear you, Ms. Hughson. Please speak up a little bit.

Let's see, try again. Testing, can you hear us?

**MS. HUGHSON:** Okay, I can hear you. Can you hear me?

**THE COMMISSIONER:** It's a bit better. We could still do it a bit louder I think, if you could.

**MS. HUGHSON:** I don't know where –

**THE COMMISSIONER:** Oh, you're good there now.

**MS. HUGHSON:** – how close I am to the microphone so I'll speak louder.

**THE COMMISSIONER:** Thank you very much. And if you get closer to the mic I find here it works anyhow.

I'm Leo Barry, the Commissioner. Welcome to Newfoundland and Labrador from Alberta by technology, I guess.

**MS. O'BRIEN:** Okay –

**MS. HUGHSON:** Well, thank you for the welcome.

**MS. O'BRIEN:** Okay, Ms. Hughson, I'm going to ask Madam Clerk to get you to affirm your evidence before we begin.

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

**MS. HUGHSON:** I do.

**MS. SHEEHAN:** Please state your full name.

**MS. HUGHSON:** Susan Darlene Hughson.

**MS. SHEEHAN:** Thank you.

**MS. O'BRIEN:** Thank you, Ms. Hughson.

Before I start to ask you questions, Commissioner, I'm going to ask to enter the following exhibits: Exhibit P-0782, P-0783, P-0785 through to P-0787 and P-0790 through to P-0792.

**THE COMMISSIONER:** So ordered.

**MS. O'BRIEN:** Thank you.

Commissioner, I'm going to begin with – before we get to the ASIRT report, I'm going to begin by bringing Ms. Hughson through some evidence about how the Alberta Serious Incident Response Team works and her own background. I'll then seek to have her qualified as an expert in order to give the opinion that appears in her report. So that's the way I intend on proceeding.

**THE COMMISSIONER:** Thank you.

**MS. O'BRIEN:** Ms. Hughson, can you tell the Commissioner, please, how and when ASIRT was created.

**MS. HUGHSON:** ASIRT was created in late 2007 in response to an initiative between the Alberta Association of Chiefs of Police and the Alberta Solicitor General at the time, in response to a concern that there was a need for an independent investigative body in this province before there was an incident that occurred. They wanted to get ahead of the curve on this and decided to try and put together a body that would be responsible for the independent investigation of specific types of incidents or events in relation to law enforcement in the province.

**MS. O'BRIEN:** Okay. Thank you.

And I am going to ask you about the mandate of ASIRT and I'm going to bring up Exhibit P-0785, please, Madam Clerk. And, Ms. Hughson, what I am bringing up here now in our hearing room is section 46.1 of the Alberta *Police Act*. So with reference to that, can you just briefly explain to the Commission what ASIRT's mandate is?

**MS. HUGHSON:** So the section of the *Police Act* was drafted before ASIRT was brought into existence. I don't have the act in front of me but I can tell you basically how it works. Section 46.1 requires chiefs of police or the commissioner to report serious incidents involving serious injury or death to a person that may have been caused by police conduct, and also to report any allegations of police misconduct of a serious or sensitive nature.

They are required to report that to the director of law enforcement, which is the assistant deputy minister for Alberta Justice and Solicitor General, Public Security Division. So that requirement does not have a time frame to it but the expectation is – there are expectations in place where if it's a serious injury or death case it's to occur within the hour as much as possible, and if it's an allegation of a serious or sensitive nature concerning police conduct such as corruption, breach of trust, sexual – dated, historical sexual assaults, those types of things, obstruction of justice, it's supposed to occur within 24 hours.

What happens is once they make that report to the director of law enforcement under the *Police Act*, there are a series of options as to how the director of law enforcement may direct that matter to be investigated.

**MS. O'BRIEN:** Okay. Thank you Ms. Hughson.

That's section 46.1(2) that is – that we have up before us and it sets out what the options are. And one of them is to direct the head of an integrated investigative unit to conduct an investigation into the incident or complaint. And I understand that ASIRT is, in fact, an integrated investigative unit as contemplated by this act. Is that right?

**MS. HUGHSON:** That is correct.

**MS. O'BRIEN:** Okay.

Now, I'm going to bring up, I'm going to ask you a bit about how ASIRT is staffed. And I'm going to bring up the org chart from your website at P-0786, please, Madam Clerk?

**MS. HUGHSON:** Right. I have it in front of me.

**MS. O'BRIEN:** All right, can you explain to the Commissioner how ASIRT is staffed and organized. And, again, we don't need a lot of detailed evidence but just to give him a sense of how it works.

**MS. HUGHSON:** So when ASIRT was formed it was decided that it would be civilian led. So the idea is that the head of ASIRT is expected to be non-law enforcement in terms of a police background or a police officer, or a former police officer. It has been, initially it started as a secondment of a Crown into that position and then ultimately it was determined that the division should be more formal and the secondment was terminated and it became an independent position.

I am the second person to hold the head position which is the executive director. And they advertised my position; they advertised it as a person with extensive criminal law background and knowledge.

**MS. O'BRIEN:** Okay and in a few minutes I'll get to –

**MS. HUGHSON:** And it included –

**MS. O'BRIEN:** Sorry to interrupt. In a few minutes I will get to your experience, Ms. Hughson, but if you could go on to explain. So you're at the top here as the executive director.

**MS. HUGHSON:** Right.

**MS. O'BRIEN:** Underneath you it's director of investigations.

**MS. HUGHSON:** Now, it could have been –

**MS. O'BRIEN:** And then I know you have some – you have police officers seconded to ASIRT as well as some civilian investigators. Can you explain that aspect please?

**MS. HUGHSON:** So we have a director of investigations. That person is considered a Government of Alberta employee. The current director of investigations is a former RCMP member. The team commanders – we have two offices in the province: one in the north and one in the south. The team commanders are Government of Alberta employees. Both of them are former law enforcement: one from the Edmonton Police Service in the north and one from the Calgary Police Service in the south.

Then in terms of our investigators, all of our investigators right now are either Government of Alberta employees hired as investigators that have former law enforcement experience. And then we have, in addition to those Government of Alberta employees we have seconded members from – in Edmonton we have seconded members from the RCMP, the Edmonton Police Service and we did have a seconded member from the Department of National Defence. That secondment ended. In Calgary, we have seconded officers from the RCMP; two, and from – or yeah, two from the RCMP and two from the Calgary Police Service.

**MS. O'BRIEN:** Okay.

So I understand when you have the seconded officers, they are still members of that force and they're seconded to ASIRT for two-year periods of time. Is that right?

**MS. HUGHSON:** It's not necessarily two years; it depends on the agreement with the particular police service. For example, the Edmonton Police Service has a union agreement that requires a set term of two years, so they are here. Edmonton Police Service members are seconded for a period of two years. RCMP members may be here longer and in fact have been here longer.

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** So it depends on the individual service.

**MS. O'BRIEN:** And can you just – and again, we don't need a lot, but I'd like you to give the Commissioner some sense of what you see as the advantages and disadvantages of using, you know, active members, seconded members of active police forces who – police forces you may – ASIRT may well be investigating. Is that right?

**MS. HUGHSON:** Right.

**MS. O'BRIEN:** Yes.

**MS. HUGHSON:** That is correct. So we have a seconded – our model is dependent on a seconded – on a system that allows for secondments of members from the various services.

What those members bring to our team are: knowledge of those police services and the internal workings of those police services, the policies of those police services; they have access to the databases that those police services use so that we can access them at will; and they bring us a network. So while it can be – I know it has been criticized that there are seconded members, we find it actually works very well for us.

We do have certain practices in place to ensure that there is a level of independence. So, generally speaking, the primary investigator in any command triangle will not be from the – will not be a seconded officer from the service under investigation, and in particularly sensitive ones, we may have nobody even involved. So, for example, when we were sent to the Yukon into an RCMP-sensitive investigation, no RCMP members went and responded to that particular call.

So we do try to separate and have a Government of Alberta employee or a seconded member from a different service be the primary investigator in those files. And the team commanders are both civilian employees.

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** So we value, in my opinion, experience, accessibility and skills over perception. And it is a perception issue and it is an absolutely understandable perception issue but, for me, the integrity of the investigation is important.

I also note that it does seem to work very well in terms of maintaining a working relationship with the police services that are we investigating. ASIRT's reputation and relationship, generally speaking, with the police services is very positive. The same cannot be said for some of the other models. So –

**MS. O'BRIEN:** And when you're referring to other models, would you be referring to things like the SIU in Ontario where they do not have active serving police members as investigators? Is that right?

**MS. HUGHSON:** They don't have active serving members. The vast majority of the SIU is former law enforcement, but they don't have any seconded members, but they have an adversarial relationship that makes investigations very difficult. So there is a – there's a definite breakdown in the relationship between the SIU and the police services that they investigate, and that reflects itself in how those investigations unfold.

**MS. O'BRIEN:** Okay, and I'm just going to ask you, so when you refer to your civilian investigators, all your civilian investigators are former police officers from some force. Has ASIRT ever used a civilian investigator who wasn't former law enforcement; in other words, have you ever trained someone from scratch, a pure civilian?

**MS. HUGHSON:** We didn't. ASIRT did have a person that was not a former police officer that came in into another position and wanted to be trained as an investigator. There's nothing in the ASIRT model or in the Government of Alberta that is against the concept of civilian investigators properly trained, but have no former law enforcement experience.

So we did train one person. This was before I came to ASIRT. That person was trained over a period of years and eventually reached the stage where she was placed in an investigative capacity. Once she was trained, she left our office to join the ombudsman's office.

**MS. O'BRIEN:** Okay so I –

**MS. HUGHSON:** And I am not against civilian investigators not being law enforcement, but I am a former Crown prosecutor and I have the view that, from my perspective and I'll maintain this perspective, if it was my child that was shot by a police officer, I'd want a homicide investigator investigating it. If it was my son or daughter who shot that person, I would want a properly trained homicide investigator. So I am personally of the view that I prefer officers or investigators to have that skill.

We can train that skill, and I've indicated that with the correct budget we can absolutely do that, but it would take a training program and it would take years before I would leave them in a significant capacity in an investigation.

**MS. O'BRIEN:** Okay, thank you.

And currently, am I right, ASIRT employs approximately 40 people and most of those are full time?

**MS. HUGHSON:** They are all essentially full time.

**MS. O'BRIEN:** Okay. All right.

**MS. HUGHSON:** We have some wage employees that were intended to be part time but our workload has expanded so significantly that they are essentially working full time.

**MS. O'BRIEN:** Okay. And I understand you do provide some ongoing training to your investigators as well. I know you're not training up anyone from scratch right now but you do, do an ongoing training?

**MS. HUGHSON:** We do legal updates. We do ongoing training. We try to send them to homicide courses, those types of things. We send them to project undercover operation courses, that type of thing, but, yeah.

**MS. O'BRIEN:** Thank you.

I'm going to bring up P-0787. And, Ms. Hughson, I don't mean to be rushing you through some of your answers. You have so many good things, we want to hear from you, and we're time limited, of course, so I'm going to keep our pace brisk or at least attempt to.

What I brought up, Ms. Hughson, are some statistics actually from your website.

**MS. HUGHSON:** All right.

**MS. O'BRIEN:** So this gives us a sense, I believe, of – you have years here from 2008 up to 2016. And there's a listing here of the total number of files assigned to ASIRT each of those years, and then you've broken them up by death, serious injury, sensitive. Then you have a number of other categories here: assist oversight agencies, investigation, review, oversee/oversee and review. Those are the major categories.

Can you just explain to the Commissioner, what – I know these are different ways that ASIRT can engage with a file, can you explain those briefly to the Commissioner, what they are.

**MS. HUGHSON:** Okay.

So the assist oversight agencies is when we assist another agency – one of the other agencies across the country that are involved. So we've assisted the SIU, the IIO; they've assisted us.

**MS. O'BRIEN:** And IIO is in British –

**MS. HUGHSON:** Investigation –

**MS. O'BRIEN:** Sorry, just to – IIO is in British Columbia, right?

**MS. HUGHSON:** Yes, it is.

**MS. O'BRIEN:** Okay. Thank you.

**MS. HUGHSON:** Sorry, all these acronyms I get used to.

Okay, so an investigation is when ASIRT is called in to conduct an investigation. Those are files where we take control of the investigation and it is our team that is investigating.

We differ from the SIU but are similar to the IIO in BC in that we depend on the home agency for things like forensic services, so ident. We also rely on some of those services for things like traffic reconstruction or firearms examination. We may send them to one of the other services in the province, but we rely on the police services for those areas of speciality.

So when ASIRT comes in, it's responsible for the investigation. It controls the communications that go out regarding that investigation. When we do a review, our review is to be an examination of the investigation conducted by another agency. And when we are doing a review, we are only looking at that investigation; we are not looking at the incident itself. It's not intended for us to comment on whether there are reasonable grounds to believe an offence has been committed.

The purpose of the review, since it was started, was to determine whether we thought the investigation was complete, whether there was any evidence of any tunnel vision or bias that caused us concerns. And if we had any recommendations or had concerns about investigative steps that should have been taken, we could make those recommendations in the review process.

**MS. O'BRIEN:** Okay and just to be –

**MS. HUGHSON:** There isn't –

**MS. O'BRIEN:** – clear that's what you did in the present case the – with Constable Smyth and Donald Dunphy. It was just what you've described there in that type of review?

**MS. HUGHSON:** That is correct.

**MS. O'BRIEN:** Okay.

Thank you.

**MS. HUGHSON:** That is correct.

And then the oversight and review, which we don't do very often, is where we actually direct how the home agency investigates while the investigation is ongoing. That doesn't have very much value to us in the sense that if we're going to direct how it be done, we'd rather just do it ourselves. And the home agencies are capable agencies of conducting their own investigation, so really it's not a particularly palatable option. Either we want to investigate completely or just review.

The only time, in my experience with ASIRT, that we did an oversight and review is when an investigation had been ongoing for a week, and the government wanted us to come in and be in a position to correct anything that had happened up until that point.

**MS. O'BRIEN:** Okay and we can –

**MS. HUGHSON:** So we took an oversight review.

**MS. O'BRIEN:** Okay.

We can see it from your statistics here the majority of what you do are investigations and then second to that would be reviews.

**MS. HUGHSON:** Right.

**MS. O'BRIEN:** And here in the last column here we see the number of police officers charged each year out of all those files. And I think it's fair to say that would be a very small percentage or a small number. Is that fair to say?

**MS. HUGHSON:** It's a reasonably small percentage. It's not an unexpectedly small number because ASIRT gets called in to an incident not because there's something obviously wrong, but just because there's to be a determination made. And so it's not like a typical criminal investigation where you know a crime has been committed –

**MS. O'BRIEN:** Sure.

**MS. HUGHSON:** – and then there's no charges.

**MS. O'BRIEN:** I understand that. And just generally –

**THE COMMISSIONER:** (Inaudible) excuse me, what's the total number of police officers in your jurisdiction? There's four charged in 2016, that's four out of how many officers?

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

**MS. O'BRIEN:** So the Commissioner is asking are those – trying to get a sense of how many officers you would be overseeing that resulted in, say, the four charges in 2016? How many police officers would be there in the forces that you'd be doing your review and investigations on?

**MS. HUGHSON:** Well, it would be hard to say how many officers we would be investigating because we have 83 files if we had, for example, in 2016, 44 investigations. So we know that 44 investigations ASIRT was responsible for. Those 44 investigations may have had only one subject officer or they could have had four subject officers. So it –

**THE COMMISSIONER:** Yeah, I understand that. I think you may have given this figure before, I'm not sure. What is the total number of police officers in the province?

**MS. HUGHSON:** Approximately 6,000.

**THE COMMISSIONER:** Six thousand.

**MS. HUGHSON:** I believe.

**THE COMMISSIONER:** So we're talking about four charged out of 6,000? Would that be correct?

**MS. HUGHSON:** Yes, it's possible. And you should be aware that those charges, when you say four officers in 2016, that may not have been a 2016 incident.

**THE COMMISSIONER:** Okay.

**MS. HUGHSON:** So we would not have investigated all 6,000 police files. You know, that we'd be looking at –

**THE COMMISSIONER:** No, I understand that. I'm trying to get a feel for the size of your police force or forces.

**MS. HUGHSON:** It's huge.

**THE COMMISSIONER:** Pardon?

**MS. HUGHSON:** It's huge.

**THE COMMISSIONER:** Yeah.

**MS. HUGHSON:** Our scope of officers is huge for the entire province.

**THE COMMISSIONER:** Yeah. Okay.

Thank you.

**MS. O'BRIEN:** Okay.

And we get a sense of what is ASIRT's approximate annual budget?

**MS. HUGHSON:** It's about \$3.5 million to \$4 million. It's a comparatively low budget compared to some of the other agencies. We rarely come in under budget and most often we end up over budget.

**MS. O'BRIEN:** And just to give us some context, is it approximately – Alberta has a population of approximately just over 4 million people. Is that right?

**MS. HUGHSON:** You know, I honestly wouldn't be able to even guess.

**MS. O'BRIEN:** Okay, so I'm just trying to get – that's fine, but it's certainly information we can get otherwise. We're just trying to give a bit of a comparison in size to Alberta compared to Newfoundland and Labrador. Okay.

Now, I do understand that ASIRT has a contract with the Government of Yukon and that is of interest to us. Can you briefly explain that to the Commissioner?

**MS. HUGHSON:** We were contacted, ASIRT was contacted by the Yukon government to come and conduct investigations into incidents in their jurisdiction that might come out. They recognized that there might be a need for it but also recognized that they wouldn't have a need for a full-time body up there.

So they contacted with ASIRT that ASIRT could be contacted when a serious injury or death occurs, or there's an allegation of a serious or sensitive nature. And there would be discussions on whether ASIRT were to respond to investigate or conduct a review.

What resulted was a memorandum of understanding between the Yukon government and Alberta and ASIRT that provides for the Yukon government paying for a full-time position with ASIRT for one investigator on the understanding – for a year, on a yearly basis – on the understanding that we will respond in appropriate cases. And knowing that when we do respond, because we follow principles of Major Case Management and we also are very concerned about officer safety, we will be sending a team. So they don't – we don't send up one investigator, we actually investigate it as we would down here.

That has been in place for a number of years and has been well received up there and has been working very well. And we're continuing that agreement, we operate by way of memorandum of understating.

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** And that is going to continue.

**MS. O'BRIEN:** Thank you.

And the, I – you know, everybody knows that Yukon is a fairly remote part of Canada, you know, as are parts of Northern Alberta, of course. So when a serious incident happens, most of us could understand that the first hours following a critical incident can be critical in terms of collection of evidence and the investigation.

So how does ASIRT deal with that? So, for example, if there was a police-involved shooting in the middle of winter in Yukon or in Northern Alberta, with the distances, the weather, how do you manage that, getting your investigators to the scene?

**MS. HUGHSON:** Oh, when we're dealing with ASIRT being called out on an investigation, as soon as we are called out we make contact with a liaison with the home agency and give directions as to what needs to occur with respect to continuity of the scene, securing the scene and seizing certain evidence that can be lost if it's not seized immediately.

So we ask – if the witness officers remain on scene, we ask that certain things happen with the subject officer, and we will ask that certain things happen with respect to the scene itself. It can take us a matter of hours sometimes to respond to some of the Northern or Southern Alberta areas, but we do respond almost immediately. It takes about, maybe half an hour, 45 minutes to get everybody moving and all the calls to go out, to make sure that we have a team that we can send.

With the Yukon, we have to fly up there. It takes longer, so we give directions on how the scene is to be secured. And we give instructions for the identification section to do certain things before we will arrive. We have expectations on how a scene will be maintained and that would include not moving anything like moving any firearm that might be on scene or anything else that might be on scene that isn't related to emergency medical care.

So in Alberta, it can take us maybe – I know it's taken us five hours to get to some locations. When we had a particularly difficult time between Christmas and New Years' in 2014, we had a team going to Wainwright, Alberta – yeah, Wainwright, Alberta and Grand Prairie on two officer-involved shootings within days, so that required sending cars out immediately. We have a

fleet of vehicles that we use for our investigators so that they can go. And then we had a third officer-involved shooting and we flew the Calgary team to the location to get them to the scene.

Our scenes – we are usually to a scene within hours. The only time that I’m aware that we wouldn’t have made it to a scene would have been in – there was a Yukon file that they responded to long before I came here, and there was one that I dealt with while I’m in this position in Manitoba where we had to go to a remote First Nations community . And it’s a fly-in only location, so we had to get to Manitoba and then we had to get that location. And we got there, I think – within less than 48 hours we had the team on the ground and investigating.

**MS. O’BRIEN:** Okay.

**MS. HUGHSON:** And that’s the only time we would have people holding a scene for days.

**MS. O’BRIEN:** Okay, so you would rely on the local force –

**MS. HUGHSON:** (Inaudible.)

**MS. O’BRIEN:** – to do your holding the scene but you would be directing the activities at the scene.

**MS. HUGHSON:** Absolutely.

**MS. O’BRIEN:** Okay.

And before I – those are the questions I have for you from ASIRT, but I just want to be clear, I didn’t want to be misleading. When I was asking you about the number of charges that result from the number of files ASIRT handles, and I noted it was a small number, I was – you know, I do understand but to make it clear because you’re doing the type of investigations you’re doing, finding that there is reasonable and probable grounds that a criminal offence only occurs in a small percentage of the cases. How does that rate compare with purely civilian-led organizations or, you know, investigative units? Is it similar numbers?

**MS. HUGHSON:** I would expect it would be similar numbers. I can tell you that, generally speaking, you can’t control what happens in court, but I can tell you that a number of ASIRT’s investigations lead to guilty pleas.

I can tell you that I’m also aware of cases in other jurisdictions, and it hasn’t happened while I’ve been here, but there’s been cases in other jurisdictions where charges get stayed or withdrawn after they’re charged. That is very rare in an ASIRT investigation.

**MS. O’BRIEN:** Okay. All right.

And so I’m just going to get a few questions on your background, Ms. Hughson. I understand you started your career actually as a criminal defence lawyer for the first year, year and a half or so, and then you became a Crown attorney. Is that right?

**MS. HUGHSON:** I did. I did. I articulated with a criminal law firm alone; Brimacombe, Sanderman and Stoppel at the time.

**MS. O’BRIEN:** And then my notes here – and I’ll just go over them quickly – but that from approximately 1991 until 2003 you were a Crown prosecutor in Alberta. And during that period of time you prosecuted some very serious offences: homicide, serial rapes, some of the most serious types.

And then from 2003 until you joined ASIRT in 2014 you were working with the Appeals Branch of the Prosecution Service in Alberta? Is that right?

**MS. HUGHSON:** That is correct.

**MS. O'BRIEN:** Okay.

And since that time, since 2014, you've been the executive director of ASIRT.

**MS. HUGHSON:** That's correct. I was the director of appeals from 2008 to 2013.

**MS. O'BRIEN:** Thank you.

Commissioner, I know we've been – had Ms. Hughson on the phone for some time, but I did want to get all the background on the ASIRT. And I'd now be seeking to qualify her in the area of investigation of serious incidents involving police officers.

**THE COMMISSIONER:** Counsel, do you have any concerns about Ms. Hughson's qualifications to give opinion evidence in this matter?

Mr. Williams? No.

Ms. Buis?

Mr. Drover?

RCMP?

Ms. Breen? No?

Okay, well then, based upon the information you've provided, Ms. Hughson, I'm pleased to find you qualified as an expert as indicated by, requested by Ms. O'Brien, Commission counsel.

**MS. HUGHSON:** Thank you, Sir.

**MS. O'BRIEN:** Thank you.

Now, one of the areas I'm going to touch on just briefly, Ms. Hughson, before we get to your report, is independent observers. So in our pre-hearing interview, I understand that ASIRT has used independent observers before, always in the context of First Nations communities. You did tell me that it's not that you would not consider using an independent observer in another context, but to date it has always been in First Nation communities. Is that right?

**MS. HUGHSON:** That is correct.

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** And we call them community liaison observers. So that's the context that we have used them in, yeah.

**MS. O'BRIEN:** Okay.

And I think when we look at section 46.1 of the *Police Act*, that that act actually contemplates that type of that option. Is that not right?

**MS. HUGHSON:** It is contemplated but the observers that ASIRT uses are created by way of a contract with them. It's not a result of the director making a direction. ASIRT initiates those overseers themselves.

**MS. O'BRIEN:** Okay. Thank you.

And if you could just briefly tell the Commissioner how you have used independent observers and in particular, I know you have reviewed the – ASIRT has reviewed the Constable Smyth, Donald Dunphy file and so you are aware of how an independent observer was used in the case that we are dealing with here today.

So if you could maybe, when you describe how you have used a community liaison, if you could just highlight the differences in how ASIRT used them as compared to how they were used in this role and any similarities as well.

**MS. HUGHSON:** Okay.

So ASIRT will bring in or ASIRT will seek out a community liaison when you have a particular file that is highly sensitive. And notwithstanding the fact that ASIRT is an independent body and it is a civilian-led independent body, there are still concerns, public concerns or community concerns particularly, especially in First Nations communities, about the independence of investigations into the police. And so we often hear it's the police investigating the police.

Civilian liaisons are brought in to be effectively a person who sees, oversees the entire investigation and at the end of the investigation they have access to every single piece of paper on that investigation, every video, every photograph, every file. And then they are asked to comment on whether they have observed any concerns regarding tunnel vision, bias, whether they have concerns about the independence of the investigators and also whether they have any recommendations or concerns about steps that should have been taken or wouldn't take – or haven't been taken.

What we do is we go to the community and ask them to give us names of, say, five individuals that they feel are capable of being independent and acting in their stead and we will select a person from that list of names. They are – we've used them in the First Nations communities in particular because there's a lot of distrust, and there's a historical reason for that distrust between law enforcement and our First Nations communities.

And it brings them some comfort to know that it's not just ASIRT saying we did everything we could, that there's somebody in their community that they can say I looked at it. I worked with them all the way through; they kept me apprised all the way through. I looked at everything and I'm satisfied they did what they could and they did everything they could.

So we've done that in a number of cases. In some cases we've had seven pages of questions that they've come back with that they've asked our investigators so that they can satisfy themselves that they want to – that they're prepared to essentially agree that the investigation was independent and complete and thorough.

So we have a confidentiality agreement that we get them to sign at the beginning. We will keep them apprised of where the investigation is at and at the conclusion of the investigation we give them the entire investigative package before it comes to me. So they are intended to sign off on their independent observations before it comes to me for a decision.

**MS. O'BRIEN:** Okay.

And do your community liaisons, do they ever visit the crime scenes or do they have an opportunity to watch interviews or participate in witness interviews in any way?

**MS. HUGHSON:** They are not entitled to participate in the investigation and I would not have them taken to crime scenes and I would not have them participating in the course of the investigations. So, for example, in this particular case, I understand the independent observer went for the purposes of the re-enactment and in fact asked questions.

So we would not have an independent observer involved in that. I don't do that because from my perspective, once you are part of the investigation, you lose a measure of independence. And also I have concerns that you have now created a witness. They're not independent anymore. They're not an overseer. They're a participant. So we would never do that. We would never have an independent observer actually participating actively in the investigation.

What we have done is if we have an investigator who suggests something that we haven't – think has merit, we'll go do it and they will certainly see every interview, every re-enactment, every statement, but they will not be seeing it as it occurs.

**MS. O'BRIEN:** I've just one last question for you on that topic in – and I'm just referring to page 404 of the Task Report, Commissioner, which has been put into evidence. But there it was Corporal Steven Burke who was the primary investigator on this file. And he met with you and I believe Mike Sekela at the end when you'd finished your review. And as a result of his meeting with you he made a note that someone from ASIRT, so I don't know if it was you or your colleague, had said that an independent observer should be a respected member of the community outside the justice system.

Do you recall saying that and is that accurate? Is that what you're saying, an independent observer should be outside the justice system?

**MS. HUGHSON:** I don't recall saying it would be outside the justice system. It has to be a respected member of the community, obviously. And I would have no problem with the independent observer having any criminal law experience at all.

In fact, in one case, we considered a family friend of a deceased in an officer-involved shooting that had former law enforcement experience. But so that does not disqualify somebody in my opinion.

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** It's participation that I had an issue with.

**MS. O'BRIEN:** Okay.

Thank you. I just wanted to clarify that.

I'm going to go now to the review that ASIRT did. I'm going to first bring up the letter of request which is P-0782 and I'll just be with this document for one moment.

But this is where our Minister of Justice and Public Safety wrote the Minister of Justice and Solicitor General for Alberta to request – to formally request ASIRT's assistance in this matter.

And I just want to – he writes here, Minister Parsons writes here in the last paragraph: "I understand that ASIRT would review an investigation for thoroughness, competency and overall accuracy and that the goal of any review is to identify whether the investigating agency has

completed the investigation in a manner consistent with the level of investigative excellence that follows ASIRT's objective to maintain public confidence in policing. We would expect that the investigation be carefully scrutinized for evidence of investigative bias, tunnel vision and/or a lack of objectivity."

Has Minister, sorry, Parsons – I think I might have called him Minister Andrews there for a moment. Has Minister Parsons properly expressed what ASIRT did in this case?

**MS. HUGHSON:** Yes.

**MS. O'BRIEN:** Okay. Thank you.

Now, I'm going to review this fairly quickly because I don't believe it's controversial, but I understand when you get a file you actually assign a primary investigator to the file. Is that right? When you get a review file?

**MS. HUGHSON:** We – yes.

**MS. O'BRIEN:** Okay.

And in this case the primary investigator was Mike Arrowsmith. Is that right?

**MS. HUGHSON:** That is correct.

**MS. O'BRIEN:** Okay.

And we have had lots of evidence here on the command triangle of major crimes management, and I understand you follow a similar model even for your reviews. And you would have had your team commander as we saw on the – your org chart a little – a short little while ago was Lorne Pubantz. Is that right, on this file?

**MS. HUGHSON:** That is correct, yes.

**MS. O'BRIEN:** Okay.

And ASIRT would have received the full investigative file from the RCMP. Is that right?

**MS. HUGHSON:** Yes, to the best of our knowledge. Yes.

**MS. O'BRIEN:** Okay.

And then you have the ability to ask some questions back and forth with the RCMP to get further information as you need it or your investigator wanted to see. Is that also correct?

**MS. HUGHSON:** That's correct.

**MS. O'BRIEN:** Okay.

Were any of the individuals involved in this review current or former members of the RCMP?

**MS. HUGHSON:** The primary investigator is not a former member of the RCMP. The team commander is not a former member of the RCMP. They're both former law enforcement, members of the Edmonton Police Service.

The team – the director of investigations, who the file then goes to, is a former RCMP member. And so, yes, he was a former RCMP member, and then it comes to me who, obviously I am not a former police officer at all, so ...

**MS. O'BRIEN:** Okay.

So if I just understand the process as I've gleaned it from you, it's that the investigator would do a briefing note of his report in this case. That would go kind of up through the chain as everyone goes up to the team commander, then the director of investigations. At each level, the individual is reviewing it and ensuring they're happy with it. And, ultimately, it ends up with you as the executive director and you do the final sign-off and reporting letter out to the agency.

**MS. HUGHSON:** That's correct. And at any point in the chain, it could be sent back if there's concerns or other issues we want to pursue.

**MS. O'BRIEN:** Okay.

So I'm going to bring up your report now. It's entered into evidence at P-0004.

And I'm going to go through it fairly quickly, Ms. Hughson, and other counsel may have questions on it. It is entered into evidence, the full of the report, and the Commissioner has had the opportunity to read it and can revisit it at any time.

At the beginning of your report, you just give us some background on ASIRT, which you've already given us here today. So I'm going to go to page 3.

**MS. HUGHSON:** All right. I have it in front of me.

**MS. O'BRIEN:** Okay.

And I think this is important. In page 3, you give some explanation here of how "It is equally important to understand that" – what a review is not. Can you just explain that to the Commissioner, please?

**MS. HUGHSON:** I think it's important because there's a common misperception, particularly on the part of the public, that when ASIRT is asked to review something that it's perceived as an actual investigation. And that we're actually going to go out and interview witnesses and we're going to review the incident itself and come to conclusions on whether the officer was lawfully placed and in the lawful execution of his duty and whether there was a lawful use of force.

It's very important to make sure, for everybody involved, where the lines are and that includes not only what we will do, but what we will not do. It is not our role, it is somebody else's role in this particular scenario, to make the decision to determine whether the evidence provides reasonable grounds to believe an offence was committed and to determine what steps should be taken with respect to that particular investigation.

So in this particular file, there was a considerable number of outside involvement before we even became involved. So there was the independent observer, which the RCMP already had, and there was a request for an incident review, I believe, from the RNC to the Saskatoon Police Service. So I just wanted everybody to be – to understand what we would do and what we would not do.

**MS. O'BRIEN:** Okay.

So you didn't – ultimately, ASIRT does not give an opinion as to whether Constable Smyth's use of force was appropriate or not, for example.

**MS. HUGHSON:** We do not.

**MS. O'BRIEN:** Okay.

But what you did do was review the RCMP's work on the file. And I understand if – just please correct me if I'm wrong, but I believe your ultimate conclusion is expressed here: "A careful review of the completed investigation confirms that it was thorough, complete and conducted in a manner consistent with current investigative standards." Is that right?

**MS. HUGHSON:** It was.

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** Yes.

**MS. O'BRIEN:** And on the bottom of page 4, I see – sorry, I'm just going to go, actually, to the top of page 4. I apologize.

"Based on our review, no obvious personal or professional bias was demonstrated."

**MS. HUGHSON:** That would be based on, yes, our review of the investigation.

**MS. O'BRIEN:** Okay.

And – sorry, and here was the other sentence I wanted to bring you to, which was at the bottom of page 3: "ASIRT carefully scrutinized the investigation for evidence of investigational bias, tunnel vision, and/or a lack of objectivity. There was no evidence to support a conclusion or even a suspicion that any of these identified risks manifested themselves in this investigation."

So if I –

**MS. HUGHSON:** That's correct.

**MS. O'BRIEN:** Oh –

**MS. HUGHSON:** That's my conclusion.

**MS. O'BRIEN:** Okay. Thank you.

When I interviewed you, Ms. Hughson, prior to the hearing, when we had our pre-hearing interview, I was curious as to one of the sentences on the top of page 4 here where you had recorded that: "The recognition of the potential conflict and the steps taken to isolate the impact of that conflict were noteworthy and demonstrative of an intent to maintain the integrity of the investigation."

And at that time I was wondering where that came from, as I had not found any evidence of conflict being specifically addressed in the RCMP file. Do you recall that?

**MS. HUGHSON:** I do recall that, yes.

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** And I haven't had a chance to go through the entire investigation again. I did go through it; there is reference to the connection or to the relationship between the primary investigator – I wouldn't say relationship – whether there's a conflict in the relationship between the primary investigator and the subject officer.

And, additionally, other RCMP officers that did have a conflict, but would be considered for character witnesses, was also assessed. So I took that in the overall context.

**MS. O'BRIEN:** Okay. Yes, and that was going to be my point to you –

**MS. HUGHSON:** That's what I would think. Now, I haven't been able to go through –

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** – in as much detail as I would like.

**MS. O'BRIEN:** Okay.

But I do understand here that one – at least one RCMP officer who worked with Constable Smyth, who was Sergeant Doug Noel, he worked with – he was identified as a witness and interviewed as such by the RCMP.

**MS. HUGHSON:** I can't recall if it was one witness or not. I did – I thought there were more than one RCMP witness, but I could be wrong because it's been a while.

**MS. O'BRIEN:** Okay.

And there was, I believe, someone else who worked with the PSU as well. Okay.

**MS. HUGHSON:** Right.

**MS. O'BRIEN:** Okay.

If there had been prior contact between a subject officer and a member of the MCU, which you've just identified then that there was, should that have been documented in the RCMP file and should the family of Mr. Dunphy have been told that?

**MS. HUGHSON:** (Inaudible) I think it's important to be as transparent as you possibly can be. I do think – I know that we had a circumstance before I came here where because of a confluence of events we had to have a primary investigator that was an EPS member in a file where EPS was under investigation. That's the only time that I'm aware that it's happened.

But when it happened, we as ASIRT – not we because I was there but ASIRT – documented the discussion on the issues and the problems in terms of staffing and why they made the decision to make that person the primary investigator and the nature of the person's background with EPS was documented on the file. And, of course, that was of course released publicly in the fatality inquiry that subsequently occurred with respect to that officer-involved shooting.

I believe that any sort of information relating to conflict should be documented. I think it's important to be documented. I would not necessarily disclose that to the family at the outset. To me, that's a decision for the investigative agency to make in terms of who they wish to assign to investigate that particular file.

But I would certainly – in any investigation, I would certainly advise the family of any pre-existing relationship or so that if we have – if they – we’ll tell them a primary investigator was a seconded member from the RCMP or we’ll tell them about that person. Generally speaking, we will exclude people if there’s a personal relationship but we have the luxury of doing that with the number of experienced investigators that we have.

**MS. O’BRIEN:** All right. Thank you.

Now, we are going to get into – ASIRT does make some observations and recommendations in its report which is in the next section. But before we go to that, I think it’s important for you to explain – I’m just highlighting here on page 4, the sentence that begins: “While ASIRT has some observations and recommendations regarding aspects of the investigation, it is our opinion that none of the issues identified rise to a level of seriousness that would bring into question the integrity or validity of the investigation or would impact any conclusions ... based on the evidence.”

Can you just, you know, explain that to the Commissioner before we get into the actual recommendations?

**MS. HUGHSON:** So we may see flaws in an investigation that could change the course of an investigation that is such a significant piece of the puzzle that it might significantly impact any informed observer’s assessment of whether the officer was lawfully – of the evidence in relation to whether the officer placed and in lawful execution of his duties.

Some of the identified flaws in this particular investigation, ultimately, in the context of the whole of the evidence, did not impact my assessment that an informed reasonable person would be able to make a reasonable decision on the evidence as to whether the officer was lawfully placed and whether the officer was in lawful execution of his duties.

So in my particular – in this particular case, in my opinion, in terms of the evidence, it did not ultimately taint significantly the quality or the content of the evidence in such a way that it might impact that assessment.

**MS. O’BRIEN:** Thank you.

**MS. HUGHSON:** Does that make sense?

**MS. O’BRIEN:** Yes, thank you for that answer.

Your recommendations are set out, Ms. Hughson, in the – in this report. I’ll ask you to briefly tell the Commissioner what each one was. Most of them we will not a lot of detail on as we have had a fair bit of evidence already and they’re straightforward. There is a couple I will have some more or may have some more detailed questions for you, but if you could just begin going through them.

**MS. HUGHSON:** Okay.

So our first recommendation was under the umbrella of dealing with a subject officer. In Alberta, having had experience in these types of investigations, it’s important that, in my opinion, the investigation be pursued in a particular fashion. They’re very serious matters.

In my opinion in this particular case, the interview with the subject officer dealing with the subject officer initially, my concern was it could be perceived as being friendly or overly

friendly, or that they were taking it easy on the subject officer. It's a fine line. It's something that for going forward I would suggest they be more mindful of.

In my opinion and in my experience, the RCMP, when they're doing these matters, can conduct them in different forms and it can be an incident review, it can be a sudden death investigation. And the way they conduct it is usually focused the way they generally investigate. So they look at the affected person's conduct or the person who's been injured, and they look at the officer's conduct sort of as a part of that investigation into what the affected person did.

In this particular case, the whole focus of the investigation is on the conduct of the subject officer and it takes a little bit of a mind shift. Being mindful of the fact that this is not something that is common to these investigators, I wanted to raise for them that they should be more mindful of how they approach subject officers in their interviews. And they should be, at all times, aware of the fact that they may be gathering evidence – while it may not look like it at the outset, that they may be gathering evidence that may be necessary in a criminal prosecution down the road so that they want to ensure that they are following best practices to secure the admissibility of that evidence.

So in my opinion, in particular, particularly the first interview, they didn't come in and sit the officer down and explain what they were doing, that this was a homicide investigation, that they were investigating the incident resulting in the death of Mr. Dunphy and that he has potential jeopardy in that investigation. It brings home to the subject officer the seriousness of what they're doing as opposed to a conversation. And to me, it appeared to be more of a conversation, not an interview.

**MS. O'BRIEN:** And should Constable Smyth have been cautioned by the interviewers in your opinion?

**MS. HUGHSON:** Is he legally required to be cautioned? No. Would I have recommended it? You don't know what he's going to say. You don't require the magic of the words of caution but at a minimum I would have advised him that this was a homicide investigation where he caused a death, and that anything he said could be used in subsequent proceedings.

I would be advising that more out of an abundance of caution in any future prosecution. Is it legally required? No. Is it an issue that would be litigated? A hundred per cent yes. If you didn't do the caution and you tried to put that statement in, would it be something that would be brought up? Absolutely.

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

And if you could just keep moving through your recommendations, please, and –

**MS. HUGHSON:** During the course of the investigation they revealed – or during the course of dealing with the subject officer they revealed information to him. I would recommend against that.

In this case, though, I do note that they documented their decision to do that, which I felt was good and an attempt by them to be transparent about what they're doing and why. So that's a good thing.

From my perspective, documenting why you make decisions – you can always be criticized for the decision but document why you made it. So in this particular case, I know that they advised him that the rifle that was recovered was loaded.

I went back – we had talked about this in my pre-interview, and I did go back and review that statement. And I, again, am of a mind that I would prefer they not disclose information to the subject officer. And I think that if you have concerns or mental health concerns with respect to that particular officer, it's better to let the assistance branches of those police services handle the officer.

But looking at the disclosure that they made, it occurred at the conclusion of that particular statement given to that particular officer, so he'd already been tied down to a particular version of events. And it came at a point in the interview where it was very clear that it was troubling the officer that he killed someone and I – and so I understand why they would want to tell him that there was a round in the gun.

Personally, I don't think ASIRT investigators would have told them – would have told him, but it was a judgment call and I don't think it compromised the investigation in any way. But I think they should be mindful of doing things like that.

**MS. O'BRIEN:** Okay. Thank you.

And then the next –

**MS. HUGHSON:** And you can't pick and choose who you disclose things to. So there was another situation where they would not answer questions of a civilian witness saying that they had to maintain the integrity of the investigation. You can't – either you do it or you don't sort of thing.

**MS. O'BRIEN:** Okay. Thank you.

Moving through, I think, I believe – I don't mean to skip over anything, but I believe your next one, your next recommendation, had to do with photographing the subject officer at the time of the incident.

**MS. HUGHSON:** We – actually, when we're called out to an incident, you should photograph the subject officer as he appeared. As soon as possible after the incident, you should seize his firearm and you should be doing things like doing the load count at the time when you seize that.

There was no photographs; the description was documented, but a photograph is really important. And we've had investigations that have turned on how an officer appeared to the affected person. You can't go back and recreate that; that evidence is lost. It wasn't an issue in this particular case, I don't believe, but it is something that we would, as a normal course, do.

**MS. O'BRIEN:** Okay.

**MS. HUGHSON:** And that goes the same with respect to the sidearm magazine and ammunition: we would secure it, we would have a load count done, we would have found out whether it was topped up, those types of things. And that was not initially met.

**MS. O'BRIEN:** Okay. And I think the next section of – the next recommendation has to do with officer notes. And I believe it is self-explanatory when you read through the section.

**MS. HUGHSON:** Yes.

**MS. O'BRIEN:** You just, you know, you should have good notes, especially first responders. And when you're recording something, a monitor should be making notes in case the video is lost, as it was in this case.

**MS. HUGHSON:** Absolutely.

**MS. O'BRIEN:** I believe your next one, your next recommendation, had to do with the physical re-enactment experiment. This was the file folder drop.

**MS. HUGHSON:** Yeah.

**MS. O'BRIEN:** And, again, I don't – I think it's pretty – your report is pretty straightforward, but please correct me if I'm wrong, I understand you didn't feel it was of much investigative value. Is that fair to say?

**MS. HUGHSON:** I actually think it's of no investigative value. There's experts – I dealt with a lot of shaken babies or child injuries. The mechanics of injury or the mechanics of something that happened are difficult to recreate at best and require sort of a confluence of perfect factors. Half the time the folder landed on the table; half the time it didn't. So it didn't really advance the investigation at all and it really wasn't scientifically sound in my opinion.

**MS. O'BRIEN:** Thank you.

And the last recommendation you have is with the investigation of officer-involved incidents involving death or serious injury. And if I – you're referring here to a bit of a checklist or best practices. Could you explain this recommendation, please, to the Commissioner?

**MS. HUGHSON:** So the investigation of officer-involved shootings in particular is a very specialized area and it requires a totally different focus than most investigators are used to doing. And in the circumstances, I know that before ASIRT was formed, K Division had done a particular guide to investigating member-involved shootings.

We reviewed and felt would have been a useful start, at least for the RCMP to have, in investigations of this nature. And it highlights the unique nature of investigating officers as opposed to investigating the conduct of somebody who's come into contact with an officer.

So I actually recommended that they should try and – that I had been authorized to give them a copy if they wanted it, and that I thought there was substantial value in preparing for these things in advance. Because in my view a lot of what went wrong in this investigation was more a measure of inexperience in these types of investigations and that they would benefit from preparing for these types of investigations in advance. So they did not request it from us at any point.

**MS. O'BRIEN:** Okay, so I saw that.

So you had – you were authorized to give them and you offered them the RCMP K Division investigative guide, but you're saying that nobody from RCMP B Division, after receiving this report, came and requested that from you.

**MS. HUGHSON:** Not to my knowledge. I did, after our discussions just a few days ago, contact the RCMP and say – because you had asked if I could secure a copy of that for the Commission. It's a third-party document, so I prefer it come from the RCMP. So I contacted the RCMP and asked them to determine whether they would be prepared to release it or not.

**MS. O'BRIEN:** Okay. Thank you.

So I only have one final question for you. I first should ask, do you – have I – I know I haven't gone into every word and detail in your report, but have I – do you believe we have covered all the important aspects of your report?

**MS. HUGHSON:** I believe so. I mean, I think the report speaks for itself. It's meant to just be a sort of an overview, so ...

**MS. O'BRIEN:** Thank you. And other counsel may have questions.

The last question I did want to ask you, it's not addressed in your report, but we did discuss it in our pre-hearing interview and it's been a topic of much discussion here at the inquiry. I'd like to know what ASIRT's practice is with interviewing subject officers in terms of any delay prior to interviewing them. So if I could ask you to end your questioning with a response to that one, please.

**MS. HUGHSON:** There is a body of research that talks about the unique position of officers involved in critical incidents and the interviewing of subject officers after a critical incident. ASIRT's practice is generally to deal with the subject officer at the scene or at the event – not at the scene, they'll be obviously brought back to a detachment or a division building.

We deal with the subject officer the date of the incident. We provide them with a written notification or designation, which is what we're required to do under the *Police Act*. It's a fairly lengthy form and it sets out the rights and responsibilities. And they are expected to make notes, but you should know that in Alberta, at least, we're not entitled to those notes under any circumstances, subject to the subject officer giving them to us. The police chief cannot give them to us.

**THE COMMISSIONER:** So the –

**MS. HUGHSON:** We cannot accept them from anybody but the subject officer. So we are –

**THE COMMISSIONER:** So the notes are –

**MS. HUGHSON:** – prohibited from possession of the –

**THE COMMISSIONER:** The notes are provided to the chiefs of police, are they?

**MS. HUGHSON:** The way it's supposed to work is those notes are prepared. They're directed under the *Police Act* to make notes at the time of the incident. Those notes are then given to their chief of police and held, but we are not entitled to copies of those notes.

**THE COMMISSIONER:** Okay. What is the purpose of that –?

**MS. HUGHSON:** So they are required to make notes, but we don't get them.

**THE COMMISSIONER:** How are they used? What use are they?

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

**THE COMMISSIONER:** How are the notes used after that? Of what use are they?

**MS. HUGHSON:** They're no use for us at all, but because they're – for the internal police service, if there's an internal disciplinary proceeding, they're entitled to use the notes for different purposes. Because they're compelled, I think the feeling was they would be

inadmissible in any event against the officer unless they were voluntarily provided. So they only have use if the officer – to ASIRT in a criminal investigation, if he voluntarily provides them.

**THE COMMISSIONER:** Okay.

**MS. HUGHSON:** So he's required to make notes. Those notes go to the chief of police. We do not get them.

We will then release the officer to go home. And we will advise him that he has the opportunity to contact counsel, that we will contact him in the upcoming days to talk about whether he wishes to provide a statement to ASIRT or not.

We do not interview the subject officer the night of an incident, generally speaking, because we do accept it is a unique situation. There is research suggesting that the memory of the officer impacted by a number of different factors may be better 48 to 72 hours after an incident. And I know that that's also a recommendation or that time delay is also a recommendation of the psychology – I think it's the psychological section for the Association of Chiefs of Police in the United States as well.

It's something that's different from the status quo in terms of if you were investigating a homicide, generally, if we had somebody that we knew killed somebody, we would have them in the chair and we would be expecting our homicide investigators to be investigating them. But that person is not in the same position as an officer, as a police officer.

The officer is not under arrest or detention. We have no reasonable grounds, at that point in time, to believe an offence has been committed. Police officers start from the standing that they have protections under the *Criminal Code*. So it is – it can't be equated to the person who has – there's no general authorization to use force for the average citizen to take a life, or use force against another person.

So, generally, when one person kills another person, it is a culpable homicide and save and except certain, very limited exceptions like self defence, but they will treat that person as a suspect or as a potential accused. The subject officer is not in that same position. So number one, we can't force them to give statements; and number two, we do accept that there is some articulable reason to treat them differently and so we do.

**THE COMMISSIONER:** Just a couple of questions in this area, if you don't mind, Ms. Hughson.

**MS. HUGHSON:** Yeah.

**THE COMMISSIONER:** I'm trying to understand, really one might argue that the only difference between the police officer and the civilian is that the police officer has one additional basis for not being culpable, which is that the lethal force was authorized by section 25 of the *Criminal Code*. Would that be fair?

**MS. HUGHSON:** I think it is very different. You have – a police officer that is involved in a critical incident is enforcing the law when he's doing his job. And his response or his perceptions going into this incident are very different, in my opinion, than a person who's engaged in what is prima facie a criminal act. So psychologically they come into these incidents very differently and they come in from a different perspective.

I'm not a psychological expert. The information that I looked up, there were – there are psychologists who have identified that officers are in a very unique situation, and that different

techniques for interviewing should be taken and one of those different techniques includes the delay.

I tend to accept that they are in a very different position.

**THE COMMISSIONER:** Yeah.

I have the impression that it's not well settled. It's difficult to say what the mainstream position is. Some have argued that, well, this is basically the chiefs of police putting it forth as a reason for going more easily with the interrogation, or I should say with the interviewing of police officers, giving them more breaks than they would give a civilian.

I've seen references – I think we probably have them in evidence here – articles where this, the scientific reliability of the notion that the memory is better at 24 hours or 48 hours or 72 hours later, all of which figures I've seen, is questionable. That even the chiefs of police, the US Chiefs of Police have a position, I understand, where they do a preliminary statement and then may postpone for a formal statement. But they still recognize, as does I think, is it Alberta – or sorry, Ontario also. But in any event, the US Chiefs of Police, we had one article quoted there where they take the position that they're all right to do a preliminary interview but defer a longer so-called formal interview. Do you have any comment on that?

**MS. HUGHSON:** The issue about the delay is controversial. I certainly accept that.

In some ways, to my mind, because there is a right to counsel there's going to be a delay anyway. So you can talk in theory about having the ability to interview but there's no authority to detain the police officer, other than – you would not be able to place the officer under arrest for detention –

**THE COMMISSIONER:** No, I understand that but –

**MS. HUGHSON:** – other than potentially investigative detention.

**THE COMMISSIONER:** Yeah, the unusual –

**MS. HUGHSON:** So there's going to –

**THE COMMISSIONER:** Sorry, the unusual situation here is that we had a police officer who was co-operative and ready to give a statement, wanted to give a statement.

**MS. HUGHSON:** Right.

**THE COMMISSIONER:** And was basically talked out of it by representatives of the police association and by some of his fellow officers, I'm not saying improperly or anything with any sort of nefarious intent, but they had obviously read or heard the same arguments that you refer to.

**MS. HUGHSON:** Right.

**THE COMMISSIONER:** But here we had an officer who was ready to give a statement and was basically persuaded, no, to wait for 24 hours on the basis of what was supposed to be some sort of scientific research indicating that memory would be better after 24 hours.

But still, the same association of US police chiefs who would push that notion; they acknowledge that they would have this preliminary statement obtained, you know, from a co-

operative subject. You couldn't force him to give – or her to give a statement, but if he or she wanted to do, they'd go along with having a preliminary statement and then later a longer formal statement.

**MS. HUGHSON:** To my mind it would be a judgment call. That would be the only reason to delay it if they – if the person had a burning desire to give a statement.

**THE COMMISSIONER:** Right.

**MS. HUGHSON:** My experience, though, I can tell you we generally will not take a statement from an officer at the time of the shooting. And those officers that have indicated that they might be willing to give a statement ultimately give a statement in any event when we contact them days later, after they've had the opportunity to speak to counsel.

In our province, we have statutory legislation that requires officers not to speak to each other regarding the incident. If they're going to talk, they're going to talk. There's nothing you can do to really control that.

**THE COMMISSIONER:** Right.

**MS. HUGHSON:** But the delay – the issue with the delay in my mind is contamination.

**THE COMMISSIONER:** Right.

**MS. HUGHSON:** And in this province we have things in place to try and reduce or minimize the risk of contamination and that includes –

**THE COMMISSIONER:** Segregation.

**MS. HUGHSON:** It used – sorry?

**THE COMMISSIONER:** You segregate the police officers from each other. That would be one step, I think.

**MS. HUGHSON:** Right, and they're required by law not to talk about the incident.

**THE COMMISSIONER:** Right.

**MS. HUGHSON:** It's not just ASIRT saying: Don't talk to other witnesses.

**THE COMMISSIONER:** Right.

**MS. HUGHSON:** Under the statute, they're required to be segregated and they're not entitled to speak to each other, including the witness officers are not entitled to discuss the incident until all officers have been interviewed, including the subject officer.

**THE COMMISSIONER:** Right.

Thank you for that.

**MS. HUGHSON:** So –

**THE COMMISSIONER:** Yeah. Thank you.

**MS. HUGHSON:** I don't know if that helps.

**THE COMMISSIONER:** It does.

**MS. HUGHSON:** So it is controversial. We wait and it hasn't operated to our detriment that I'm aware of.

**THE COMMISSIONER:** Thank you. I appreciate that.

**MS. O'BRIEN:** Okay.

Thank you, Ms. Hughson. Other counsel may have questions.

Commissioner, we're working a little bit differently today because we are working over a Lync – Microsoft Lync connection. When counsel want to question Ms. Hughson, they will come to this position and I will move over to the other side of the bench.

**THE COMMISSIONER:** Okay.

**MS. O'BRIEN:** Thank you, Ms. Hughson.

**THE COMMISSIONER:** Do you have any questions?

Ms. Breen, you're going to have some?

**MS. BREEN:** Thank you.

Ms. Hughson, good evening. Erin Breen for Meghan Dunphy. We met, I believe, last year.

**MS. HUGHSON:** Good morning.

**MS. BREEN:** Oh, I'm sorry, is it still good morning there?

**MS. HUGHSON:** Yeah. No, actually, it is now afternoon here. It is.

**MS. BREEN:** Okay.

I just have a few brief questions for you, Ms. Hughson.

**MS. HUGHSON:** Yeah.

**MS. BREEN:** First of all, Mr. Arrowsmith, who did the investigation for ASIRT, is – would you – what would be his level of experience as a police officer? How many years has he been an investigator?

**MS. HUGHSON:** Oh, I would have to be guessing because I don't have that in front of me. But I knew him when he was an Edmonton Police Service member while I was a Crown. So he's got at least 20-plus years' experience as a Major Crime investigator and he's an investigator that I dealt with repeatedly on any number of serious files, so I have a lot of knowledge and respect for his ability.

**MS. BREEN:** Okay.

And in your review, the ASIRT review, you were looking for any evidence, according to the report, of bias, tunnel vision or a lack of objectivity. And you concluded there was no evidence to support even a suspicion of either of these things. Is that correct?

**MS. HUGHSON:** Yes, it is.

**MS. BREEN:** Okay.

Now, I understand that – because we have disclosure from ASIRT that was provided to the Commission of Inquiry and there are just a couple of references I wanted to take you to briefly. First of all, if we could bring up, Madam Clerk, P-0791.

Now, Ms. Hughson, I don't believe you are able to see the exhibits that we are bringing up, but this is basically – did you receive this from the Commission, that there were going to be references?

**MS. HUGHSON:** I have some exhibits – references. If you can tell me exactly what it is –

**MS. BREEN:** Sure.

Okay, so this –

**MS. HUGHSON:** – I should be able to find it.

**MS. BREEN:** This comes from the disclosure and it appears to be almost like a task list or – it's page 15. And it has a date on it of June 3, 2016. And it looks to be a typewritten notation of your request to Mr. Arrowsmith.

**MS. HUGHSON:** Ah, yes, I have it; the DNA information.

**MS. BREEN:** Yes.

So what –

**MS. HUGHSON:** Yeah, it was actually – yeah.

**MS. BREEN:** What I wanted to ask you about – because I understand as well you've received now the report of Mr. Gareth Jones, have you, that has been filed as an exhibit here at the inquiry?

**MS. HUGHSON:** I just received it this morning. I had not seen it prior to today.

**MS. BREEN:** Okay.

And Mr. Jones was retained by the Commission of Inquiry to provide that report and review the RCMP investigation. And I'm asking you this question because it relates to a finding that Mr. Jones made in his report.

But on June 3, 2016, it appears – there's a notation there that the ED, who I assume to be you, "requested clarity on the examination of the AP's weapon." And that would be referring to Mr. Dunphy. Is that right?

**MS. HUGHSON:** Yes.

**MS. BREEN:** Okay.

**MS. HUGHSON:** Yes, the affected person. Yes.

**MS. BREEN:** What does – affected person, okay. The “ED wanted to know if DNA testing was completed on the weapon.” Is it Sekela, Sekela?

**MS. HUGHSON:** Sekela.

**MS. BREEN:** Okay. And that’s the man who you referred to earlier as the director of investigations, is that right?

**MS. HUGHSON:** That is correct.

**MS. BREEN:** “... contacted ARROWSMITH and he could not provide the answer as he AOL. SEKELA will acquire the answer and advise the ED.”

And then we see a follow-up on that on June 22.

**MS. HUGHSON:** Right.

**MS. BREEN:** So this would have been after you received Mr. Arrowsmith’s briefing report in April?

**MS. HUGHSON:** That’s correct.

**MS. BREEN:** Okay.

And you were asking on June 3, 2016, whether or not the rifle that was seized by the police in this case had been tested for DNA.

**MS. HUGHSON:** That’s correct.

**MS. BREEN:** So that was a concern of yours at that time.

**MS. HUGHSON:** Yes.

**MS. BREEN:** Okay.

And you learned that that was never tested for DNA.

**MS. HUGHSON:** That’s correct.

**MS. BREEN:** Okay.

Are you asking that question at that time, Ms. Hughson, because that was an investigative step that you have thought would have been contemplated or done?

**MS. HUGHSON:** I asked it because it was something that I thought could have been contemplated and done, so I would have made that a recommendation if they hadn’t considered it. We received information that DNA was not – I’m trying to recall what it was.

It appears – now you’re testing my memory on this, but that there had been a conversation between the RCMP and the lab that DNA testing would not be recommended in this particular

case. And I can't remember why, but the information back to me was that it had not been done, but it was considered, and then the decision was made not to send it, that they didn't think it would be of evidentiary value.

**MS. BREEN:** Okay.

And I'm not trying –

**MS. HUGHSON:** So –

**MS. BREEN:** Oh, sorry, go ahead.

**MS. HUGHSON:** So it is something that I would have asked them to consider and the information was back that they considered it.

**MS. BREEN:** Okay.

**MS. HUGHSON:** And elected not to do it. So that's why it's not included.

**MS. BREEN:** Okay.

And we have learned here, or at least it appears, my friends will correct me if I'm wrong, that that does not appear to have been discussed, considered or contemplated between the lead investigators and the forensic people before that the rifle was actually tested for fingerprinting and then sent off to a lab for some form of testing with respect to whether it was capable of firing. So we don't understand that that was contemplated at the time when the police had searched the scene and when it could have been tested for DNA. At least, that's my understanding of the evidence.

So what I am asking you is that, in light of the fact of your June 2016 requests, and if it is the case that the police did not actually consider testing the rifle for DNA, is that not a deficiency here in the investigation?

**MS. HUGHSON:** I would say it would be a deficiency, yes.

Now, I'm not saying they – my understanding, it may not have been considered at the time that they sent it off for fingerprint testing, but that it was considered at some point. So when I say it was considered, I don't know exactly – like I'm not saying was it a specific point and that there was a conversation about whether it was suitable.

I don't know. That's what the information I received back about it. Does that make sense?

**THE COMMISSIONER:** Am I –

**MS. BREEN:** Mr. Commissioner.

**THE COMMISSIONER:** Sorry, am I incorrect in terms of just – while I think of it, Ms. Rasmussen – that didn't they consider that the type of material and the age might have – would have presented problems in getting DNA off that rifle?

**MS. BREEN:** That was – my understanding was that was the explanation given for the failure to get fingerprints.

**THE COMMISSIONER:** Okay, right.

**MS. BREEN:** But my understanding from the testimony of Corporal Lee was that she had expected that if the investigators wanted DNA testing done, someone would have asked her to do that and that it was not asked of her at that time.

**THE COMMISSIONER:** Yeah, but there was also evidence, wasn't there, that the – in order to get DNA, it would have to be used a certain number of times or there had to be contact for a certain number of times? Am I right on that? Does that relate to the rifle? I'll go back and check the transcript, but I'm just trying to recall.

Sorry, Ms. Rasmussen wanted to say something like further off.

**MS. BREEN:** Oh, go ahead.

**MS. RASMUSSEN:** Yes.

**THE COMMISSIONER:** Go ahead.

**MS. RASMUSSEN:** Yes.

To be fair, I think it was Corporal Burke's evidence that the question was asked of the experts and the answer was for touch DNA on the rifle, a person would have had to handle it significantly over a period of time. And since they were not trying to prove the ownership of the rifle, but rather –

**THE COMMISSIONER:** Mr. Dunphy obviously would be probably found there right.

**MS. RASMUSSEN:** Right. And the only other thing that could have been probative that they were trying to investigate was whether Constable Smyth may have touched the rifle. And that would not have been probative because he would not have had the opportunity to handle it over a period of time.

**THE COMMISSIONER:** Yeah, that was my vague recollection. Anyhow, you pursue it with Ms. Hughson.

Sorry to interrupt.

**MS. BREEN:** Thank you.

And I don't know if Ms. Hughson can shed any more light on it.

**THE COMMISSIONER:** Right.

**MS. BREEN:** But I wanted to because it was there in her list of tasks.

Ms. Hughson, also, I wanted to briefly reference you to the briefing note of Mr. Arrowsmith, which I understand he submitted April 18, 2016. And it is Exhibit P-0790 here. There's only three pages that I have asked be exhibited.

**MS. HUGHSON:** Yes.

**MS. BREEN:** And I understand the process that Mr. Arrowsmith is your investigator. From there, it would go up the chain, I presume, to the director of investigations and yourself before the report is released.

But first of all, I wanted just to take you to the middle of page 19. It appears here that Mr. Arrowsmith had a concern or suggested that there should be “a re-enactment of dropping the .22 calibre rifle from the position allegedly held by the AP,” which would be Mr. Dunphy, “to determine that the proximity it comes to rest is consistent or plausible to the location the rifle was found in at the scene.”

So that is one suggestion that Mr. Arrowsmith did make to you in his briefing note.

**MS. HUGHSON:** He did, absolutely.

**MS. BREEN:** And I – obviously it did not make it into your report. And I assume it relates to the same issue you had with the dropping of the file folder.

**MS. HUGHSON:** It does. To me, it would amount to junk science, unless you could recreate the event. And Constable Smyth’s evidence in the statements that he’d given were not detailed enough, in my mind, to be able to do that. I think that attempting to create or recreate a re-enactment of the holding of that firearm and the dropping of that firearm would be almost impossible.

**MS. BREEN:** Okay.

**MS. HUGHSON:** So I don’t agree. I think – without a mechanical engineer of some sort, I don’t think it can be done. And I don’t think that the circumstances would be able to be recreated with sufficient certainty that one could place any reliable weight on and opinion on that.

**MS. BREEN:** Okay.

And you’re talking about a re-enactment done at this stage in the game which would have been in 2016. You said it was because of the concern you can’t recreate the scene as well. You said that Constable Smyth’s statement wasn’t detailed enough. But, again, is that not a consideration the investigators could have contemplated when they did have control of the scene and when they could have questioned Constable Smyth? You’re –

**MS. HUGHSON:** I don’t –

**MS. BREEN:** Go ahead.

**MS. HUGHSON:** I think his pure version part of the statement about seeing the rifle, and his perception of the rifle, is very clear in these incidents that perception is not reality. I can tell you that we have video of incidents and have officer’s perceptions of incidents that are markedly different. So you can’t rely particularly on a subject officer’s recollection of how a particular item might have been held.

You’d have to recreate Mr. Dunphy in whatever position Mr. Dunphy would have been in, holding that firearm in whatever position Mr. Dunphy would have been holding that firearm at the same height, at the same angle to recreate that event. And, to me, that’s impossible the day after as much as it is impossible in 2016.

**MS. BREEN:** Okay. And you said you’d likely need a biomechanical engineer or someone of that nature to even attempt that?

**MS. HUGHSON:** To even attempt it, yeah.

**MS. BREEN:** Okay.

Moving on, Mr. Arrowsmith also raised a concern about whether there was any kind of examination of the functionality of the chair that Mr. Dunphy sat in. And, he determined – at page 20 his information was that the chair had not been examined for the purpose of functionality as a lift chair.

**MS. HUGHSON:** That's correct.

**MS. BREEN:** Okay.

We didn't see that in your report.

**MS. HUGHSON:** I did not consider that to be a significant factor or anything that I felt could have advanced the assessment of what occurred.

There's no suggestion I find – if you've seen these chairs, there's no suggestion or there's no mention of the officer of the mechanical lift being employed and there is no information as to whether it was functioning or not functioning. I didn't think whether it was functioning or not would advance us at all, any further into the inquiry as to what happened.

**MS. BREEN:** Okay.

**MS. HUGHSON:** So to my mind, although it would have been something that I would expect might have been done, I wasn't concerned about it not being done.

**MS. BREEN:** Okay.

**MS. HUGHSON:** So I disagree with Constable Arrowsmith on this point.

**MS. BREEN:** Okay, but it is something he did right?

**MS. HUGHSON:** Absolutely.

**MS. BREEN:** And then I want to take you to page 21 of the same exhibit.

**MS. HUGHSON:** Yeah.

**MS. BREEN:** And this is Mr. Arrowsmith, I guess, flagging his concerns about the interview that was conducted with Constable Smith.

**MS. HUGHSON:** Yes.

**MS. BREEN:** And Ms. Hughson when I read Mr. Arrowsmith's concerns about the interview they appear to be phrased in a way that are stronger, much stronger than appear in your final report. And, for example, I'll take you to the second paragraph– sorry, well it's in one main block. It starts: The decision of the MCU investigators to share information with the SO creates the optics that could question the RCMP investigation with respect to transparency, independence and bias. The appearance of this to the public could create optics causing a question to be raised concerning bias in favour of the subject officer.

**MS. HUGHSON:** Yes.

**MS. BREEN:** So on that date, Mr. Arrowsmith is certainly flagging for you that this is a significant issue for him, at that point in time, but ultimately in your report we find your

conclusion is that there is not even any evidence to support a suspicion of bias or a lack of objectivity.

**MS. HUGHSON:** Which (inaudible) ultimately Constable Arrowsmith – well, I use constable because that’s when I knew him. I shouldn’t use constable. Mike Arrowsmith’s report was that it was independent and that there was no evidence of tunnel vision or bias. When he’s talking in that paragraph, he’s talking about optics, and to me how the optics appear to a public person does not necessarily, in my mind, impact the validity of the interview.

The purpose of the interview was to get information from the subject officer and it accomplished that goal. Do I think it looked too friendly? Yes I did. Do I think that those optics, in my mind, impacted the investigation? It did not.

When I looked at those particular statements (inaudible) the conclusion of the first interview with the subject officer, it’s a human response on their part to want to share information with him. And it would appear to be a bias. But it’s an opinion.

They documented the way they approached. They did get a statement from him. Which is – believe me – the exception rather than the rule in every jurisdiction, including the SIUs. But, so did it give the appearance they may be closer? Sure. Would it raise that appearance to an independent observer? So, for example, Ms. Dunphy? Absolutely, it might. Does that mean it was evidence of investigational bias? No. I don’t agree that that’s the natural imprints to draw.

**MS. BREEN:** It would cause a suspicion though, of that being present, would it not?

**MS. HUGHSON:** I – when I looked at it overall, I found – and I looked at the evidence in its entirety in the context, rather than just parsing out pieces. I did not feel that that raised a suspicion.

**MS. BREEN:** Okay. And you have read Mr. Jones’s report, and you are aware that he has reached many different conclusions than you reached?

**MS. HUGHSON:** I have not read Mr. Johnson’s in its entirety, as I received it this morning. I have noted some of his comments, and I can’t tell you how whole-heartedly I disagree with some of them.

**MS. BREEN:** Okay.

**MS. HUGHSON:** But I haven’t had an opportunity to review it in detail. So I can’t really go further than that.

**MS. BREEN:** Okay. Those are all my questions.

Thank you very much.

**THE COMMISSIONER:** Ms. Hughson, the Commissioner here.

I’m just going to check and see if counsel has any questions.

Mr. Williams? You had – okay, let’s go, we’re gone past our time so if you can ...

Thank you, Mr. Drover.

**MR. DROVER:** (Inaudible) the mic – not used to being at this table. It looks so different up here.

I have one question. I represent the police association, and I would like you to comment, I guess, on the practice or non-practice – if that's the way it is – of subject officers being allowed to meet with their association representatives.

**MS. HUGHSON:** In a general practice, I should tell you that in Alberta, we do allow association representatives to come assist for – assist witness officers and subject officers when a critical incident occurs. They are to come in solely to give for support purpose.

We certainly try to work with the associations as much as possible, as is reasonable, but association members will not be present generally during an interview. And any contact that an association member has with the subject officer on the night of an occurrence will be documented. So if an association member comes in and discusses or goes to talk to the subject officer, our expectations is he's simply there to provide support, tell him what – that they'll provide him with a lawyer if he needs one and not to discuss the incident, but there is some contact on occasion.

**MR. DROVER:** Thank you.

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

Mr. Williams?

**MR. WILLIAMS:** Good afternoon Ms. Hughson.

Tom Williams, I represent Mr. Paul Davis who was premier at the time the incident occurred. I only have one brief question.

Obviously, your report is there to review for objectivity, independence and thoroughness. In the evidence that we had – excuse my preamble, the evidence is that obviously from involved in the premier's office, there was one member of his office staff, a Ms. Donna Ivey, who had forwarded the tweet in question.

When the RCMP chief investigator was questioned, he was asked as to why they saw fit to interview Ms. Ivey as opposed to anyone else, including the premier, and he felt there was no need to question anybody in terms of their involvement beyond Ms. Ivey.

In terms of your review of the RCMP report, were you satisfied with the thoroughness and completeness of their witness list and who they in fact questioned investigating this matter?

**MS. HUGHSON:** Yes I was.

**MR. WILLIAMS:** Okay. You didn't see any deficiencies in failing to interview either Mr. Davis or any other members of his staff.

**MS. HUGHSON:** No, absolutely not.

**MR. WILLIAMS:** Okay. And there was no relevant evidence that you saw that was admitted pertaining to any of these individuals?

**MS. HUGHSON:** No.

**MR. WILLIAMS:** Okay. That's all –

**MS. HUGHSON:** Not as it relates to the investigation of the officer-involved shooting, no.

**MR. WILLIAMS:** Okay. Thank you.

That's all the questions I have.

Thank you.

**THE COMMISSIONER:** Thank you.

Ms. Hughson, as Commissioner, I want to thank you very much – oh, I'm sorry, I missed – we're almost there, almost finished.

Ms. Rasmussen and Ms. Buis, do you have – oh, just Ms. Rasmussen, okay. I thought – okay, go ahead.

**MS. RASMUSSEN:** That's okay.

**THE COMMISSIONER:** I got a miscue down there.

**MS. RASMUSSEN:** We're usually very quiet.

Ms. Hughson, my name is Lori Rasmussen. I represent the RCMP.

So there's been a lot of talk about, in a general sense, civilian over-sight and what that should look like and I just wanted to revisit something you said about your investigators. I think you said there was one time that you had – or it might have been previous to your tenure there.

But one time when a civilian had been hired and trained at great length and no doubt expense, and then they left ASIRT for another opportunity. So is it fair to say that it's not really a viable approach to expect to hire investigators who are civilians and not former police officers?

**MS. HUGHSON:** In my opinion, it's a viable approach with the correct budget and the correct amount of time. I actually would not have proceeded in a fashion that ASIRT did trying to train an individual person, on an individual basis without a set training program to be in a position of investigator, because I think – my opinion and experiences at Crown is that you can teach all you want, but what our investigators bring to the table is experience in the application of those tools, and the skills and experience in handling situations.

When you're dealing with investigations into police officers, you're interviewing trained interviewers. You are interviewing generally professional, smart witnesses. You are investigating matters that are very specialized, and it does take, in my opinion, a certain skill set. And to get that skill set, it isn't just book learning; it's experience. And that experience comes the same way as it would for counsel in – as a Crown, learning how to cross-examine.

It takes you a while experiencing cross-examination to become a very skilled cross-examiner. And, it's the same skills and techniques that I think law enforcement bring to the table. But we choose, and I believe that any person can be trained to do a job with sufficient time and resources, but it's naive to think that you can bring in a person without that experience and skill. And it's dangerous to let them – to suggest that they should be investigating matters as serious as the ones that any independent investigative agency investigates.

So, and I think that that's proven – scanning the different models across the country, it's demonstrated that the lack of those skills can be particularly disadvantageous and harmful to any potential prosecution down the road. So – and you've heard – we've heard stories of scenes, for example, in some jurisdictions being held for nine days, an outdoor scene. That's impossible, but a person who isn't skilled in homicide investigations or those types of investigations may not realize that evidence is disappearing if they are in an outdoor scene and that time is of the essence.

It's a particular skill set; it's a balance to choose what model you want to have. I am particularly a proponent of ASIRT's model. It has worked very well over the years. It has resulted in solid investigations and prosecutions, and it is a model that is adopted by two other jurisdictions in this country.

So I actually think the use of seconded officers and former law enforcement has merit. The perception is the problem with our model, but in terms of the reality, the investigators I have, that I know I have, have integrity and are as interested in holding police officers accountable as anybody for any misconduct that they engage in, and also for seeing justice done in those cases where there hasn't been misconduct.

It's equally important to provide or clear for the public an officer's reputation who is involved in an incident and be able to say that he acted lawfully as it is to hold him accountable if he didn't, and that takes skill and integrity, and I think that that's what our model represents.

**MS. RASMUSSEN:** Thank you, and when we're talking about the timing of taking a statement from an officer involved in a critical incident, when you were having the discussion you said: These types of investigations are unique. And so is it fair to say that you wouldn't, you couldn't and, in fact, you shouldn't treat a police officer in this position the same as you would a civilian who had just killed someone?

**MS. HUGHSON:** I think it is dangerous to even assume or to believe that they are similar in any way, shape or form. When you're looking – one of the examples in my pre-interview that was given was the person who is driving impaired and kills a – has a collision and kills a family. We would take a statement from that person at the time if we could, and that's absolutely correct; but this is a person who has gone into a critical incident for a specific lawful purpose, which is not what that person in the impaired driving situation is contemplating. Nor is it the same situation when you have somebody who is armed with a firearm who shouldn't be, who is not lawfully entitled to carry that firearm like a police officer is, or to use force like a police officer is in the execution of his duty, and then the situations escalate.

I don't think there is – there are similarities but it's not the same. Generally speaking, there's – with few exceptions, ASIRT investigated a homicide involving a police officer, but police officers get up in the morning and I don't think that generally, in officer-involved shootings, they went out that day thinking that they would be involved in an incident where somebody would die. And the impact of those incidents and the mindset that they have when they go into those incidents is very different than what one might find in a criminal context.

So I do think it's a very specialized, unique area and I do think that while you should examine the science behind it – and it is controversial, in particular, with respect to the delay – there are articulable principled reasons put forward by psychologists, why the situation is different and why it should be treated differently. And I think there's a principled articulable reason to follow that advice in the case of an officer-involved shooting. And I think you can take the requisite steps to minimize the risks that that delay might give rise to.

**MS. RASMUSSEN:** And so would you agree that that differential treatment is in no way preferential treatment, based on some sort of brotherhood of police investigating police?

**MS. HUGHSON:** It has nothing to do with brotherhood, I can tell you. And, in fact, in these types of investigations, leave aside the subject officers, in a criminal investigation the investigation into the conduct of the police officer is the only situation I'm aware of in criminal law where I can compel a witness to give a statement. So, in fact, police officers are treated differently already in the context of officer-involved shooting investigations or investigations into officer conduct.

Witness officers are compellable and required to give a statement, whereas any other witness in any other investigation could simply tell us to pound sand and walk out and there would be nothing for us to compel them to provide a statement. So officers are treated differently. It is a unique area of the law and a unique area of investigation. And trying to marry it with the standard criminal situation, to my mind, is different. You have to sort of balance the differences, if you can.

**MS. RASMUSSEN:** Okay.

It's been a topic of this inquiry and there's been some discussion about, and it comes out of your report, whether it was made clear to Constable Smyth and others that this was a criminal investigation. And I think in your pre-interview with Commission counsel you talked about the fact that, in the RCMP parlance, this may be sometimes referred to as a statutory investigation, is that right?

**MS. HUGHSON:** Yes, and I – in fairness, my comments in my letter was to be more – so it should have been documented better that this was a criminal investigation. I accept that this was a criminal investigation, and there was discussion outside the room with Constable Smyth that I'm aware of that they talked to him about what they were doing, but generally speaking, in this type of investigation it would be better if that conversation was documented on the video tape as opposed to outside the room.

And it is important, I think, to be fair to the subject officer, to bring home to him that we are investigating the officer conduct, we're not investigating the AP, and that this is a homicide investigation, to bring home to them how serious it is because, depending on what they say, they are potentially at risk. They have criminal jeopardy potential.

So the RCMP, in my opinion, did a criminal investigation. Going forward, it would be better if that was a more formalized process or identified with the subject officer, but it was a criminal investigation or a statutory investigation, as RCMP use.

**MS. RASMUSSEN:** Okay, fair enough.

Your investigator was provided with the entire RCMP file, right?

**MS. HUGHSON:** Yes.

**MS. RASMUSSEN:** And to your knowledge –

**MS. HUGHSON:** To our knowledge, yes, and we asked.

**MS. RASMUSSEN:** Okay, and to your knowledge, he would have reviewed that in detail?

**MS. HUGHSON:** Yes.

**MS. RASMUSSEN:** Every part of it?

**MS. HUGHSON:** Yes.

**MS. RASMUSSEN:** I want to talk about another issue that came up, and that was with the officer we called Constable X, who transported Constable Smyth to the detachment after the incident. And one of the recommendations or the weaknesses you found in your report was that Constable X – oh, sorry; I'm thinking of another report.

Constable X should not have encouraged Constable Smyth to talk about the incident, and you thought – it's the opposite. You found that was not a weakness, you said, because there was a potential there to muck things up, I think were you're words.

**MS. HUGHSON:** That is my experience as a Crown. Those transport conversations, when there is nobody documenting as it is said, exactly what is said, can be very dangerous and problematic and they often result in Charter issues and other issues in any other kind of case.

In terms of this particular officer, the fact that he discouraged conversation was not a big deal to me in the sense that he wasn't in a position to note. He was by himself in the car, as I understood it, and this is going by memory. So it becomes problematic to encourage a conversation about an incident and is also – the position of the subject officer in this situation is legally a little bit murky because he's not a suspect, per se. So the legal issues that could give rise to, before they can be sorted in a formal interview process, are problematic as well.

So if it were two people in the car, I don't know. I would prefer that the trained investigators that are familiar with the incident be the ones doing the interviewing, but I know that I was asked about whether there should be fault for discouraging him from speaking to him about the incident. I actually don't think that that was an unreasonable position for that officer to take.

**MS. RASMUSSEN:** Okay, and we heard evidence from, in particular –

**THE COMMISSIONER:** Excuse me, can you give me an idea how much more time you're going to need? We've gone considerably over, so I'm a bit concerned.

**MS. RASMUSSEN:** Probably five minutes, maybe.

**THE COMMISSIONER:** Okay.

**MS. RASMUSSEN:** We've heard evidence from Staff Sergeant Osmond, who was the team commander, and he agreed with you on this issue and he said – he went so far as to say that members are sometimes conditioned to do that because they fear somewhere down the line the fruit of the poison tree might be raised and you've got a problem.

So you would agree with that?

**MS. HUGHSON:** Oh, absolutely. My experience is more borne from being a homicide prosecutor than these investigations. Those in-car statements are rife with potential issues and how it can impact a subsequent investigation.

**MS. RASMUSSEN:** And, in fact, I think you mention in your interview that you've seen this done with officers discourage even non-police subjects of investigations from giving statements.

**MS. HUGHSON:** Oh, absolutely, yes.

**MS. RASMUSSEN:** You may – you’ve said you had received Mr. Jones’s report and you’ve had – you haven’t quite had time to digest it. But you may not be surprised to know that this is one area where he differs. And in that vein, I just wonder, is that some indication that many of these things are judgment calls, that reasonable and intelligent and educated investigators and others might disagree about any number of these things?

**MS. HUGHSON:** That’s one of the realities of these types of investigations and it’s the advice I give my own investigators: a lot of this is a judgement call; try to make a principled, articulate decision on why you are doing something, and above all else, document why you are doing it, so that if you get asked about it later you can explain why you did it and you have a reason to explain why you did it.

It is a judgement call. I disagree with him on this from a Crown – and I look at it from a Crown perspective. I prefer – I want my homicide investigations clean and precise; and I want any subsequent statements taken by my homicide investigator when I was a Crown to be admissible and unassailable, and potentially that would muck it up.

So I didn’t have a problem with – and in Alberta, anyway, and I don’t know about there, but in Edmonton at least, it could be the most junior constable asked to transport a person in a homicide case to headquarters who is not the same as a savvy, smart, experienced homicide investigator that will be asking this individual questions.

So it’s a difference of opinion. Could he have accepted the statement? Did he have to discourage it? No. Do I find it problematic that he did? It’s a judgement call, and in my opinion, I don’t.

**MS. RASMUSSEN:** Okay.

So your investigator, Mike Arrowsmith, he found nothing to indicate professional personal conflict of interest in this case?

**MS. HUGHSON:** Absolutely not.

**MS. RASMUSSEN:** And he found nothing to indicate tunnel vision?

**MS. HUGHSON:** That’s correct.

**MS. RASMUSSEN:** And although you made some recommendations, I think you’ve said that there are very few cases, in fact, you’ve only maybe had one case where you made no recommendations, right?

**MS. HUGHSON:** Yes. Yeah, recommendations are very common, yeah. See, they’re the rule, basically.

**MS. RASMUSSEN:** So, again, there’s been a lot of talk about perception of bias always being a problem with police agencies investigating police-involved incidents and – or you might use the word optics, as well.

In your experience, how often is actual bias a problem as opposed to perception?

**MS. HUGHSON:** In terms of our work, optics seem to be the primary issue. There are occasions where I have had concern; this was not one of those cases. But generally speaking, usually the biggest complaint is the optics, and my position is that a reasonably informed person, understanding the circumstances and the articulation for the result, understands the difference between optics, how something looks, and whether that is evidence of tunnel vision or bias.

While you always have to be concerned about perception – and that’s why I mentioned it in the letters to the RCMP – that’s something that they really need to be mindful of in these types of investigations, because the scrutiny is much greater than in any other investigation. So you might not have to document these decisions in your average investigations. People are going to ask you why you didn’t be more aggressive with this officer; people are going to ask you why you didn’t encourage him to talk to you in the car.

It’s important to do the right thing, if you believe are right at the time, for articulable reasons because somebody will always have a complaint. So you can’t govern your conduct concerned about how everybody else is going to perceive it because there will be somebody who will be dissatisfied, guaranteed. You have to do the best job possible in the circumstances you’re given.

The optics, the perception of bias in my opinion is often high, even in our investigations where I know for a fact there is no investigational bias or tunnel vision, that I know for a fact that this is not – ASIRT does not have investigators that are concerned about protecting the blue line or police protecting police, and that are not interested in holding police accountable.

So my instructions to them are make your best judgement calls, follow best practices. And you’re going to get criticized down the road but be prepared to articulate why you did the things you did.

**MS. RASMUSSEN:** Okay.

And, again, you had no concern in this case of tunnel vision or any actual bias.

**MS. HUGHSON:** To me, in my opinion looking at the evidence of the investigation as a whole, there was no evidence of tunnel vision, investigational bias or a lack of objectivity in this investigation.

**MS. RASMUSSEN:** Thank you, Ms. Hughson.

**THE COMMISSIONER:** Have we finished?

Ms. Hughson, I want to thank you as Commissioner. You’ve taken a lot of time; you’ve done a lot of work on this file, obviously. We appreciate it very much and it’s very helpful.

**MS. HUGHSON:** Well, thank you very much, Sir. I hope if there’s any other questions you have, that I could answer them.

**THE COMMISSIONER:** Well, we may come up with some. We might request you to supplement something by note, but right now I have a lot to work with. A lot of this we’ve already gone over through other witnesses, but your perspective was a unique one and very helpful.

**MS. HUGHSON:** Thank you very much.

And, obviously, everybody knows where to find me if you need anything further.

**THE COMMISSIONER:** Thank you.

**MS. HUGHSON:** All right.

**THE COMMISSIONER:** All right we’ll adjourn now until 9:30 tomorrow morning.

**MS. SHEEHAN:** All rise.

The Commission of Inquiry is now closed.