



COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY

Transcript

Volume 31

Commissioner: Honourable Justice Leo Barry

Monday

27 February 2017

THE COMMISSIONER: Ready to go?

Okay, I understand we're back in public session there now. I've made an evidentiary ruling which in law had to be done in camera. And that decision has been made so we'll continue now with the second application this morning which is the third application on evidence that's been made in the inquiry.

So I'll refer to this as application three and that's the application of, I take it, Mr. Kennedy, although I'm not sure in terms of the way you've been sharing the work. I have material from Mr. Kennedy so I am assuming it is his application.

Mr. Avis?

MR. AVIS: That is correct, Commissioner, but I have a concern I want to raise.

THE COMMISSIONER: Go ahead.

MR. AVIS: I'm not in a position to make argument but I want to raise a concern, a very serious concern that the RNC has. Yesterday – late yesterday afternoon, we received the Massine-Coleman report.

THE COMMISSIONER: Right.

MR. AVIS: And we have a number of very serious concerns for what it – you know, we have issues over qualifications, that possibly –

THE COMMISSIONER: Well, we're not into that. We're not – it's not your application.

Right now, we're dealing with the application to admit a psychiatrist. Yours is the third this morning, fourth in the inquiry application, which I understand is to bring in an expert to deal with some issues that you believe – at least I assume you believe – still exists.

Because when I went through your questions, it seems to me a lot of them are not differing from the Coleman-Massine position, but go ahead.

MR. AVIS: Well, Commissioner, it's not related to this but it's of such concern, this other issue –

THE COMMISSIONER: Okay, well get it out.

MR. AVIS: – that I just want to put it on the record. I don't have instructions at this point, we are (inaudible).

THE COMMISSIONER: What are your concerns, Mr. Avis?

MR. AVIS: But the bottom line is that we feel we do not have adequate time to respond to this, receiving it, you know, in the seventh week of the hearing. And –

THE COMMISSIONER: Well, Mr. Avis, you've known what the schedule of the hearing is and there – we're into an inquiry where I am, and I have decided what evidence should go forward. Whether or not it's submitted into evidence, of course, is something that may be considered.

But there is no obligation, as I see it, under the rules that you be supplied with a report any earlier than has been done, but we were trying, as you know, to get it done as quickly as possible. And you're dealing with other individuals and other schedules and you do the best you can.

But you're going to have to be more specific in terms of what you're concerned about having time to respond to and not just leave it in that sort of general fashion. It's not going to work that easily.

For example, one of your – when we get to your application this morning, as I understand it, you have, if I can find it now, a list of – you say eight questions, I only see seven there so I don't know where the other one has disappeared to, but there are seven questions.

Did the tweet of concern warrant a threat and risk assessment? I believe – I just looked at it very quickly and haven't studied it but I believe the report agrees with the RNC in that regard, doesn't it?

MR. AVIS: I believe it does.

THE COMMISSIONER: In terms of concluding that the tweet –

MR. AVIS: Yes.

THE COMMISSIONER: – did warrant a threat and risk assessment.

MS. CHAYTOR: Yes, that's my reading of it as well.

THE COMMISSIONER: And what is a threat and risk assessment? Well, general discussion and I have to confess, I'm still somewhat in the dark in terms of the difference between a threat assessment and a risk assessment. So that might be something that will be of interest for me to hear but I'm not sure that your proposed expert is going to differ from what's discussed in the report.

MR. AVIS: If I may assist you here –

THE COMMISSIONER: Go ahead.

MR. AVIS: – because I realize it's not the time for my argument, I have to do some work on it. We obviously have to bring an application. I'm merely expressing a concern. I do believe that, hopefully, much of the –

THE COMMISSIONER: Well, this might help you resolve your concern if I just –

MR. AVIS: Well, a certain part of the concern. But the report, you know – goes, you know –

THE COMMISSIONER: Well, I assume –

MR. AVIS: Because –

THE COMMISSIONER: – you weren't assuming that they were going to agree with everything that you're – that the RNC or the RCMP or anybody else might –

MR. AVIS: No, I didn't expect that.

THE COMMISSIONER: That's not the way that would go.

MR. AVIS: The report goes into great detail about training, use-of-force training, policy and matters that I don't believe we've had sufficient notice of. You say we don't need notice. Again, I'm not –

THE COMMISSIONER: You have –well, this – again, this as to do with your comment there somewhere about you only had one day out of 42 or something, when there's been a steady stream of police officers gone through on the stand. And a number of which had dealt exactly with those issues.

I don't understand your comment. This has to do with – I guess the other application. But what do you mean, you've only had one day out of 42?

MR. AVIS: That's not what we're asking for.

THE COMMISSIONER: Pardon?

MR. AVIS: I can appreciate that comment, but it's not really related to my application. It has to do with the fact that we have a 70-page report but we're receiving two days – sorry, eight or 10 days before the person testifies. We need to look at the possibility of another expert opinion because of the extensive –

THE COMMISSIONER: Yeah, I don't think you're likely to be going there, Mr. Avis. We're going to be into a September, October deadline by the sound of things if we go on in that regard.

I will consider, but keep in mind, there's a schedule. There are reports before the inquiry. You're seeking to bring in another report, which I'm going to be considering in the context of: What are the problems? Where do you have disagreements? It may be that some of it can be dealt with by way of a written report on those points, if any that are, we'll say, in dispute or not agreed upon, in terms of your expert and the experts that've already been called.

Keep in mind also, that both the RCMP has Mr. Knapman who's coming in, who'll be testifying to some of this, as I understand it. And you're going to have to, as I say, specifically show me how there's going to be some prejudice to you. And you'll have the opportunity in that Phase 2 discussion next Wednesday, is it, where we're proposing that where, again, that's going to be a topic –

UNIDENTIFIED FEMALE SPEAKER: Thursday.

THE COMMISSIONER: Thursday, sorry. That's going to be a topic, you know, where we can arrange to have your expert have input. But right now, just going through your seven questions: Should Smyth have gathered more information before visiting Mr. Dunphy? I guess there's some disagreement there but –

MR. AVIS: Well, I don't know – actually know the content of my report yet.

THE COMMISSIONER: Pardon?

MR. AVIS: Because I've had – you know, I don't have an ongoing dialogue. I make a request; I'm still waiting for the report. So I was of the –

THE COMMISSIONER: So we still don't know. We still don't – okay.

MR. AVIS: I was –

THE COMMISSIONER: Well, that's all the more reason why we're going to have to leave – I know you're putting it on the record, but if you're going to put it on the record, you're going to have to do it precisely and you're going to have to do it quickly by the way because –

MR. AVIS: Well, I got the point, Sir.

THE COMMISSIONER: All right.

MR. AVIS: And I'm going to be proceeding accordingly.

THE COMMISSIONER: Just to go through the seven questions: Why did he not just call him on the phone and speak to him? Well, you know, again, these are almost basically – well, they've been dealt with by a number of police officers already who have differing views on it.

And, you know, some of this, frankly, from where I'm sitting is just going to be cases of police officers will agree to disagree. But I have to draw a conclusion from this incident as to whether there's anything I can recommend that might be changed in terms of the policies, procedures, practices that might avoid something like this happening again. So –

MR. AVIS: I do appreciate that, Sir. But –

THE COMMISSIONER: Did he have to go and visit him on Easter Sunday? Again, you know, an expert is not going to –

MR. AVIS: Well, your expert comments.

THE COMMISSIONER: Sorry?

MR. AVIS: He says it was –

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

MR. AVIS: Your expert goes so far as to suggest that it's –

THE COMMISSIONER: It's not my expert, it's the inquiry expert. I'm not –

MR. AVIS: I'm sorry, I –

THE COMMISSIONER: And don't assume that I'm going to be agreeing with it.

MR. AVIS: I apologize. I apologize.

THE COMMISSIONER: Don't assume I'm going to be agreeing with it.

MR. AVIS: I apologize for the reference.

THE COMMISSIONER: Why do you not simply monitor Dunphy's tweets for a while to see what came up? What, 27,001 tweets is going to make a difference? But anyhow.

Should he have gone alone? Again, there's going to be, I suspect, differing opinions on that.

But right now, where I'm looking, Mr. Avis, there seems to me to be slight areas of disagreement, but in terms of many of the main points, it's a matter of, you know, should there

be an improvement, should there be an update. Not the sort of thing that an expert is going to come in and definitively settle –

MR. AVIS: But –

THE COMMISSIONER: – but where your client’s views should be considered, I agree.

MR. AVIS: Since we’re on that application, the difficulty I’ve encountered, and I take responsibility for it, I was trying to get a CV from Sergeant Lenehan. When he filed his report with his senior management, his CV or background was part of that.

When I spoke to him Saturday, he indicated he might not be able to release that portion either until it goes through his superiors. I’m advised we’re getting it today. In that regard, I don’t have – the Commission doesn’t have the benefit of his CV to make a determination, but Sergeant Lenehan is a member of essentially a Protective Services Unit, which neither Massine nor Coleman are, and I believe he would bring an important perspective onto all those issues for that reason alone. But what my –

THE COMMISSIONER: Right. Go ahead. You may –

MR. AVIS: – intention was, now that we have the Massine report, because you did keep telling us to wait and we did to a point, I feel what I need to do now –

THE COMMISSIONER: And by the way, I didn’t tell you to wait. I suggested that it might be –

MR. AVIS: I understand, Sir. I understand.

THE COMMISSIONER: Anyhow.

MR. AVIS: Again, misquoting, I just thought it was a useful suggestion that we took to heart, let’s put it that way.

In light of the Massine report, I do believe I need to discuss those very issues that you mentioned and see where Sergeant Lenehan is going, but that’s not the only problem.

I’m obviously going to have to put forward – as you say, I was merely raising a concern because there’s very little time left. I’m going to have to have something to you by tomorrow morning and I will do my utmost to do so.

THE COMMISSIONER: You’re going to have to ...?

MR. AVIS: Well, I need to review this further. We only got the report yesterday. I’ve got to meet with management in the RNC, which I plan to do as soon as the inquiry ends today.

THE COMMISSIONER: All right.

MR. AVIS: And I’m hoping to get some –

THE COMMISSIONER: Okay, let’s move on to the next application –

MR. AVIS: Absolutely, Sir, absolutely.

THE COMMISSIONER: – and we’ll leave open. I had contemplated that you would probably need a bit more time and I’ve contemplated that possibly Wednesday afternoon might be, if we have to consider argument on the point, might be when we deal with that just to keep our schedule moving. Although there are people that I know counsel want to fit in there.

Sorry, go ahead, Ms. –

MR. KENNEDY: Sorry, I also have comments, Commissioner.

THE COMMISSIONER: – Ms. Chaytor.

MS. CHAYTOR: Okay. Then just something that we would like to see prior to from this particular expert, we were expecting to get the CV, and I understand from Mr. Avis now why we haven’t yet received it, because one of the things would be Sergeant Lenehan’s involvement, if any, with the training of Constable Smyth in the VIP course that he did at the OPP. That was one of the reasons that the RNC gave that they didn’t use the OPP for their –

THE COMMISSIONER: Right.

MS. CHAYTOR: – internal review.

THE COMMISSIONER: Right. Let me just deal with that. Let me just deal with that.

MS. CHAYTOR: So that would be something we’d like to know.

THE COMMISSIONER: Mr. Avis, I had forgotten about that. Counsel had raised that with me, that the proposed experts you have is from the OPP, I take it –

MR. AVIS: Correct, Sir.

THE COMMISSIONER: – and there’s already been a decision that there might be a conflict between the RNC and the OP and the –

MR. AVIS: No, that was the Judicial Institute of BC, I believe.

THE COMMISSIONER: Wasn’t it the –?

MR. AVIS: Yes.

MS. CHAYTOR: No.

THE COMMISSIONER: Ms. Chaytor can deal with –

MS. CHAYTOR: No. Yeah, no, there were –

THE COMMISSIONER: There was some evidence Constable Smyth had been trained by –

MS. CHAYTOR: He also did training – we understood he also did training at the OPP. And, in fact, the RNC advised us that’s why they didn’t go to the OPP for their internal review that they looked to Saskatoon.

THE COMMISSIONER: Right.

So you can check that out, Mr. Kennedy, as to whether those facts are correct. Maybe you know now but I'm not going to spend any more than another couple of minutes on this –

MR. KENNEDY: I just want to make a comment, Commissioner.

THE COMMISSIONER: Go ahead.

MR. KENNEDY: I have very – on behalf of Constable Smyth, I have very significant concerns about the contents of the report by Mr. Coleman. I have concerns about his expertise.

THE COMMISSIONER: Well, that's fine but –

MR. KENNEDY: I have concerns about his comments.

THE COMMISSIONER: Yeah, go ahead.

MR. KENNEDY: And there will be – all I'm saying is there will be a formal application to seek time to have his report reviewed, Commissioner.

THE COMMISSIONER: All right, which will be considered, but right now we're going to move on to – but, first of all, before we get off that, that may still be, Mr. Avis, a matter of concern in terms of whether your purposed expert might be in some conflict if he in fact was involved in the training of Constable Smyth.

MR. AVIS: I believe I asked him that but I will verify it for – I will go back and –

THE COMMISSIONER: Because of – and this, consult with Ms. Chaytor in terms of the specifics of our concern.

MR. AVIS: Absolutely.

THE COMMISSIONER: Yeah. Okay.

Now, the application that we're supposed to be considering, not the one that Mr. Avis just raised, has to do with the application of Mr. Kennedy to bring forward an expert – to call an expert. Now, I have here the RNC, Constable Smyth and the RNCA wish to call two experts. Who?

MR. KENNEDY: Sorry, where is that?

THE COMMISSIONER: Well, I'm looking at –

MR. AVIS: Commissioner, that's me, if I may.

THE COMMISSIONER: Yes, that's exactly why I'm –

MR. AVIS: That's the two experts.

THE COMMISSIONER: That's exactly what I'm trying to figure out here. Who is making the application to call Dr. Collins? Is it –

MR. AVIS: Mr. Kennedy is.

THE COMMISSIONER: Okay.

MR. AVIS: But –

THE COMMISSIONER: So why do I have your brief, we'll say, on the application?

MR. AVIS: Well, it was my understanding that we have been working together so that we don't overlap, it would be the RNC would like to call both, but we've let – Mr. Kennedy has dealt with that one and I've dealt with the other one. It's just a division of labour, that's all.

THE COMMISSIONER: Okay, so the other expert you're referring to has to do with the use of force –

MR. AVIS: Lenehan, yes.

THE COMMISSIONER: – the one we were just – okay, sorry.

MR. AVIS: The two, the two –

THE COMMISSIONER: I've got it clear now.

MR. AVIS: We've worked together so we're –

THE COMMISSIONER: All right.

Now let's go, let's consider Mr. Kennedy's application. An application to call psychiatric evidence, I take it, Mr. Kennedy?

MR. KENNEDY: Yes, it would be evidence of a forensic psychiatrist, Commissioner.

THE COMMISSIONER: And specifically the report – and I'm going to treat it as a will-say, if you don't mind, as to what your expert proposes to say. And this is just to save time now, to do, if you let me do a little summary here and then you can make your remarks.

But as I see it, there are two, two specific segments: one, you'll be seeking to have Dr. Collins testify regarding attention, perception and memory distortions following an officer-involved shooting; and the second, I think, discrete matter on which you seek evidence has to do with memory retrieval following a deadly force encounter.

We have Dr. Collins stating that he's been requested to give opinion evidence regarding: "the psychological effects of officers" – I don't know if that should be upon officers – "during a shooting event, and the aftermath of an officer involved shooting incident."

Now, during Constable Smyth's testimony at this inquiry, issues were raised as to alleged inconsistencies and discrepancies arising from his various police statements concerning what had occurred in the Dunphy residence on the date in question, including a description of the event itself, the time frames involved, the placement of the rifle, how he identified himself, and his forgetting of certain calls, four calls, I think it was, to Mr. Dunphy.

The question also arose whether Constable Smyth had been given preferential treatment on the night of the shooting by being allowed to meet with RNC officers and to postpone his statement. Various police officers testified they understood that the best time for obtaining an accurate and complete statement for an officer involved in a shooting is at least 24 hours after the event.

So as I understand it, Mr. Kennedy, and I'll let you elaborate on it in a moment, you're putting forward Dr. Collins to deal with issues that relate to the credibility of Constable Smyth in terms

of explaining why there might have been inconsistencies or discrepancies in his various statements or testimony as compared to statements. And you're also bringing it forward to deal with this argument that he didn't receive, or the statement, he didn't receive preferential treatment.

From looking at Dr. Collins's report – which again, as I say, I'm considering like a will-say statement, you're telling me what he proposes to say – he's had extensive involvement in providing expert consultation and testimony in cases of officer-involved deaths. His report of February 21, 2017, the one which you've put forward, which Constable Smyth wishes to enter into evidence, describes how brains tend to screen, filter and distort what we're looking at, particularly when we are intently concentrating.

Dr. Collins writes that: "When human beings are forced to make quick decisions. in response to sudden threats, their attention tends to become very narrowly and externally focused on the perceived threat." And that's been referred to, I think, as weapon focus, amongst other things.

If called upon, I understand Dr. Collins will testify that individuals in a high-risk situation: "devote their attention to a particular object and ... tend not to notice unexpected objects" That's a direct quote from his proposed opinion.

He will describe how individuals, when threatened, are subjected to cognitive arousal leading to perceptual narrowing, especially if a weapon is involved. And this weapons-focus effect is a biologically mediated, automatic reaction to a traumatic event in order to focus on that which is most salient to survival.

Attention is directed to a weapon during the violent event, at the expense of other details. Dr. Collins refers in his report to a survey by a – I don't know if it's a professor, but it's A. Artwohl, which is called *Perceptual and Memory Distortion During Officer Involved Shootings*. Now, that comes from the *FBI Law Enforcement Bulletin*.

And there the author examined perceptual and memory distortion during officer-involved shootings. A majority felt that the incident transpired, that they'd been involved in – transpired in slow motion. But others – I think that was the majority, a significant majority in that case – but others thought that time sped up. So you got the larger group saying they felt that things slowed down; others, however, felt that time sped up.

In terms of hearing and vision, they were affected differently as well. Officers responded to the threat, not with conscious thought but rather, and what they described as, on autopilot. Most say they responded automatically to the perceived threat and that their training just automatically kicked in without their thinking about it. And in fact I would, I think, broadly – and you'll be able to comment on it – I would broadly consider Constable Smyth to having given that picture of his training having kicked in.

Dr. Collins, in terms of memory retrieval, notes that Ontario and Alberta normally seek interviews and witness – they distinguish between witness officers and subject officers. As far as witness officers are concerned, they look at getting interviews within 24 hours. ASIRT says its preference is to interview witness officers as soon as possible. Also, the International Association of Chiefs of Police may ask for pertinent information soon after a shooting and allow recovery time before a full formal statement.

So just before I let you elaborate on this, it seems to me on – and this is the briefer issue, the 24-hour thing – your expert is not going to describe a consensus; your expert is actually going to be raising a question as to whether what RNC and other police witnesses have said in this inquiry. If I understood his opinion, he's pointing to organizations in Canada and the international police

chiefs organization as, in fact, distinguishing between doing – as soon as possible doing a preliminary statement and delaying for 24 hours or whatever for a full formal statement, as they describe it.

Just on that point, Mr. Kennedy, am I wrong there in terms of – and, frankly, if that’s the case, I don’t see much benefit to calling Dr. Collins on that point if, you know, this is all he’s going to say. Plus, we have the added significance of it’s hardly an issue where, well, whatever was right or wrong, there was the delay and there was the 24-hour delay.

And the argument there was preferential treatment is dealt with by the fact that where Constable Smyth should be regarded as a subject officer rather than a witness officer, he has, I think – I believe it’s set out in writing for Ontario, maybe not for others – but he had the right not to give a statement, at least a statement that was not cautioned and protected his Charter rights. So the argument of preferential treatment seems to be dealt with, unless I’m missing something, in terms of that –

MR. KENNEDY: Yeah, there’s two points. Commissioner, I –

THE COMMISSIONER: Yeah, go ahead.

MR. KENNEDY: Yeah.

THE COMMISSIONER: So you just go – I’m doing this just to try and expedite the matter.

MR. KENNEDY: I think it’s important –

THE COMMISSIONER: You set out whatever I missed or whatever you want to there.

MR. KENNEDY: I prefer to set it out on my own, Commissioner.

THE COMMISSIONER: Yeah.

MR. KENNEDY: The issue of – and perhaps the starting point here – I sent you an excerpt yesterday from the Iacobucci report at Chapter 3 in context where –

THE COMMISSIONER: I read that, yeah.

MR. KENNEDY: – Justice Iacobucci talks about the – it is critically important, he talks about, in terms of the perspective to, as best I can, “to understand what it is like to be the police officer, or to be the person in crisis, in the highly charged moment of a potentially violent encounter.”

So there are a number of aspects to Dr. Collins’s evidence. Justice Iacobucci says: “Without that perspective, one cannot fully appreciate” – that’s paragraph 8, Commissioner –

THE COMMISSIONER: Yeah.

No, I read that several times –

MR. KENNEDY: – “what causes fatal encounters”

THE COMMISSIONER: Like yourself, I memorized it all, most of it.

But, go ahead.

MR. KENNEDY: What appreciate –

THE COMMISSIONER: But see, just answer me this: Why do I need to know, you know, the explanation for why individuals may or may not be involved in the weapons-focus effect? Why do I need to know, to have a doctor explain –?

MR. KENNEDY: Because you've got an expert, so-called expert, being put forward by the Commission who he has no problem commenting on the credibility of Constable Smyth, Commissioner.

THE COMMISSIONER: Who –

MR. KENNEDY: This Dr. Coleman has no problem commenting on the credibility of Commissioner – of Constable Smyth.

THE COMMISSIONER: Well, I can assure you that the ultimate issue in terms of –

MR. KENNEDY: He is (inaudible) to be guilty –

THE COMMISSIONER: Well, that's fine. You can criticize him for that when we get there, but in terms of credibility, I'm going to be deciding credibility. That's the ultimate issue for me to decide and whether it's the experts – again, not my expert, inquiry. An expert might be called by an inquiry, don't assume that I'm accepting that, you know, it's –

MR. KENNEDY: Part of the problem, Commissioner –

THE COMMISSIONER: Go ahead.

MR. KENNEDY: – is that we're just giving a summary of what Dr. Collins can say. I laboured under the illusion – if I could just make this comment, it's an important comment.

THE COMMISSIONER: Go ahead, go ahead.

MR. KENNEDY: I laboured under the illusion that I should not talk to Dr. Collins while he was preparing his report so I had no input into what went into his report –

THE COMMISSIONER: That's fair enough.

Now, you could have if you'd asked – you know, you could have sought some direction there.

MR. KENNEDY: – whereas Commission counsel has taken their questions throughout this inquiry from Dr. Coleman's report. His report is actually – it will show questions being asked by Commission counsel throughout this showing ongoing contact. So they can outline what they want from Dr. Coleman's report; I have not had that opportunity, Commissioner.

THE COMMISSIONER: You might have had it if you'd asked for it, Mr. Kennedy, as I think – who was it? I gave someone –

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: I gave someone – well, now –

MR. KENNEDY: It goes to question –

THE COMMISSIONER: – but that’s a fair – that’s a fair comment in terms of maintaining separation so that your expert maintains subjectivity and so forth. But –

MR. KENNEDY: So it goes to questions of independence and bias, Commissioner, in the expert report.

THE COMMISSIONER: It does and all of that will be considered, Mr. Kennedy. But answer me this: First of all on the 24-hour thing –

MR. KENNEDY: Yes.

THE COMMISSIONER: – what Dr. Collins is proposing to set out, it doesn’t establish what you’re seeking to establish, I don’t think.

MR. KENNEDY: It establishes two – well, I –

THE COMMISSIONER: Go ahead.

MR. KENNEDY: It establishes two points; one, I haven’t had the opportunity to discuss in great detail with the man what his testimony would be. But there are two issues to the 24-hours aspect. Witness after witness who have testified have been questioned both my Commission counsel and by counsel for Ms. Dunphy, on the issue of preferential treatment.

THE COMMISSIONER: Right.

MR. KENNEDY: So when you’re looking at – and one of our major arguments at the end of all this, Commissioner, will be the issue of hindsight. How hindsight –

THE COMMISSIONER: Right.

MR. KENNEDY: – always allows for a perfect consideration –

THE COMMISSIONER: Right.

MR. KENNEDY: – of what should have taken place.

So in this particular case there’s two issues; one is what Constable Smyth did on the date on question, the advice that was given to him. Was that advice that was valid at the time and was it advice that – in the scientific community, in terms of these people who were writing on officer-related shootings, was it accepted at that point, so that it takes away the preferential treatment, arguably.

THE COMMISSIONER: And for what he stated – from what he stated, at least two of the three groups it refers to, would have sought a preliminary statement as soon as possible after the event, but would possibly delay the complete formal statement until after 24 hours or so, to permit recovery of memories.

MR. KENNEDY: Yeah. I provided you with a couple of articles that were provided, obviously, by Dr. Collins. And one dealt with the IACP had further outlined in a report how they thought things should be approached.

Mr. Commissioner, it’s one thing to criticize the police, or anyone for that matter, for what they’ve done. But if they do it based on what they understood at the time to be valid, then that’s a significant factor in your determination.

THE COMMISSIONER: All right, but –

MR. KENNEDY: Dr. Collins can help with that.

THE COMMISSIONER: No, arguably he can't, but I'll deal with that in a moment. But on the first point, in terms of – sorry, I lost my train of thought now. Now, what was your first point there? He can help on what?

MR. KENNEDY: The first point, in terms of the hindsight or walking in someone else's shoes. What took place on the date in question –

THE COMMISSIONER: Oh no, I'm sorry. Yeah, I've got it now.

Mr. Kennedy, my approach there is that there seem – there's a big question in my mind as to whether this is medically necessary or something that we'll say is a step taken to make it easier for the police officer. Okay?

Now – and this is why I'm referring you to your own proposed expert and his arguments, including the cops extract or *Officer-Involved Shootings: A Guide for Law Enforcement Leaders* where there's a reference there to, on page 12, when they talk about the heading Incident scene walkthrough: "Again, depending on the officer's physical and emotional condition, the IC should ensure that a preliminary basic walkthrough of the incident scene is conducted with the involved officer to help gather the foregoing information, if not prohibited by law, collective bargaining agreement, or department policy. As soon as possible, the lead criminal investigator should replace the patrol supervisor"

And then over further there's a referral to medical evolution – I'm sorry, I don't have that. That's too big a page to read all of it, I don't have highlighted there and get it more quickly.

In the Geiselman article that your – Dr. Collins put forth as well, on the first page of that, he talks about: "I have recommended to detectives that a decision about when to conduct a full investigative interview must be made on a case-by-case basis. If the witness is in apparent shock, is incoherent, sweating, or pacing, then obtain some basic elements from the witness ..." even if – they're saying even if, you know, there's that much evidence of shock, still "obtain some basic elements from the witness to begin the investigation and return for a full investigative interview later. Otherwise, conduct the full interview as soon as possible before the retrieval environment has changed and memory has faded."

So these are reports that are being put forth through Dr. Collins's proposed opinion, where I'm looking at it and I'm saying, okay, after I hear from Dr. Collins, where am I going to be left in terms of that particular issue?

MR. KENNEDY: Well, if you don't hear from him you won't know. That's the problem here, Commissioner.

THE COMMISSIONER: I do know –

MR. KENNEDY: If I could just – what I need to –

THE COMMISSIONER: Go ahead.

MR. KENNEDY: I need to –

THE COMMISSIONER: Yes, go ahead.

MR. KENNEDY: – really outline –

THE COMMISSIONER: Go ahead.

MR. KENNEDY: – what the crux of my argument is here today, Sir –

THE COMMISSIONER: Go ahead.

MR. KENNEDY: – so that you can then take that into account and, basically, under chapter – under section 5(4) of the *Public Inquiries Act*, it states at paragraph – “A commission shall not make a report against a person until the commission has given reasonable notice to the person of the charge of misconduct alleged against him or her and the person has been allowed full opportunity to be heard in person or by counsel.”

That’s the first step, is that there’s been allegations of misconduct made against Constable Smyth. They’re out there. They’re definitely there.

MR. COMMISSIONER: Wait now, is that – sorry, your –

MR. KENNEDY: That’s the *Public Inquiries Act*.

MR. COMMISSIONER: I think that’s where – I think that’s where the Commissioner has arrived at the point where he is prepared to issue a notice of misconduct, is it not? It’s not because at the beginning of the inquiry there’s an allegation of misconduct.

MR. KENNEDY: There’s been allegation of misconduct from – against Constable Smyth from day one.

So the elements of misconduct, in various case law, in the Krever report –

THE COMMISSIONER: Give me the, give me the – where is this – that’s section 5(1) of which?

MR. KENNEDY: Section 5(4) of the *Public Inquiries Act*.

THE COMMISSIONER: Okay, subsection 5(4), one second now.

“A commission shall not make a report against a person until the commission has given reasonable notice to the person of the charge of misconduct alleged against him or her and the person has been allowed full opportunity to be heard in person or by counsel.”

The Commission has not taken any position that there should be – “... until the commission has given reasonable notice to the person of the charge of misconduct ...” I haven’t given any notice that there’s a charge of misconduct in this case that would have that section kick in, or subsection.

MR. KENNEDY: There’s allegations being made, Commissioner, if I could just play this out because –

THE COMMISSIONER: Go ahead.

MR. KENNEDY: – in the Krever Inquiry there’s – in the Krever Inquiry decision of the Supreme Court of Canada, there’s discussion as to what constitutes misconduct or a notice of

misconduct and whether it's allegations made, which have been made clearly in this case, have been put forward, then the individual affected has to be provided with the opportunity to answer.

The reference made in section 5(4) is a full opportunity to be heard in person or by counsel. And if I could take that, now, when I go to the next, I want to take that a step further and I want to refer you, Commissioner, to the comments of – under the heading “Findings of Misconduct” by Professor Ratushny at pages 369 to 371.

THE COMMISSIONER: Have you copied me on that? I don't recall.

MR. KENNEDY: I provided that with you last night.

THE COMMISSIONER: I have the book with me. What was it, 3 –?

MR. KENNEDY: 369 to 371.

THE COMMISSIONER: 369, yeah. Go ahead.

MR. KENNEDY: So you'll see, Commissioner, Professor Ratushny here, he quotes from an article from Wayne MacKay and Monica McQueen, which I meant to provide to you, but I just – I read it late last night and I didn't have an opportunity to get it to you, but in any event it's an article by Professor MacKay about the issue of – he uses the term –

THE COMMISSIONER: “... the Legality of Blaming.”

MR. KENNEDY: He uses the term blaming, but in any event, that's not what I'm saying here.

So at the bottom of this page there is – Professor Ratushny is talking about findings of misconduct and being kept in perspective. He refers to the comments of Commissioner Cory or Justice Cory in the Krever decision at the top of the next page, and there's reference here to the effects on reputation and the effect throughout the inquiry process.

THE COMMISSIONER: Right.

MR. KENNEDY: At page – the middle of that page, Professor Ratushny states: “Fairness requires advanced notice and the opportunity to respond to potential findings of misconduct. It also requires fairness at the hearings where parties should not be permitted to use cross-examination simply to ‘beat up’ witnesses”

My comment is that I'm referring to is: “Fairness requires advanced notice and the opportunity to respond to potential findings of misconduct.” I don't think, Commissioner, I would be going too far to state here there have been allegations of misconduct raised. There are potential findings of misconduct, so that Constable Smyth has to be provided with full opportunity to respond.

THE COMMISSIONER: Well, first of all, in terms of the full opportunity to respond, I'm not taking issue with that in terms of – there will be a difference of opinion, I'm sure, in terms of what full opportunity may mean. But in terms of – what I'm questioning is whether that section 5(4) kicks in where, in the course of carrying out my mandate of examining the circumstances of Mr. Dunphy's death, the Commission arrives at a conclusion that there should be a note – that there's probably misconduct or whatever there is. Keep in mind I'm not taking a position on the standard of proof, but that's there as well. That if the Commission arrives or the Commissioner, in this case, arrives at the conclusion that someone is in jeopardy, we better get a notice out, then that's what you're talking about there.

MR. KENNEDY: So at that point, if we could just play this out, Commissioner, what I'm suggesting, as opposed to if you ultimately determined that was going to happen, then our full opportunity to respond is essentially lost because the Krever case talks in detail about when do you – how do you respond in circumstances where all of the evidence has been called? Where there's now – do you ask to reopen the hearing? Do you come forward? Is it better that we do it in the hearing process itself?

And the equivalent, I would suggest to you, Commissioner, the full opportunity to respond would essentially, in criminal law context, be to make full answer in defence. In other words, we have to be able to answer the allegations that are being put forward. And I'm not saying you're (inaudible) –

THE COMMISSIONER: Yeah, and I wouldn't –

MR. KENNEDY: I'm not saying you've made any determinations. That's not my point. It's that serious allegations have been raised.

Dr. Collins is an expert in forensic psychiatry who has an expertise in and involvement in officer-involved shootings. We have the comments of Justice Iacobucci saying we have to put ourselves – I try to put myself in the shoes of the police officer. This forensic psychiatrist can offer evidence, which may or may not be of assistance to you.

THE COMMISSIONER: Well, Mr. Kennedy, I don't think I have to – or it would be proper for me to say may or may not. What I'm asking you to respond to is why I see not right now – subject to your saying something else – I see not right now in terms of that 24-hour thing, first of all, the 24-hour issue or the preferential treatment, however you want to label it. And I've given you reasons why I don't see that he would be helpful because in what he's proposing to say, he so-called will say, and you've had a chance to read it, he brings into question whether this and – you know, such a consensus as was indicated by the – some of the witnesses, anyhow.

MR. KENNEDY: So will the same analysis be engaged in when it comes to Dr. Coleman?

THE COMMISSIONER: Sorry?

MR. KENNEDY: Commissioner, will you engage in the same analysis when it comes to Dr. Coleman in Mr. Massine's report?

THE COMMISSIONER: Why not?

MR. KENNEDY: Okay, good. That's fine.

THE COMMISSIONER: Why not? I'm – that's –

MR. KENNEDY: Well, because it's a report that's been put forward by the inquiry.

THE COMMISSIONER: It's not a – but the inquiry is not putting that forth as something that, you know, we adopt, or I adopt, as the Commissioner adopts –

MR. KENNEDY: Your counsel has adopted it by their questioning.

THE COMMISSIONER: The counsel – no, the counsel has tried to be fair to both sides in the course of their questioning, and sometimes you would disagree with what they've done. That doesn't mean they're wrong or that they're being unfair to your client. It means that they're

trying to raise the issues for both sides in a fair fashion. And I – well, I won't get into it now because it'll be for another day, but you'll have lots of –

MR. KENNEDY: There will be raised – yes, the role of counsel will be raised again, Commissioner.

THE COMMISSIONER: You will have that opportunity, Mr. Kennedy, but it won't be dealt with in a general fashion. You're going to have to be specific.

MR. KENNEDY: Yes, I will be, yup.

THE COMMISSIONER: You'll be – the specifics will be looked at, but now, again I come back to – and I don't think I'm unfair in pressing you on this. Dr. Collins is going to say that the – two of the three organizations he refers to go with a partial preliminary interview, immediately, as soon as possible, and defer the full formal interview. So on that issue, which is one of the ones you want to call him for, I just don't see what the point is.

MR. KENNEDY: Commissioner, I've – the argument is out there. I've outlined in terms of the – I've looked at Bingley. I've looked at – I would suggest that it – part of the issue of necessity is the consideration in the context of an inquiry of the full opportunity to respond to a potential finding of misconduct. So in terms of what we –

THE COMMISSIONER: Yes, but you're, again, you haven't shown me how Dr. Collins's opinion on that point, the shall we say, the simpler, more precise point of whether there should be delay – whether a police officer should be permitted delay in giving a statement. You haven't shown me where Dr. Collins's testimony is necessary on this point.

MR. KENNEDY: That's fine.

THE COMMISSIONER: Now, on the other one, the other reason for putting it in, which is the, to put it in directed at explaining any inconsistencies or discrepancies or being part of the explanation, anyhow –

MR. KENNEDY: That would be ancillary to the main evidence, Commissioner, which would relate to the psychiatric or the psychological effects on an officer in an officer-involved shooting.

Whether or not – and you're – Mr. Commissioner, you appear – excuse me, I should say you appear – one of the issues that appears to be heard is that there is no difference between anyone else involved in a shooting incident or in a potential homicide or a homicide situation, than an officer in the – like Constable Smyth.

The evidence, the psychiatric literature, the evidence of Dr. Collins, would suggest that's not the case, that there is a significant difference, and it's one that I would suggest –

THE COMMISSIONER: Significant difference in –

MR. KENNEDY: In terms of the effect on an officer, what happens to an officer in those circumstances.

THE COMMISSIONER: Okay. First of all, I'm surprised that it should require opinion evidence, but it strikes me that that evidence, that's part of the evidence that's going to be going in through Knapman, is it?

MR. KENNEDY: So we have a police officer – so, Commissioner, wait now – so we'll have a police officer who can give this evidence, but a forensic psychiatrist can't?

THE COMMISSIONER: Just, one second now. We have a police officer who's been scheduled for two months, who's on the witness list, who's ready to go, and, yes, in that –

MR. KENNEDY: Who your counsel did – who your counsel didn't accept his qualifications, they went to someone

THE COMMISSIONER: And in that case it may not be necessary to have, shall we say, gold standard, if that's the way you're putting it out, of psychiatric evidence. Let me get back to that.

If you're concerned about decisions being made at the point that a rifle is about to be pointed at you, this Commission, and I am sure no court, is going to take too fine a point in terms of how an officer should be reacting when he or she concludes he or she is about to be shot.

So I don't see that as – and again it's interesting because we're talking about time points here. It happened so quickly that on Constable Smyth's rendition, there's a rifle point at him, now obviously all this is subject to whether there's been adequate – whether the accuracy of Constable's Smyth's testimony has been adequately challenged to make it unworthy of consideration which is not to be dealt with here today, but when you're – you're seeking to have a psychiatrist give me explanations which I don't need as far as I can see?

MR. KENNEDY: I don't have any further comments.

THE COMMISSIONER: Well, I'm not finished Mr. Kennedy, if you don't mind.

As far as I can see, the proposed testimony of Dr. Collins is to explain this adrenalin rush et cetera and the physiological things that have occur when an officer is placed under threat and an explanation for why he or she may be too shook up in the immediate aftermath to give an accurate rendition of what occurred.

Now, if there is something else that I'm, that I'm –

MR. KENNEDY: I don't have any further comment. I don't have any further comment.

Thank you.

THE COMMISSIONER: You're satisfied that you've made all the points that you needed to make?

MR. KENNEDY: I don't have any further comment.

Thank you.

THE COMMISSIONER: Mr. Kennedy, I want you to indicate because you're not being prevented from presenting any other matters that you have dealt with. You haven't responded to the chapter and verse I've given you from Dr. Collins's report on the latest preferential treatment argument, where I do not see how that report or what he proposes to say, is necessary in that regard. And I'm now part way through attempting to question you on, in case I'm missing something, whether Dr. Collins is going to testify to something more than – what I see from his report, he's going to give explanations as to why Constable Smyth might have omitted something. Why he might have expressed inconsistencies between one statement and another or between his testimony and the statements.

Now, the fact that you may not like what I've indicated to you through my questions on the first point is no reason for you to terminate the argument as you seem to be attempting to do. Am I wrong there?

MR. KENNEDY: No, you're not wrong. Commissioner, you've made yourself clear in terms of your – what you've read in terms of Dr. Collins's report.

THE COMMISSIONER: And I've raised questions because I'm seeking to understand just what you see to make sure I don't treat you unfairly or your client unfairly.

MR. KENNEDY: I am not saying you're treating me unfairly in the argument, Commissioner. What I'm saying to you is that my main argument here relating to the admissibility of expert evidence is the Mohan criteria and the second criteria as to whether or not the prejudicial value or the –

THE COMMISSIONER: That's the second stage from White and Burgess, okay.

MR. KENNEDY: Well – and it confirmed in Bingley.

THE COMMISSIONER: Yeah.

MR. KENNEDY: Is that basically what I'm suggesting to you here is that there is evidence which is relevant, which is necessary, which could reasonably assist the trier of fact and which there is no exclusionary principle. When it goes to the second stage, and this is outlined by yourself, Commissioner, in your earlier decision on the chair, that basically those principles apply.

I can only outline for you the part of the problem that I've ran into here, and again maybe it's the misconception that I laboured under, is that I can't outline for you fully what Dr. Collins can say because I've had no discussions with him.

So we got a preliminary report which in the normal course of events would be elaborated upon when he provides his testimony. This witness testified at the Reid/Power inquiry and, again, it was a different issue I think he testified on. He's testified in numerous coroner's inquests or given information in relation to officer-related shootings. He was interviewed by Justice Iacobucci in terms of the report that he prepared. I can only indicate to you that he can offer evidence which, in the words of Justice Iacobucci, could help you understand the officer, the shoes that the officer walks in, and what goes through an officer's mind as all of this is happening.

This is not simply, Commissioner, Dr. Collins saying this is what I think would be going on; this is a body of literature and science which has been developed over a period of time. And whether we agree or disagree, there is a distinction being made because officers can be studied and there can be evidence gathered after these officer-related shootings.

There are numerous articles. Mr. Drover was going to get more into the content of the articles and what Dr. Collins could argue. So it's not that I'm terminating argument, Mr. Commissioner. It just appears to me, by your comments, that you have outlined basically the concerns that you have. I cannot say to you that I can answer all of those concerns today; I can tell you that there is a concern about the 24-hour argument. It's not settled.

I read you the testimony of Ms. Hughson in terms of what she said in her pre-trial interview. We've got the positions put forward by SIU and ASIRT and we'll hear from ASIRT. So I'm just

suggesting to you that Dr. Collins's evidence could be of assistance to the inquiry and could allow Constable Smyth to answer allegations of misconduct which are being made against him.

That's the basic argument that I'm putting forward. There's not a whole lot more that I can add, Commissioner.

THE COMMISSIONER: Okay.

Just on the –

MR. AVIS: Commissioner.

THE COMMISSIONER: Sorry – just on the second stage, which has been confirmed in Bingley as being the approach initially and adopted in White Burgess where they seem to say there are two stages now, and the second stage is balancing the probative value against the prejudice or against the cost. In Mohan, I think it was Justice Sopinka made clear that cost is not restricted to the traditional economic sense of cost, but rather it's in terms of its impact on the trial process. And in this case that would relate to the impact on the inquiry process.

And there's a risk that if experts are called and called unnecessarily, particularly, you get into a so-called battle of experts and the judge, or in this case, the Commissioner, is just there as a referee with the experts basically calling the shots. Well, that's not how I see the inquiry should continue. And Bingley, I think, is significant for the fact that he does emphasize, again, the impact upon the process that we have to consider here.

And there's a reference here to if it involves inordinate time that is not, which is not commensurate with the value of the evidence. We're into a situation where there's an inquiry set, a schedule set. The mandate of the inquiry ends at a specific date and I'm trying to keep this thing on schedule. I'm trying to make sure that we get a report within a reasonable period of time. I'm going to need an amount of time, which I've estimated, in order to prepare the report.

We have set out the schedule of witnesses for a long time, and now we're getting applications to add new witnesses on what could be fairly extensive trails to follow and I'm not going to do it unless I am satisfied that it is necessary that I do it. You will be, and I will be, keeping it very much in mind that I will have a responsibility to make sure that if Constable Smyth or anyone else is going to be affected by an allegation of – what's the reference?

MR. KENNEDY: A charge of misconduct.

THE COMMISSIONER: Sorry?

MR. KENNEDY: The words used in the *Public Inquiries Act* are a charge of misconduct.

THE COMMISSIONER: A charge of misconduct, right.

That there will be proper notice go out. And while you might say, well, that is not as good as my having the same opportunity as I have before, it would be better from your perspective if you were treated as though there were a charge of misconduct already there, I take it, from the thrust of your –

MR. KENNEDY: But can I just – can I just play this out, Commissioner.

THE COMMISSIONER: Sorry, go ahead, you know.

MR. KENNEDY: I'm not saying anything. You know, again, I'm just trying to be – because fairness is the key concept in an inquiry. But say, for example, you dismiss the application to allow Dr. Collins's evidence and so we're trying to stay on schedule, or say – and then a notice of misconduct goes out, and then I say to you, well, now I want to call Dr. Collins. It's going to be too late. Then we're into judicial review, potentially, and then the whole thing is slowed down anyway.

THE COMMISSIONER: Well, it may be, but I'd have to decide, first of all, whether or not Dr. Collins should be called and I'd have –

MR. KENNEDY: That's fair.

THE COMMISSIONER: That issue might come up.

But I don't see at this stage, Mr. Kennedy, where I'm in a position to say that the evidence of Dr. Collins is necessary and would warrant extending the schedule of this inquiry. I believe that a thorough job can be done on this issue, as on other issues, with the witnesses that have been called and the ones that are proposed to be called.

I understand generally, for example, in terms of these witnesses, that the police officer, Knapman – I forget his title. What's his rank? Corporal Knapman. He will be there to answer some questions as to what they're taught in terms, for example, of how to react if they're put – if a threat appears.

You're suggesting that the evidence of a psychiatrist would be better in this regard. And I have to ask myself: Is the evidence of a psychiatrist necessary? And, you know, I may –

MR. KENNEDY: I would say the same thing with Dr. Coleman. And I will say the same thing about Dr. Coleman.

THE COMMISSIONER: Don't threaten me.

MR. KENNEDY: Oh, no, no, I'm not, I'm just saying –

THE COMMISSIONER: Fine, you exercise – exercise –

MR. KENNEDY: – to you that's the same thing with (inaudible).

THE COMMISSIONER: Well, it sounds like, you know, tit-for-tat, you know.

MR. KENNEDY: No, it's not threats. It's not threats, Commissioner.

THE COMMISSIONER: If you're going to do that, then I'm going to do this. You'll do what you have to do –

MR. KENNEDY: And I'm going (inaudible).

THE COMMISSIONER: – I'm sure as far as –

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: – Mr. Coleman's report is concerned. But anyhow, if you have any –

MR. KENNEDY: So, but I want to answer one point though.

THE COMMISSIONER: So go ahead.

MR. KENNEDY: You've raised the issue all of a sudden these applications are coming forth. These issues have been raised throughout the inquiry, Commissioner. You know, in terms of Mr. Avis and the meeting of January 4 raised the issue of the effect on the police officer himself.

So these issues have been out there. We've been waiting for reports to determine whether or not – and I can remember specifically when he raised the issue. These issues have been out there. We're told there will be reports and then the reports that are provided either don't relate to it or question the evidence, so we're forced into a situation then where we have to now go get these reports. I'm not criticizing or blaming anyone, but we need time, Commissioner, to – we need time to be able to respond.

Constable – I wrote, as I've outlined in my letter, Dr. Collins on February 6, I think it was. By February 21, he's providing a report to us. So, I mean, we're not wasting time, we're not losing time. I –

THE COMMISSIONER: I'm not saying you're doing –

MR. KENNEDY: I mean, if your –

THE COMMISSIONER: Sorry. Go ahead.

MR. KENNEDY: – decision is that's the argument – I put forward an argument that it is, it meets the Mohan criteria that it does not – the second aspect either of the – we'll call it of Bingley or, I guess, of White Burgess is that that can also is not affected here, but that you're – you should look, Commissioner, at the nature of the inquiry and the potential allegations of misconduct, or the allegations of misconduct have been made, the potential notice of misconduct, the fact of what the *Public Inquiries Act* says and having regard to the law in relation to potential findings of misconduct. That would be the arguments I would put forward.

THE COMMISSIONER: All of which I'm doing.

MR. KENNEDY: Okay.

THE COMMISSIONER: But I have given you specifics with respect to that allegation of preferential treatment and the 24-hour delay –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – in making a statement. I think we've pretty well exhausted that, as you indicated.

On the other aspect of how Dr. Collins's opinion regarding memory distortion, potential memory distortion; you listed a number of things in your letter, I think. And I tried to go through them last night one by one to fully understand what might be involved and why psychiatric evidence might be necessary.

One significant issue – and I'm not saying they're all covered here, but I think the main ones might be – you're putting it forward arguably to help understand why Constable Smyth in the re-enactment could not recall the Rubbermaid tub.

MR. KENNEDY: That's one –

THE COMMISSIONER: That's –

MR. KENNEDY: That's one reference I remember, Commissioner, yes.

THE COMMISSIONER: Yeah, well, that's, I think from –

MR. KENNEDY: Yeah.

THE COMMISSIONER: I think you might have said – I think it was in your letter, is the reference –

MR. KENNEDY: I did reference the other day. I outlined it for you, yeah.

THE COMMISSIONER: – to the placement of the rifle, I think, was the wording.

MR. KENNEDY: The placement of the rifle. That's correct, yeah.

THE COMMISSIONER: Yeah. And in addition to whether it was on the tub or not – and I believe Constable Smyth, you know, freely admitted he wasn't certain about –

MR. KENNEDY: The tub, yeah.

THE COMMISSIONER: – and he couldn't explain it. So, I mean, there's no issue with the fact that Constable Smyth has accepted it. He wasn't certain. I mean, that was his testimony at the re-enactment. I don't understand why I need an explanation as to why this uncontradicted evidence is there. I don't –

MR. KENNEDY: But it's not; it's not uncontradicted.

THE COMMISSIONER: As to why it might have occurred, the – I don't need an explanation that probably it had to do with the fact that, you know, you had that weapon focus and that's all he was looking at, and he wouldn't see a pink elephant, not alone a blue or green Rubbermaid tub, you know, he was so focused on the weapon. But do I need – you know, if Constable Smyth says he was uncertain regarding the tub, he couldn't, you know, visualize that, well, why do I need Constable, or Dr. Collins to explain why that might have occurred?

MR. KENNEDY: A lot of what expert opinion evidence is, Commissioner –

THE COMMISSIONER: Sorry, go ahead.

MR. KENNEDY: What a lot of expert opinion evidence does, and you've rightly pointed out, are things that a commissioner, a judge, will look at as being common sense. We have to look at whether or not – it gives a scientific aura or aura of expertise to, a lot of times, common sense.

But, unfortunately, in this particular case, a police officer is saying something as opposed to an expert witness saying something can have an impact in the way it's assessed. We have allegations being made here that Constable Smyth basically murdered Donald Dunphy and then staged the scene. Now, that's the allegation, Commissioner. This –

THE COMMISSIONER: No, I don't – I have not heard anybody put forth the submission that Constable Smyth murdered Donald Dunphy, which would bring in –

MR. KENNEDY: You haven't?

THE COMMISSIONER: No.

MR. KENNEDY: That's what Mr. Simmonds's cross-examination has been all about.

THE COMMISSIONER: No, no, no.

Ms. Dunphy, it was put to her early on by me: Just what is it do you think that happened here? Do you think that Constable Smyth went up there and intentionally shot your father? She said no.

Do you recall that?

MR. KENNEDY: I do recall that but there's also a difference in –

THE COMMISSIONER: In –

MR. KENNEDY: – first-degree and second-degree murder. Second-degree murder doesn't require planning or deliberation.

THE COMMISSIONER: It requires intent.

MR. KENNEDY: And the intent would be as outlined by – as alleged by Mr. Simmonds is that if he shot a man who had a stick in his hand, that the intent to kill – he's reckless – one, the intent to kill, or two –

THE COMMISSIONER: Well, that's not murder. That's not –

MR. KENNEDY: It is murder. The second –

THE COMMISSIONER: Not –

MR. KENNEDY: It is by causing bodily – knew or was reckless as to the consequence of his actions. That's the second part of section 229(i)(a) – or (i) and (ii)(b) I think. The intent to kill, specific intent –

THE COMMISSIONER: There's been no – there's been no allegations of – that would constitute the elements of murder that I can see in this case, Mr. Kennedy. You are going too far in that.

There are allegations that Constable Smyth may have been negligent in reacting too quickly.

MR. KENNEDY: Is that in the *Criminal Code*? If you look at, Sir –

THE COMMISSIONER: Anyhow –

MR. KENNEDY: If you look at 229, one (a)(ii), that's my recollection, I could be wrong on that.

There's a second part. There's the intent to kill and also cause or intended cause to bodily harm, which he knew or ought to have known could result in death. That's my understanding of the second part of – that amounts to second-degree murder. And he –

THE COMMISSIONER: And so I want – you're saying that –

MR. KENNEDY: The allegations –

THE COMMISSIONER: You're saying that the allegation is that –

MR. KENNEDY: Yeah.

THE COMMISSIONER: – on the way in to Mr. Dunphy's residence –

MR. KENNEDY: No.

THE COMMISSIONER: Oh, when? Okay, where do you –?

MR. KENNEDY: Second-degree murder can apply.

THE COMMISSIONER: So where are you going to get – where are you going to get the element of murder where the evidence is at worst – at worst – is that Constable Smyth reacted too quickly to believing that he was under threat?

MR. KENNEDY: Okay.

So culpable homicide is murder where, one, the person who causes the death of a human being means to cause his death – so that's the specific intent to kill – or means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

THE COMMISSIONER: Yeah, so you still got the –

MR. KENNEDY: So if you shoot someone who has a stick –

THE COMMISSIONER: You still got to have the means, you got – i.e., intends to; means to, intends to.

MR. KENNEDY: Yeah, but that's the – the argument would be or is that if you shoot someone who has a stick in his hand, then you ought to have known that you couldn't fire a firearm in defending yourself. And that would have – that would become second-degree murder.

THE COMMISSIONER: Mr. Kennedy, I don't agree with you. I'll –

MR. KENNEDY: I can assure you, Commissioner –

THE COMMISSIONER: I'm sure this will be a matter for final argument in terms of what you want me to find in this, in the results of the inquiry.

MR. KENNEDY: It's not – that's the argument –

THE COMMISSIONER: Just one second now. We'll go on. Whether that's your interpretation of the argument, okay.

I'm going through now the details trying to find out why you think Dr. Collins should be called again. The first item was to somehow add information regarding how this rubber tub might not – Rubbermaid tub might not have been picked up.

MR. KENNEDY: The time frames, Commissioner, for example, the – whether it's two seconds –

THE COMMISSIONER: Yeah, I've just –

MR. KENNEDY: – five seconds, seven seconds.

THE COMMISSIONER: Yeah, exactly. I have that noted here –

MR. KENNEDY: Okay.

THE COMMISSIONER: –as one of the items. And as I –

MR. KENNEDY: So memory and time (inaudible).

THE COMMISSIONER: I've already – one second, now – I've already noted that the time frames are given in that first application between two seconds and seven seconds at the outside from –

MR. KENNEDY: I'm not sure if that includes looking around, but the time –

THE COMMISSIONER: That's – well, it does.

MR. KENNEDY: – would be two or six seconds, yeah.

THE COMMISSIONER: I'm pretty – well, look at my first decision anyhow. I think I noted that that could include the time looking around.

Another item: To help understand why Constable Smyth fired four shots in quick succession, you know, which again, basically a kicking in of the training that we've had established for us. And he went on autopilot. Again, do I need to have an explanation as to how a finely tuned person involved in the use of force responds to training as he's been taught because of the threat there? Do I need an explanation as to, you know, why that occurs? I don't think I do. In terms of, you know –

MR. KENNEDY: Commissioner, you've –

THE COMMISSIONER: – training, there's – if a person –

MR. KENNEDY: You're outlining all the issues. You understand –

THE COMMISSIONER: Sorry?

MR. KENNEDY: You understand the issues. You've outlined the issues.

THE COMMISSIONER: And I'm trying to get input from you as to how I might be somehow wrong in questioning whether Dr. Collins's testimony is necessary on these points. You know, you're not, with respect, I don't think giving me much –

MR. KENNEDY: That's fine.

THE COMMISSIONER: – in terms of the specifics.

MR. KENNEDY: I'm not going to concede you're right, so your rule –

THE COMMISSIONER: That's fine, that's fine.

MR. KENNEDY: That's fine. So you're going to have to make a ruling on it, so –

THE COMMISSIONER: I'm not asking you to. What I'm asking you to do is what – Mr. Avis, we're not done yet, so just give me a second here.

The time frame is the other point I had noted and whether or not Constable Smyth identified himself with his rank; that's a minor – in terms of his recollection, that's a minor point. Why Constable Smyth might have forgotten initially to tell investigators he attempted four calls to Mr. Dunphy; that would, I think, be – fall into that area of the lack of recall and why that might occur.

But again, keep in mind that without experts in the assessment of inconsistencies and so forth, it would be the strange situation for someone to do a – present a lengthy statement, a lengthy statement or statements, without certain inconsistencies or discrepancies. Who's – none of us are perfect, with or without having suffered trauma or gone through a traumatic event.

Anyhow, those are – I'm inviting, again, suggestions as to why the testimony of Dr. Collins is necessary, and any of this I don't see it, frankly, necessary and subject to Mr. Avis, I'll make a ruling here shortly.

Mr. Avis, you wanted to make a point?

MR. AVIS: Yes, just if I can be of some assistance here, Commissioner. The – what we're hearing from the officers is their own second- and third-hand information about what their training tells them in this regard. None of them have the ability or expertise to explain any of the rationale behind it, the rationale of which is being challenged. Corporal Knapman does not have any kind of a background to explain any of this and the report I read yesterday trashes Corporal Knapman's (inaudible) –

THE COMMISSIONER: I'm trying to figure out why do I need an explanation? Can you tell me? Mr. Kennedy didn't tell me. Why do I need an explanation for Dr. Collins for –

MR. AVIS: Because there's no one–

THE COMMISSIONER: – these items I've –

MR. AVIS: –there is –

THE COMMISSIONER: – pointed out?

MR. AVIS: If I may, the first part of his report, “Attention, Perception, and Memory ...” retrieval, those two are intimately related.

THE COMMISSIONER: Yes –

MR. AVIS: The issue –

THE COMMISSIONER: I got it.

MR. AVIS: – of a memory retrieval arises from –

THE COMMISSIONER: Memory distortion, memory retrieval, right. But –

MR. AVIS: There is no explanation–

THE COMMISSIONER: But I've split memory retrieval as specifically relating to the allegation of preferential treatment. And, you know –

MR. AVIS: I –

THE COMMISSIONER: – getting more than 24 hours. So just leave it there for that particular issue. There's still memory retrieval involved in the first part of Dr. Collins' opinion. Didn't intend to say that, if I did.

MR. AVIS: No, no, I'm not – I – all I'm saying is this: there is no person before you that has any expertise to explain –

THE COMMISSIONER: And I'm asking you, why do I need the expertise to explain? What am I missing here?

MR. AVIS: Well, you're going to – forgive me, but if you decide that time distorts – I mean, I guess you'll go – that's being challenged. You have the evidence of Constable Smyth. You have the evidence of others.

THE COMMISSIONER: What's being challenged? That time distorts?

MR. AVIS: Well, the whole issue of the timing of events and his recollection of events has been seriously challenged here. And while, you know, you do not have a scientific basis to rely upon, you only have second-hand, kind of like anecdotal comments from officers saying, this is what I'm trained. And, forgive me, I – it's not my first time down this road. I find some of their explanations are a little bit different.

THE COMMISSIONER: Now, keep in mind you don't need to have certificates in order to be qualified in certain areas or to be considered an expert – able to give opinion evidence, if you're into an area where you have lengthy work experience, for example.

MR. AVIS: See, but they don't have this experience. Unless the person – unless the police officer, him or herself, has actually been in this situation, they don't have the actual experience. Unless the critics of the situation have –

THE COMMISSIONER: What, unless you've been shot at?

MR. AVIS: Absolutely. No, actually shot somebody. That's what we're talking about. None of the officers who came before you have actually shot somebody. So all they can regurgitate is –

THE COMMISSIONER: Well –

MR. AVIS: – their second –

THE COMMISSIONER: We're not going to wait for that –

MR. AVIS: No, but –

THE COMMISSIONER: –in this inquiry, Mr. Avis.

MR. AVIS: But, Dr. Collins can fill in that gap.

THE COMMISSIONER: Let me mention, by the way, that Dr. Collins – in one of the cases I gave you, it was interesting. The – where he was called in on an eyewitness case, regarding the

frailty of eyewitness testimony, I believe. And the trial judge in that case decided not to admit the evidence.

MR. KENNEDY: That was Dr. Moore, I thought. Dr. Collins –

THE COMMISSIONER: Sorry?

MR. KENNEDY: Dr. Collins, I thought, Commissioner, testified or they proposed his testimony in the Dalla Lana case, the University of Alberta board of regents and Dr. –

THE COMMISSIONER: I may be getting – sorry, I may be getting (inaudible).

MR. KENNEDY: Dr. Moore was (inaudible) in the eyewitness identification.

THE COMMISSIONER: Was it? Yeah, okay.

Thank you. I think you're right. Yeah.

Yeah, the university appeal board in Dalla Lana noted that the evidence of Dr. Collins “was relevant and probative only in relation to the credibility of the complainant” in that case. That was a university sexual assault in a residence in university.

And the trial judge noted that – or was that the Court of Appeal, Mr. Kennedy? I've forgotten now.

MR. KENNEDY: Dalla Lana, Court of Appeal.

THE COMMISSIONER: Yeah, Alberta Court of Appeal.

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: Sorry?

MR. KENNEDY: I thought Dalla Lana was the Alberta Court of Appeal. There was a dissenting judgment. There was Martin, Rowbotham and an ad hoc justice. One dissented. Leave to appeal was refused to the Supreme Court of Canada, I think.

THE COMMISSIONER: Right. The appeal was refused to the Supreme Court of Canada? Yeah.

But there it noted that the evidence of Dr. Collins was relevant and probative only in relation to credibility, which was the ultimate issue in the appeal before them.

And Dr. Collins had stated in his present opinion: “What we know about human factors, in deadly force confrontations, explains why Constable Joe Smyth's” – should be, I think there's an error there – “had perceptual and memory discrepancies regarding the incident.”

Well, that's going a bit far, you know, in terms of explains why. If he had said it may partially explain or may be one factor, but in terms of saying it explains why Constable Joe Smyth had perceptual and memory discrepancies regarding the incident, basically there's no role for me here. I should just pass it over and pass – if I had a gavel, I'd be required to pass the gavel over to Dr. Collins if he considers or you consider that that's evidence that should be admissible.

Mr. Avis, did you have any other point to make there? All right –

MR. AVIS: No, I'm unable – because we – I, too, have had, other than introducing Dr. Collins to my friend, Mr. Kennedy, had no contact. So I've come –

THE COMMISSIONER: Well, you have his report – you have his report, proposed report.

MR. AVIS: I understand. I've read stuff like that. You know, to me that's generic, an outline.

THE COMMISSIONER: Well, my ruling is going to be generic now, then.

MR. AVIS: Thank you.

THE COMMISSIONER: Mr. Drover, sorry, do you have ...?

MR. DROVER: Yes, I did delve into the reports, different psychiatric reports and things, provided by Dr. Collins. And as you point out, there is very little consensus on this 24-to-48-hour time frame and there hasn't really been any consensus amongst our witnesses, but it is something that the Commission, that you, are going to have to –

THE COMMISSIONER: And as a recommendation, it may very well be –

MR. DROVER: – make a recommendation on.

THE COMMISSIONER: Yeah, it may very well be my recommendation in this regard, it could be something along the lines of the RNC should consider protocol for witness statements, and before doing so, it might be advisable to have – to collect some papers or to get some opinions from a number of mainstream psychiatrists to establish whether there is any consensus in this regard or –

MR. DROVER: Well, that might be – and that might be –

THE COMMISSIONER: – for example. And that's just one example. I'm not saying that's a –

MR. DROVER: That might be a sensible way to do it because in essence, then, you're –

THE COMMISSIONER: I'm not going to get – I'm not getting into a debate, you know, between psychiatrists. Ms. Breen may be entitled to call her own psychiatrist in rebuttal to Dr. Collins, and on it goes, you know, so, –

MR. DROVER: I understand (inaudible) –

THE COMMISSIONER: But your point is a valid one. I'm not ignoring it in terms of a potential recommendation I might ultimately make.

MR. DROVER: Right, but my point was to say that sometimes where there is no scientific consensus, it's useful to speak to somebody in the field who can explain the different positions, how those positions are dealt with, how they are arrived at and then help you, in turn, make your recommendations.

THE COMMISSIONER: And I might have – have had to do this if there had not been the fact that it seems to be a non-issue, unless I'm missing something.

If it's done as far as Constable Smyth is concerned, we can't undo that. We can't un-ring the bell. He was given the 24 hours to give his statement. And the other aspect of it is that we have a divided – by the expert himself, we have divided opinion, stated, admitted, so ...

Anyhow, is there anything further any counsel might have in this regard?

Well, I'm going to issue my ruling in this respect now, too, because I think we've exhausted the – and I appreciate and thank counsel for giving me the various angles that should be considered here, but frankly, I'm treating my own approach on these issues as though – because of the pressures of time and so forth, and witness scheduling, difficulties if we change from one schedule to another in getting witnesses at a particular time, keeping in mind that, as well as the need to do a thorough analysis. I've had the weekend to become alerted to the issues that would be raised and I've had an opportunity to read the case law involved, and I'm satisfied I have from the proposed opinion itself sufficient evidence that this psychiatric opinion is not necessary and that it should not be admitted, and therefore we will be continuing without that – without the admission of that evidence.

I will be providing a written opinion, so I'll further reserve my decision in that regard. But I'll be given full, written reasons and, ultimately, I think I've explained in the course of my questioning why I have difficulty seeing that it's necessary and that's the basis, plus the weighing of probative value versus prejudice, prejudice, in this case, being of the impact on the inquiry process, delays that would occur and so forth, if we get into a battle of experts.

And in terms of probative value, again, I think I won't have to repeat it. I referred to specific issues where it seems to me that the – it's thought to have the opinion evidence make a difference and I've concluded that the evidence is not necessary and we'll proceed without it.

So I see it's gone past 11:20 and we should have had our break before now, so we'll break for 15 minutes and then come back.

Mr. Avis, we still have to deal with your –

MR. AVIS: Sorry, I understood it – I need to go, as I thought we would –

THE COMMISSIONER: Okay, if you want, I can give it a –

MR. AVIS: – I think I need to go back also to question –

THE COMMISSIONER: Sorry, if I can give a decision, then that will give you leave to come –

MR. AVIS: You suggested when – what I'm saying is, now that I have the Massine report, I have a question to respond, my friends of the inquiry counsel raised. I want to review the report. I need to have – I want to see the report first –

THE COMMISSIONER: Okay.

MR. AVIS: – before I speak to my expert and then see, you know, in light of your comments about what is dealt with in the Massine report, see if we can narrow down the issues as well as to have his CV. So I'm not – I thought you suggested we leave that to a late – to Wednesday or something. I –

THE COMMISSIONER: Yes, but the – your – where is your witness? He is in Toronto, is he?

MR. AVIS: Yes, Sir.

THE COMMISSIONER: And were you proposing to have him present?

MR. AVIS: I discussed with him both and he's available for both, but he's not available next week, that's all.

THE COMMISSIONER: Yeah, see, that's the example of what I'm talking about in terms of when we get into, at this late stage, considering additional expert evidence.

MR. AVIS: No, I'm sorry; he's not available this week. Sorry. It's this week he's not available. He is available next week.

THE COMMISSIONER: Yeah. What I had – when I said Wednesday, I had contemplated your getting – having a witness available for Wednesday afternoon and deciding – which is not to say that he would necessarily be called to give – present a full report, but there may be aspects of it that might be necessary. And I'm saying might be necessary because there's still evidence coming in.

We have, as I understand it, Corporal Knapman referring to or dealing with this issue to some extent. And you know what the inquiry's proposed expert or the expert that's been put forward by the inquiry, you know what will probably be said there. So it's a question of your deciding whether you still need your expert when you get a chance to analyze that –

MR. AVIS: And I plan to get on to that right away, but –

THE COMMISSIONER: Right. So we could do it in a couple of different ways, one of which would be to tentatively assign Wednesday as a time you'd call your witness, if in fact that is – leave is given to do that.

MR. AVIS: As I said, I've been advised he's not available this week. I'll have to find out why.

THE COMMISSIONER: Yeah, you do that. I'm saying why – why I'm – well, we can probably – we'll look at during the break re-arranging for next week. It might have to move – might be able to move a witness from next week up for –

MR. AVIS: Yeah. I –

THE COMMISSIONER: – to make room for your witness.

Okay. Let's adjourn for 15 minutes to consider that. Then, hopefully, we'll get at the next witness in the inquiry.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now recessed.

Recess

MS. SHEEHAN: This Commission of Inquiry is now in session.

Please be seated.

THE COMMISSIONER: We don't have Ms. Breen. Is she ...?

MS. CHAYTOR: Commissioner, Mr. Freeman checked, and we're told to go ahead without Ms. Breen and Mr. Flaherty. Mr. Flaherty will be along shortly.

THE COMMISSIONER: Okay, thank you.

MS. CHAYTOR: Mr. Commissioner, our next witness is Joe Browne and I would ask, please, if we could have Mr. Browne affirmed.

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

MR. BROWNE: I do.

MS. SHEEHAN: Please state your full name.

MR. BROWNE: Joseph Francis Browne. Browne is spelled B-r-o-w-n-e.

MS. SHEEHAN: Thank you.

THE COMMISSIONER: With an E, is it?

MR. BROWNE: With an E, yes, Commissioner.

MS. CHAYTOR: Commissioner, I do have a few exhibits to ask to have entered, please, through our witness and those are P-0251, P-0254, P-0255 and P-0271 through to P-0275 inclusive.

THE COMMISSIONER: So ordered.

MS. CHAYTOR: Thank you.

Mr. Browne, I understand you are a retired member of the RNC.

MR. BROWNE: Yes.

MS. CHAYTOR: And you joined the force in 1983 and you retired in 2010.

MR. BROWNE: Correct.

MS. CHAYTOR: And I also understand that during your career with the RNC you ascended the ranks to the position of chief of police and you held that position for a four-year period between March 2006 and May 2010.

MR. BROWNE: That's correct.

MS. CHAYTOR: I understand on April 5, 2015, you were employed as the chief of staff in Premier Paul Davis's office, having assumed that position since August of 2014, and that you remained in that position until the change in government in November, I guess – December of 2015.

MR. BROWNE: Correct.

MS. CHAYTOR: I also understand that you did continue on with the Opposition Office, but you finally retired November 2016.

MR. BROWNE: Correct.

MS. CHAYTOR: And you're now fully retired.

MR. BROWNE: Correct.

MS. CHAYTOR: Okay.

In the course of your employment with the RNC, did you work with Mr. Davis?

MR. BROWNE: Yes, I did.

MS. CHAYTOR: Okay. And I understand he would have been your media relations officer when you were chief, is that correct?

MR. BROWNE: That is correct.

MS. CHAYTOR: And as chief, then, you would have been the spokesperson for the RNC, so I take it you would have had fairly frequent contact with Mr. Davis in that role?

MR. BROWNE: Absolutely.

MS. CHAYTOR: Okay.

And did you also work with the current chief of the RNC, Chief Bill Janes?

MR. BROWNE: Yes.

MS. CHAYTOR: And I understand you had a long-standing professional relationship with him; in fact, he was a senior officer under your command while you were chief.

MR. BROWNE: That's correct. Inspector, I believe, yes.

MS. CHAYTOR: Okay. And you didn't – however, you have no personal relationship with him.

MR. BROWNE: No, I don't, no.

MS. CHAYTOR: Okay.

Did you also work with Deputy Chief Singleton?

MR. BROWNE: Yes.

MS. CHAYTOR: And Superintendent Jason Sheppard?

MR. BROWNE: Yes.

MS. CHAYTOR: And Acting Inspector Joe Gullage?

MR. BROWNE: Yes.

MS. CHAYTOR: And have you maintained any personal relationship with any of those gentlemen?

MR. BROWNE: No, I have not.

MS. CHAYTOR: Okay.

While with the RNC, I understand that you knew Joe Smyth as well, but not any more than you would any other subordinate officer.

MR. BROWNE: Correct.

MS. CHAYTOR: He never reported directly to you, and you have no personal relationship with Constable Smyth.

MR. BROWNE: Correct.

MS. CHAYTOR: In your experience as chief of police, did you have contact with the premier's office?

MR. BROWNE: As chief of police?

MS. CHAYTOR: As chief of police.

MR. BROWNE: I did, yes, on occasion.

MS. CHAYTOR: Okay, and how often and under what circumstances would that have occurred?

MR. BROWNE: Not frequently. Over the span of my four years, I wouldn't be able to exactly say how many times, but not a lot, couple times a year maybe. Generally budget related; during the budget cycle each year, there might be a question or something, and there was one or two occasions with respect to security-related issues in the premier's office. That would be generally the type of activity. Public sector strike, I think, during a period of time, those type of things, but not frequent.

MS. CHAYTOR: Okay, so –

MR. BROWNE: As required, I guess is the best way to describe it.

MS. CHAYTOR: Okay. So sometimes for security issues that arose in the premier's office and other times would be budgetary issues, for the most part.

MR. BROWNE: That would be generally the contact, yes.

MS. CHAYTOR: Okay.

Did you ever have the occasion to coordinate any speaking notes for a press conference with the premier's office when you were chief of police?

MR. BROWNE: To coordinate? No, I don't think there was much. I think there was a couple of issues that we might have – I was speaking to that I think perhaps the premier of the day was, or some senior government official, so there would have been an exchange between comms folks, but I don't recall specifically any kind of coordination.

There was one issue, I think, where there had been a threat received that ultimately resulted in a criminal charge that I think we spoke to, and I think the premier of the day might have as well.

MS. CHAYTOR: Okay and that was a threat received to the premier's office or government official?

MR. BROWNE: No, there was – I received it myself as chief. Chief justice received one, same letter, premier and I think there was – I can't remember who else was in there.

MS. CHAYTOR: So in that situation, there may have been some coordination in terms of your message to the public?

MR. BROWNE: Right.

MS. CHAYTOR: Okay.

And I understood from your pre-hearing interview that your occasions in which you would have contact with the premier's office would have been rare occasions. And how about in terms of the role, then, once you became chief of staff for the premier? Did there seem to be any difference in terms of the amount of communications between the premier's office and the RNC?

MR. BROWNE: No, no change. Pretty standard.

MS. CHAYTOR: Pretty standard, so no change in that. Okay.

MR. BROWNE: Not that I saw, anyway.

MS. CHAYTOR: Okay.

And the Commission is tasked with inquiring into the Royal Newfoundland Constabulary's policies, protocols or manuals governing communications by members with the public or the media following a serious incident and during active investigations. And it would be helpful to the Commissioner to hear your thoughts as a former chief of police of the RNC on how you handled communications during active investigations and, more broadly speaking, any thoughts you might have as to how the police can balance protecting the integrity of an investigation with the public's interest in wanting to know as much information as possible.

MR. BROWNE: Right. Well, you mentioned balance and I think that's really what it's about. And, you know, you have to be cautious on what information is released, if it in any way can impact on either the investigation or if a charge is laid, for example, if there's a trial, a pending trial or during a trial. So you have to be careful on that.

But, you know, there are certain pieces of information I think that could go out that – if it didn't affect those particular considerations that could happen, but it is a delicate balance. Very often what happens is, if it attracts significant attention, media attention, the chief of the day will find him or herself in front of the scrum, media scrum, and oftentimes you're not certain what questions what will come. So oftentimes what you release is on the fly.

First is a structured, written press release, but it is a balance for sure. There are no easy answers to it.

MS. CHAYTOR: And during your time as chief, did you have a situation where you had to speak publicly regarding an officer-related serious incident.

MR. BROWNE: Yes.

MS. CHAYTOR: Okay. And how did you handle that situation in terms of public communications while the investigation was ongoing?

MR. BROWNE: I have to think back on exactly what we said, but it was, again, using that same principles. You know, I think we provided an overview of the circumstance. There was still an active investigation, so there were certain details, of course, that weren't released, but I don't remember specifically what I said at the time.

MS. CHAYTOR: Okay.

Okay, I'll move on then in terms of your role with the premier's office, unless there's anything else, Commissioner?

Sorry, yes.

THE COMMISSIONER: I was just wondering, in terms of communicating to the public while there's an active investigation, it's been suggested in this case, actually, or this inquiry, that there could have been information provided to the public regarding how the proactive policing worked in terms of going out and getting ahead of a potential threat. A couple of other items of basically a process nature where there could have been comment.

I think one of the issues was the public wondering about the officer going alone to visit a person of interest. How do you feel about the RNC issuing some sorts of general explanations about those types of issues, which don't relate to the incident itself, but relate to, I guess it would be, operational issues within the RNC?

MR. BROWNE: Right. As I was thinking back on the media coverage around this particular incident, I thought actually, that that question was posed early on in – you know, after the event and I thought it was dealt with by Chief Janes, actually. I think the added wrinkle in this case is that it was being investigated by another agency, so the RCMP had carriage of the investigation. So I think that would have complicated slightly what the RNC could or should (inaudible).

THE COMMISSIONER: So that the RNC itself did not have an effect or an impact or influence upon the RCMP investigation?

MR. BROWNE: You'd have to be doubly careful of that.

THE COMMISSIONER: Right.

MR. BROWNE: And I think that – if it was a – you know, if the RNC were carrying the file, it would be different, but I think that would have to be another consideration, and a significant one given that – you know, general practices and stuff, I would agree that, you know, you could share that information, but if any part of that was the subject of what the RCMP were doing, I think it would be challenging for the RNC to weigh it in.

THE COMMISSIONER: Uh-huh.

Okay, go ahead, Ms. Chaytor.

MS. CHAYTOR: Okay. Thank you.

So in terms of your job duties, then, as chief of staff at the premier's office, what in fact were your job duties?

MR. BROWNE: Generally, it's the administration and operation of the office.

MS. CHAYTOR: Okay. And did all members of the staff report to you either directly or indirectly?

MR. BROWNE: Yes.

MS. CHAYTOR: Okay.

MR. BROWNE: Well, say for the executive assistant to the premier and the constituency assistant; otherwise, the rest of the staff did, yes.

MS. CHAYTOR: Okay. And I understand Heather MacLean was a direct report to you?

MR. BROWNE: Yes.

MS. CHAYTOR: Okay.

And did you have any experience in politics prior to assuming the role of chief of staff to the premier?

MR. BROWNE: No.

MS. CHAYTOR: And when Paul Davis asked you to take on that role, did he indicate to you why he chose you? Were there any particular policies, for example, that he had in mind that he thought your policing background might be of assistance or an asset to him?

MR. BROWNE: No, I think it was more an administrative experience.

MS. CHAYTOR: Okay. And was there anything in terms of the administration of justice that he had in mind and discussed with you at the time?

MR. BROWNE: I think during the leadership process he was engaged in, I think all the candidates actually had issued a platform, if you will, one of the things I think was included in his, to the best of my knowledge, was putting an emphasis on – well, seniors is one because he created a new seniors department – on public safety, generally. So there was some of that.

And the other thing, really – well, two things happened: one was for a period of time the Department of Justice became the Department of Public Safety, and then ultimately the Department of Justice and Public Safety; and there was the creation of the premier's advisory committee on crime prevention. That was the extent of –

THE COMMISSIONER: We felt a little bit left out when you took the word justice out of the name.

MS. CHAYTOR: Justice out.

MR. BROWNE: I know that, personally, yes.

MS. CHAYTOR: Yes, okay. And that was –

MR. BROWNE: It was short-lived though, Commissioner.

MS. CHAYTOR: Short-lived, yes. There was some opposition, certainly, from the legal community around that.

Anyhow, in terms of your – and in your interview you did say that to me. One of the commitments was to put more focus on public safety –

MR. BROWNE: Yes.

MS. CHAYTOR: – within the Department of Justice, and that Mr. Davis had some very concrete thoughts as to what he wanted to see happen in that area.

MR. BROWNE: Well, yeah, and that led to the creation of the advisory committee on crime prevention, but that's as far as it went.

MS. CHAYTOR: Okay.

MR. BROWNE: You know the entire – we were there 12 months, essentially.

MS. CHAYTOR: Yes. Okay.

And the other thing that you did mention in your interview, and it's page 24, 23-24 of the transcript, if anybody's interested, but was again you put the re-branding of the Justice Department, you referred to with me, putting an emphasis on public safety –

MR. BROWNE: Right.

MS. CHAYTOR: – and then, as you said here today, for a short period of time it did become the Department of Public Safety.

MR. BROWNE: Yes.

MS. CHAYTOR: Okay.

Were there any other initiatives in terms of putting more focus on public safety?

MR. BROWNE: No. No, just the advisory committee.

MS. CHAYTOR: Okay.

And no discussion, for example, in terms of any dealing of social media as a form for commentary or anything like that?

MR. BROWNE: With respect to public safety?

MS. CHAYTOR: Yes, with respect to public safety?

MR. BROWNE: No, no.

MS. CHAYTOR: Okay.

Did the members of the Protective Services Unit report to you in any capacity?

MR. BROWNE: No.

MS. CHAYTOR: And in answer to your question – at your interview, I asked whether or not you would have any involvement in responding to ATIPP requests that would have been directed at the premier’s officer regarding this matter, the Donald Dunphy matter, and whether you provided any advice to your staff with respect to such requests, and you said that you would have cautioned them not to do anything to interfere with the ongoing police investigation.

MR. BROWNE: Right.

MS. CHAYTOR: Okay.

And, Mr. Browne, did you understand that the RCMP investigation – did you understand it to be a criminal investigation?

MR. BROWNE: Yes.

MS. CHAYTOR: And were you aware prior to this incident that the premier’s office staff were monitoring social media?

MR. BROWNE: Yeah. I wasn’t ultimate, you know, deeply involved in that. It wasn’t an issue I was paying attention to, but there was several accounts that were being monitored.

MS. CHAYTOR: Several accounts that were being monitored?

MR. BROWNE: Right.

MS. CHAYTOR: And we’ve heard evidence from Ms. Donna Ivey with respect to the accounts that she was monitoring?

MR. BROWNE: Right.

MS. CHAYTOR: And I understand it was primarily her job duty –

MR. BROWNE: Yes.

MS. CHAYTOR: – to do that. Not her primary job duty, but primarily that was her spear of responsibility.

MR. BROWNE: That’s correct.

MS. CHAYTOR: And what did you understand to be the purpose of the social media monitoring?

MR. BROWNE: Two things, really. Well, the social media, from what I saw, was a means to push information out more than receive it. I didn’t think it was particularly useful in that regard, at least, and that probably is based on my own inexperience with social media. But it was a form to gauge public opinion and to, you know, if a new initiative was released, to see what the reaction was. That’s my understanding of it, anyway. And occasionally, if a direct, you know, question was posed, that could be put to a department to answer, then that would be what I think – what I would have thought would have occurred.

MS. CHAYTOR: And, Mr. Browne, I’m just going to ask if you could speak a little more –

MR. BROWNE: Oops, sorry.

MS. CHAYTOR: – into the microphone. Thank you.

Did you provide any instruction to the staff as to how to go about monitoring social media –

MR. BROWNE: No.

MS. CHAYTOR: – or what to monitor for?

MR. BROWNE: I didn't have the experience to do that.

MS. CHAYTOR: Okay.

Were you aware of any policy or protocol by which they would follow to go about doing their monitoring?

MR. BROWNE: Now, I know there's a general government-wide policy on media and communications. That's the extent of my knowledge of that.

MS. CHAYTOR: Okay.

While you were chief of staff, were there files kept in the premier's office of who and what the staff was monitoring?

MR. BROWNE: No.

MS. CHAYTOR: Okay.

So if the purpose, for example, was – one of the purposes was to direct the person to the appropriate department or agency that may be able to assist them, was there any system in place to keep track of that and to follow up to make sure the person received the assistance that they required?

MR. BROWNE: Yeah, it might have – there was a TRIM process in – well, a government-wide process where correspondence is tracked. So I don't know if that would – if she would do that or not, but generally speaking. If it was a written correspondence, for example, it would be placed in TRIM and then forwarded to the appropriate department. So social media might have been done the same way –

MS. CHAYTOR: Okay. And –

MR. BROWNE: – but I don't know that for certain.

MS. CHAYTOR: Okay.

And similarly, if there were any individuals identified who may be making political commentary, were there any files kept with respect to persons who were known to be vocal on certain issues or activists in certain areas?

MR. BROWNE: Not to my knowledge. I never seen a file, no.

MS. CHAYTOR: You never, you never knew of that –

MR. BROWNE: No.

MS. CHAYTOR: – or heard of that, I should say.

MR. BROWNE: No, did not.

MS. CHAYTOR: Okay, all right.

When you were chief of police – go back there for a second – was there a protective security unit or protective PSU unit at that point in time?

MR. BROWNE: No formalized unit, no.

MS. CHAYTOR: Okay.

And I believe then it would have been done on an ad-hoc –

MR. BROWNE: Ad-hoc, as required basis, that's correct.

MS. CHAYTOR: And at that time I believe it was Mr. Williams who was premier when you were chief?

MR. BROWNE: Correct.

MS. CHAYTOR: Okay.

So then your first involvement with the PSU as a structured unit would have been when you were PO to – or chief of staff to the premier's office?

MR. BROWNE: That would be right.

MS. CHAYTOR: Okay.

And what involvement would you have had with the members of the PSU in that role?

MR. BROWNE: Very little, actually. They dealt mostly with scheduling perspective with either the communications director or the premier's executive assistant or premier's executive support staff.

MS. CHAYTOR: Okay.

MR. BROWNE: So I would see them in passing or if we were – if I attended a function, which I did rarely, but when I did with the premier, I may have been travelling in the same vehicle, but that would be it.

MS. CHAYTOR: Okay. Would they contact you or advise you if they were following up on a perceived threat or security issue regarding the premier?

MR. BROWNE: There was no requirement for them to do that. It actually only happened one occasion and it was, I think, at the conclusion of whatever they were looking into. I'd received some information, but there was no protocol or requirement for them to do that, so the one time. So it was really no practice; we had no procedure.

MS. CHAYTOR: Did you or anyone else in the premier's office to your knowledge provide them with any instruction or guidance as to how they were expected to go about doing their duties?

MR. BROWNE: No.

MS. CHAYTOR: What was your practice in terms of the level of knowledge to be given to Premier Davis on issues of security or perceived threats?

MR. BROWNE: It – well, as I said, there was only one that I was made aware of. You know, this particular incident, this unfortunate event, occurred at around the six-month point in time that we were there, and so in the five months leading up to that, there wasn't a whole lot. You know, if the premier was travelling, there may be some advisories that the PSU would bring to our attention, but that's generally it.

MS. CHAYTOR: Okay.

And I understand that sometimes the PSU members would contact you to advise if they were following up on something, in terms of a perceived threat or –

MR. BROWNE: Well, once.

MS. CHAYTOR: Once, okay. That happened once. And in that particular case, what happened?

MR. BROWNE: I don't remember the exact details of it, but it was – I don't even know why it came to their attention, but there was an incident or an issue with somebody in Paradise, I believe was the location. And that was a matter followed up by Corporal Doug Noel.

THE COMMISSIONER: I'm sorry, I couldn't hear.

MR. BROWNE: It was followed up by Corporal Doug Noel. It didn't amount to anything so it was – when he spoke to me it was, I'd spoken to – I think he said he'd spoken to the subject and there was nothing to it.

MS. CHAYTOR: Okay.

Mr. Browne, in terms of communications from Constable Smyth to members of the premier's office, we've looked at a couple of email, and we can bring them up if you wish, but P-0253 is one. It's an email, January 25, 2015, and I know I reviewed this with you during your pre-hearing –

MR. BROWNE: Yes, you did. I know what you're talking about.

MS. CHAYTOR: – interview and it was sent by Constable Smyth to members of the premier's office including yourself, and this was the one regarding – it had originated with the RCMP as a bulletin regarding Islamic State of Iraq and it was for law enforcement-only flag.

THE COMMISSIONER: That's the ISIS one, is it?

MS. CHAYTOR: That's the ISIS one, yes, yes, Commissioner.

In that situation, in that particular email, Constable Smyth wrote that "Premier Davis fits into a unique category of having been a former police officer, and now public Government leader."

Did you see that as being relevant to his security, the fact that he was a former police officer?

MR. BROWNE: Other than, as I understand it, that he fit two out of three categories, I think, that were attached to the advisory.

MS. CHAYTOR: Okay. All right.

And February – in this same one, sorry, he refers to some basic characteristics to be cognizant of. Were you aware at this point in time of any heightened sense of security or concerns for threats of this type of nature in our province at the time?

MR. BROWNE: Not in our province. There was some activity on a national and international scale, but none that I was aware of so ...

But these things are often based on intelligence reports that are circulating within the policing community. So I hadn't been aware of what the intelligence was in this province since I left as chief.

MS. CHAYTOR: Okay.

MR. BROWNE: So I don't know what – if that was, you know, part of the rationale behind this or not.

MS. CHAYTOR: And I think you referred in your interview to the fact that the Ottawa shooting had happened the fall preceding this –

MR. BROWNE: Right.

MS. CHAYTOR: – this email and that the world is a changing place in terms of these types of issues, is what I understood you to say.

MR. BROWNE: Yes.

MS. CHAYTOR: Okay. All right.

And then the one of February 4, 2015; that's P-0072. And, again, Madam Clerk, you can bring it up if you wish, but I'll just go through again. This was sent to you along with other members of the premier's office.

And in this one there's similar about Premier Davis being a police officer, but also under the second bullet it refers to Newfoundland undergoing a period of fiscal adversity and restraint: "A struggling economy, whether real or perceived, creates some heightened concern for security of elected officials. Persons whom already hold a grievance towards government can feel further justified in their actions or rhetoric based on a perceived sentiment of an apparent majority. The same perception can also cause an escalation in the number of persons of interest where herd mentality becomes a factor."

And was this – what's being expressed here in this bullet, was this a concern, belief or sentiment in the Davis administration? Was this –?

MR. BROWNE: No.

MS. CHAYTOR: Okay.

Commissioner, I'd like to move on, then, to the specific events leading up to the April 5 encounter. The Commissioner has heard evidence, of course, from Donna Ivey regarding an email that she sent to Joe Smyth and Doug Noel on April 3, 2015. And she described her subject line as a tweet of concern. And, Mr. Browne, you were copied on that email.

MR. BROWNE: Yes.

MS. CHAYTOR: And you recall getting that email.

MR. BROWNE: I do.

MS. CHAYTOR: Okay.

And if we could bring up P-0078, please.

Were you aware of this tweet or any concern regarding Mr. Dunphy prior to receiving Donna Ivey's email on April 3?

MR. BROWNE: No.

MS. CHAYTOR: Okay.

We see on the bottom here is where she sends it, sends it along, and it's the last in this series. Okay, and then there's some communication back from Constable Smyth.

And then you reply: "This guy seems to be an injured worker. His constant tweets are focused on that subject."

And I'm wondering, then, Mr. Browne, how did you know this about Mr. Dunphy, that he was an injured worker and his tweets were focused around that subject?

MR. BROWNE: Right, so when I received that, I think it was an hour or so after the initial email was sent, I think Constable Smyth or Acting Sergeant Smyth was posing a question about what the context of this was. I was also curious. So I was sitting in front of my own computer. I googled the Twitter address. I don't see it on the screen here, but it was Donahue2DonDunphy or whatever the Twitter address was and then found –

MS. CHAYTOR: Okay, and here it is.

MR. BROWNE: – and when I did that, of course, I had a look at it very quickly. Didn't put much time into it. Scrolled through some of the things I saw on there. I noted a statement on the – well, it's called a term, but the profile page: "a crucified injured worker from" Newfoundland. So that was – when I saw that, that's why I ...

MS. CHAYTOR: Okay, and it might be helpful, then, if we bring up P-0009, please.

THE COMMISSIONER: Sorry, I was taking note, I missed it.

MS. CHAYTOR: I'm sorry.

THE COMMISSIONER: Was that before or after the shooting?

MR. BROWNE: This was on April 3, Friday.

THE COMMISSIONER: April 3, thank you.

MS. CHAYTOR: Yes, Commissioner, so what I understand the witness to say is that it was before the shooting and that's what enabled him to be able to reply on 11:30 a.m., April 3. He gathered some information by going online and looking at Mr. Dunphy's Twitter account and

that he was an injured worker. That's how he describes himself on his Twitter account and that seemed to be the focus of his tweets.

And if we could just bring up –

MR. BROWNE: Well, I was looking at Donahue2DonDunphy. I, at that point, didn't know if there was a Don Dunphy then. We didn't learn that –

MS. CHAYTOR: Okay.

MR. BROWNE: – that there was an actual person by that name until afterwards of course.

MS. CHAYTOR: Don Dunphy?

Okay. All right.

And we don't have that here, but I thought he had identified himself as being Don Dunphy, an injured worker, in his profile, but I could be wrong on that.

MR. BROWNE: Well, no, I think you're right but –

MS. CHAYTOR: Okay.

MR. BROWNE: – again, this is Twitter and social media, so I wouldn't rely too much on that until it was confirmed.

MS. CHAYTOR: Okay.

And you weren't very – you weren't – it wasn't one of the areas in which you had any particular skill set.

MR. BROWNE: No, I didn't. I had very little experience on it also.

MS. CHAYTOR: Okay.

Page 2, please, and this is the –

MR. BROWNE: None.

MS. CHAYTOR: This is the threat – or the thread of tweets that we had from Mr. Dunphy that day. You read the tweet, obviously, the one that was sent by Ms. Ivey.

MR. BROWNE: Yes.

MS. CHAYTOR: And when you went in to look at Mr. Dunphy's account, did you read through the thread of the tweets?

MR. BROWNE: No, I didn't see these. I didn't – I wasn't – the first time I saw those, I think, was Sunday, or it was after the shooting, anyway. So I'd scroll very quickly. There was a lot of – if I recall, a lot of retweeting, there was a lot of information on the site, so I just did page down and, you know, I spent a couple of minutes on it, enough to – that based on the profile description to make what I said: he seems to be an injured worker. It wasn't conclusive.

MS. CHAYTOR: Okay.

So you didn't go in to find the particular tweet –

MR. BROWNE: I wouldn't have –

MS. CHAYTOR: – and put it in context with the other tweets.

MR. BROWNE: To be frank, I wouldn't have really known how to do that.

MS. CHAYTOR: Okay. All right.

MR. BROWNE: I don't use Twitter. Never did; still don't.

MS. CHAYTOR: Okay.

What you read then, did it cause you concern?

MR. BROWNE: The tweet that was sent by Donna Ivey?

MS. CHAYTOR: Yes.

MR. BROWNE: That one? Yeah, well, I agreed with her assessment on it. It was a tweet of concern.

MS. CHAYTOR: Okay.

And I think you told me on your interview not particularly, but you did agree with Ms. Ivey passing it on to the PSU.

MR. BROWNE: Yes.

MS. CHAYTOR: She took the appropriate action.

MR. BROWNE: Yeah, I wasn't particularly concerned with it, but I could see why she would classify it in the way she did and I have no issue with that.

MS. CHAYTOR: Okay.

And in terms of it being of concern that you thought you needed to notify Mr. Davis about it, did you notify him or think that it warranted you notifying him?

MR. BROWNE: No. I didn't, no.

MS. CHAYTOR: Okay.

And so you didn't mention that this was happening to Mr. Davis, the email exchange or the fact that Donna Ivey had identified a particular tweet and forwarded it to the PSU?

MR. BROWNE: No, not at that point. It was much too early to have any discussion on that.

MS. CHAYTOR: Okay.

And at any point in time prior to the shooting, did you do that?

MR. BROWNE: No.

MS. CHAYTOR: Did you think that the tweet was directed at Mr. Davis?

MR. BROWNE: Not particularly. I wasn't sure what it was directed at, actually. It was really confusing, but ...

MS. CHAYTOR: Okay.

And we can see that it copies the @PremierOfNL account, but it also has @SandyRCollins as well as @ShermanDowney. And I understand Sherman Downey to be a singer. And this was – Sandy Collins had originally tagged that @PremierOfNL and that @ShermanDowney, so Mr. Dunphy is replying to all three or sending this out to the three of them.

MR. BROWNE: Right. This is not the email I saw, right? So you – this is not the –

MS. CHAYTOR: Okay.

I'm sorry. Okay.

This is not the one you saw, but it's part of the trail.

MR. BROWNE: Right, but I didn't see those until after so ...

MS. CHAYTOR: Right. Okay.

And I think that's true, though, if we could just scroll down, then, the ones that – right. Okay.

So in terms of being directed, it's the same three that originated with Mr. Collins's tweet. If we start with Mr. Collins, he has @PremierOfNL and he also has @ShermanDowney. And then those are – that, along with Mr. Collins's, then, Twitter handle, is what we see in the string.

MR. BROWNE: Yes.

MS. CHAYTOR: Okay.

And I take it then, Mr. Browne, you had never heard of Mr. Dunphy through any other source in government prior to the shooting.

MR. BROWNE: No.

MS. CHAYTOR: So his plight in terms of being an injured worker, that hadn't been the subject of any discussion.

MR. BROWNE: No, it did not.

MS. CHAYTOR: Okay.

MR. BROWNE: Was not.

MS. CHAYTOR: When you read through some of his tweets, did you read anything that caused you any concern for the premier's security?

MR. BROWNE: No.

MS. CHAYTOR: Joe Smyth replied, and we've taken down the email, but he replied and said that he was familiar with him, but he's explained that in his evidence that he was thinking it was a different person.

MR. BROWNE: Uh-huh.

MS. CHAYTOR: But he will move to speak with him. Did you understand that he was going to go meet with Mr. Dunphy?

MR. BROWNE: Well, I didn't know there was a Mr. Dunphy at that time.

MS. CHAYTOR: Well, to the person who was the subject of the tweet or other third of the tweet?

MR. BROWNE: If I – it's not here on the screen, but what I thought he said: he would do some background work and move to speak to the person, or words to that effect, I think. So that, to me, was the standard –

MS. CHAYTOR: Okay.

MR. BROWNE: – approach that he would take.

MS. CHAYTOR: Okay.

And did you know, then, that Mr. – or Constable Smyth was headed to visit Mr. Dunphy prior to the shooting? Did that come to your attention in any respect prior to the shooting?

MR. BROWNE: No, it did not.

MS. CHAYTOR: Okay.

Did you have discussion with any other member of the RNC regarding Mr. Dunphy prior to the shooting?

MR. BROWNE: No.

MS. CHAYTOR: And I understood from what you said in your interview and from what you're saying here today that you thought you felt the comment was such that warranted Constable Smyth following up on it.

MR. BROWNE: Yes.

MS. CHAYTOR: And I think your words, you called it, he would carry out a threat risk assessment is how you described it in your interview –

MR. BROWNE: Right.

MS. CHAYTOR: – to figure out who the person is and whether or not they might pose a risk or whether, in fact, the comment may be a threat –

MR. BROWNE: Yes.

MS. CHAYTOR: – that it would be appropriate action for him to take.

MR. BROWNE: Correct.

MS. CHAYTOR: Okay.

Mr. Browne, when and how did you learn about the shooting?

MR. BROWNE: Sunday afternoon, mid-afternoon, just after 3 o'clock, I think, I received a – well, we had some phone-tag issues, but ultimately spoke to Chief Bill Janes of the RNC.

MS. CHAYTOR: Okay, Bill Janes.

And what did Bill – Chief Janes tell you?

MR. BROWNE: It's been – the passage of time is certainly significant now, but I can tell you generally what he spoke – what he said to me. I don't know specifically, I couldn't give you verbatim, but it was that Acting Sergeant Smyth had been involved in a police shooting, fatal police shooting.

And he mentioned, if I recall correctly, Mitchells Brook, but – because I think I had this – I didn't – never heard of it. And I, for some reason, said to him: Isn't that on the West Coast of the province? And so I think he said it was on the Southern Shore or something. But that was – then that's the extent of the conversation we had.

MS. CHAYTOR: Okay.

And I think that your phone records would show that you had a conversation – there were actually four calls between yourself and Chief Janes that day, but the two that you would be referring to were 3:15 p.m. and 3:17 p.m. Is that correct?

MR. BROWNE: Right.

MS. CHAYTOR: That would be about right?

MR. BROWNE: I think so, yes.

MS. CHAYTOR: Okay.

Why would Chief Janes call you to inform you of this?

MR. BROWNE: I think – well, you could ask him, but I think, you know, as a member of the protective detail it would be appropriate to advise the premier's office and I would probably be a logical point of contact.

MS. CHAYTOR: Did you recall at the time whether or not Chief Janes was able to give you the name of the individual who had been shot?

MR. BROWNE: I don't recall if he had the name during that conversation or not.

MS. CHAYTOR: Okay.

Did you link the information that you were receiving from Chief Janes to the email exchange that had occurred a couple of days before and Constable Smyth saying that he was going to move to speak to the individual?

MR. BROWNE: Not during the conversation, the brief conversation I had with Chief Janes, but we met later in that afternoon and each of us had a particular piece of information. I don't know exactly how –

THE COMMISSIONER: Who's we? Yourself and the chief?

MR. BROWNE: No, myself, the premier, deputy chief of staff and the director of communications.

MS. CHAYTOR: Heather MacLean, yes.

MR. BROWNE: Yes.

MS. CHAYTOR: There was a meeting, we've heard, 4 p.m. that afternoon after receipt of this information, approximately.

MR. BROWNE: Yeah, I thought it was little later than 4 but –

MS. CHAYTOR: Okay.

MR. BROWNE: – it's my –

MS. CHAYTOR: All right.

Well, and that's just the –

MR. BROWNE: – 5 o'clock.

MS. CHAYTOR: – evidence that we've had –

MR. BROWNE: Yeah.

MS. CHAYTOR: – that it was approximately 4 o'clock.

MR. BROWNE: Around 4:35 I thought it was, but ...

MS. CHAYTOR: Okay.

MR. BROWNE: So I think at that point each of us had a little piece of information. I don't know exactly how we assembled it, but when we did, you know, that's when Don Dunphy's name was first, I think, confirmed.

MS. CHAYTOR: Okay.

MR. BROWNE: Or identified to us.

MS. CHAYTOR: Okay.

So in terms of the timing of that meeting – and others have put it at approximately that time, so you think it was a little bit later than that, maybe closer to 4:30.

MR. BROWNE: Yeah – yeah, I don't know exactly, but it could have – yeah, I thought it was a little later in the afternoon –

MS. CHAYTOR: Okay.

MR. BROWNE: – but somewhere between 4 and 5.

MS. CHAYTOR: Okay.

And if we could bring up, then, P-0252 and these are your phone records. And if we look at page 3, please, Madam Clerk, at the bottom, we'll start at the bottom and then work over to the top.

These are your phone excerpts. And I – and we can see here that we have the two phone calls to – that I've already referred you to, 3:15 and 3:17, with Chief Janes.

MR. BROWNE: Uh-huh.

MS. CHAYTOR: So 015. And then if you come down, then, at 4:35 p.m. there's another call not quite four minutes with Bill Janes at that point in time as well. So did that discussion with Bill Janes happen while you were still in your meeting at Confederation Building?

MR. BROWNE: I don't – I don't know. I can't say for certain.

MS. CHAYTOR: Okay.

MR. BROWNE: It might have.

MS. CHAYTOR: And what was the purpose of Chief Janes calling you back at 4:35?

MR. BROWNE: I don't recall the exact details of it. I thought we were interrupted when we spoke first. I believe he had an incoming call and we didn't complete our conversation earlier.

MS. CHAYTOR: Okay.

And so that would be your first two calls that you had. There was a one-minute call with him at 3:15 and then your 15:17, two minutes later, you had a rollover two-minute call with him.

MR. BROWNE: Right.

MS. CHAYTOR: Okay.

So but then there's a subsequent call at 4:30 in the afternoon. So you don't recall what was discussed or the purpose of that call?

MR. BROWNE: No. The exact details, I don't know.

MS. CHAYTOR: Okay.

And then we also have over on to the next page another call at 5:34, again with Chief Janes. And it appears you spoke to him for a little over three minutes. So do you recall what you would have spoken to him about at 5:30 p.m. that evening?

MR. BROWNE: With RNC – that's where I think we were still – I was still at the office. I'm pretty sure that's the last call I made to him (inaudible).

MS. CHAYTOR: Okay, so you're still at the office. And is this during your meeting?

MR. BROWNE: Yes, so that's why I thought it was a little later than 4. So it's 5:30 – no, I might have been there a little later than everybody else, but it was –

MS. CHAYTOR: Okay. So at least one of these calls is what you're saying happened while you were still at your meeting.

MR. BROWNE: Yes.

MS. CHAYTOR: Okay.

And then what was the purpose of Chief Janes speaking to you or during your meeting with others at the premier's office?

MR. BROWNE: Well, the focus or the conversation of the meeting was around communications. That was essentially it. The meeting didn't take very long to actually occur or happen. And I think at this point we were wondering what, if anything, the RNC – if they were going to speak to it and when and those sorts of issues. And I think it was just to connect the communications people.

MS. CHAYTOR: Okay.

And why would that be necessary for the premier's office to coordinate public communications with the RNC?

MR. BROWNE: Well, this was a significant issue and that's exactly what communications people do is issues management. There were – we were certain that the premier would at some point very soon the next day be required to speak to the media.

And, in fact, I believe there was already media inquiries that I was aware of during the meeting that was brought up. I think Heather had mentioned she had been contacted or – and there actually might have been an early media report as well so ...

MS. CHAYTOR: And she had been contacted, I think, by David Cochrane. Is – yeah, she had – she's given evidence to that effect and we've seen some records.

MR. BROWNE: It could be. Yes.

MS. CHAYTOR: Yes. Okay.

And I should have filled in the blanks, but your phone records also show that after you've received those first initial calls from Chief Janes, then within, I think, two or three minutes you made efforts to contact the premier right away.

MR. BROWNE: Oh, absolutely. Yes.

MS. CHAYTOR: Okay.

There's also some text messaging between Warren Sullivan and Joe Smyth on April 5, 2015, and this is at P-0268, page 3. And in that messaging, Constable Smyth suggested to Constable Sullivan that perhaps the chief, meaning the chief of police, should contact Joe Browne. And then he said Joe Brown was, and then in quotation marks – and this would be at page 3 of this exhibit, please, if we could make it a little bigger: Maybe he should contact Joe Browne. And then Constable Smyth suggests "He is aware of the person."

And what awareness would Constable Smyth think that you had of Mr. Dunphy at this point in time?

MR. BROWNE: I wouldn't know because I had no awareness of it. I didn't know at that point who Mr. Dunphy was or if, in fact, there was a Mr. Dunphy, so ...

MS. CHAYTOR: Okay.

Did this come up in your discussion with the chief, that you had any awareness of the situation regarding Mr. Dunphy?

MR. BROWNE: I don't know. I didn't have any awareness of him, so ...

MS. CHAYTOR: Okay. Well, I guess the only awareness that we have seen in the record would be that you weighed in on the email chain on April 3.

MR. BROWNE: Right. To Donahue2DonDunphy, whoever – which we now know, of course, was Mr. Dunphy.

MS. CHAYTOR: Okay. And so other than your internet searching on Mr. Dunphy on April 3, you had no other awareness of Mr. Dunphy.

MR. BROWNE: No, I did speak to – well, I don't know exactly, I'm sure you have it here – but I did speak to Constable Noel. I remember calling Constable Noel that afternoon as well – Corporal Noel, sorry – to see if he was aware or if he had heard of the situation. And so he had basically relayed much the same information as I'd gotten from Chief Janes. Don't know if he mentioned the name then or not. I don't think so, but that was the extent of the conversations.

MS. CHAYTOR: Okay. Thank you.

Commissioner, I'm just noticing that we are at our regular break time, but if you wish and if others are – I don't know if we need to – should we push through and take a shorter lunch break? I'm in your hands.

THE COMMISSIONER: We have Dr. Avis scheduled, do we, for 1:30?

MS. CHAYTOR: Yes, he's scheduled, yes, for 1:30 and we may be able to – I think he is booked out for the whole afternoon, so it may be that we are able to push through as much as we can with Mr. Browne and I'm concerned that we not – if Mr. Avis –

THE COMMISSIONER: Yes, it's going to be – I'm a bit nervous about that. I've dealt with doctors before, and they're pretty locked into their schedules. If you don't mind, we'll split the testimony and – I don't know if it's possible to have Chief Browne – Mr. Browne, can you come back this afternoon? Do you have problem with that?

MS. CHAYTOR: If we finished up late – if we finished up earlier with Dr. Avis?

THE COMMISSIONER: Yes, I'm thinking if we finish with, we set it for – it would probably be 3:30 or 4 o'clock?

MS. CHAYTOR: Three-thirty or four, maybe? Or if not, I've spoken with Mr. Browne –

THE COMMISSIONER: Do you think we will finish Mr. Browne in that period of time?

MS. CHAYTOR: I think so. I can keep going for a few more minutes here now, too, if that's helpful.

THE COMMISSIONER: Subject to other counsel of course.

Sorry?

MS. CHAYTOR: I can keep going for probably another 10 minutes, too, to knock off a little more if that's helpful, if people don't mind a shorter lunch break.

THE COMMISSIONER: Well, I think we're pressing counsel enough as it is in terms of time, so ... They have to try and maintain other lives as well, so I think we'll break here and recess.

MS. CHAYTOR: Okay.

MR. BROWNE: But, Commissioner, I spoke to Ms. Chaytor –

MS. CHAYTOR: Yes, we spoke.

MR. BROWNE: – before we started, and tomorrow afternoon it was a possibility. I do have a couple of things on, like –

MS. CHAYTOR: This afternoon?

THE COMMISSIONER: Yeah, no, that's fine.

MR. BROWNE: If you're really pressed, I could see if I could change for this afternoon, but it would be a little difficult.

THE COMMISSIONER: Yes, we'll make arrangements.

MS. CHAYTOR: Yes, Mr. Browne indicated that he couldn't come back tomorrow morning, but tomorrow afternoon, and we may not go all day. We've now set aside all day for Chief Bill Janes, but he may not go all day, so maybe late tomorrow afternoon would be a good option.

MR. BROWNE: My afternoon is open, so I have no issue with that.

THE COMMISSIONER: Okay. Well, let's schedule to get you back. What time in the afternoon should we look for?

MR. BROWNE: Your call, Commissioner.

MS. CHAYTOR: Maybe be available by 3, and – but it could be later than that. We'll try not to keep you waiting too long.

MR. BROWNE: I understand.

THE COMMISSIONER: Okay. So if you could come back 3 o'clock tomorrow, hopefully we will finish with you.

MS. CHAYTOR: Yes, and my understanding from counsel is they're not anticipating a whole lot of cross-examination of Mr. Browne.

THE COMMISSIONER: Right. Okay.

MS. CHAYTOR: So, yeah.

THE COMMISSIONER: Anything before we break, counsel?

So we'll break until 1:30. One of the reasons I wouldn't go through is I have another meeting now at 12:45, so –

MS. CHAYTOR: Okay.

THE COMMISSIONER: – we'll break until 1:30 this afternoon and begin with Dr. Avis.

MS. CHAYTOR: Dr. Avis, yes. Okay, thank you, Commissioner.

Thank you, Mr. Browne. I apologize.

MS. SHEEHAN: All rise.

The Commission of Inquiry is now recessed.

Recess

MS. SHEEHAN: All rise.

I declare this Commission of Inquiry in session.

Please be seated.

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

MS. CHAYTOR: Okay. Commissioner, the next witness is Dr. Simon Avis.

Dr. Avis, if you could please take the stand.

THE COMMISSIONER: Is the microphone on?

MS. CHAYTOR: Okay.

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

DR. AVIS: I do.

MS. SHEEHAN: Please state your full name?

DR. AVIS: Simon Paul Avis.

MS. SHEEHAN: Thank you.

THE COMMISSIONER: Good afternoon, Doctor.

MS. CHAYTOR: Commissioner, before we begin, there are a couple of more exhibits. We have actually several more: P-0361 –

THE COMMISSIONER: P-0361?

MS. CHAYTOR: Correct; through to P-0373.

THE COMMISSIONER: 3 –?

MS. CHAYTOR: 373. So that'll be inclusive: P-0361 through to P-0373.

THE COMMISSIONER: Okay.

MS. CHAYTOR: And then we also have P-0738 and P-0739.

THE COMMISSIONER: Thank you.

So ordered.

MS. CHAYTOR: Good afternoon, Doctor.

DR. AVIS: Good afternoon.

MS. CHAYTOR: So before we begin with your evidence, Nick Avis, counsel for the RNC, raised on Friday that you are in fact his brother. And I just want to clarify for the record that at the time you carried out your work in relation to this matter that we're going to discuss today, your brother was not counsel to the RNC. And in fact, of course, the inquiry had not even been called at that point in time.

DR. AVIS: Yeah (inaudible).

MS. CHAYTOR: Okay.

And I would ask then – Commissioner, you have before you P-0361, which is Dr. Avis's CV. And I'm just going to review a couple of highlighted portions of your CV, please, Doctor.

You received your MD from Memorial University in 1979.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: And on June 1989 you received your certification from the Royal College of Physicians and Surgeons in general pathology and anatomical pathology.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: And then in March 2001 you received founder designation in forensic pathology by the Royal College.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay. And in August 1995 you were appointed the chief forensic pathologist for the Province of Newfoundland and Labrador. And then in September 1996 you were appointed the first chief medical examiner for the Province of Newfoundland and Labrador, and that's a position you hold to this date.

MR. AVIS: That's correct, Ma'am, yes.

MS. CHAYTOR: Okay.

Commissioner, unless there are any questions, I would ask, please, to have Dr. Avis qualified as an expert witness in forensic pathology.

THE COMMISSIONER: Counsel have any suggestions or any questions about Dr. Avis's qualifications?

MS. BREEN: I have no questions; but, Mr. Commissioner, the monitors aren't on.

THE COMMISSIONER: Okay.

MS. BREEN: On the sides for the public.

MS. CHAYTOR: Thank you, Ms. Breen.

THE COMMISSIONER: We'll rectify that, hopefully.

MS. CHAYTOR: Thank you, Ms. Breen.

And, again, the Exhibit is P-0361.

THE COMMISSIONER: Okay.

So with no – if there are no questions to be raised, no objections, I'm satisfied from the curriculum vitae the history of Dr. Avis's training, education and training, and experience that he should be qualified as a forensic psychiatrist.

MS. CHAYTOR: Pathologist.

THE COMMISSIONER: I'm sorry. Forensic –

MS. CHAYTOR: Pathologist.

THE COMMISSIONER: Pathologist. What did I say?

MS. CHAYTOR: We're back into this morning, I think.

THE COMMISSIONER: What did I say, psychiatrist.

MS. CHAYTOR: It's an expert witness in forensic pathology, please.

THE COMMISSIONER: Well, okay.

MS. CHAYTOR: Well, we could see what else we could squeeze out of you, I guess.

Okay. All joking aside; I understand, Doctor, that you hold your position as chief medical examiner pursuant to section 3.1 of the *Fatalities Investigation Act*.

DR. AVIS: Yes, I am.

MS. CHAYTOR: Okay. And if we could bring up please P-0372. And I just want to spend a little time just reviewing a few of the provisions of that act.

Part of what we're doing here is an educational process as well, Dr. Avis. So it may be new to some people listening that the *Fatalities Investigation Act* may be something that people aren't aware of.

And if we look at section 5(a) perhaps you could tell us, when do you, as the chief medical examiner, get involved in a death?

DR. AVIS: Well, under the act, anyone who becomes aware of a death that is reportable under the act is required to report it to a medical examiner, a duly appointed medical examiner in the province. That may in fact be me if it's in the St. John's area, or it may be someone else if it's outside of the Avalon Peninsula.

At some point in time, as the chief medical examiner, the death will be reported to me. The reports would be sent to me. I will review the reports and ensure the accuracy and the competency and completeness of the investigation and then our office will certify it as a true report from the medical examiner's office.

MS. CHAYTOR: Okay. And so in the situation here with section 5, Notice of death. "A person having knowledge of or reason to believe that a person has died under one of the following circumstances shall immediately notify a medical examiner or an investigator: (a) as a result of violence, accident or suicide."

And I take it that's where we were with respect to Mr. Dunphy?

DR. AVIS: Yes, Ma'am.

Section 5 applies to those individuals who die in the community.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Go back to that for a moment.

MS. CHAYTOR: Yes.

THE COMMISSIONER: Doctor, that seems to be a little clumsily worded. The 5(c) "where the person was not under the care of a physician."

That would probably be covered by (b) and (d), would it? Is that really necessary there, the (c)?

DR. AVIS: No, I think it is a necessary accompaniment to enable us to request physicians to sign death certificates –

THE COMMISSIONER: I'm sorry, I can't hear you. To –

DR. AVIS: In order for us to request physicians to sign death certificates on patients that they have in the community. If a person is not under the care of a physician –

THE COMMISSIONER: Right.

DR. AVIS: – there is no one to sign a death certificate.

THE COMMISSIONER: Oh, okay.

“A person having knowledge of or reason to believe a person has died under one of the following circumstances shall immediately notify a medical examiner or an investigator.”

Well, someone dies and the person was not under the care of a physician, wouldn't that be an example of either unexpectedly when the person was in good health or where the cause of death is undetermined? Would you need (c), and it's not important – I guess it's not very significant, but when I read it, and when I read it again, it seems to stick out as something different than the other four; (a), (b), (d) and (e) I can understand.

DR. AVIS: Well, a person could die unexpectedly and not in good health but not be under the care of a physician.

MS. CHAYTOR: That's true.

THE COMMISSIONER: Right; (c) says “where the person was not under the care of a physician.”

We'll leave it.

MS. CHAYTOR: Okay. All right.

The next section I'd like to take you through is page 6, and it's section 9(1), and this is with respect to possession and release of the body. And 9(1) says: “When a medical examiner conducts an investigation into a death under this Act, he or she is considered to take possession of the body at the time he or she receives the notification.

“(2) As soon as possible after taking possession of the body, the medical examiner shall sign a notice in the form prescribed by the Chief Medical Examiner and have it affixed to the body or the shroud, garment or container holding the body.”

I understand from our prehearing interview what that would normally be in your practice, that would be the toe tag?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Two, yes, okay.

And 9(1) in this particular situation I understand, or perhaps you could tell us, when and how did the notification happen with respect to Mr. Dunphy's death?

DR. AVIS: I think Mr. Dunphy's death occurred was Dr. Denic was covering – the death was reported to him. He would therefore provide direction as to the initial procedures, where to transport the body and how to transport the body, what information we may require. The body would have been transported to our facility at Eastern Health and then when the working week starts the responsibility of the case would go over to the medical examiner who's on service that week, which was myself. So I would have taken over the first week day.

MS. CHAYTOR: Okay.

DR. AVIS: It initially got reported to Dr. Denic.

MS. CHAYTOR: Okay.

And so from the time it was reported to Dr. Denic that is the point in time that it's considered that you were – the medical examiner had taken possession of the body.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

And then under 10(1): "Upon notification of a death, where the medical examiner is satisfied that the death occurred under a circumstance referred to in section ..." – and we just referred to section 5 – "the medical examiner shall investigate the death and where possible establish (a) the identity of the person; (b) the date, time and place of death; (c) the cause of death; and (d) the manner of death."

And I understand, Dr. Avis, and I'm going to take you through in some detail your report, where you were able to answer those questions.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

In section 11, then we have Duties of investigator: "An investigator, when authorized by a medical examiner, (a) shall assist the medical examiner in carrying out his or her duties under this Act; and (b) may exercise the powers and duties of a medical examiner as enumerated in section 10.

"(2) Every member of the Royal Newfoundland Constabulary and the Royal Canadian Mounted Police is by virtue of his or her office, a medical examiner's investigator."

And, Dr. Avis, in this situation I understand the RCMP would have been your investigator. Is that correct?

DR. AVIS: Yes, Ma'am.

The death occurred in the jurisdiction of the RCMP, so they would be our primary investigators.

MS. CHAYTOR: Okay.

And in your interview, Dr. Avis, we had some discussion about circumstances where something is considered a criminally suspicious death and you mentioned that in that situation the police may have a dual role, acting as the criminal investigator in addition to acting as your investigator. Perhaps you could just explain that to the Commissioner, please.

DR. AVIS: Well, I'm not saying that they would have a dual role. If they are attending a death where the circumstances from the get-go suggest that there is criminal activity or it's criminally suspicious, it is our advice that the police officer act primarily as a police officer and act accordingly, rather than act as a medical examiner's investigator since we have certain powers of search and seizure that are limited to answering our four questions that we wouldn't want the police to confuse and apply our criteria to their case. So it's more of a question, if it's criminally suspicious act as a police officer.

MS. CHAYTOR: Okay. Fair enough.

Thank you for clarifying that. And the four questions, of course, that you referred to are those that I took you through in section 10(1): the identity; the date, time and place; cause of death; and the manner of death. Those are your –

DR. AVIS: Yes, all of our authority, which includes searching and seizing without warrant is only to answer those four questions.

MS. CHAYTOR: That's correct. And I'll take you – I'll also point out that section in the legislation as well.

Dr. Avis, was this considered, to your knowledge, a criminally suspicious death?

DR. AVIS: It would certainly be considered a homicide from the very get-go. Yes, Ma'am.

MS. CHAYTOR: Okay.

And in situations where it's considered a homicide from the beginning, in those situations, based on your experience, do the police usually get a warrant in addition to any powers they might have in acting under your authority? Is there usually a warrant obtained?

DR. AVIS: I would hope that warrants would be obtained and that the investigation proceed as if it was a criminal case as opposed to simply a medical examiner's case.

MS. CHAYTOR: Okay. And I think on your interview you weren't sure, but you had assumed – I don't want to put words in your mouth, but you weren't sure, but you had assumed that there would have been a warrant obtained in this case.

DR. AVIS: The normal course of events is for the police – we can hold the scene under the medical examiner's authority whilst the police obtain a general warrant and go from there, such that anything that would be seized from the scene would not be thrown out because of, you know, the fruit from the poison tree. If they had seized it under our authority it may not be appropriate evidence for a criminal case.

MS. CHAYTOR: Okay, because it may not necessarily be directly related to the death. There may be evidence that's not – that can't meet the test.

DR. AVIS: Well, any evidence we have has to have –

MS. CHAYTOR: It has to be directly related, that's right.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay. So in this case, did you know whether the RCMP were proceeding solely under your authority and without a warrant?

DR. AVIS: No, I would have to assume that they were proceeding under a warrant as if it were a criminally suspicious death.

MS. CHAYTOR: Okay.

Okay, and if we could then now look at 12(1) on page 8, Powers of a medical examiner: "A medical examiner, or an investigator acting under his or her authorization, may without a warrant (a) enter a place where he or she believes on reasonable grounds that a body that is the subject of an investigation, or matters related to the body, is or has been located."

Now, in this situation, did you or any member of your office visit Mr. Dunphy's residence?

DR. AVIS: No, Ma'am.

MS. CHAYTOR: Is that something that you do in the course of your mandate from time to time? And, if so, under what circumstances do you find it necessary to visit?

DR. AVIS: Visiting the scene in person is done quite rarely these days. Visiting the scene via photographs and video is done in almost every case. So in every case we will review the scene. We require the police to provide us photographs of the scene, and that is how we do our scene investigations.

We will occasionally enter a scene if it's a situation where the police require some further information as to the nature of the case. For example, in a badly decomposed body it might be difficult to determine whether or not violence has been perpetrated. Under those circumstances we will go to the scene to examine the body and to provide the information to the police that what you're seeing is consistent with body decomposition and not violence. So we will, we will go to the scene if it's required to assist in the investigation.

MS. CHAYTOR: Okay.

And then under 12(1)(b), it's "take possession of anything which he or she has reasonable grounds to believe" – and this is the wording – "may be directly related to the death."

And in this case, Dr. Avis, what did you take possession of that you believe might be directly related to Mr. Dunphy's death?

DR. AVIS: Well, we didn't take possession of the firearms or any of the instruments in the room. I believe they were – those possessions were taken by the police officer, and we did not take the firearm that was used or allegedly used. Again, that would not be something we would do. We would prefer the police handle those types of instruments.

MS. CHAYTOR: Okay.

So under your authority, I believe you said that the only thing that you would have seized were the medications, Mr. Dunphy's medications.

DR. AVIS: The medications would have been something we would have seized to assist us. They may have had a role or may have had a contributing element to the death. Yes, Ma'am.

MS. CHAYTOR: Okay.

And were you aware that a rifle found at the scene, ammunition found at the scene, Constable Smyth's firearm, a stick belonging to Mr. Dunphy, a yellow file folder found at the scene, that all of these items were seized by the police?

DR. AVIS: I'm not quite sure about the yellow file folder, but I'm aware of the other.

MS. CHAYTOR: Okay.

And would you be able to say whether the stick or that file folder would be directly related to Mr. Dunphy's death?

DR. AVIS: I can't see a file folder being directly related to his death. And given the fact that there was no evidence of blunt force injury contributing or causing the death, I don't see the stick would either.

MS. CHAYTOR: Okay.

And (c) says: "may cordon off or secure the scene or area in which the death under investigation occurred for a period not exceeding 48 hours or an extended period that the Chief Medical Examiner may authorize."

Do you know if the scene was in fact secured, and did you have any communications with anyone from the RCMP as to any measures taken to secure the scene?

DR. AVIS: No, Ma'am.

The security of the scene would – I would have believed to be under the police themselves. They were not using my authority to hold the scene. I did not receive a request to hold the scene. And, again, in a criminally suspicious case of this nature it's usually the police that hold the scene.

MS. CHAYTOR: Okay.

DR. AVIS: There may be times where until they get a warrant that we will hold the scene for a short period of time, but we would not hold the scene for an investigation into a criminally suspicious death.

MS. CHAYTOR: Okay. So you were operating under the understanding that there would have been a general warrant in place.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

In this case we know the scene was released on April 7, 2015, following the autopsy. The autopsy was also carried out on that date. Is that right Doctor?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

And if we could look at P-0364, please. And this is a Supplementary Occurrence Report of Constable Shawn Seaward of the RCMP, who I understand Constable Seaward attended the autopsy.

And Constable Seaward says that he "attended the OCME office today. Present were myself, Cst John Galway and Cpl Kelly Lee from FIS. The autopsy was presided over by Dr. Simon Avis ... Cst Galway was exhibit member and seized all exhibits ... The autopsy was completed in three hours and cause of death as expected was from a gunshot wound(s). Dr. Avis had no issue with the releasing of the residence. His report will be forthcoming."

Dr. Avis, what circumstances would have given or could have arisen that would have caused you to pause and not want to release the residence at the point of time of having completed the autopsy?

DR. AVIS: If there was any question as to the cause of death, we may hold onto the scene and –

MS. CHAYTOR: Okay, so –

DR. AVIS: There are other times we will hold onto the scene. For example, even if we're investigating a death where the person has died of carbon monoxide poisoning, even though we know the cause of death we may not release the scene at that point in time because we may not have identified where the carbon monoxide is originating from and therefore the scene poses a danger to other people. Again, no issue with releasing the scene is with respect to my four questions.

MS. CHAYTOR: With respect to your four questions, okay.

So any discussion that you had with Constable Seaward or any other member of the RCMP on this, you understood that you're agreeing to that with respect to your mandate under the *Fatalities Investigations Act*?

DR. AVIS: Other evidence such as fingerprints and what have you is never discussed with me. That's privy to the police investigation and –

MS. CHAYTOR: Okay.

And if we could bring up P-0365, please. And this is an Identification Continuation Report of Corporal Kelly Lee, and what she writes in her report is that no issues were identified by Dr. Avis's perspective. So this might be helpful to you here in terms of what she writes – if I could just find her reference.

THE COMMISSIONER: Right there.

MS. CHAYTOR: And here it is right here. "No issues were identified from Dr. Avis' perspective or that of FIS that would necessitate maintaining DUNPHY's residence as a scene any longer."

Okay. So I take it in your discussions with the police, again, you were looking at it from your perspective and the four questions you were being asked to answer. Is that correct?

DR. AVIS: I guess, Ma'am.

MS. CHAYTOR: Okay.

And at the time that you make that determination, did you review any documentation or consult with anyone; have any other discussions with anyone?

DR. AVIS: I can't recall anything specific, no.

MS. CHAYTOR: Okay.

And if we could look then at P-0738, and this is your final report which is dated June 4, 2015. And this is the form, Doctor, I'm sure you're quite familiar with it. On page 2, please, Madam Clerk.

And perhaps you can just tell the Commissioner, what is the purpose of this form and who receives this form?

DR. AVIS: This is a form generated by our office, the final report. It just simply puts the demographics of the individual, immediate cause of death, circumstances and any other comments, or whether an inquiry is indicated or considered.

MS. CHAYTOR: Okay.

DR. AVIS: The amount of information put under the final report will vary, depending on the case. For example, in a homicide we tend to put less information on the front sheet as opposed to a natural death or a motor vehicle accident or a suicide.

MS. CHAYTOR: Okay. All right, Doctor.

And I just want to clarify for the record here, Madam Clerk, I'm not sure why this came up with C015. I think originally it was indicated to be a confidential exhibit, but the new number is P-0738.

MS. SHEEHAN: Yeah.

MS. CHAYTOR: Okay. So this record is a public record and not a confidential record.

Now, in terms of – you've given the date of death here but, Doctor, are you able to say the time of death?

DR. AVIS: No, Ma'am.

MS. CHAYTOR: And the immediate cause of death is indicated to be a gunshot wound, and then in terms of – if we come down here, sorry – Manner of Death, you ticked homicide.

And perhaps you could just explain what that term means from a medical point of view.

DR. AVIS: Okay. Well, the manner of death, which is a statement as to how the cause of death came about, is listed as either: "Natural, Accident, Suicide, Homicide, Undetermined." That classification is a medical one. It is not a legal one, and it doesn't have any implications for culpability or legal standing.

Homicide is simply, from a medical perspective, where an individual's death occurs as a result of the actions of another individual.

MS. CHAYTOR: Okay.

And then: Other significant conditions contributing to the death but not cause related, and this isn't filled out. So I take it there was nothing that you were able to identify in that respect.

DR. AVIS: No, Ma'am.

MS. CHAYTOR: Okay.

And then the question: "In your opinion was this death preventable?" And there's nothing completed there. And why would that be? Were you able to give an opinion on that?

DR. AVIS: We're steering away from giving an opinion as to whether death was preventable, simply by policy.

MS. CHAYTOR: Okay.

DR. AVIS: In fact, if you look at most of our reports, that is not – that is very rarely filled in.

MS. CHAYTOR: Okay.

DR. AVIS: When the medical examiner system was originated in 1996, these forms were generated. We're still using the same forms that were generated back then. When we have the new forms they won't be included.

MS. CHAYTOR: Excuse me, Madam Clerk, what's happened to my document? Okay. Sorry about that, Doctor.

And the last question there that's not completed is whether or not a public inquiry is recommended, and that's not completed. And can you speak to that, in terms of when you would complete that and what information you would need to determine whether or not a public inquiry would be warranted or recommended.

DR. AVIS: We'd only include it on the front sheet if we believe a public inquiry is – or is indicated. We would make a recommendation to the Minister of Justice in writing.

MS. CHAYTOR: Okay.

DR. AVIS: That's how we do – that's how it would be under the act.

MS. CHAYTOR: Yes. Under section 25, I believe, of the act you would then have the authority to be able to recommend to the minister that a public inquiry be held.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

DR. AVIS: The problem is that these final report sheets aren't always filled in by the chief medical examiner. They may be filled in by the local medical examiner who may start thinking of a public inquiry, you know, and start filling it in. So we – as I say, when we get around to revamping the forms, we will be removing those particular options.

MS. CHAYTOR: Okay.

And then if we also continue on then. After this final report, then we have the actual autopsy report on page 3 here, and I understand again the autopsy happened April 7, 2015, and so it was two months prior to your final report. So in terms of the period of time in between, why would there be a delay in issuing your final report, or why would there be that two-month gap?

DR. AVIS: Well, you know, an autopsy is not something that just happens on a single day. The anatomic dissection of the body will happen on the day of the autopsy. So on April 7 the anatomical dissection would have occurred. We then wish to review sections of organs and tissue under the microscope. It varies from case to case, but in most cases we'll be looking at, at least some tissue. There's also toxicology, which takes anywhere from two to three months, depending on when it's sent off. We have to send our toxicology down to the US, it's batched. So on average, it's about four to six weeks.

MS. CHAYTOR: Yeah, I think in this case the toxicology report is dated April 30, 2015; so this one seems to have come back a little quicker, perhaps.

DR. AVIS: Which means it was probably towards the end of our batching process and –

THE COMMISSIONER: Excuse me, counsel, I'm going to have to take a break for a moment.

Excuse me, Doctor, I have to do something in my office please.

Thank you.

Recess

MS. SHEEHAN: All rise.

The Commission of Inquiry is now in session.

Please be seated.

THE COMMISSIONER: I apologize for the interruption, Doctor.

Go ahead when you're ready.

MS. CHAYTOR: Okay.

Doctor, when we broke, I was asking you about the time difference between when the autopsy happened and your final report, and you explained that there would have been histology as well as waiting on toxicology from the – and I understand in this case, the toxicology was done in the United States and the report came back on April 30. We'll have a look at that in a minute. Were you waiting on any information from the RCMP before concluding your report?

DR. AVIS: No.

MS. CHAYTOR: Okay. All right.

And if we could go back, please, I was done with this page of the document. Okay. So if we look at – and this is page 3 of the exhibit – in terms of the other people who were in attendance, of course we've heard from Corporal Kelly Lee, who did the fingerprinting. You and Corporal Lee took photographs during the autopsy. And we also have present here a prospector – and I'm sorry, could you – how do we pronounce his last name, please?

DR. AVIS: Dr. Denic?

MS. CHAYTOR: No, the prospector.

DR. AVIS: Oh, Dr. Karavelic.

MS. CHAYTOR: And I understand that he was a resident who was completing his training in pathology at the time. Is that correct?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: All right. And what role did he play in the autopsy?

DR. AVIS: He's just doing a dissection under my supervision.

MS. CHAYTOR: Okay. So he did the dissection under yours and – and, or I guess – Dr. Denic's supervision because he's present as well?

DR. AVIS: Dr. Denic was just in and out. He wasn't there for the entire autopsy.

MS. CHAYTOR: Okay.

And I understand that sometimes you would leave the room as well but that would be to look at information from radiology because there were X-rays of the skull and that type of thing as well?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay. All right.

And we also – the only other person then that hasn't been, I think, identified, Dr. Daniel Reid, and I understand he would have been an autopsy technician. Is that correct?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: All right.

And we see a total of – there were three RCMP officers present, Corporal Lee and Constable Galway, as well Constable Seaward. Is it usual to have three police officers attend?

DR. AVIS: It's usually two, sometimes three. It depends on the nature of the case, and sometimes individuals will come and just stay for part of it and go. It's (inaudible).

MS. CHAYTOR: Doctor, I'm just going to ask you to lean in a bit again –

DR. AVIS: Sorry.

MS. CHAYTOR: – too, please, make sure we can hear you.

DR. AVIS: We would mention anyone who was in and out of the autopsy room or spent any amount of time, but two officers is not unusual.

MS. CHAYTOR: Two is not unusual, how about three?

DR. AVIS: Three, sometimes. It depends.

MS. CHAYTOR: Sometimes three.

DR. AVIS: Yeah.

MS. CHAYTOR: Okay.

And Findings, you say there are two gunshot wounds to the head and a gunshot wound to the torso. If we scroll down here in terms of – and we've already talked about the cause and manner of death. Toxicology: blood ethanol, so blood alcohol level was negative. And I understand again that's part of what was done in the toxicology in the US.

Is there any reason why that would be done in the US, as opposed to why wouldn't this be done in St. John's?

DR. AVIS: Well, there are no forensic crime labs in St. John's or forensic toxicology labs. There's virtually none in Canada that will do it for a cost-recovery basis.

MS. CHAYTOR: Okay. I understand some of your blood screening or some of this was done here too, though?

DR. AVIS: Some of it will be done in at the Health Sciences Centre : blood alcohols, for example, carbon monoxides, blood sugars and things of that nature, but toxicology you require a fully certified forensic lab and ...

MS. CHAYTOR: Okay.

And so drug screening then you've indicated was non-contributory. And what did you mean by that?

DR. AVIS: The drugs present didn't cause or contribute to the death of the individual.

MS. CHAYTOR: Okay.

And perhaps we could look at page 13, then, of the document. This is the Toxicology Report. And there were some positive findings, and the compounds that are listed here, perhaps you could just explain, or perhaps over on the next page under the analysis and comments. Perhaps you could explain to the Commissioner what these drugs are that were found in Mr. Dunphy's system and what the results mean and the report limit?

DR. AVIS: Well, Delta-9-THC, Delta-9 Carboxy THC and 11-Hydroxy Delta-9-THC are all metabolites of cannabis, marijuana or hashish.

Levels really don't mean too much. We're not sure, you know, when a person's considered under the influence, there are no guidelines, but those levels are fairly commonly seen. Delta-9 is the active metabolite, Carboxy THC is the inactive metabolite and the 11-Hydroxy is also another active metabolite.

This just indicates that the individual had consumed cannabis at some point prior to his death.

MS. CHAYTOR: Okay.

And so, for example, if someone were to look at this and think, well, report limits are 1.0 and then the result is 20. That doesn't mean 20 times some limit or indicate anything in terms of –

DR. AVIS: No.

MS. CHAYTOR: Okay.

DR. AVIS: And the report limits is just a cut-off. So when they say negative, it's not really negative, it's less than 1.

MS. CHAYTOR: Okay.

DR. AVIS: So it could be 0.8 and we'd still call it negative. So that's just the reporting limits and I give the reporting limits for each analyte. So Delta-9 Carboxy THC, the reported limit is 5.0 so if it comes in at 4.9, they'll record it negative.

MS. CHAYTOR: Okay. All right.

And in terms of – you said these are usual – the results are usual, so nothing too much out of the ordinary.

DR. AVIS: They're not – they're not outstanding.

MS. CHAYTOR: Okay, nothing too much out of the ordinary. Okay.

DR. AVIS: But, as I say, it does suggest the recent consumption of cannabis.

MS. CHAYTOR: Okay. I'm just –

DR. AVIS: And –

MS. CHAYTOR: I'm sorry, go ahead.

DR. AVIS: Sorry.

MS. CHAYTOR: I just want to look at under 2 here there's reference – these are Reference Comments. And number 2 suggests that: "Pharmacologically, it has depressant and reality distorting effects."

Okay. Anything in terms of levels that you're seeing here that you think may have been contributing to Mr. Dunphy's state of mind at the time?

DR. AVIS: No, Ma'am.

MS. CHAYTOR: No? Okay.

DR. AVIS: And the other drug present was Oxycodone –

MS. CHAYTOR: Yes.

DR. AVIS: – which is an opiate which is present in OxyContin and Percodan or Percocet.

MS. CHAYTOR: Okay.

And also what's referenced here, it refers to peak concentrations being attained after certain times of ingesting or smoking the marijuana. Are you able to determine, based on the levels or any analysis that were carried out, how recently Mr. Dunphy had consumed marijuana in relation to the timing of his death?

DR. AVIS: His marijuana?

MS. CHAYTOR: Yes, marijuana.

DR. AVIS: Well, the fact that Delta-9 THC was present indicates that it was recent, probably within a few hours.

MS. CHAYTOR: Okay, but nothing – you can't gauge it any more than that, just within a few hours.

DR. AVIS: Can't say any more than that.

MS. CHAYTOR: So sometime, sometime that day.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay. Would this indicate that Mr. Dunphy would have been under the effects of marijuana then at the time of his death, whatever those effects might be?

DR. AVIS: It would be hard to say. I don't know what Mr. Dunphy's habit with these types of drugs are. If he's a regular user, or whether he's an occasional user, whether this was the first time he'd ever used it, it's really hard to say.

MS. CHAYTOR: Okay. I think the evidence was that he was a therapeutic user for a long period of time.

DR. AVIS: Then this I would suspect would be a fairly typical pattern for him for therapeutic purposes, similarly, with the oxycodone.

MS. CHAYTOR: Okay. And what is the usual known effect of marijuana in terms of a – on a person's demeanor?

MR. KENNEDY: Can he answer that question, Commissioner?

THE COMMISSIONER: Sorry, what was the question?

MR. KENNEDY: He's a forensic pathologist and Commission counsel is asking him the effects of marijuana on a person's demeanor.

THE COMMISSIONER: Uh.

MR. KENNEDY: If they were going to leave that evidence perhaps it should have come in from another source, not a pathologist.

THE COMMISSIONER: Just one second now.

I think Mr. Kennedy may be correct here, Ms. Chaytor.

MS. CHAYTOR: That's fine, I'm happy to move along.

THE COMMISSIONER: Yeah.

MS. CHAYTOR: I'm fine. That's fine.

In terms of oxycodone, anything in those levels that are of concern?

DR. AVIS: No, Ma'am.

MS. CHAYTOR: Okay. And is there anything in terms of the combination of the drugs that you're seeing here?

DR. AVIS: I don't believe a combination of cannabis and oxycodone would be an issue. There are some drugs that in combination with oxycodone may increase the effect of them, but I wouldn't be concerned about the presence of cannabis and oxycodone.

MS. CHAYTOR: Okay. And you were comfortable in reviewing this, and I take it, it's part of what you would do. You are comfortable reading the toxicology report and putting non-contributory in terms of the death, in your report. Or do you have someone else interpret this for you before you make that conclusion?

DR. AVIS: I mean, as a forensic pathologist I have to be able to interpret toxicology; otherwise, I wouldn't be able to do my job.

MS. CHAYTOR: Okay. And in terms of then, one other reference comment here, it says: sustained – “However, sustained-release perforations” – and this is with respect to the oxycodone. “However, sustained-release preparations appear to produce adverse reactions, up to and including death, at concentrations of oxycodone well below 1000 ng/mL, especially in combination with other central nervous system depressants, depending on use pattern and route of administration.”

Is there anything of – is that of any relevance in terms of being contributory to his death?

DR. AVIS: No. This is really the fluff of the report. It really doesn't contribute anything to my interpretation.

MS. CHAYTOR: Okay. All right.

And so –

DR. AVIS: It does come with every report you know.

MS. CHAYTOR: Are you able to give any opinion as to whether the level of marijuana found in Mr. Dunphy's system would affect his coordination?

MR. KENNEDY: Isn't that the same question that was asked earlier, Commissioner?

MS. CHAYTOR: No, I asked his demeanour.

THE COMMISSIONER: No, the previous question was on demeanour, Mr. Kennedy.

Just let me – give me a second here. Sorry, here's my binder. I just want to go back.

Dr. Avis, I have your CV here, in terms of – as part of your training, to what extent do you get into this sort of question, the extent to which a certain quantity of marijuana or oxycodone or the combined effect might affect coordination? Do you have any training in that regard?

DR. AVIS: Well, we have to interpret it in terms of does it cause death?

THE COMMISSIONER: Sorry, I cannot hear you.

DR. AVIS: As to whether drugs cause death; you have to appreciate that drugs (inaudible).

THE COMMISSIONER: Whether the drugs cause death, yeah, but the –

DR. AVIS: Yeah, but before you die you start to become uncoordinated, you start to stop breathing and then you stop breathing, and then you die.

THE COMMISSIONER: That's, you mean, if there's an overdose. Is that what you're referring to there?

DR. AVIS: I mean it's hard not to study the effects of drugs. I mean, what other expert is there out there that's going to provide the information?

MS. CHAYTOR: Well, I guess from Mr. Kennedy's point of view it would be somebody who would have some direct training in toxicology.

Mr. Kennedy, what are you suggesting?

MR. KENNEDY: I'm suggesting that the issue of the effect of marijuana or the potential effect of marijuana is one that would have been known to Commission counsel throughout this matter, that a more – a forensic psychiatrist or a psychiatrist would be the individual who could talk about the effects of drugs and not the forensic pathologist. They've chosen not to address the issue. There are police officers who could have actually addressed the issue such as the guy who did the grow-op examination, Sergeant Conohan.

THE COMMISSIONER: Ms. Chaytor, do you have any comment?

MS. CHAYTOR: Well, I certainly understood from my interview of this expert that he felt that he did have the extensive experience and would be able to answer the questions. He certainly answered the question on demeanour on his interview and I thought I'm hearing the expert say today that he feels comfortable in answering the question.

THE COMMISSIONER: Yeah, I just want to go –

MS. CHAYTOR: Perhaps you could help us out with your resume.

THE COMMISSIONER: I'm looking at the CV. Can you tell me, Doctor, –

MS. CHAYTOR: Let's bring up, please, P-0361 to help the doctor.

THE COMMISSIONER: – where you would have gotten the training in that particular area?

Here we're not talking about the effect of these drugs in terms of causing the death, directly causing the death of Mr. Dunphy. We're seeking to establish whether the drugs that he took might have led him to have a certain degree of – well, a certain lack of coordination, this last question, which might have bearing upon his ability to do certain things that are relevant in the police investigation, so whether it would affect his physical coordination.

Where in your training in the CV that we have here –

DR. AVIS: There's no specific course –

THE COMMISSIONER: No. Okay.

DR. AVIS: – that's addressed in here. It's simply addressed with the knowledge of forensic pathology.

THE COMMISSIONER: When you say the knowledge of forensic pathology, well you pick that up in various courses as well as your on-the-job training, shall we say. Did you not?

DR. AVIS: There's no courses on drugs and behaviour and how people react to drugs. Similarly, I would say a forensic psychiatrist never measures the level of drugs and therefore would never have any idea what the patient's actual levels are.

THE COMMISSIONER: Right, but they are measured here in the police investigation. Are they not?

DR. AVIS: Yeah, but I doubt that a psychiatrist ever sees –

THE COMMISSIONER: Sorry?

DR. AVIS: I doubt that a psychiatrist ever sees (inaudible).

THE COMMISSIONER: Okay, you're saying a psychiatrist in terms of whether a psychiatrist would –

DR. AVIS: (Inaudible.)

THE COMMISSIONER: But the mere fact that you can't point to someone else out there who can do it doesn't mean that we have to accept you as being able to do it if – in law. It's a matter of ensuring that when we qualify you as a forensic pathologist that you have the ability or that you're entitled to give an opinion on that. You're only entitled to give an opinion if you've had education, training or accumulated work experience. So that's what we're trying to pin down now, in terms of Mr. Kennedy's objection.

So you say it's in your general knowledge of forensic pathology. Are you saying that within the courses that you took in order to qualify, you picked up various bits and pieces?

DR. AVIS: There was no specific course.

THE COMMISSIONER: No, okay. There's no specific – we know that. We've established that. Now, where did you have information then or where did you develop your knowledge of –?

DR. AVIS: Well, when discussing drug overdose deaths and issues of that nature.

THE COMMISSIONER: Okay, if there's a question, for example, we'll take it as a hypothetical, if there's a question in the investigation of a death, where the defence is self-defence because the victim, the dead person, did something and there's a question of whether he or she was able to do something, considering a possible lack of coordination, due to imbibing of drugs or the taking of drugs. Are you – you know, do you feel that you have the training to qualify in that regard? In other words, you're not – it's not a matter of whether drugs took Mr. Dunphy's life, it may be a matter of whether he had the coordination and ability to do something which justified Constable Smyth responding.

DR. AVIS: I have no difficulty not answering the question.

THE COMMISSIONER: I know you have no difficulty not answering. I think we all have that situation. What I want to know is if – whether I should permit the question to go to you because you have the qualifications as a forensic pathologist to – and because you've been exposed to this before in your education and training. And you say you haven't been specifically exposed, in terms of a course, one particular course but have you been exposed in other parts of your training?

DR. AVIS: No, Sir and there is, as far as I'm aware, scientific evidence that links levels of marijuana or cannabis or THC with behavioural consequences.

THE COMMISSIONER: What about alcohol?

DR. AVIS: Well, alcohol has been studied infinite because alcohol is easy to test. Alcohol is reliable to test and over the years people have studied the effects of alcohol –

THE COMMISSIONER: But you're saying –

DR. AVIS: – by giving alcohol to individuals, –

THE COMMISSIONER: Right.

DR. AVIS: – measuring their levels and seeing how they respond.

THE COMMISSIONER: They actually did that in Newfoundland, the RCMP when the jury was still out as to whether we'd bring in limits on alcohol while driving. They brought – invited most of the bar out to a club and supplied two individuals with alcohol so we could see how much it would take to get individuals to particular stages. So I'm familiar with that in alcohol.

Now, they brought in – we're in a situation where medical marijuana is available and the police are involved in determining whether someone is under the influence of marijuana. They must have a way of testing it, do they not?

DR. AVIS: Well, they are developing ways of testing it but they still are not sure what levels and what – how to interpret the levels with respect to how a person behaves.

THE COMMISSIONER: Right.

DR. AVIS: Some information suggests that chronic users actually do better under the influence of marijuana than not under the influence. It's –

THE COMMISSIONER: Chronic, chronic, okay –in your – so that would be a regular user in your scale there is it? You gave us a scale of regular, occasional and first-time user, I think, early on.

DR. AVIS: Yes, Sir. Studies have shown that people who regularly use marijuana can do boring tasks, if you will, –

THE COMMISSIONER: Right.

DR. AVIS: – better then when they don't do marijuana.

THE COMMISSIONER: Okay.

DR. AVIS: But again you have to know the drug history of the individual that you're, that you're looking into.

THE COMMISSIONER: Okay. Ms. Chaytor, so –

DR. AVIS: One of the problems you're going to have with testing for cannabis road side is we have no idea what levels and incapacitation means. We don't know what it means.

THE COMMISSIONER: Okay. I suspect there'll be lots of people calling upon you over the next few years.

MS. CHAYTOR: Volunteers for some research.

THE COMMISSIONER: I'm sorry.

UNIDENTIFIED MALE SPEAKER: The next time I have one of those trials, I know exactly who I'll be calling.

THE COMMISSIONER: Okay, Mr. Kennedy, so your position is that in order for Dr. Avis to answer that question I have to see it to some particular area of his experience, training, education which has dealt with that. Is that ...?

MR. KENNEDY: Well, there's also other issues, Commissioner. It's my understanding that –

THE COMMISSIONER: Sorry, what did you say?

MR. KENNEDY: There are other issues. My understanding is that medicinal marijuana, which has been referred to a couple of times, has a different component than the marijuana that Mr. Dunphy was growing in his house.

We don't know the strength of that marijuana, which, if you do a THC test, it will tell you the levels of THC in there, which would have an effect. So there are so many variables.

THE COMMISSIONER: Well, why –?

MR. KENNEDY: But that doesn't tell you the –

MS. CHAYTOR: I think – I think –

MR. KENNEDY: What that tells you is the concentration in his blood.

THE COMMISSIONER: Yeah.

MR. KENNEDY: It doesn't tell you the THC content.

MS. CHAYTOR: I thought, and I could be wrong but, Doctor, I believe on your interview you indicated that what you were seeing in the toxicology part here is what you referred to as pure marijuana as opposed to some of the things that you see on that –

DR. AVIS: No, I –

MS. CHAYTOR: Do you want to refer to that piece or –? In terms of the type of marijuana that you sometimes see on the streets these days, that type of thing.

DR. AVIS: No, it's cannabis as opposed to –

MS. CHAYTOR: The cannabis, sorry, yes, cannabis.

DR. AVIS: I think I might have been referring to the synthetic marijuana. This is not –

MS. CHAYTOR: Right. And this is not synthetic marijuana, right?

DR. AVIS: No.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Sorry, Mr. Kennedy, go ahead.

MR. KENNEDY: This issue has been before the Commission. Commission counsel, Commissioner, has been aware of it. There are other effects of marijuana.

They could have had an expert. I mean, Bingley is about drug recognition experts who can come in a testify about the effects of marijuana.

THE COMMISSIONER: That's what I was just going to mention.

THE KENNEDY: But there's also the psychological effects of marijuana; if you're going to get into the physical or the physiological, there's also the psychological effects.

So I just object to this question being answered here and that this expert clearly does not have the expertise to provide the answer. He's indicated himself.

THE COMMISSIONER: Ms. Chaytor, anything further to add?

Again, I think it may, to some extent, not be a significant issue in that we have the report, as it stands right now, of Dr. Avis would be that he did not see this as a ...

MS. CHAYTOR: It's non-contributing.

THE COMMISSIONER: A contributing factor, right.

MS. CHAYTOR: So the drug screening he indicates as being non-contributory. So perhaps the expert could explain what it is you mean when you say drug screening, in this case, was non-contributing to his death. What exactly are you referring to?

DR. AVIS: Well, he had no physiological effects that would result or contribute to a person's death.

THE COMMISSIONER: To the person's death. Okay.

MS. CHAYTOR: And you're not – sorry.

THE COMMISSIONER: Go ahead.

MS. CHAYTOR: Yes. And you're not able to then answer the other questions in terms of whether or not it's contributing to anything else to do with this case?

DR. AVIS: Well, I think I've objected to providing any answer as to how it might make a person behave. So I'm fine, I have no –

THE COMMISSIONER: Well, they haven't objected to that. They've objected to your replying to that without indicating where you have gotten your information. Unless we can go further in that regard, Mr. Kennedy, it's –

MS. CHAYTOR: If I could, just one other question then. Have you given similar type of evidence in any other legal proceeding?

DR. AVIS: Well, I'm sure defence counsel have asked me several times questions –

MS. CHAYTOR: Similar and you've provided answers similar to the questions that I'm asking you here today.

DR. AVIS: Yeah.

MS. CHAYTOR: Yes.

DR. AVIS: I cannot tell you when, who or –

MS. CHAYTOR: No, but you've been qualified in court, given those answers to –

THE COMMISSIONER: Well, I don't think that's going to be enough, Ms. Chaytor, the fact that another counsel might not have objected or –

MS. CHAYTOR: Objected, fair enough.

THE COMMISSIONER: There's too many variables there.

Just move on. I'm going to give some further consideration of that before I give a final ruling.

MS. CHAYTOR: Okay.

Thank you.

MR. DROVER: Can I clarify an answer? Did Dr. Avis say that there's no reliable scientific studies done on the behavioural, I guess, including physical behaviours of marijuana? Was that something you said during your discussion?

DR. AVIS: Titrating levels with behaviour. We don't know what – what does a level of five nanograms per milligram mean in terms of your behaviour? I don't know, I don't think anyone knows.

MR. DROVER: So then that seems to me that he's kind of answered the question by saying there's no real reliable studies out there and he wouldn't be able to say. Would I be wrong in saying that? I don't want to put words in your mouth.

THE COMMISSIONER: No, that's, well – Mr. Kennedy do you have any problem with that? I think Dr. Avis is entitled to say what he doesn't know about or what he hasn't seen in terms of that aspect of cannabis and the consumption of cannabis.

Ms. Chaytor, I think that's –

MS. CHAYTOR: (Inaudible.)

THE COMMISSIONER: Sorry, I didn't see you there, Mr. Flaherty.

MR. FLAHERTY: Sorry, Mr. Commissioner.

THE COMMISSIONER: Go ahead.

MR. FLAHERTY: Just to put forward, this might help clear things up, based upon my employment law practice and labour law practice, I think there's a bit of a difference here that people aren't picking up on. One is the research with respect to certain levels and how that may impair or may affect behaviour but then there is, as far as I was aware, other research that shows that if someone is under the affects they may have a psychological or certain psychological changes in behaviour. But I think, and I may be corrected, Dr. Avis, that the main crux of what

Dr. Avis is at is that unlike a breathalyzer, or alcohol testing, there was no agreed upon way or there's no method to say this testing level results in this type of behaviour.

THE COMMISSIONER: This level of the cannabis in the blood stream –

MR. FLAHERTY: Indicates impairment or this type of impairment. But once someone is impaired there are certain, or there may be certain types of behaviour that are associated with impairment, but correlating impairment with THC blood levels, as far as I'm aware and what I'm aware of accords with what the doctor said, that the research suggests that level and the type of impairment, there's no consensus.

THE COMMISSIONER: We're going to call you as an expert shortly now.

But thank you, Mr. Flaherty.

THE COMMISSIONER: Yeah, I think I understand the distinction and I think, as Mr. Drover, summed up, Dr. Avis's testimony, I think that's where it stands right now that in Dr. Avis's opinion he's unable to state what the effect – correct me if I'm wrong, Doctor – you're unable to state what the effect of the amount of drugs in Mr. Dunphy's bloodstream or body might have resulted in, in terms of idea demeanour or coordination. Would that be fair?

DR. AVIS: Yes, Sir.

THE COMMISSIONER: Okay.

MS. CHAYTOR: Thank you, Commissioner.

If we go back then, back to your report, so that's P-0738, page 5 of exhibit. There's a note written here towards the middle of the page: "Paper bags are placed over the hands after opening the body bag and prior to removal of any clothing."

Dr. Avis, what is the importance of the bags on the hands?

DR. AVIS: Well, normally when you're moving a body from a scene to a different location, especially if it's a – I'm going to use the term criminally suspicious, although I don't particularly like that term, but I think everyone knows what one means when you say criminally suspicious, its customary to a bag the hands and any other part, feet and head if necessary, to prevent loss of evidence.

As the body is moved from the scene of death into a vehicle, out of a vehicle, into a cold room, out of a cold room, unto the autopsy table, off the autopsy table, there's a chance for trace evidence to get lost. So one usually puts bags on the hands to prevent that from happening; paper bags.

MS. CHAYTOR: And I understand then, in the normal course the bags are placed on the hands at the scene before the body is moved.

DR. AVIS: At the scene. Yes, Ma'am. In this case they weren't and so we just simply put – once we were aware of that we put bags over the hand to prevent any potential contamination from primer residue which would be the residue caused by the discharge of a firearm from contaminating any surface.

THE COMMISSIONER: You did that at the morgue.

MS. CHAYTOR: They did that at –

DR. AVIS: We did that in the morgue. It ideally should have been done at the scene.

MS. CHAYTOR: Okay.

And then on the next page, page 6 please, Madam Clerk. This is the External Examination of the body. We can just scroll down, here we go. “Examination of the ears are unremarkable.” And in terms of if there had been blood, or any significant amount of blood in the ears, would that have – you expect to see that noted in your report?

DR. AVIS: Depending on the amount, you have to remember that a number of orifices do contain blood just from the normal process of dying. So it’s not unusual to see body fluids in oral cavities, nasal cavities.

MS. CHAYTOR: Okay, so I understand –

DR. AVIS: Ears would be a bit different because blood coming from the ears could indicate fracture at the base of the skull.

MS. CHAYTOR: It could indicate a fracture to the face or skull?

DR. AVIS: It’s something that we might look for as a sign of a skull fracture.

MS. CHAYTOR: Okay. And in this case of course the fracture to the skull would have been obvious, I would take it. So in that sense if there were blood in the ears it may not be remarkable in that sense.

DR. AVIS: And that type of observations is far more relevant for a living person.

MS. CHAYTOR: Yes, okay.

DR. AVIS: Because for us, we take the brain out and look to see if there’s any fractures. In a living person, you have blood coming out of the ears may give the clinical tip off that there’s a fracture.

MS. CHAYTOR: Okay. And in terms of the nose, it’s unremarkable and there’s no evidence of abrasions, contusions or lacerations. You do the same thing, make the same comment in terms of Mr. Dunphy’s mouth and you also say that his dentures are present in the upper and lower jaw. And I take it they would have been in place, intact in his upper and lower jaw, is that correct?

DR. AVIS: Yes, Ma’am.

MS. CHAYTOR: And the – if the person at some time prior to their death had been frothing at the mouth, would you expect to see any evidence of that at this point in time?

DR. AVIS: It depends how much frothing at the mouth; a small amount of frothing, no. A mild amount of frothing, you might see dried saliva in the corners of the mouth. In individuals who have extensive frothing, yes, you may see it externally and you may see it within the airways.

MS. CHAYTOR: Okay.

And do I understand that in any event post-mortem that body’s fluids sometimes come out of the mouth, in any event?

DR. AVIS: Yes, and the frothing fluid would have a different connotation. Yeah, frothy fluid would have a different connotation than just simple fluid. Frothy fluid usually indicates that it's emanating from the lungs and it's being frothed by movement of the lungs.

MS. CHAYTOR: Okay.

DR. AVIS: So it's – we'll be looking for a condition called pulmonary edema.

MS. CHAYTOR: Okay.

And you continue on here and you also make similar comment in terms of no evidence of abrasions, contusions or lacerations to the lips. You also say that about his face, about his neck, about his abdomen and also his upper and lower extremities – I'm sorry, upper and lower extremities, as well as his back and his buttocks. So there's no evidence of any abrasions, contusions or lacerations. And what is the significance of determining this?

DR. AVIS: Well, abrasions, contusions and lacerations are blunt-force injuries commonly seen in an individual who's been in any type of altercation, a fist fight, for example, or getting rough with someone, in which blows are delivered. Typically, blows are delivered around the facial area, so this is why we look inside the mouth. We look at the hands to see if there are any offensive or defensive injuries. It just gives us any evidence that the individual has been in some type of physical altercation.

MS. CHAYTOR: And were you able to find –?

DR. AVIS: And in this case there was none.

MS. CHAYTOR: Okay.

No evidence of that whatsoever.

DR. AVIS: None.

MS. CHAYTOR: Okay. Thank you.

And in terms of – you indicate that the medical records are reviewed. What records did you review with respect to this matter?

DR. AVIS: They were the records from the family physician.

MS. CHAYTOR: And that was Dr. McGarry I understand?

DR. AVIS: Dr. McGarry, yes.

MS. CHAYTOR: Okay.

And I understand, though, you had some difficulty with his handwriting.

DR. AVIS: Yes, his – it's difficult.

MS. CHAYTOR: Okay.

And in terms of his prior physician, Dr. Paul Walsh, did you have his records?

DR. AVIS: No, Ma'am, we didn't.

MS. CHAYTOR: And did you have Eastern Health records and did you review those?

DR. AVIS: I'm not sure, to be honest, if we received Eastern Health or not.

MS. CHAYTOR: And would you have had – so you don't know whether or not you reviewed those or requested those?

DR. AVIS: I don't believe we requested them.

MS. CHAYTOR: What is the purpose in a situation such as this of reviewing medical records?

DR. AVIS: Well, it's specifically looking to look at the person's medical history. You have to appreciate that the majority of deaths we investigate are natural causes. Over 60 per cent of all the deaths we investigate are natural causes and therefore, for us, a history of natural disease is something that we – is very important to us.

The presence or absence of natural disease in someone who's died from trauma may or may not be significant.

MS. CHAYTOR: And was there anything of any relevance –?

DR. AVIS: In a case where a person has received gunshot wounds, the fact that they had cancer of the prostate, for example, really wouldn't make much difference to the cause of death.

MS. CHAYTOR: Okay.

And was there anything, then, of any relevance to your work gleaned from the records, from the medical records you reviewed?

DR. AVIS: No, Ma'am. Just there was – with the medications, there was an empty bottle of Percocet, which is Percodan and does contain oxycodone, so that could explain where the oxycodone came from.

MS. CHAYTOR: Okay, and that's under the medications now, though, with the body, right?

DR. AVIS: Yes.

MS. CHAYTOR: Okay. All right, but in terms of the medical records, nothing of any relevance.

DR. AVIS: Medical records.

MS. CHAYTOR: Okay.

Yeah, so you've written here that a number of medication bottles accompanied the body and I understand, though, that that would be the usual practice for the medications to come in with the body. Is that correct?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: And also we have some evidence in this that in fact that wasn't the case and that you requested that the medications be brought in. And we have evidence, I believe, of

Constable Cox – that he retrieved the medications from the house and were brought in to you on your request.

And for anyone who's interested, that's P-0359, page 99 of the daily log.

Now, the discrepancy that you note here between the bottle label and the bottle contents, were these prescriptions that were otherwise prescribed for Mr. Dunphy?

DR. AVIS: Some of them, yes, they were prescribed for him and, again, it's just something that we note. It's very, very common for people to cross-contaminate their medications. For example, a pill bottle might say digoxin, but when you open it up it contains Tylenol.

This is one of the reasons why we want the medications brought to us, not just told what the person is taking, because you can't always believe what's written on the bottle and what's in the bottle. They're often different or elderly people tend to co-mingle: they'll put their day's supply of drugs into a single bottle.

MS. CHAYTOR: Okay. And you indicate here Percocet. And was it in fact – was that the empty bottle label? Was it Percocet?

DR. AVIS: There were empty bottles of Percocet, yes, Ma'am.

MS. CHAYTOR: Okay, and then the prescription for venlafaxine?

DR. AVIS: Venlafaxine.

MS. CHAYTOR: Venlafaxine. And what is that?

DR. AVIS: It's an anti-depressant, although it can be used for other things. It can be used for –

MS. CHAYTOR: Yes.

DR. AVIS: – obsessive compulsive behaviour, anxiety as well as depression. So it has a number of uses.

MS. CHAYTOR: Yes, and I think we have some evidence from his GP on that.

So neither of those drugs, the Percocet or – neither of those drugs were in his system according to the toxicologist?

DR. AVIS: Well, Percocet.

UNIDENTIFIED MALE SPEAKER: (Inaudible) Percocet is oxycodone.

MS. CHAYTOR: Percocet is oxycodone –

DR. AVIS: Percocet is oxycodone, yes.

MS. CHAYTOR: Sorry, Percocet was, yes, but not the antidepressant, venlafaxine.

DR. AVIS: The venlafaxine wasn't. Now, that doesn't mean it wasn't in the system; it just means that the cut-off may have been – it may have been below the cut-off.

MS. CHAYTOR: Okay, all right.

And then page 8, please, of the exhibit.

Okay, and this is the evidence of injury, and I'm just going to take you down through this. There are two gunshot wounds noted to the head and one gunshot wound to the left upper torso is described below. And I understand that if we look at pages 18, 17 and 18, of this same exhibit there are three – you show a number here, one, two, three, four on this diagram in terms of wounds. And I'm just going to take you through this, Doctor, but I understand that when you use this numbering, this numbering is not intended to reflect order of shots. These are just your numbering of the wounds to the body?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

And I also understand, and correct me if I'm wrong on anything here, but there's two headshots to the head, so the one that you have noted as one here, and there's also a number three; and according to your report, number one is an entry wound and number three would be an exit wound. Is that correct?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

And number two, then, is the second headshot.

DR. AVIS: It's the second –

MS. CHAYTOR: Second wound to the head, sorry.

DR. AVIS: – second entry wound, for which there was no exit.

MS. CHAYTOR: Second wound to the head.

And number four on the left shoulder area here, that is the torso shot that you're referring to?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay, all right.

And if we could back – if we could go back then, please, to page 8 of the exhibit.

THE COMMISSIONER: Page what?

MS. CHAYTOR: Page 8 of the exhibit. So the point I'm trying to show here that there is no significance to the numbering other than – in other words, the wound numbering isn't intended to correlate with any order of shots fired.

DR. AVIS: No, Ma'am, no.

MS. CHAYTOR: Okay.

And that the three – while there's evidence here, and you have listed three – wound number one, two and three – as wounds to the head. One is actually an entrance gunshot and wound number

three is an irregular wound to the right temporal area which I understand you concluded to be the exit of the bullet from wound one.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

We also see here written for wound number one, you refer to wording: "There is no burn collar or powder tattooing." And perhaps you could tell the Commissioner what the significance of that is?

DR. AVIS: Well when you're – with a firearm wound there are two things – the two things you're interested in is whether it's an entrance or an exit wound. And then once you've determined if it's an entrance wound, you like to have some idea as to the muzzle-to-target distance.

Whether it was a contact wound; a contact wound implies the muzzle is applied directly to the skin surface. Upon discharge, one gets a burn collar around the entrance wound, typically seen in someone who's committed suicide.

As the muzzle-to-target distance increases, gun powder – which, again, is not the correct term but I'm going to use it – comes out of the muzzle and hits the skin causing powder tattooing. It's a rim of dots around the injury.

Powder tattooing starts at about 10 millimetres and can extend anywhere up to 40 millimetres depending on the type of firearm. You would have to test fire the exact gun with the ammunition to determine where powder tattooing stops. But powder tattooing indicates an intermediate gunshot wound. So an intermediate gunshot wound, on average, is usually up to about 30 centimetres.

MS. CHAYTOR: Okay.

So is – does this tell you in terms of – from what I understand you're saying that you're doing this to see if there's contact or close contact.

DR. AVIS: Yes.

MS. CHAYTOR: And this would tell you that it was somewhat of a distant gunshot wound. Are you able to say how far away –?

DR. AVIS: No, Ma'am. Once you exceed the – once you exceed the length of the powder tattooing it could be 30 centimetres, it could be 300 centimetres.

MS. CHAYTOR: Okay.

DR. AVIS: There's no way of telling after that. All we can say in these instances are that all three gunshot wounds were distant wounds.

MS. CHAYTOR: What –

DR. AVIS: There was no evidence of a contact wound and no evidence of an intermediate gunshot wound.

MS. CHAYTOR: Okay and the other factor being that the type of firearm has to be factored in as well?

DR. AVIS: Yes, this was a Glock.

MS. CHAYTOR: Yes. Sorry?

DR. AVIS: A nine-millimetre Glock.

MS. CHAYTOR: No.

THE COMMISSIONER: Sig Sauer.

MS. CHAYTOR: Yeah.

DR. AVIS: Sig Sauer?

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

DR. AVIS: Sorry?

MS. CHAYTOR: RNC?

UNIDENTIFIED MALE SPEAKER: Sig Sauer.

MS. CHAYTOR: Sig. Yeah, Sig?

DR. AVIS: A nine-millimetre Sig Sauer.

MS. CHAYTOR: Okay.

UNIDENTIFIED MALE SPEAKER: .40 calibre.

DR. AVIS: .40 calibre, okay.

MS. CHAYTOR: .40 calibre, yeah.

Okay. All right.

And also in the direction, in what you say here, the direction of the wound is from front to back, left to right. And what does that mean and how were you able to determine that to be the case?

DR. AVIS: It's simply – in this case – lining up the entrance with the exit wound, appreciating that once a bullet hits bone that its course can be changed, so it's not necessarily going to travel in a straight line. So we do have to keep that in mind, but simply to give some idea as to the direction of fire based on the entrance and exit wound.

MS. CHAYTOR: Okay.

And then wound number two, and this is the shot to the left temple area, and which according to the evidence that we have and Constable Smyth has said, this would have been the last shot that was fired as he exited the wound – exited the room. And, again, there's no burn collar or powder tattooing. So in terms of distance, that would mean at least 30 –

DR. AVIS: At least 30 centimetres.

MS. CHAYTOR: – centimetres away. Okay.

You also recovered the bullet with respect to this wound. Did the location of the bullet tell you anything of any significance?

DR. AVIS: No, Ma'am. Again, it helped in aligning the direction of fire or the direction in which the trajectory went. Again, I will just add that same caveat that when a bullet hits bone, it can change its direction a little bit. So it may not be totally accurate to line up an entrance and an exit and say that that was the course of travel. It's –

MS. CHAYTOR: Okay.

And in this case, of course, you didn't have an exit from that.

DR. AVIS: No, Ma'am.

MS. CHAYTOR: Okay. All right.

And then wound three is what we understand to be the exit wound and it's the regular wound then to the right temporal area. And so in terms of – are you able to conclude anything about the position of the shooter in relation to the deceased by comparing the entrance wound and the exit wound?

DR. AVIS: No, Ma'am.

It's not possible for me to determine the position of the shooter and the person who gets shot based on this. You have to remember that when I'm describing these injuries I'm describing them in the anatomic position which – the anatomic position is an individual standing like this.

MS. CHAYTOR: Right. Okay.

DR. AVIS: So whilst I say the wound may be travelling downwards, if the person is actually bending down, the wound may be travelling upwards so –

THE COMMISSIONER: You may have to stay closer to your mic so we can pick you up for recording purposes.

DR. AVIS: So this is the criteria I'm using, the anatomic position. And not everyone is in that position when they get shot but it's the standard reference position.

MS. CHAYTOR: Okay. Thank you.

THE COMMISSIONER: And just for the record, Dr. Avis stood with his arms at roughly a 45-degree angle would you say? Or were they by your side? I've forgotten already.

DR. AVIS: About 45. It's – I think Michelangelo's living man or something.

THE COMMISSIONER: The scene of David.

DR. AVIS: Yeah, something like that.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Okay, go ahead.

MS. CHAYTOR: Okay.

Yes, that's important for the transcript. Thank you.

And with respect then, are you able – with respect to wound number one are you able to say if Mr. Dunphy was seated at the time he sustained wound number one?

DR. AVIS: Well, as I would say, whilst I cannot tell you the position of the individual at the time of discharge, one can be offered a scenario and be able to say whether it's consistent.

MS. CHAYTOR: Yes.

DR. AVIS: But as opposed to me telling you where they were, I can look at the scenario and say, yes, it would be consistent.

MS. CHAYTOR: Okay.

And is it consistent with him having been in a – seated in a chair at the time he was shot based on what you – in terms of the location of the wound and the exit wound and the other information and evidence that you would have had?

DR. AVIS: It's consistent with him sitting in the chair. In fact, the bullet from wound 1 was located in the chair back, I believe.

MS. CHAYTOR: Yes, that's correct.

DR. AVIS: Which, again, would be totally consistent with him sitting in the chair as described. And given that the wounds are moving around, it would suggest either Mr. Dunphy was moving around in this direction or the police officer was moving in the opposite direction.

MS. CHAYTOR: Okay and you –

DR. AVIS: So it's all consistent with ...

MS. CHAYTOR: Yes. And you read or you certainly had the synopsis of Constable Smyth's statement. And so was it consistent with what you read in the synopsis of his statement?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

And if we look at the wound number four, as you've numbered it, and that's the wound to his torso. And, again, you mention no burn –

THE COMMISSIONER: Just –

MS. CHAYTOR: Sorry.

THE COMMISSIONER: I'm just looking at my watch. We probably should take the –

MS. CHAYTOR: Are we going to take another break?

THE COMMISSIONER: – mid-afternoon break –

MS. CHAYTOR: Okay. All right.

THE COMMISSIONER: – before we get into wound 4 there.

MS. CHAYTOR: Okay.

THE COMMISSIONER: How are you doing with your ...?

MS. CHAYTOR: I'm thinking I'll probably be another 45 minutes.

THE COMMISSIONER: Okay.

All right, we'll break for 15 minutes.

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: Thank you.

Go ahead when you are ready.

MS. CHAYTOR: Madam Clerk, if we could go back, please, to P-0738. And I think we were now on wound number four which we will find at page – there we go. Thank you.

All right.

And similar, then, in this situation, Doctor, with respect to this wound you then, again, noted there was no burn collar or powder tattooing. And I just want to bring P-0320 in answering that in terms of the shot not being close enough to cause burn collar or powder tattooing. If we look at P-0320 –

UNIDENTIFIED MALE SPEAKER: 0320?

MS. CHAYTOR: P-0320? Yes, this is the RCMP forensic lab report. And page 4 of that document, please. And it may be, Doctor, that you may have misspoke in terms of centimetres versus inches, I just want to be clear on that.

But if we look at page 4 of this document number six, it says: The shirts – and the exhibit numbers are given – each have damage consistent with having been caused – and then if we come down here, “distance range is the distance from muzzle to target at which no firearm residue pattern would be deposited on the target. This distance has been determined to be beyond 30” (76 cm) using the combination of the pistol” And I understand the type of pistol was taken into account here and the cartridges. So is it 30 inches as opposed to 30 centimetres?

DR. AVIS: Again, I was just giving a general, nondescript gun.

MS. CHAYTOR: Okay.

DR. AVIS: You now know that it's the .40 calibre Sig Sauer, so they test-fired it for us.

MS. CHAYTOR: Right. Okay, so it's 76 –

DR. AVIS: But that's how you do it, you test fire it.

MS. CHAYTOR: Right, okay.

THE COMMISSIONER: So you go with the test fire.

DR. AVIS: You go with the test fire.

MS. CHAYTOR: You go with this. Yeah, okay. And we are going to have some evidence from Darryl Barr on this as well. And I understand this to be the range so that it's at least 76 centimetres or 30 inches away.

Okay, just wanted to clarify that.

If we could go back now, please, then to P-0738 – P-0738 back to wound number four. And in the description that you give of this wound, Doctor, you refer to 1.5 litres of blood. And what does that tell you, the amount of blood that you were able to find?

DR. AVIS: Well, that's a significant portion of blood –

MS. CHAYTOR: Sir, if you could just lean into your microphone a little better, please?

DR. AVIS: Yeah. It's a significant amount of blood bleeding into the chest cavity.

MS. CHAYTOR: Page 8.

DR. AVIS: We have about four litres of blood, so it's just slightly less than –

MS. CHAYTOR: Page 9. That's it, thank you.

Sorry? Sorry, go ahead, Doctor.

DR. AVIS: It's just slightly less than half the blood volume.

MS. CHAYTOR: Okay.

So does that tell us anything in terms of the heart was probably still pumping or, you know, for that amount of blood to be lost?

DR. AVIS: No. Well, I mean the heart's going to pump for a while after the gunshot wound. The other thing is that the lungs are very, very vascular. You've got to remember the lungs receive all of the vascular output from the right heart. So lungs bleed very, very profusely so finding that much blood is, in two perforating injuries, is not unusual.

MS. CHAYTOR: Okay.

DR. AVIS: It would not collect immediately; it would have to collect over a period of time. It's not something that would just suddenly appear.

MS. CHAYTOR: Okay.

And would this – if we could just look here in terms of what you're saying, in terms of the wound and what was perforated, it says that the wound perforates the left chest wall through the left ribs two and three, perforates the left upper lobe. You mean the lung.

DR. AVIS: Uh-huh.

MS. CHAYTOR: Tears the descending aorta.

DR. AVIS: Yeah.

MS. CHAYTOR: Perforates the body of T7. And I take it that's the thoracic spine at T7. Is that correct?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Tears the surface of the right upper lobe; again that's the lung. Exits the right chest cavity through rib number seven, which is fractured and then you located the bullet in the soft tissue of the chest wall.

In terms of perforating T7, does that mean that the spinal column was severed?

DR. AVIS: No, the T7 is the large vertebrae. The spinal cord is behind T7.

MS. CHAYTOR: Okay.

And if the spinal column had been perforated, we would expect to see that as a reported finding in your report?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

In terms of the direction of the wounding – again, from left to right, front to back and down – is there any significance in that?

DR. AVIS: No, Ma'am.

The same significance with the other injuries; again, taking into consideration the criteria we use to describe up and down, left and right, et cetera.

Again, this would be consistent with the information provided as to how the shooting occurred.

MS. CHAYTOR: Okay.

I understood you, Doctor, to say that you're not able to determine the order that the wounds were sustained.

DR. AVIS: No, Ma'am.

MS. CHAYTOR: Okay.

Are you able to say which of the three shots killed Mr. Dunphy or whether it was a combination of the shots?

DR. AVIS: Well, certainly wound two – can I just go back and make sure I’m referring to –

MS. CHAYTOR: Back to your diagram? Yes. Back to –

DR. AVIS: No, to the descriptors.

MS. CHAYTOR: Oh, your descriptions, I’m sorry. Yes, we’ll just scroll back up there, Madam Clerk. Here we go.

Wound one is –

DR. AVIS: Yeah.

MS. CHAYTOR: Okay.

DR. AVIS: Wound two is certainly a lethal injury. Wound four is certainly a lethal injury. Wound one would be a lethal injury in time.

I think the important thing to recall or to remember about these types of injuries, whilst all of them in and of themselves could potentially be fatal – and in some of them, like you say, you only need one of them – wound two would be all one would need – it doesn’t necessarily mean that a person is immediately incapacitated.

Death is not an event, it’s a process. A fatal injury or a fatal event occurs and that could be a natural disease, such as a heart attack, or it could be a physical injury, such as a gunshot wound, in which the damage that has been created is going to kill the person, but they’re not necessarily going to die immediately. You’re not alive one second and dead the next.

MS. CHAYTOR: Okay.

DR. AVIS: Your body recognizes, if you will, that it has received a fatal injury and then it goes through – there’s a period of time that we refer to as the agonal period which is the period where the body is recognizing that it’s reached its limit.

That agonal period can be very, very short. For example, in a heart attack where you have a cardiac arrhythmia, that agonal period can be very, very short, within seconds. So there are some instances where you can be literally alive one second and dead the next; heart attacks.

Others, such as these types of injuries, are going to have an agonal period which could extend for some time. The bottom line is that except for wound number two, none of these wounds would have necessarily immediately incapacitated the individual.

Wound two goes through the centre of the brain and it’s very likely that a wound that goes through the centre of the brain is going to do so much damage that an individual is unlikely to be able to show any physical activity. But wounds one and three are not immediately fatal.

Even though wound one has extensive injury to the frontal part of the brain – you know, the frontal part of the brain doesn’t control too much in terms of our heart beat and respiration – it

would still be possible for an individual to move. Similarly with wound number three, whilst it's gone through a lung, whilst it's gone through the aorta –

MS. CHAYTOR: Oh, you mean wound number four.

DR. AVIS: Sorry, wound number four.

MS. CHAYTOR: Yes.

DR. AVIS: Whilst it's gone through the lung, whilst it's gone through the aorta, there is a time required for that blood to accumulate. What causes death, in this particular case, is the person runs out of blood and the heart is pumping nothing.

MS. CHAYTOR: Okay.

DR. AVIS: So you're getting no blood and no oxygen. That's a time. That takes time.

MS. CHAYTOR: Okay.

And in terms of him not being incapacitated then, is it your opinion then he would still be able to point and move a rifle towards Mr. – or Constable Smyth after he's received the first shot.

DR. AVIS: Wait now, which is the first shot? I'm sorry.

MS. CHAYTOR: Well, we don't know. It would either be the torso or the first head shot.

DR. AVIS: Yes. The first head shot or the torso shot he would be capable of movement and could be a potential threat.

MS. CHAYTOR: Okay and what about if he has sustained the shot to the torso and the first head shot? So if he's already sustained number four and number one, is it likely that he would still be able to move and continue to point a firearm?

DR. AVIS: It's likely. It's possible but less likely. I mean the more wounds you have the less likely, but it still remains within the realm of possibility.

MS. CHAYTOR: Okay.

And I think you said on your interview by the time he receives two shots it is less likely, as you are saying now. After the first shot to the head he could but it would be unlikely. Is that fair?

MR. KENNEDY: (Inaudible.)

DR. AVIS: After wound two.

MS. CHAYTOR: No, I'm asking what he said on his interview.

MR. KENNEDY: No, that's –

THE COMMISSIONER: One second. Okay, everybody, one second.

MS. CHAYTOR: That's what I understood that he said in your interview.

THE COMMISSIONER: One second please – one second until we get this straight now.

MS. CHAYTOR: Yeah. Okay.

THE COMMISSIONER: What was the – what are you suggesting to the witness? What is your question, Ms. Chaytor?

MS. CHAYTOR: So my question was, I was putting to him what he said on his interview.

MR. KENNEDY: No –

THE COMMISSIONER: One second now, Mr. Kennedy.

MS. CHAYTOR: Yeah, what he said on his interview which was –

THE COMMISSIONER: You were summarizing what he said, but Mr. Kennedy didn't – believes it wasn't summarized accurately, okay, so ...?

MS. CHAYTOR: Right, so I can take it to the transcript.

MR. KENNEDY: That's not – the point is she put – counsel put it to the witness, he answered the questions. My notes are that the first head shot he's capable of movement and being a potential threat. In number four and number one, it's possible but less likely. And then Commission counsel starts and you said this in your interview – and asking him to adopt it without referring him to the interview. And why would she put the interview to him?

MS. CHAYTOR: I can go to the transcript. I can.

THE COMMISSIONER: Go through –

MS. CHAYTOR: Yeah. Okay, we'll go through it.

THE COMMISSIONER: – the process.

MS. CHAYTOR: Yeah. And I made a note, and I think it was consistent with what he said: By the time he receives the two shots it's less likely; after the first shot he could but it's unlikely. And I believe that's –

MR. KENNEDY: Is that what he said? That's not what –

MS. CHAYTOR: Right. That's what –

THE COMMISSIONER: Well, we'll establish that now, Mr. Kennedy. One second.

MS. CHAYTOR: Page 113, then, in the transcript, let's see –

MR. KENNEDY: (Inaudible.)

MS. CHAYTOR: 113 and I'll –

MR. KENNEDY: Commissioner, it's an inquisitorial process. She puts the question to the witness, the witness gives his answer. Because Commission counsel apparently doesn't like the answer, she can't then go –

THE COMMISSIONER: No, Mr. Kennedy that's not what's happening. And this, as you recall, is not an adversarial trial; it's an inquiry and I will proceed on the basis of being fair and

keep the process going in a way that permits me to get as much evidence as I should be able to get.

That does not mean that Ms. Chaytor will be seeking to get an answer. She is, as I take it, seeking to clarify what the doctor is saying here today. But if I'm wrong on that, correct me.

Just put your question. What is the question you're putting, Ms. Chaytor?

MS. CHAYTOR: Okay.

All right, so my question I was trying to clarify with what was said in the interview. My first question was –

THE COMMISSIONER: No, we're not concerned with –

MS. CHAYTOR: My question –

THE COMMISSIONER: – what's said in the interview. I'm concerned with –

MS. CHAYTOR: But my question was what about after the first shot to the head?

THE COMMISSIONER: Okay, what about the first shot to the head?

MS. CHAYTOR: Whether or not (inaudible) it was a series of questions. The first one was: What about the fact of being able to continue to hold a firearm and point it after the two shots.

THE COMMISSIONER: Okay, I think the way to do it is go –

MS. CHAYTOR: And he said –

THE COMMISSIONER: – go back –

MS. CHAYTOR: – possible but less likely.

THE COMMISSIONER: – and ask the questions one at a time. Mr. Kennedy, if there's a question you're not happy with, raise the objection, okay? So let's start off systematically now.

MS. CHAYTOR: Thank you, Commissioner.

Okay and, Doctor, then, what about after Mr. Dunphy has sustained the shot to his torso and the first shot to the head? Would it be possible or probable for – I should say probable. Would it be probable for him to be able to hold a rifle and continue to point it?

DR. AVIS: Okay.

And, again, the first shot to the head is wound number one.

MS. CHAYTOR: The first shot to the head – yeah, the last shot to the head would be wound two. We're assuming that to be correct. And the – so, the first shot would be wound one. That's correct, wound one. And the other one being –

THE COMMISSIONER: One, wait now –

MS. CHAYTOR: Wound one and wound four.

DR. AVIS: Okay.

MS. CHAYTOR: So wound one is the first shot to the head.

THE COMMISSIONER: Wait now. I'm sorry; I'm having trouble keeping track of the numbers now.

MS. CHAYTOR: Uh-huh.

THE COMMISSIONER: Let's start off again with the whole process. We have the shot, wound number one.

MS. CHAYTOR: Yes.

THE COMMISSIONER: Wound number one; your position, Doctor, in terms of the ability of Mr. Dunphy to move, is it, and to move the rifle? That's what the –

MS. CHAYTOR: Hold the rifle and continue to point it and follow –

THE COMMISSIONER: Hold the rifle and continue to point it at –

DR. AVIS: He would still have the potential to –

THE COMMISSIONER: He could still do that with wound one. Okay.

DR. AVIS: With wound one.

MS. CHAYTOR: Okay. And –

THE COMMISSIONER: Okay, now, then –

MS. CHAYTOR: With the combination, then, of wound number one, the first headshot, and the wound number four, which was the shot to the torso, would he still be able to hold the rifle and continue to point it?

DR. AVIS: He could potentially still hold the rifle and point it. It's, obviously, less likely once you have two wounds but it's still possible.

MS. CHAYTOR: Okay.

DR. AVIS: Because, again, wound four; once you get shot in the chest, it's not you're bled out like that, it's going to take a few seconds, maybe, 30 seconds, 45 seconds before you've lost sufficient quantity of blood to contribute to the dying process. So it's still potentially feasible to move, either with wound four on its own or with wound four in combination with wound number one.

MS. CHAYTOR: Okay.

DR. AVIS: Wound number two goes straight through the centre of the brain.

THE COMMISSIONER: Okay, so wound two through the center of the brain. And your conclusion there is ...?

DR. AVIS: It's extremely unlikely, not impossible, but extremely unlikely that there would be any capability of movement.

MS. CHAYTOR: And, Commissioner, that's what we understand to be the fourth shot. That's when –

THE COMMISSIONER: Just one second now.

MS. CHAYTOR: Yeah.

THE COMMISSIONER: So that wound number two, that's the fourth shot, as you understand it.

MS. CHAYTOR: Correct. Yes, as we understand it.

It's the one to the left temple and Constable Smyth has said that's the last shot he took going out the door.

DR. AVIS: Yes, because in this particular case the brain stem is destroyed. And all of the neurons that give us the ability to move go through the brain stem. So once the brain stem is gone that's it. So wound 2 is –

THE COMMISSIONER: Sorry, what did you say about the brain stem, there was ...?

DR. AVIS: The brain stem, My Lord, is where all of the neurons that enable us to move go through the brain stem. And the brain stem is only a very, very small area. So once that is destroyed, that's it, there is no possibility of movement.

THE COMMISSIONER: Okay.

DR. AVIS: Perhaps a little bit of reflexive movement but no deliberate movement.

THE COMMISSIONER: Okay.

Now, just to finalize, the other wound, wound number three, that's an exit wound. Is that correct?

MS. CHAYTOR: Correct.

DR. AVIS: Yes.

THE COMMISSIONER: And so there's –

DR. AVIS: Yes, Sir.

THE COMMISSIONER: (Inaudible.) Okay.

MS. CHAYTOR: Correct.

THE COMMISSIONER: Mr. Kennedy, do you have any problem with –

MR. KENNEDY: That's exactly what –

THE COMMISSIONER: – that or anything further to clarify? Okay.

All right, continue with your questions.

Thanks, Ms. Chaytor. Yeah.

MS. CHAYTOR: Okay.

And, Doctor, then on your pre-hearing interview I had understood – and perhaps I misunderstand, but I had understood that after the shot to the head, not the one going out the door, not shot number – or wound number two, that it would be unlikely that he could have still been able to hold the firearm and continue to follow someone out of the room with it after the first shot to the head.

THE COMMISSIONER: Which – you're referring to the –

MS. CHAYTOR: Yes, the transcript. So –

THE COMMISSIONER: Sorry?

MS. CHAYTOR: I'm referring to the transcript that I understood that's what he said, so I'd like to offer him an opportunity to explain –

THE COMMISSIONER: You're saying there's a difference of what Dr. Avis is saying now and what he said at the –

MS. CHAYTOR: Yes, he said –

THE COMMISSIONER: – interview with counsel.

MS. CHAYTOR: Right.

THE COMMISSIONER: And what did you understand the difference to be?

MS. CHAYTOR: I understood that after the first shot to the head it would be unlikely that he would have been able to point a firearm and continue to follow him out of the room with the firearm.

MR. KENNEDY: What page number is that?

MS. CHAYTOR: That's page 112 into 113. But – and I can put it to the witness, but I'm in your hands, Commissioner, in terms of –

THE COMMISSIONER: Or you can leave it to cross-examination, whichever.

MS. CHAYTOR: Or I can leave it to cross-examination and move on.

Okay. Fair enough.

DR. AVIS: I think when we met I pointed out that there are a number of entries in forensic texts where people have had almost their entire frontal brain blown out –

MS. CHAYTOR: Yes.

DR. AVIS: – and are still capable of movement and activity.

MS. CHAYTOR: Yes.

Yes, that's right.

DR. AVIS: But certainly after wound number two.

MS. CHAYTOR: In fact, I think you actually said along the lines of he could have got up and done a jig – or words to that affect.

DR. AVIS: Then I must be – then I must have cross-referenced both wounds.

MS. CHAYTOR: Okay. In terms of the movement that you could expect from a body after having sustained a wound? Yes.

In terms of the – in terms of other tests that were carried out we did see in your report that Mr. Dunphy had a tumour on his kidney, a kidney tumour, but there was evidence of metastases and the size of the tumour was 1.5 cm. Was that of any relevance in terms of your findings?

DR. AVIS: Now, can I just see that on the autopsy report?

MS. CHAYTOR: Okay.

Yes, if we could back, please, to the – that would be page 5, I believe. It might be further along actually, External Examinations. I'm sorry, actually it's further along. Here we go. It's the very last – here we go.

DR. AVIS: Yes.

MS. CHAYTOR: There you go.

DR. AVIS: Yes, it's a malignant tumour which at this point in time would not have caused any problems but would have had the potential to cause significant problems down the road, yes, Ma'am.

MS. CHAYTOR: Okay. And what about the autolytic changes to kidneys, pancreas –?

DR. AVIS: That's –

MS. CHAYTOR: Those aren't ...

DR. AVIS: They're just sort of standard.

MS. CHAYTOR: Okay.

DR. AVIS: The organs of digesting themselves, that's all.

MS. CHAYTOR: Okay.

So nothing in relation to the tumour? Those aren't anything –

DR. AVIS: No

MS. CHAYTOR: – in relation to the tumour or metastases?

DR. AVIS: No.

MS. CHAYTOR: Okay.

And if we could look at page 22, please, of this document.

And this is the Scene Report and this a form from your office. And I understand that this was filled out by Constable Galway of the RCMP.

DR. AVIS: Yes.

MS. CHAYTOR: Okay.

And I don't know that I see a date on the form but would you have had this at the time then of the autopsy?

DR. AVIS: The ME 1 would have come with the body. There would be other information as it's being generated, would be coming in, but at a minimum we would have Scene Report, the ME 1, yes, Ma'am.

MS. CHAYTOR: Okay. And in terms of the times that we have here: Last seen alive, we have 14:25 and the source of that information is indicated to be Sergeant Smyth.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay. And Pronounced as well at the same time and is indicated to be by Sergeant Joe Smyth. And I take it that means pronounced dead. That's when Constable Smyth would have observed him and understood him to have been deceased.

DR. AVIS: That would be my understanding, yes, Ma'am.

MS. CHAYTOR: Okay. And also in terms of the circumstances surrounding his death, it says: Sergeant Smyth "attended the DUNPHY residence, in relation to an RNC investigational file. DUNPHY had threatened SMYTH with a firearm, causing SMYTH to draw his pistol, and fire multiple shots, killing DUNPHY." This would have been filled out by Constable Galway, is that correct?

DR. AVIS: Um.

MS. CHAYTOR: Or is this filled out by your office?

DR. AVIS: It's not filled out by my office, no. It would be filled out by the investigating, one of the investigating officers and it would be, presumably, John Galway and as you can see unfortunately they don't always sign ...

MS. CHAYTOR: Yes, it's certainly Constable John Galway's name associated with it and it's in your file.

So in terms of date, I know the RCMP gave you documentation before –

THE COMMISSIONER: Is there any issue that comes out of this?

MS. CHAYTOR: Just who's making this description; who's description this is and at the time that they (inaudible).

THE COMMISSIONER: Well, it's some summary. It hardly matters, does it?

MS. CHAYTOR: Yes. Okay, we'll move on.

Then if we look at page 24, we have a preliminary report of Constable Adrian Cox. And I understand this was faxed to your office on April 6 and we have a date stamp or a timestamp of 11:29. So this would have been in your possession before the autopsy took place, the next day.

What would be – I also understand, Doctor, that you asked to have the statement of Constable Smyth prior to carrying out the autopsy. And what would be the purpose of getting this information before you do the autopsy?

DR. AVIS: Well, with any death investigation, death investigation is a three-prong attack, if you will. There are the circumstances surrounding the death, there are the medical issues surrounding the individual's health and there's the autopsy report. Circumstances can be very, very important. In fact, sometimes circumstances are the most important element of a death investigation.

MS. CHAYTOR: Okay. And you also asked –

DR. AVIS: An individual who –

MS. CHAYTOR: I'm sorry.

DR. AVIS: – jumps off a building, is thrown off a building or falls off a building, all have the same autopsy findings. The autopsy report is of no value.

What is important for us to determine the cause, manner of death, is the circumstances. How did he get up to the – was anyone up there with him? Did anyone see anyone throw him over?

So in any type of death investigation we are going to focus on those three elements, and we want to be sure that those three elements, at the end of that day, all agree with each other. If there is discrepancy between the three elements, there's a problem, which means we have to go back and sort that out.

MS. CHAYTOR: Okay.

DR. AVIS: So not just with this investigation but with any investigation we want to know the circumstances. We appreciate that at the time a person dies the circumstances may not be fully known, the circumstances may change, and we encourage and require the police to keep us up to date. If something's changing, we want to know.

MS. CHAYTOR: Okay, fair enough.

I also understand that in that regard you asked for scene photos as well.

DR. AVIS: Yes.

MS. CHAYTOR: And you did receive the DVD of Constable Smyth's statement of April 6, but I understand that you weren't able to open it. But you had a synopsis of Corporal Henstridge's notes of his interview and that you reviewed that. Is that correct?

DR. AVIS: Yes, Ma'am. Unfortunately, we're not able to open a lot of the audio –

MS. CHAYTOR: Okay.

DR. AVIS: – material provided to us by the RCMP.

MS. CHAYTOR: And I – okay.

So I want to bring up, please, P-0373, because this is a list of seven documents and items that were provided to Dr. Denic by Sergeant Henstridge. And while the letter is dated April 16, 2015, and it's indicated it would help or assist in your investigation, I'm wondering, Doctor, if perhaps that is an inaccurate date and whether or not it was April 16 before you received this information.

And I don't know if you've been able to confirm that since we met but it says April 16. But if we look at the list of the seven items that are included here and also written next to number seven is that these will be delivered by Corporal Lee prior to the autopsy. So obviously the autopsy went ahead on April 7. So I'm wondering if this is in fact an error and that you would have had all of this information at the time of doing your autopsy?

DR. AVIS: Again, I can't state whether it's an error from someone else's error.

MS. CHAYTOR: Okay.

I'm just wondering in terms of the information that you would have had, because you certainly were looking for Constable Smyth's statement before going ahead.

DR. AVIS: We were certainly looking for all of this and it's something we would certainly look for. So I suspect under those circumstances that it probably – the 16th is probably a, probably an error.

MS. CHAYTOR: Okay.

THE COMMISSIONER: Sorry, the 16th is what, is probably ...?

DR. AVIS: An error.

THE COMMISSIONER: An error. Thank you.

DR. AVIS: Where it says the 16th of April, I mean –

MS. CHAYTOR: And there's no documentation in here that is dated – from what I could see there's no documentation dated later than April 6 in here. And there certainly would have been other statements, for example, we know taken after that.

So if it had been the 16th there would have been a lot more information that you could have been provided, including additional statements from Constable Smyth in terms of, for example, his re-enactment video and that type of thing. So I was just wondering if this, in fact, was information that you had at the time.

One other thing; Corporal Foote in his Supplementary Occurrence Report – and this is also in this document at page 7, but there's reference to scene contamination with cats and he was put on the scene to get cats out of the living room area. And he mentions having shooed three cats out of the living room when he arrived. The body was still there and he shooed three cats out.

We understand there was a period of time before Corporal Foote arrived when there would not have been anyone guarding the body or the scene from the presence of what has been described by most officers as quite a number of cats. Would that be of any concern to you in your investigation?

DR. AVIS: I mean I – none of the wounds had the appearance of being altered by wildlife. However, I think for the general principle one would prefer not to have a deceased body in the presence of animals because animals will start to consume a dead body.

It's something I would much rather not happen but I don't believe – having looked at the injuries, there was no evidence that there was any significant changes to the injuries. Cats tend to leave fairly typical dentition marks and ...

MS. CHAYTOR: Doctor, would you have reviewed all of the documentation that was provided to you by the RCMP?

DR. AVIS: In providing my complete –

MS. CHAYTOR: Everything that the RCMP provided to you, would you have reviewed all of it?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

Was there anything of any concern to you or anything in your findings that did not seem consistent with the account that you reviewed that had been given by Constable Smyth as to what had happened?

DR. AVIS: No, Ma'am.

MS. CHAYTOR: Okay.

And if we look at page 30 of this document, please, this is a diagram that was drawn by Constable Smyth when he gave his first statement. And we can just make it a little bit smaller.

Do you recall seeing this document?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

And was this diagram of assistance to you in your findings?

DR. AVIS: Well, again, it shows an element of consistency in terms of – my understanding he was not shooting from this position, he was shooting from, I guess, a draw position and moving around. That would be consistent with where the entrance wounds are.

MS. CHAYTOR: Okay.

THE COMMISSIONER: I'm sorry, I didn't hear the – it sort of faded at the end there. Moving around and after that you said what?

DR. AVIS: Well, we have an entrance wound to the right and then two to the left which would suggest that either the deceased is moving to the right or the person shooting him is moving to the left in relation to the deceased.

MS. CHAYTOR: Okay.

And in this second batch, I'll call it the second batch of documents that you received, because included in that was the first document which we know you received at 11:29 a.m. April 6 – or 11:53 a.m. April 6 was Constable Cox's first supplementary report or a Supplementary Occurrence Report, I should say. There's also an additional report included here which had some additional detail in terms of the resting position of the gun or the rifle, I should say.

Are you able to give any opinion as to the resting position of the rifle after the event? And if you wish, I can remind you the position being the barrel resting on the floor pointed away from Mr. Dunphy and resting on the side of a blue Rubbermaid-type tub. And is that something that you're able to give an opinion on?

DR. AVIS: I think people have assumptions about where a firearm should end up after a specific incident. In my experience, I have investigated hundreds of deaths in which an individual died with a firearm in their hand, and we know that because they committed suicide.

MS. CHAYTOR: If you could just lean in a bit, please, Doctor.

DR. AVIS: Sorry.

Because they committed suicide by firearm and the – it stands to reason that they were holding the firearm at the time of discharge. Firearms do not always end up where you expect them to. We know that in most cases they end up usually within three feet of the body, but not always. They can be at some distance.

I had a case two months ago, an individual using a handgun. The handgun is of some considerable distance from the body, yet we know that he shot himself where the photograph of the body is. So how the handgun got there, is it reflex throwing, is it just falling on the floor, I can't really say.

I am not overly concerned about the position of the rifle at the scene. I know there has been some concern that this indicates that there has been an attempt at recreating a scene or that someone's moved it. It's somewhat confusing because the suggestion has been that Constable Smyth did it and then according to the paramedics, the RCMP did it. So I'm not sure who actually is supposed to have fudged the scene.

MS. CHAYTOR: I just want to be clear, Doctor, this is you hearing this through what's been happening at the inquiry.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: This is not information you had at the time –

DR. AVIS: No, this is –

MS. CHAYTOR: Okay. All right.

DR. AVIS: This, unfortunately, is listening to the news because my wife was listening –

MS. CHAYTOR: Okay.

Did you have any knowledge at the time as to whether or not, or anything to suggest that somehow the rifle had been moved?

DR. AVIS: No, Ma'am.

MS. CHAYTOR: Okay.

DR. AVIS: I don't know. And if you look at the position of the deceased in his home, his – I don't know how I can do this and –

MS. CHAYTOR: You need to stay close to the microphone. So perhaps if you could as best as possible use your words –

DR. AVIS: But he's like this.

THE COMMISSIONER: So you're, just for the record now, you're demonstrating the position of Mr. Dunphy being seated with his hands somewhat down in his lap –

DR. AVIS: Yes, Sir. There's a photograph –

THE COMMISSIONER: Yes.

DR. AVIS: – somewhere.

MS. CHAYTOR: Okay, we can bring up, it's a C photo. If we – so if we could turn off the monitors, please, I do have a C photo here, 133. And that was going to be my next question for you, Dr. Avis, that how Mr. Dunphy's hands are positioned. It's photo 133, please.

Does the position of his hands as depicted in the photo mean that this was the position of his hands prior to being shot?

DR. AVIS: Not necessarily, no.

MS. CHAYTOR: Okay.

And so if we could bring up – do you have that in front of you now there, Doctor?

DR. AVIS: Yes.

MS. CHAYTOR: Okay.

DR. AVIS: But there's another photograph that shows this and the blue box and the gun (inaudible).

MS. CHAYTOR: Okay.

There's a – I don't know, we probably do have that one too, but is it the gun that you want to see? I have another one in my exhibits here.

DR. AVIS: I just want to show the position of the hands and the gun and offer I guess a possibility.

MS. CHAYTOR: I just don't know the number of it right off.

UNIDENTIFIED MALE SPEAKER: 045.

MR. KENNEDY: 044 and 045.

MS. CHAYTOR: Number 045? Okay.

All right, that's a C exhibit I understand as well. I'm not sure if you can see the gun, though, in that photo, can you, gentlemen? I don't have my pictures.

UNIDENTIFIED MALE SPEAKER: Yes. You can sort of see it.

MS. O'BRIEN: Yes, can we use 044?

MS. CHAYTOR: We can use 044.

MS. O'BRIEN: Or sorry, 045.

MS. CHAYTOR: 045? 045 is a public exhibit my co-counsel is telling me. So if we look at 045.

MS. SHEEHAN: It's not Scene 045, is it (inaudible)?

MS. CHAYTOR: Oh, goodness.

MS. O'BRIEN: It's the same thing.

MS. CHAYTOR: I think it's –

MS. O'BRIEN: It's the same –

MS. CHAYTOR: Not necessarily.

MS. O'BRIEN: The numbers match.

MS. CHAYTOR: What?

MS. O'BRIEN: Scene 044.

MS. CHAYTOR: Scene 04 –

MS. O'BRIEN: Scene 045.

MS. CHAYTOR: Scene 045.

Okay, perhaps while Madam Clerk's looking for that I can move on to a couple of other –

THE COMMISSIONER: I think she might have –

MS. CHAYTOR: – questions.

THE COMMISSIONER: – it there now.

MS. CHAYTOR: You have it there? No?

UNIDENTIFIED MALE SPEAKER: I believe the number is P-0010, number 045?

MS. CHAYTOR: Yeah, it's P-0010.

MS. SHEEHAN: Yes (inaudible).

MS. CHAYTOR: She knows that, though. Yeah.

I'm just going to quickly then –

MR. KENNEDY: I'd prefer to have the answer to this question, Commissioner.

MS. CHAYTOR: Yes, I'm going to come back to this question, Mr. Kennedy. Please.

THE COMMISSIONER: Just one second now.

THE KENNEDY: This has been –

THE COMMISSIONER: We'll wait.

MS. CHAYTOR: I'm just concerned that everyone have an opportunity to question the witness and we not run out of time. If I could ask a couple of other questions while we're waiting.

THE COMMISSIONER: Just one second now.

MS. SHEEHAN: (Inaudible.)

THE COMMISSIONER: Yeah.

UNIDENTIFIED MALE SPEAKER: Photos 044 and 045 (inaudible).

MR. KENNEDY: I can show him the photographs in the book.

THE COMMISSIONER: Yes, if you have the photograph there, Mr. Kennedy, if you got the full one. Just show Ms. Chaytor first, if that's the one.

MR. KENNEDY: There's two there, there's 044 and 045; 044 (inaudible).

THE COMMISSIONER: Yeah, I remember 043 we moved from – or was it 044 we moved from –?

MS. SHEEHAN: 044 I can get, 045 (inaudible).

MS. CHAYTOR: Yeah, 044 doesn't show the gun, Mr. Kennedy said.

MR. KENNEDY: (Inaudible.)

THE COMMISSIONER: 045 we're looking at?

MS. CHAYTOR: Yeah, 045. Yes, yes.

DR. AVIS: Yes, for example, on 054 –

MR. KENNEDY: What number, Commissioner?

MS. CHAYTOR: 045.

DR. AVIS: Sorry? 3WF0054?

MR. KENNEDY: Yeah, that's the number right there, Doctor.

DR. AVIS: 045? Correct.

Could it not be possible, if he had his – the gun in his hand, in which the muzzle was in his left hand, that the gun just simply didn't fall out of his hand, the muzzle impact on the ground, the gun rotate and end up where it is on the blue ...?

THE COMMISSIONER: So what you're saying is that the –

MS. CHAYTOR: No, this is 049.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible.)

DR. AVIS: Just simply –

MS. CHAYTOR: Sorry.

DR. AVIS: – fell out of his hand and toppled over.

THE COMMISSIONER: But you – what you're saying is that he could have been holding it in a position indicated by the hands?

DR. AVIS: Yes, Sir.

THE COMMISSIONER: That when he was shot the gun went to the floor, bounced and turned over. That that's one –

DR. AVIS: It simply fell out – fell out of his hands, the muzzle impacted the ground and the gun flipped over. And that would end up in this position that we see it there.

THE COMMISSIONER: Right.

MS. CHAYTOR: Okay. Okay.

And in terms of the position, then, of his hands as you see in the photograph, Doctor, I understand you to say that doesn't necessarily mean the position of his hands at the time he was shot.

DR. AVIS: No, it doesn't necessarily mean, but you can take the converse, that it doesn't necessarily mean it isn't.

MS. CHAYTOR: Right. Okay.

Okay and similar to what you said about the body still being able to move, would that come into play in your answer in that question?

DR. AVIS: I don't find as much mystery about the position of the gun as everyone else does.

MS. CHAYTOR: Okay. Fair enough. Okay.

But in terms of the body still being able to move, that would be true as well of his hands?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay.

If we could have, then, please, P-0312. That's okay; forget the picture unless anyone else might be able to bring it back around if they want. P-0312 and this is page 13, supplementary report of Sergeant Burke, April 30, 2015.

And do you remember having a meeting with Sergeant Burke or telephone conversations with Sergeant Burke, the primary investigator?

DR. AVIS: I believe I – I had several conversations with him but, yes, I do.

MS. CHAYTOR: Okay. And there's this –

DR. AVIS: And –

MS. CHAYTOR: There's a sentence here that I want to direct your attention to. And if we look at page 13, please, Madam Clerk, in this document. Okay.

And this is April 30, 2015: "Member received a return call from Dr. AVIS" – so it looks like you returned his call – "who is the doctor in charge of the DUNPHY shooting. Member asked Dr. AVIS about the hand position of the deceased as noted in the scene photos. Dr. AVIS said the hand position of the deceased does not mean that was his hand position before he was shot." Dr. AVIS noted "that it would be possible to move the body for a certain time post mortem."

And I know you take issue with that because that's the wrong terminology to use there, because once it's post-mortem, the person's dead.

DR. AVIS: Yes.

MS. CHAYTOR: You meant post being shot. Is that correct?

DR. AVIS: Yeah, I mean, I hope the implication here isn't that someone –

MS. CHAYTOR: Yes.

DR. AVIS: – moved the body once he was dead, I mean, because that's what it sounds like to me.

MS. CHAYTOR: Right, okay. Right.

DR. AVIS: And, you know, part of the problem with people interpreting what I say is that they often misinterpret what I say. And when they misinterpret it, they make it sound like something that I would never say in a million years.

MS. CHAYTOR: Okay –

THE COMMISSIONER: Join the club, Doctor.

MS. CHAYTOR: Please, I need that exhibit. What happened there?

Okay, yes, because, Dr. Avis, there is another example of that further down I wanted to take you through because there is, I know from your pre-hearing interview that you thought this was not what you would have said.

Dr. Avis said that scene evidence indicated that Dunphy was indeed seated in the chair when he was shot due to trajectory and the fact there was brain matter on the back of his chair. He also

advised that as part of his autopsy report he will speak to any other injuries besides the bullet wounds. Dr. Avis mentioned the fact that the police officer – and this is the part I think that you took issue with – Dr. Avis mentioned the fact that the police officer entered the residence believing that there was no firearms present and then one was presented. This would contradict any theory that the police officer would have placed any firearm at the scene. Not knowing there was firearm there and the last known location of one would have been behind the couch. And then you have, in brackets here it says, Meghan Dunphy statement. So I just want to offer you an opportunity to speak to this and whether or not you in fact –

THE COMMISSIONER: Well, that's really I think a matter of logical inference, isn't it?

MS. CHAYTOR: Whether or not Dr. Avis actually said anything along these lines to Sergeant Burke is the question.

THE COMMISSIONER: Whether Dr. Avis –

MS. CHAYTOR: Dr. Avis mentioned the fact that the police officer entered the residence. I believe the doctor said that's not something that he would have spoken to. Did you state this, Doctor?

THE COMMISSIONER: I think that that's referring to the fact that Constable Smyth entered the residence.

MS. CHAYTOR: This says Dr. Avis mentioned the fact that the police officer entered the residence –

THE COMMISSIONER: Yeah, the police officer he's referring to Constable Smyth, is it not?

MS. CHAYTOR: Correct.

THE COMMISSIONER: Are we reading it differently?

MS. CHAYTOR: Dr. Avis mentioned the –

THE COMMISSIONER: That Constable Smyth entered the residence believing there was no firearms present and then one was presented, which is (inaudible).

MS. CHAYTOR: Right. And what this is that Dr. Avis mentioned this. My understanding – I'd like the witness to answer the question in terms of whether or not he had this discussion with Sergeant Burke.

THE COMMISSIONER: Go ahead.

DR. AVIS: I just don't recall. I mean I certainly wasn't offering any in-depth theory or anything.

THE COMMISSIONER: Presumably you had, from the documents presented to you, you had seen Constable Smyth's statement as to how it occurred by that time and ...

DR. AVIS: I mean, you know, in our business we brainstorm, we talk about things and we sound them out to see how they sound. And I constantly tell police officers not to keep recording what I'm saying because I'm not necessarily saying something that is – that will make any sense at any point in time. I'm just seeing to myself how does it sound, how does it fit. And yet every time a police officer is in my office they got their pads out and they're writing down everything I say.

MS. CHAYTOR: Okay. All right.

I just want to offer you an opportunity to speak to it because you did take exception to it at the time of your interview. It's 131,132 of the transcript for anyone who is interested, and I'll move on:

THE COMMISSIONER: Sorry, what was – give me that transcript.

MS. CHAYTOR: It's page 131, 132 –

THE COMMISSIONER: Yeah.

MS. CHAYTOR: – of the transcript of the interview.

I understand, Doctor, that you did meet with Megan Dunphy and that meeting took place on November 24, 2015, is that correct?

DR. AVIS: I know I met, I don't recall the exact date that I met (inaudible).

MS. CHAYTOR: And what was the purpose of that meeting? And what was discussed?

DR. AVIS: She requested a meeting with me.

MS. CHAYTOR: Okay.

DR. AVIS: I'm not sure if I ...

MS. BREEN: Sorry, Mr. Commissioner, I'm having a lot of difficulty hearing Dr. Avis?

THE COMMISSIONER: Sorry?

MS. BREEN: I'm having a lot of difficulty hearing Dr. Avis?

THE COMMISSIONER: Yes, it's a pretty good mic system, Doctor, but you have to be sort of four or five inches away from it in order to pick it up.

MS. CHAYTOR: Okay.

And, Doctor, do you have notes? Is that what you are looking for in your file on that?

DR. AVIS: I was just looking, unfortunately, I didn't make any notes but I had agreed to meet with her and ...

MS. CHAYTOR: Okay, because I don't think there is anything in your file that will assist you – I could be wrong – in terms of what was discussed. So you don't have any recollection, do you, of what actually was discussed independently?

DR. AVIS: No, Ma'am.

MS. CHAYTOR: Okay.

The Commissioner has also heard evidence that Megan Dunphy wanted to see her father's body before the autopsy and I understood from your interview that that is a common request of families but that it is routinely denied. Is that correct?

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: Okay. And we have Constable Galway – we don't need to bring up this exhibit but I think it's P-0395 where he indicates that he made a request on behalf of Megan. Is there a way that such a request could be considered in such circumstances? And are – okay –

DR. AVIS: We have no viewing facility.

MS. CHAYTOR: You have – I'm sorry?

DR. AVIS: We have no viewing facility.

MS. CHAYTOR: No viewing facility.

DR. AVIS: So unless we drag the body out into a public corridor.

MS. CHAYTOR: And are you aware whether that it happens in other jurisdictions and perhaps do other jurisdictions have viewing facilities that could be arranged for families?

DR. AVIS: Other jurisdictions have huge buildings of their own, yeah.

MS. CHAYTOR: Okay. But are you aware that that is a request that – are you saying it's a request that can't be accommodated because you don't have the facilities, is that –?

DR. AVIS: Well, we certainly don't have the facilities. And the other consideration – I mean we would allow them to view the body if they were not able – if there was a physical barrier between them and the body. So if there was a physical barrier, we would allow them to see them.

THE COMMISSIONER: So that's in terms of preserving the –

DR. AVIS: Yes.

THE COMMISSIONER: – evidence on the body, yeah.

DR. AVIS: Yes, well, we don't want them –

THE COMMISSIONER: Avoid contamination.

DR. AVIS: – passing out or doing or touching or contaminating. So, you know, the problem is we do not have a physical barrier so we really can't do it. There are some times where the condition of the body is such that it may be in the best interest for them to wait until the funeral home.

MS. CHAYTOR: Okay.

DR. AVIS: Our office has, however, on a number of occasions provided graphic photographs to family of how their loved one was received by our office because they requested them and they – after counselling them and after asking them to seek counselling from someone they trust, they've come in and reviewed extremely graphic photographs. And our office will do that because, in some cases, it does help closure. And if the family really, really wants to see the body, I think it's a good idea.

MS. CHAYTOR: Okay.

DR. AVIS: But, again, we have to preserve evidence.

MS. CHAYTOR: You also had meetings and discussions, I understand, with Judge Riche.

THE COMMISSIONER: Just before you move on from that, Ms. Chaytor –

MS. CHAYTOR: Sorry.

THE COMMISSIONER: – one of the – taking a step forward, in terms of referring the family to the funeral home, in this case, I believe the state of the body after the post-mortem, particularly the head, was not in a condition for viewing. And I'm sure that similar things must occur many times, whether it be suicide or bad automobile accidents or whatever, that when you do your job, as you properly have to do, the body may not be in any state to be seen. Is there and –

DR. AVIS: It's extremely unlikely that what we will do will completely prevent a funeral home from showing the body. If a funeral home can't show the body, it's not because we – of our procedure that's made it worse, it's because it was worse in the first place. And –

THE COMMISSIONER: Okay.

I think here, to be specific and I guess somewhat graphic, there was a reference to, I think, Ms. Dunphy having the impression that her father was sent to the funeral home with his head in a bag basically. That the funeral home operator, according to her, indicated to her that – the impression I had was that – unless the bag was there, you know, the head was going to be in pieces.

So you've – if I could describe for the record, you're looking skeptical of that.

DR. AVIS: Again, I've never had – I've never seen a situation where following an autopsy so much damage was done to the body that it can't be viewed. I mean, it's often a question of how much time the funeral home is prepared to put into the reconstruction of the body.

THE COMMISSIONER: Right.

DR. AVIS: It becomes very expensive, I should imagine, after a while.

THE COMMISSIONER: Okay.

DR. AVIS: But you don't need a skull, you can use sponges and put the scalp flap – I mean, we wouldn't create a scalp flap that you couldn't, that you couldn't put back.

THE COMMISSIONER: Right, okay.

That answers my questions. Thank you.

MS. CHAYTOR: Okay.

I was just moving on to – I understand that you had at least one meeting with Judge Riche.

DR. AVIS: Yes, Ma'am.

MS. CHAYTOR: And was it just the one meeting, Doctor?

DR. AVIS: I believe it was, yes.

MS. CHAYTOR: Okay and I think the records show that it was June 10, 2015. And I also understand that that was arranged at the request of Judge Riche. And what questions did Judge Riche have for you?

DR. AVIS: I believe he asked mostly about the autopsy.

MS. CHAYTOR: Okay.

All right and so you don't remember anything particular that he would have asked of you.

I'll just bring up P-0370, and this is an excerpt if we could have page – it's page 13 of Judge Riche's report. And I'm just going to bring you down, Doctor, to this paragraph here. I just want to make it a little bit bigger, Madam Clerk, please.

He writes: "We know from the evidence obtained from the forensic pathologist Dr. Avis that the shot to Dunphy's body is what killed him. The shots to the head were not necessary to render him incapable of causing harm. Why Smyth continued firing, especially the last shot which was very close to Dunphy's head and Dunphy was not moving, makes me wonder why this was done. Smyth says he was on automatic because that comes out of their training."

Did you tell Justice Riche, or in your meeting with him, that the shot to the body is what killed Mr. Dunphy?

DR. AVIS: I have – no.

MS. CHAYTOR: Okay.

And it also seems to –

THE COMMISSIONER: Sorry, was that no?

DR. AVIS: No, My Lord.

MS. CHAYTOR: No? Okay.

And it also seems to suggest that the shot to the body was the first, and I understand what you're saying is that you're not able to determine which would have been the first shot, and whether or not the shot to the body came before the first head shot, for example.

DR. AVIS: Again, I'm sort of lost for words because I mean the shots to the head were not necessary to render him incapable of causing harm.

THE COMMISSIONER: You faded again. The shots to the head were not necessary to render him incapable of causing any harm?

DR. AVIS: Is that what I said?

MS. CHAYTOR: This is what Judge Riche is writing. Based on, he says, evidence obtained from this forensic pathologist, the shot to Dunphy's body is what killed him.

So my question is: Did you say that to – somehow to Dr. – or Judge Riche?

DR. AVIS: No.

MS. CHAYTOR: Or is it, again, someone misinterpreting what you would have said?

DR. AVIS: Complete misinterpretation.

MS. CHAYTOR: Okay.

And in terms of any indication that the body shot was the first shot, did you indicate that to Judge Riche?

DR. AVIS: My Ouija board wasn't working that day so I don't know how I would have determined which is the first shot. I mean, no.

MS. CHAYTOR: Okay. Yes, because I understand your evidence is you're not able to determine which shot came first.

DR. AVIS: And lawyers in this hall must have heard me say that on so many times, on so many occasions, that I can never tell which shot came first. I mean, I have no idea.

MS. CHAYTOR: Okay. All right.

DR. AVIS: Anyway.

MS. CHAYTOR: We can move on then.

The last thing I want to bring your attention to is P-0371 and this is page 17 from the RCMP report. And on the bottom of the report, if we can make it a little larger, please.

And this is Sergeant Burke's report now that I'm showing to you from the RCMP: "The deceased was located in a slouched sitting position in the rocker/recliner type chair to the immediate right when entering the living room. His obvious injuries were to his head at the left temple, right forehead and right ear. There was also liquid blood in his left ear and a small hole in his shirt with blood around it at his left armpit. The blood flow from the hole in his temple was not flowing straight down with gravity as is expected but it was flowing on an angle towards the back. This appeared inconsistent with the present position of the deceased."

And then there's a footnote: "Cpl. BURKE reviewed all statement/notes/ of those who entered the DUNPHY residence before FIS arrived and there is no evidence that the body was moved."

Is this something that you can speak to, Doctor, in terms of what is being observed here in terms of the blood flow from the hole in the temple not flowing straight down with gravity?

DR. AVIS: Well, that would indicate that the head had moved but, you know, the head could have moved because of the second shot. I mean, the blood may have been going down, the second shot occurs, blood flows and then – again –

MS. CHAYTOR: Okay, I just want to be clear.

We'll bring up, if we could then, a C exhibit, and it's C-0001, photo 126.

I just want you to be clear on – this is the bullet hole in the temple area, Doctor, in the left temple area. Do you have that up now, Doctor?

DR. AVIS: No.

MS. CHAYTOR: Is it there?

DR. AVIS: No.

MS. CHAYTOR: No, it's not there?

THE COMMISSIONER: It's there now.

MS. CHAYTOR: Okay, we might – do you have it up? It is up?

DR. AVIS: Oh yes, it's up now. Yes.

MS. CHAYTOR: You have it?

Okay. All right.

So I'm just wondering if that's something you could speak to and offer any explanation for.

DR. AVIS: No. In the position the head is at that moment in time on that photograph it should be running straight down as – whereas it's not. And at some point the head must have been in that position to allow the blood to flow straight under gravity. Other than that, I can't offer any other explanation.

MS. CHAYTOR: Okay.

And so when I asked you this question, you said on your interview, you mentioned you would expect it to be coming straight down but that has to assume the head was constantly in that position; maybe his head was forward like that when he was shot and then he fell back. And would that explain it?

DR. AVIS: The head must have moved at some time.

MS. CHAYTOR: Okay.

And was that anything that the RCMP, Corporal Burke or anyone else, asked you your opinion on? Was this question ever put to you by the RCMP in terms of any explanation?

DR. AVIS: They may have asked, but I mean, again, I'm not sure that I see a big problem or issue. The head has moved at some point.

MS. CHAYTOR: Okay. Thank you.

Commissioner, those are all my questions that I have for the witness.

Thank you, Doctor. Some of my colleagues, though, or the Commissioner may have questions for you.

THE COMMISSIONER: Thank you, Ms. Chaytor.

Who's going next?

We have Ms. Breen?

MS. BREEN: I have some brief questions, I can go next. I need a –

THE COMMISSIONER: Can't hear you, sorry?

MS. BREEN: Thank you.

Dr. Avis, Erin Breen for Meghan Dunphy. Good afternoon.

Dr. Avis, first of all, I just want to ask you a little bit about your contact with Meghan Dunphy. And I understand that you don't take notes regularly of these kinds of meetings. I know that in your practice you regularly meet with family members. Is that true?

DR. AVIS: Yes, Ma'am.

MS. BREEN: Doctor, can you tell us whether the RCMP are aware of this being available to family members? Is it your understanding that police officers know they can give your contact information to a family member?

DR. AVIS: I can't imagine why not. A lot of RCMP, a lot of police officers do give – our number is in the book. If you look for the chief medical examiner, the number's there and ...

MS. BREEN: Right.

And I understood from your interview that you said that you had – you still instruct the RNC. You still instruct the officers at the RNC. I think you do a 12-hour course with them, is that right, in their –

DR. AVIS: Yeah.

Well, I no longer instruct the RCMP but I instruct the RNC. And, yes, they are told that the family can call our office at any time.

MS. BREEN: Okay.

So the RNC officers are told that but you don't have a formal training with RCMP officers currently. Is that right?

DR. AVIS: No, Ma'am.

MS. BREEN: And how long has it been since you have trained the RCMP, their officers?

DR. AVIS: We used to do a – once a year, it was an orientation for all RCMP officers coming into the province. It stopped because they stopped asking me, I guess.

MS. BREEN: Right.

DR. AVIS: But I cannot recall at what point it ended.

THE COMMISSIONER: You don't recall how long? Was it a year or two years ago?

DR. AVIS: No, Sir, I can't.

THE COMMISSIONER: More than that?

DR. AVIS: It's been more than two years.

THE COMMISSIONER: Okay. Thanks.

DR. AVIS: It's been a few years.

MS. BREEN: Thank you.

And do you recall, Dr. Avis – in fact, we've had evidence from Meghan Dunphy that she did in fact meet with you twice. She met you the first time with her common-law spouse and then she came back the second time. Actually, I was at the meeting with you.

Do you recall her discussing with you saying, you know, I wish I could have been able to contact you at that time, but that she hadn't been given that information. Does that –?

DR. AVIS: Well, you know, I don't disbelieve it. I'm sure she would have. It's unfortunate that that didn't happen.

As I say, our phone rings off the hook almost continuously throughout the day of people calling wanting to speak to us. So it's not a public secret that you can get hold of us.

MS. BREEN: No, and certainly it seems like the RNC are well aware of it. So for cases where the RNC is investigating, it appears their officers are armed with that information because you give it to them yourself.

DR. AVIS: Well, I guess we'll instruct the RCMP to tell people to contact us if they required –

MS. BREEN: Yes, and I'm just asking you this, Dr. Avis –

DR. AVIS: And I'll be – again, we spend a lot of time contacting family, we don't wait. In a case like this where the cause of death is obvious, a person's been shot, we won't necessarily call the family because, to be honest with you, most of the time we're told in perhaps not quite in polite terms that they don't want to speak to us, they know why their loved one has died.

But in any other death that we investigate in which the cause of death is unknown, we spend a fair amount of time trying to contact the family.

MS. BREEN: And I'm not suggesting to you that it was your responsibility to contact her, what I'm asking you on a go-forward basis – because we understand that she had been asking the RCMP many questions about wanting to see her father's body, but the evidence that we have is that no one did provide her with your information at that time.

DR. AVIS: Tomorrow morning I will send out a directive to the hill – not the hill, the police hill – indicating that all officers should be aware of the fact that all family have the right to contact our office whenever they wish to discuss issues. We'll do that tomorrow.

MS. BREEN: Dr. Avis, you have given us some information because we had testimony from a Sergeant Saunders, who was the main identification officer in this case, about the movement of a body after death and pre, for example, when the first responders arrive at the scene. And in this case we know in Sergeant Saunders's case it was about a five-hour difference from the time the incident occurred and the time that Sergeant Saunders saw the body.

Can you explain to us what happens naturally to the body in terms of the movement of the body, and in particular in relation to the position of Mr. Dunphy in that chair? What are the natural processes that occur in terms of any movement of the body from the time that death occurs and, say, let's go with what's happened here five hours later.

DR. AVIS: Well, there is no standard procedure or standard protocol or standard movement protocol. You just have to appreciate that following a fatal injury, an individual, provided their spinal cord is intact or their mid-brain is intact, can move. It doesn't mean they will – they can move. They are capable of independent movement.

It's important for us to know that because at the scene an individual who's bleeding profusely from a large head injury can do it themselves. It doesn't mean that they will move. I can't say that, you know, in the first hour they'll do this. They may not; they may drop where they stood and not move at all, but they are capable of movement.

MS. BREEN: Yes –

DR. AVIS: An individual, for example, who's stabbed in the right side of the heart: average survival time, 20 minutes. This is a study based on individuals who have witnessed to commit suicide by stabbing themselves in the heart. Stabbed themselves in the right heart, withdrew the knife and it took 20 minutes before they died.

MS. BREEN: And, Dr. Avis, I take your point, but I'm talking about once death occurs, the natural rigidity I think is how you –

DR. AVIS: Oh okay.

Okay, well, once death has occurred then movement is no longer possible. Technically you're dead. You are able to move during the agonal period. The agonal period is that period between fatal injury and death. Once you reach death you don't move, but during that agonal period you can.

Once you go into death, the heart stops, the blood stops perfusing through the body, the blood settles creating lividity, that blueish discoloration. People call it the blueing of death. It's settles on the – gravity to the, to the lowest level. It then becomes fixed.

Initially, for the first few hours, it can move around. Then after a few hours it becomes fixed. So you can use what we call fixed lividity as a guestimate of how long a person is dead.

At the same time, muscles start to become rigid. They become rigid because of a chemical called ATP starts to disappear in the body. And as a result, the muscle fibres bond to each other. They don't contract, they don't move, so you can't get flexion or contraction.

The body will stiffen in the position it's in. And, again, that will take a variable period of time depending on temperature, activity, muscle mass, disease process. But general rule, it takes about 24 to 36 hours to become stiff.

THE COMMISSIONER: You say it's been – I think it's a bit too general, maybe, if it –

MS. BREEN: The one question –

THE COMMISSIONER: What are you focusing on?

MS. BREEN: The question I had was with respect to Sergeant Saunders when he talked about a settling of the body.

THE COMMISSIONER: That – was it he? I knew somebody had referred to some slumping that might occur.

MS. BREEN: Yes, that's correct.

THE COMMISSIONER: If the body is sitting in the chair, Doctor, and five hours pass is – does the body remain exactly where it was or would the normal process –

DR. AVIS: It can respond to –

THE COMMISSIONER: – result in any –

DR. AVIS: It can respond to gravity by moving.

THE COMMISSIONER: Sorry?

DR. AVIS: It can respond to gravity by slouching down. I mean a body can slouch.

THE COMMISSIONER: As over this – would it be over time or ...?

DR. AVIS: Again, there's no rule to it. I mean, just like you're lying asleep watching television and you start moving down –

THE COMMISSIONER: You slump down. Slump or slouch –

DR. AVIS: Slumping down.

THE COMMISSIONER: – as you indicated.

DR. AVIS: Yeah.

THE COMMISSIONER: All right.

DR. AVIS: It's of no physiological – no physiological relevance. I don't know –

THE COMMISSIONER: So there's nothing that necessarily occurs but –

DR. AVIS: Right.

THE COMMISSIONER: – I take it what you're saying it could occur.

DR. AVIS: Could occur. Yeah.

THE COMMISSIONER: Right.

DR. AVIS: Now, he's not talking –

THE COMMISSIONER: Ms. Breen, is that – is what you're –

MS. BREEN: That's the question, that's what I was getting to, Judge, Mr. Commissioner, thank you, was the evidence of Sergeant Saunders that he gave –

THE COMMISSIONER: Right.

MS. BREEN: – about what he noticed when he came in and the change.

THE COMMISSIONER: Yeah.

MS. BREEN: Sorry, Dr. Avis, did you have something to add?

DR. AVIS: Yeah, but that wouldn't have any physiological consequence or any physiological meaning. It wouldn't have any meaning to me in terms of anything happening to the body or a process that's going on.

THE COMMISSIONER: No, but in this case there's some question about where the hands of Mr. Dunphy might have been at the time of shooting which had to do with – which might be related to his lifting the firearm. And there might be some question of whether the position changed from the time of the shooting until it was seen by Corporal Saunders five hours later.

DR. AVIS: But how would we know?

THE COMMISSIONER: Hmm?

DR. AVIS: Where is the evidence that it moved? Where is there evidence that anything happened?

THE COMMISSIONER: That is the – well, one question that's sought to be answered – Ms. Breen, wants to have answered which I think you have answered – is whether in the normal process because of gravity or whatever, there might be – you can't say there was definitely – but there might be some sinking down, slouching or something of the body. Is it – did I understand you correctly in that regard?

DR. AVIS: Yes, My Lord, that could very well happen. It might start to stop once you stiffen up because once you stiffen up, there's resistance to the slouching but ...

THE COMMISSIONER: You can't say.

DR. AVIS: Well, it's sort of difficult to give an explanation for something that we're not sure is actually there.

THE COMMISSIONER: Right.

DR. AVIS: I'm trying to explain something that hasn't been seen but is rumoured to have been there.

THE COMMISSIONER: Well, I'm not sure if there's anything we can show you.

MS. BREEN: I believe what Sergeant Saunders was referring to, Mr. Commissioner, is that there was the bullet in the chair and where the bullet had entered the chair versus what he saw when he first came into the scene where he saw Mr. Dunphy's head positioned. And I believe he said he made an assumption that there was a, you know, a slouching down of the body that would occur naturally after time – over time. I just wanted Dr. Avis to make a comment on that as to whether that's possible.

DR. AVIS: It's possible.

MS. BREEN: Dr. Avis, also, I understand from your testimony that you would have expected the RCMP to obtain a general warrant in this case to search the house.

DR. AVIS: Yes, Ma'am.

MS. BREEN: And also I understand that what you had told Commission counsel in your interview was that you did not feel that anyone was coming to you for direction in relation to what they did with the scene.

DR. AVIS: No, I was not directing any investigation into what happened.

MS. BREEN: Thank you very much.

Those are all my questions.

THE COMMISSIONER: Mr. Kennedy.

MR. KENNEDY: Good afternoon, Dr. Avis.

Jerome Kennedy, representing Constable Joe Smyth.

Doctor, you described what you do, or the medical examiner's office, I think at one point during an interview with Ms. Chaytor, it was a death investigation service. So that's part of what you do.

DR. AVIS: Yes, Sir.

MR. KENNEDY: So it's not simply you do an autopsy. You look at – is that correct?

DR. AVIS: It's a death investigation which could include an autopsy.

MR. KENNEDY: Yeah.

The role of the forensic pathologist though is to, not only determine the cause and manner of death but to apply scientific principles, correct?

DR. AVIS: Yes, Sir.

MR. KENNEDY: And the interpretation of injuries though, or the cause and manner of death, you can draw inferences but you shouldn't speculate, should you?

DR. AVIS: That's correct.

MR. KENNEDY: Yeah.

So you draw inferences from proven facts, or the facts as you know them.

DR. AVIS: Yes, facts as we know them.

MR. KENNEDY: And historically that has been the critical role of the forensic pathologist in the criminal justice system in both – in Canada and throughout the world, correct?

DR. AVIS: Yes, Sir.

MR. KENNEDY: Yeah.

So when you're doing a – in your role as a forensic pathologist, you have certain information, you're looking for things that are consistent and inconsistent with what you know, correct?

DR. AVIS: Yes, Sir.

MR. KENNEDY: So if you know, for example, or there's an allegation that there has been blunt force injury to the face, and yet there are no abrasions, bruises, contusions, scratches then that would cause you to question whether or not there was blunt force injury to the face, correct?

DR. AVIS: Yes, Sir.

MR. KENNEDY: Meanwhile, the opposite, if part of the information that you possess, or has been provided to you is that there had been a struggle or a fight and there are abrasions, contusions, scratches then that would be consistent with that struggle as being put forward.

DR. AVIS: Yes, Sir.

MR. KENNEDY: Yeah.

So you look at consistencies and inconsistencies in reaching your conclusions or trying to reach your conclusions. Is that a fair statement?

DR. AVIS: It's not just inconsistencies or constituencies but that is what – one of the important things we look for, yes, Sir.

MR. KENNEDY: And that's why – and I guess my point is simple – that's why you want some information about what's alleged to have occurred prior to reaching any conclusions from your perspective as a forensic pathologist. Is that correct?

DR. AVIS: Well, absolutely, Sir. And as I pointed out, the jumping, falling from a height I think demonstrates that very well.

MR. KENNEDY: In this particular case, Sir, there were no bruises, cuts, lacerations, scratches to the facial area of Mr. Dunphy which would indicate a struggle of any sort. Is that correct?

DR. AVIS: That's correct.

MR. KENNEDY: Sir, were there any – there were also, if I understand correctly, no similar or those types of injuries to the body which would indicate any kind of struggle.

DR. AVIS: That's correct.

MR. KENNEDY: Because sometimes you'll see grab marks or bruise marks on the arms. Correct?

DR. AVIS: Correct. The only injury to the body were the gunshot wounds as described.

MR. KENNEDY: And so when you're looking at the – even though there's a gunshot wound, you will also be looking for other injuries or noting them if they are present.

DR. AVIS: Yes, Sir.

MR. KENNEDY: Okay.

Sir, in terms of where Mr. Dunphy – I think it was put to you during your pre-interview, your pre-inquiry interview, as to whether or not Mr. Dunphy could have been standing when he was shot. Do you remember that discussion with Commission counsel?

DR. AVIS: I – I guess, I mean ...

MR. KENNEDY: In any event, your evidence today is that the way in which Mr. Dunphy was found sitting in the chair is consistent with what you knew about the situation both in terms of the information provided and the evidence that you had before you.

DR. AVIS: It had always been consistent, yes, Sir.

MR. KENNEDY: Yeah. Never caused you to question that?

DR. AVIS: No, Sir.

MR. KENNEDY: Sir, if you come across the information again, a diagram of the scene, a synopsis of a statement, and there's a glaring or inconsistency, would you point that out to the police or point it out in your autopsy report?

DR. AVIS: I would certainly discuss it with the police, yes, Sir. Part of our job is to assist the police in interpreting medical evidence and certainly if I saw something that concerned me I would bring it to their attention.

MR. KENNEDY: Sir, if I could – Madam Clerk, if I could have – could I have 0370, Exhibit 0370 brought back on the screen for a second. This is retired Judge Riche's report, which he was acting as an independent observer. Was that your understanding or did you have any understanding of his role?

DR. AVIS: I wasn't quite sure, to be honest with you, what his role was.

MR. KENNEDY: Who was with retired Judge Riche when he met with you that day?

DR. AVIS: There was a police officer and ...

MR. KENNEDY: Could we go to the second-last paragraph, please? And you'll see – excuse me: "We know from the evidence obtained from the forensic pathologist Dr. Avis that the shot to Dunphy's body is what killed him. The shots to the head were not necessary to render him incapable of causing any harm. Why Smyth continued firing, especially the last shot, which was very close to Dunphy's head and Dunphy was not moving, makes me wonder why this was done." The third sentence appears to be Justice Riche's sentence.

You looked rather quizzical when you were asked about whether or not you made these comments to retired Justice Riche. And you indicated, no, and I think then your answer actually was that there was a complete misinterpretation. Do you remember that line of questioning?

DR. AVIS: Yes.

MR. KENNEDY: What do you mean by a complete misinterpretation?

DR. AVIS: Well, that if I said anything remotely like this – which I can't believe for a second I did because that's not, that's not me, that's not how I approach things – he must have completely misunderstood everything I said.

MR. KENNEDY: So does that relate to the paragraph as a whole or just the first couple of sentences?

DR. AVIS: Well, I mean if the rest of the paragraph is based on the conclusion from the first couple of sentences, then I guess everything is wrong.

MR. KENNEDY: Yeah.

So when you say it is not something that you would have said, is that from a scientific perspective as a – why isn't this something, I guess, you wouldn't have said?

DR. AVIS: Because I would have no idea which – I don't know which shot was first, which shot was last. And to say, I mean – I just can't make that conclusion, that it was a shot to Dunphy's body that killed him.

MR. KENNEDY: But you see what Justice Riche is drawing from that, is that if he shot him in the body and killed him, why did he shoot him two more times in the head, or shoot him in the head at all?

DR. AVIS: Well, because simply put, that the shot to the body would not necessarily kill someone and they, therefore, remain a potential risk. And so one has to continue shooting until the risk is negated.

MR. KENNEDY: Now, this same exhibit, I don't know if you – I've got to turn over the pages. Page 19, Madam Clerk, I don't know if it's continues – if it's part – yes, okay.

We'll go down a little bit further in the fourth paragraph. Keep going, please. The forensic pathologist – you see the last sentence here, you can read the paragraph: "There seems to be no doubt that Dunphy was probably shot in the area of the chair where he was found. The first bullet, however, according to Smyth was shot at his body and the angle of that shot seems to indicate that Smyth was probably somewhere in the vicinity of the door or opening whereby you exit the living room. The forensic pathologist indicates that the bullet entered on Dunphy's left side and ... went across his body and damaged his aorta and killed him." Do you see that comment?

DR. AVIS: Uh-huh.

MR. KENNEDY: Does that – do you remember saying that or did you say that to retired Justice Riche?

DR. AVIS: No, I'm sure I described it going through – going through the chest wall, going through the lung, going through the aorta, exiting. I mean that's sort of a précis and I ...

MR. KENNEDY: It's referred to as the first bullet, according to Smyth.

DR. AVIS: And how would I know it was the first – how did I know it was the first bullet?

MR. KENNEDY: I don't. That's just what's written there. This is in Justice Riche's report and then he refers to the forensic pathologist indicating. So do you remember saying that? Is what's there accurate?

DR. AVIS: No.

MR. KENNEDY: Sir, in terms now –

THE COMMISSIONER: You're saying you didn't say that (inaudible).

DR. AVIS: No, I didn't say it.

THE COMMISSIONER: Right.

MR. KENNEDY: And there's a couple of other points I want to clarify. So essentially from what I understand that in the agonal period and there would be the – wherever the shot, so we've got Constable Smyth's – what he says happened, that the gun, holding the gun is quite possible after the first shot, less likely after the – if the first shot is to the head, or excuse me to the body. Wound two is to the – and, again, I've got the wounds mixed up. Could you – essentially he could hold the rifle until that final shot to the –

DR. AVIS: He could potentially hold the rifle and could potentially be a risk until that shot that went through the brain stem.

MR. KENNEDY: Because this is all taking place in seconds, isn't it, potentially?

DR. AVIS: Yes, I mean – well, again, I wasn't there –

MR. KENNEDY: That based on Constable Smyth's version –

DR. AVIS: – but I can't imagine it being more than four or five seconds.

MR. KENNEDY: Now, Sir, in terms of where the rifle fell, you don't – and you were talking about this and you said that you – my note indicates said that you said that you've been dealing with hundreds of deaths with firearms, people with firearms in their hands. And firearms do not always end up where we expect them to lie.

DR. AVIS: Yes, Sir.

MR. KENNEDY: And you see nothing inconsistent with the firearm, or alarming, or disconcerting with the firearm, where it's located in this case?

DR. AVIS: No, Sir.

MR. KENNEDY: The trickle of blood that was referred to you – you were shown the picture at the – during your interview with Commission counsel, you didn't – you said you didn't find anything of any significance in that either.

DR. AVIS: I can't see anything of any significance.

MR. KENNEDY: Yeah. It doesn't cause you any concern?

DR. AVIS: No, Sir.

MR. KENNEDY: So you did say, though, if – in Commission counsel, that if you were trying to recreate the scene, you wouldn't position the gun like that. Do you remember saying that to Commission counsel?

MS. BREEN: Mr. Commissioner, I am going to object to that line of questioning. I don't think that that's a proper area for Dr. Avis to give any kind of opinion on, as to what he would do if he was going to stage a scene.

THE COMMISSIONER: Just give me a second now.

The – you’re saying that Dr. Avis, what, this afternoon said that or –

MR. KENNEDY: No, what I’m saying is –

THE COMMISSIONER: – at his interview?

MR. KENNEDY: – in the interview with Commission counsel at pages 120 to 121 –

THE COMMISSIONER: Right.

MR. KENNEDY: He basically – well, I can –

THE COMMISSIONER: No, no –

MR. KENNEDY: There’s been an objection.

THE COMMISSIONER: – just briefly, give me back the question you put. You said you put it at –

MR. KENNEDY: Yeah, I’m going to – I said at the scene, or excuse me, during the interview with pre –

THE COMMISSIONER: With counsel, yeah.

MR. KENNEDY: During the pre-inquiry interview with Commission counsel, he indicated that if he was going to recreate the scene or try to recreate the scene, he wouldn’t position the gun like that.

THE COMMISSIONER: Right.

Now, Ms. Breen, what’s your – what’s the basis of your objection?

MS. BREEN: I don’t understand how Dr. Avis can give an opinion for you, Mr. Commissioner, to consider about what he would do to stage a scene of a crime. I don’t see how that’s within his role here at all.

MR. KENNEDY: Okay.

Mr. Kennedy, it’s sort of illogical –

MR. KENNEDY: That’s fine.

THE COMMISSIONER: – proposition you’re putting forward there, isn’t it? Something that’s more argument than –

MR. KENNEDY: No, I just –

THE COMMISSIONER: – medical or ...

MR. KENNEDY: Yeah, it’s not a big issue. It’s just it was put to him at the end –

THE COMMISSIONER: Yeah. As a matter of fact, I think I put the same thing to one of the witnesses somewhere along the stage, which was a long time ago, so I forget who. But –

MR. KENNEDY: I think it was Meghan Dunphy.

THE COMMISSIONER: Actually, it might have been Ms. – to Ms. Dunphy, was it?

MR. KENNEDY: I think it was.

THE COMMISSIONER: Yeah.

MR. KENNEDY: Yeah, at the end of her interview, her testimony.

THE COMMISSIONER: And that's correct. Yeah, I remember now.

So if – I think it's not really a question for Dr. Avis.

MR. KENNEDY: That's fine.

THE COMMISSIONER: Maybe not even a question for me, but I'll have to consider it anyhow.

MR. KENNEDY: Okay. So let me summarize –

THE COMMISSIONER: Okay.

MR. KENNEDY: Constable – or excuse me, it's late in the day – Dr. Avis. So you had a synopsis of Constable Joe Smyth's statement when you – given to you early in the investigation.

DR. AVIS: Yes, Sir.

MR. KENNEDY: You had the diagram which you understood to be drawn by Constable Smyth which was P – shown to you as P-0373, the exhibit here.

DR. AVIS: Yes, Sir.

MR. KENNEDY: You had done your autopsy and examined the injuries on the body. You indicate as you're doing this, all of this, you're looking for consistencies, inconsistencies, discrepancies. Correct?

If I understand you correctly, Sir, there's nothing you found which is inconsistent with Constable Smyth's version of the events.

DR. AVIS: That's correct.

MR. KENNEDY: Thank you very much.

Those would be my questions, Doctor.

THE COMMISSIONER: Thank you.

Any other counsel?

MR. FREEMAN: Good afternoon, Dr. Avis. Mark Freeman, I'm counsel for the RCMP. I just have a few questions for you.

You were asked about the obtaining of a warrant a couple of times this afternoon by Commission counsel and by Ms. Breen. You don't intend to offer any legal opinion here as to whether the RCMP seeking or not seeking a warrant was proper. Is that –

(Audio silence.)

UNIDENTIFIED MALE SPEAKER: Yeah, mine is working.

UNIDENTIFIED FEMALE SPEAKER: Mine is on.

MS. BREEN: Mine is on too.

(Audio silence.)

UNIDENTIFIED MALE SPEAKER: There's a disconnection at my console somehow.

DR. AVIS: If I could rephrase that.

THE COMMISSIONER: Okay, we're –

UNIDENTIFIED MALE SPEAKER: Don't worry, the mic was off.

DR. AVIS: I don't offer any legal opinion and I have no qualifications to offer any legal opinion in any death investigation. I simply offer an interpretation of the medical and physical evidence.

MR. FREEMAN: And this is true with respect to the seeking of a warrant or not seeking a warrant in this case.

DR. AVIS: Absolutely. Yeah.

MR. FREEMAN: Thank you.

You mentioned the seizing of prescription drugs and that the RCMP did not seize the prescription drugs automatically in this case from the house and provide them to you. Do you recall that?

DR. AVIS: Yeah, I'm not sure. We got them eventually. Sometimes we have to ask more than once. It's not a problem but we get them.

MR. FREEMAN: So it's not automatic in every death that you need to see –

DR. AVIS: We do ask them to bring the medications but, again, you know, there are times when there's so much being done that things get forgotten. And if they do forget to bring the medications, then we'll simply say can you bring the medications in. It's not a big deal, as long as we get them at some point.

MR. FREEMAN: Thank you.

You have no reason to believe that any medications went missing in the interim between the time that you asked and the incident in this case?

DR. AVIS: No, no.

MR. FREEMAN: Okay.

There's – on the issue of Ms. Dunphy viewing the body, obviously this is a very important topic for Ms. Dunphy in this matter and fair enough. Tell me if this is correct, there's no practical way that Ms. Dunphy could have viewed or touched her father's body until it got to the funeral home. Is that fair?

DR. AVIS: That is a fair statement, yes, Sir.

MR. FREEMAN: And I just have one other area for you. This is on the idea of the –

DR. AVIS: And, again, if we could allow them to see the body that would be one thing, but we would never want them to touch the body because there is the potential for transfer of evidence and – so seeing the body is one thing. If we could have a method where they could see the body but not to touch because there is a, or could present problems if it goes to court.

MR. FREEMAN: Okay, thank you.

And with respect to the issue of the wound to the temple and the blood draining with gravity or not with gravity, I just have a question for you about that.

You can't recall whether the RCMP asked you about that or not, is that fair?

DR. AVIS: I think they mentioned it. And it's an interesting observation but again it's not one that keeps me awake at night wondering what this means and, you know, because in the context of the entire case, I don't think it means anything.

MR. FREEMAN: And that was – you're not sure, you think the RCMP then did ask you about that at one point.

DR. AVIS: I know it's been discussed. Yes, I'm absolutely sure it was discussed but when and who ...

THE COMMISSIONER: I seem to recall seeing something, Mr. Freeman, on it.

MR. FREEMAN: I just wanted to make sure that it was clear that Dr. Avis thought that we did ask because I thought that during Commission counsel's questioning maybe it came out that we had not asked that. That RCMP hadn't but it sounds like we did indeed.

Those are all my questions.

Thank you.

THE COMMISSIONER: Thank you, Mr. Freeman.

Mr. Avis.

MR. AVIS: Thank you.

THE COMMISSIONER: The other Avis.

MR. AVIS: Yes, we don't need to introduce each other.

THE COMMISSIONER: The legal Avis.

MR. AVIS: The legal Avis. I give legal opinions.

Anyway, there's many questions I'd like to ask you under oath but you'll be happy to know that none of them are relevant to the inquiry, except for a few.

With respect to this wound number two, and I just want to make sure I understand your evidence correctly. You did indicate that where wound number two is in the centre of the brain, it's the only one, you think, that there's unlikely to be some physical activity afterwards, but it does not mean that the person would be immediately immobilized. Do I understand that correctly?

DR. AVIS: No, they would likely be immobilized once it happened because the brain stem has basically cut off all of its circuits to the lower body.

THE COMMISSIONER: Yeah, that was what I understood.

DR. AVIS: They wouldn't necessarily be dead –

THE COMMISSIONER: Right.

DR. AVIS: – at that point –

MR. AVIS: Okay.

DR. AVIS: – but they would not be able to move once that had happened.

MR. AVIS: Okay.

Now, I have a few questions sort of off topic but it's related to some evidence I introduced earlier and I just need the medical evidence to support it.

I wanted to question you about a syringe as a weapon. So could you just explain, if you had a sterile syringe and needle, what kind of harm or injury could that do to a person?

DR. AVIS: Okay, well, it would depend a little bit on the size of the needle.

MR. AVIS: Standard.

DR. AVIS: Well, what's a standard needle?

MR. AVIS: Okay, you tell me.

DR. AVIS: Twenty-one gauge –

THE COMMISSIONER: Just, just – sorry, just a second now, where – do I have any evidence that there's a syringe in play here?

MR. AVIS: Commissioner, I asked a series of questions of Constable Smyth about when he was – it was alleged in use of force that it was a shoplifting and he happened to have a needle. I asked him about what his training taught him about what a syringe might mean as a weapon and I do need to put in, somewhere along the line, medical evidence to support that, that's all. It'll be over quicker than the objection.

THE COMMISSIONER: Go ahead, sorry.

MS. CHAYTOR: Sorry, I remember this – and at the time I apologized for having misspoken on the shoplifting and that the issue was that, in fact, the person was charged with –

THE COMMISSIONER: Robbery?

MS. CHAYTOR: Yeah. Armed robbery, yeah the Sears incident and, yeah, so anyhow, I think that's what Mr. Avis –

MR. AVIS: Yeah, I'm not addressing that. I may also have to put this to perhaps Coleman and Massine, depending on what questions I have about – may or may not have about prior use of force, but the questioning would be over by now.

THE COMMISSIONER: Go ahead, go ahead.

MR. AVIS: Thank you. What's the average, typical size of a needle? Average –

DR. AVIS: Well, I mean there's the diabetic needle that people use to use insulin. It's a very, very small half-inch needle. And then maybe a 21 gauge which is the standard one they take blood from you in a hospital. Is this a used syringe?

MR. AVIS: Yes – no, not a used one, that's why I said sterile.

DR. AVIS: Sterile syringe. Yes, it can be used as a weapon. It's unlikely to be a – create fatal injury. I mean, it could potentially disrupt a blood vessel. Obviously, if you stabbed someone in the neck or an area it could cause a bit a bleeding.

THE COMMISSIONER: I don't need convincing that a syringe of any length could be a possible weapon, Mr. –

MR. AVIS: Okay. Then –

THE COMMISSIONER: I don't know where you're going with it. I don't see it as an issue but –

MR. AVIS: There's no evidence before the Commission on this – medical evidence on this point. I'm just introducing here.

Anyway, I give up.

THE COMMISSIONER: Mr. Drover, do you have any questions?

Mr. Flaherty?

MR. FLAHERTY: Good afternoon, Dr. Avis. Cletus Flaherty, counsel for the Don Dunphy Community Coalition.

I just want to go back with reference to your report and just go through the four wounds. With respect to wound one, the first wound, is it probable that Don Dunphy was able to keep hold of his gun, point it at Constable Smyth as Constable Smyth exited the room to his left? Is it probable?

DR. AVIS: It's possible.

MR. FLAHERTY: So would I take that to be less than probable?

DR. AVIS: No, if it's possible, it's potentially probable.

THE COMMISSIONER: I don't think that that's really a place for possible versus probable, is it?

MR. FLAHERTY: Well, I could buy a lottery ticket tonight; it's possible I'll win, it's not probable.

THE COMMISSIONER: Well, we know everything is possible, Mr. Flaherty, but in that context – frankly, anyhow, continue with your –

MR. FLAHERTY: So as chief medical officer, in your experience, in your role, can you say whether or not it's probable or are you just saying it's possible? And when you say possible, can you give me some indication as to the possible chance or percentage, or is it just that it's – is it remotely possible?

DR. AVIS: It's possible. And I think that's as far as one can go with it. It's possible; therefore, it's possible he could injure you.

MR. FLAHERTY: Okay.

No, and sorry that I asked the question, but in your evidence you've discussed likely versus unlikely, so I guess I'll reframe the question using those words.

Is it likely that Mr. Dunphy held on to his gun, pointed it at Constable Smyth as Constable Smyth exited the room? Is it likely?

DR. AVIS: Again, likely makes it sound as if I'm able to interpret evidence a lot more than I really am. I can't say it's likely.

MR. FLAHERTY: Okay, so it's –

DR. AVIS: So all I can say is it's possible.

MR. FLAHERTY: Okay. Thank you.

THE COMMISSIONER: Any further questions?

Now, Mr. Avis – sorry Avis the legal – I get the feeling that you gave up before you wanted to get your question across so I'll put it for you: A regular type syringe, not a little tiny small one but the regular type syringe the size of, the length of something less than a fountain pen or ballpoint pen I'm holding up, possible to be a weapon?

DR. AVIS: Absolutely, you're right. It would actually be –

THE COMMISSIONER: A matter of common – a matter of common sense and everyday experience?

DR. AVIS: Yes, Sir.

THE COMMISSIONER: Do you have enough evidence there, Mr. Avis? I don't want to leave a gap.

MR. AVIS: Dirty needle?

THE COMMISSIONER: Dirty needle? Then it could be a little tiny small one. As far as I'm concerned, it's a weapon.

MR. AVIS: And if I may, it would not necessarily require you stabbing the person; a scratch would suffice, am I ...?

THE COMMISSIONER: Again, common knowledge, common experience.

MR. AVIS: Okay.

Thank you then.

THE COMMISSIONER: I'm going to give the evidence and transfer seats with Dr. Avis in a minute, but that – we don't need expert opinion on that sort of thing I don't think, Mr. Avis.

All right, we've had a long day. We've gone past the – 10 past 5.

Doctor, I appreciate your taking the time –

DR. AVIS: Yeah.

THE COMMISSIONER: – and the patience to answer some of our, what I'm sure, are not at the level of medical school, medical students in some cases, but these questions had to be put to you.

Thank you.

We're going to break now. Anything before I break in terms of housekeeping for counsel? We're going to hear tomorrow morning –

MS. CHAYTOR: Yes, tomorrow morning will have then, Chief Bill Janes, and then we'll put Mr. Browne back on the stand. Hopefully we won't be – even though we allocated the whole day for Chief Janes, hopefully we'll be done by late afternoon and we can get the rest of Mr. Browne's evidence in.

THE COMMISSIONER: Okay.

Okay no further.

Thank you.

MS. SHEEHAN: All rise.

THE COMMISSIONER: Break until 9:30 tomorrow morning.

MS. SHEEHAN: This Commission of Inquiry is now closed.