

**COMMISSION OF INQUIRY
RESPECTING THE DEATH OF DONALD DUNPHY**

COMMISSIONER JUSTICE LEO BARRY

WRITTEN SUBMISSION

APRIL 7, 2017

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PART I

Introduction

On October 19th, 2016, an Application for Standing before the Inquiry Respecting the Death of Donald Dunphy was made on behalf of and granted for former Premier Paul Davis in relation to the tragic events which unfolded on April 5th, 2015, in Mitchell's Brook, Newfoundland. At the time this tragedy took place, Mr. Davis was serving as the Provinces 12th Premier having been sworn into office in September 26th, 2014.

It is not merely the title of the Office that he held which warranted Mr. Davis having been granted standing before the Inquiry, but more importantly, it is that it was a member of his security detail, Cst. Joseph Smyth, who was involved in the fatal shooting. Additionally, there was much attention paid to the fact that it was a member of the Premier's Communication staff, Ms. Donna Ivey, that referred the matter on to the Protective Services Unit for their review and consideration.

It is worthy of note that the Commissions Terms of Reference; Section 3(i) specifically identifies that the Commissioner is to:

- (h) inquire into the relevant policies, protocols or manuals in force at the material time in either the Office of the Premier or the Royal Newfoundland Constabulary, including particularly any policies, protocols or manuals relating to
 - (i) the security of the Premier and Cabinet Ministers,
 - (ii) the monitoring of and response to social media, and
 - (iii) with respect to the Royal Newfoundland Constabulary, policies, protocols or manuals governing communications by members with the public or the media following serious incidents and during active investigations;

- (i) inquire whether Mr. Dunphy's use of social media had any role in the circumstances of his death.

In this regard, the nature of the evidence before the Inquiry pertaining to Mr. Davis involvement form two facets which we would respectfully submit need to be considered in relation to Mr. Davis and members of his staff.

The first issue for consideration before the Commissioner is the actions and activities, or lack thereof, of Mr. Davis and those employed in the Office of the Premier at all relevant times.

The second issue for review by the Commissioner are the relevant policies, protocols or manuals that may have been in place in the Office of the Premier at material times and as they relate to the:

- (i) The security of the Premier and Cabinet Ministers; and
- (ii) The monitoring of and response to social media.

As a consequence of reviewing these matters, we anticipate the Commissioner will be persuaded to make recommendations pertaining to the adequacy, or lack thereof, of such practices or protocols in place as it relates to security issues pertaining to the Premier and Government officials and to make recommendation on a go forward basis.

Having framed these two issues, this is not to ignore nor disregard the critical aspects which unfolded on April 5th, 2015 or in the days and weeks that followed. While we would respectfully submit that it is abundantly clear that Mr. Davis had no personal involvement in the tragic death of Mr. Dunphy, given the fact that he held public office and it was his security detail that was involved in the shooting, by extension, public perception has suggested otherwise.

While one of the primary purposes of the Inquiry into the death of Donald Dunphy is to investigate the circumstances surrounding his death, the mandate of the Commission of Inquiry extends beyond this to include as part of its Terms of Reference, whether or not Cst. Smyth was directed to attend upon Mr. Dunphy and if so, by whom and for what purpose.

In the days, weeks and months that followed the shooting, social media ran rampant with unfounded speculation and accusations of the involvement of then Premier Davis and suggestions that he may have ordered that Cst. Smyth attend upon the home of Mr. Dunphy subsequent to a member of his staff discovering a tweet that she allegedly misinterpreted as a 'threat' to the Premier and his family.

Furthermore, there was much innuendo suggesting that there may be some form of inappropriate or close relationship as between Mr. Davis, Chief of Staff Joseph Browne and Cst. Smyth, given their previous employment as members of the RNC.

It is this very suggestion that permeated social media and gives rise to Mr. Davis' concern that any police investigation or review of the same, in relation to the events surrounding the death of Mr. Dunphy, has adequately addressed any issues pertaining to Mr. Davis or members of his staff as they related to the incidents of April 5th, 2015. Accordingly, it is important from the perspective of Mr. Davis, that the police investigation was seen to have adequately considered these issues. We would note for the record that when the Chief RCMP Investigator, Cpl. Steven Burke was questioned on this issue of why the RCMP did not interview Mr. Davis and why such an interview was not deemed necessary, Cpl. Burke responded: [Hearing Transcript p. 107 – Feb. 9, 2017]

MR. WILLIAMS: 2002. So having approximately 14, 15 years' experience and your 12 homicide investigations, has any of your investigations or reports ever gone through the scrutiny or review that this particular investigation has gone under?

CPL BURKE: No.

MR. WILLIAMS: Okay. And with respect to this particular report and investigation, at any time whether by way of formal review or through the process we've been here today, has anybody ever questioned your failure to interview any pertinent witnesses in relation to this investigation?

CPL BURKE: No.

MR. WILLIAMS: And do you feel, having been involved in the investigation from the start, that you had an opportunity to question any and all relevant witnesses with respect to the matter?

CPL BURKE: Yes.

MR. WILLIAMS: Corporal, I know that from review of the evidence that has been submitted by the RCMP that you or your team saw fit to interview Ms. Donna Ivey of Premier Davis's office.

CPL BURKE: Yes.

MR. WILLIAMS: And what was the purpose for interviewing her? What relevance did she have to your investigation?

CPL BURKE: Ms. Donna Ivey was the person that brought the attention of the tweets to Constable Smyth. And we wanted to further develop the information that she has or

further explore the information that she may have had with regards to the reason for Constable Smyth's attendance in Mitchells Brook.

MR. WILLIAMS: Okay. And it's also noted that at no point was there ever any interviews done of former Premier Davis or his Chief of Staff Joe Browne with respect to any involvement they may have had in the investigation. Is that correct?

CPL BURKE: Yes.

MR. WILLIAMS: And why did you think that was not relevant to interview those two gentlemen?

CPL BURKE: I didn't feel they had any information to further our investigation.

MR. WILLIAMS: So would it be fair to say that upon completing, over the course of conducting your investigation you felt that neither one of these gentlemen had anything to add to your investigation?

CPL BURKE: I didn't obtain any information that would lead me to believe they had any information to help our investigation or assist with our investigation.

MR. WILLIAMS: So four or five quick points along those lines. Was there ever any evidence to indicate whether or not Mr. Davis knew Mr. Dunphy prior to the events of April 5, 2015?

CPL BURKE: No.

MR. WILLIAMS: Was there ever any evidence that Mr. Davis was aware of the tweets that were forwarded by Mr. Dunphy prior to April 5, 2015?

CPL BURKE: No.

MR. WILLIAMS: Was there ever any evidence to indicate that Mr. Davis had any involvement either in the assessment or interpretation of the tweets in question prior to April 5, 2015?

CPL BURKE: No.

MR. WILLIAMS: And at any time was there ever any evidence that indicated that Mr. Davis may have had any involvement in either directing Constable Smyth to investigate the tweets or, more importantly, at any time was there ever any evidence to indicate that he directed Constable Smyth to attend at the home of Mr. Dunphy?

CPL BURKE: No.

MR. WILLIAMS: Okay. That's all the questions I have.

In addition, it is also worthy of note that in the final report of the RCMP and the review of the same by ASIRT, there were no findings or recommendations with respect to any elements of the investigation pertaining to Mr. Davis or any members of his staff. Given that it was primarily Special Assistant of Communications, Donna Ivey who had limited involvement in the matters precipitating the shooting, with minimal involvement of Chief of Staff, Joe Browne and Communications Director, Heather MacLean, there was no fault or wrongdoing found in relation to the events surrounding the death of either Mr. Dunphy by Mr. Davis or his staff.

To this end, Mr. Davis has a very real interest in any findings made by the Inquiry in this regard, so as to dispel, once and for all, any suggestion that he or members of his office had at the time, any relevant involvement in the incident, other than the limited role of referring the matter on to the Protective Services Unit as instructed.

As noted by the Commissioner in granting full standing to Counsel for Mr. Davis regarding participation in the testimony of all witnesses, Counsel has exercised their professional discretion in determining which witnesses they would participate in and accordingly a review herein of all the relevant evidence will be limited. The same should not be seen as any lack of interest or relevance to the overall mandate of the Commission of Inquiry, but simply in keeping with the objectives of time and financial restraints which the Commissioner was operating under.

Therefore the contents of the within submissions will be focused solely on the matters which apply directly to the involvement of Mr. Davis and members of his office at all material times.

PHASE I

FACT FINDING PHASE

PART II

Events Surrounding the Death of Donald Dunphy on April 5th, 2016

DONNA IVEY

On the afternoon of April 2nd, 2016, while travelling in the car with then Premier Paul Davis, Minister Sandy Collins, posted a tweet: [Exhibit No. P009]

Sandy Collins

Traveled with @PremierOfNL in his car today...guess what CD was playing?
@ShermanDowney The Sun in Your Eyes. #ListenLocal

In response to the same, Donald Dunphy responded with a series of tweets as outlined below.
[Exhibit No. P009]

Donahue2DonDunphy

@SandyRCollins @PremierOfNL @ShermanDowney is that why u can't c
problems of seniors & injured workers, the sun is in your eyes, put #nlpoli

Donahue2DonDunphy

@SandyRCollins @PremierOfNL @ShermanDowney put on sun glasses &
take out the ear plugs u might c & hear ppl crying for help, but why #nlpoli

Donahue2DonDunphy

@SandyRCollins @PremierOfNL @ShermanDowney but why would u care after putting in hard time getting that poor mans MHA pension, I hope #nlpoli

Donahue2DonDunphy

@SandyRCollins @PremierOfNL @ShermanDowney I hope there is a God, I think I c him work on two garbage MHAs who laughed at poor ppl #nlpoli

Donahue2DonDunphy

@SandyRCollins @PremierOfNL @ShermanDowney he got them before they got to enjoy the pension they didn't deserve, I won't mention #nlpoli

Donahue2DonDunphy

@SandyRCollins @PremierOfNL @ShermanDowney won't mention names this time, 2 prick dead MHAs might have good family members I might hurt #nlpoli

In her role as Special Assistant, Communications within the Office of the Premier, Ms. Donna Ivey was sitting in her home on Good Friday morning (April 3rd, 2015) when she came across the tweet as posted by Mr. Dunphy on the previous evening. Ms. Ivey, who was a highly regarded and well trained Communications Assistant, had been working in the Office of the Premier since September, 2014. Ms. Ivey's experience was garnered over an eight year period having worked in various communications roles within numerous government offices and departments.

Ms. Ivey gave testimony that her work responsibilities included such tasks as:

[Hearing Transcript pg. 139-140 – Jan. 9, 2017]

MS. CHAYTOR: So what – then you told me that your position in the Premier’s office was a little bit more than what you were doing as communications manager with Government Members’ Office. So tell us about your duties. What were you asked to do in that position?

MS. IVEY: I was, I guess, the media liaison for the Premier’s office. I was responsible for preparing all of his documentation that he would take with him to various speaking events and engagements, which included sometimes drafting and editing speaking notes for him. As well as, I guess, communicating with various host organizations in developing the details surrounding the events such as the agenda and the logistical items surrounding it. I was responsible for various other communications support. And I was – then, I guess later on during my tenure there, I was tasked with the social media as well.

MS. CHAYTOR: What –

MS. IVEY: That didn’t come initially in these – when I started there in September. That took a while for that to be assigned to me.

MS. CHAYTOR: What does that mean, tasked with social media? What exactly were you doing with social media?

MS. IVEY: I wasn’t solely responsible for it up until – and I can’t remember exactly when it was, it was passed on to me to be responsible for. I may have been, I guess, perhaps around December of 2014, maybe.

MS. CHAYTOR: Okay. But what was it that you had to do about social media?

MS. IVEY: Oh, okay. It was mainly posting. There were a lot of postings and some monitoring, and there were four social media accounts. Two of which were Facebook, two were Twitter.

MS. CHAYTOR: And did you have responsibility for some or all of those accounts?

MS. IVEY: There was one that I wasn't solely responsible for that I assisted with, and that was the Premier's personal Facebook account, which he also used for his constituency business. The others, the two Twitter accounts and the official Premier of Newfoundland and Labrador Facebook account, I did maintain.

MS. CHAYTOR: Okay, all right. So the two Twitter accounts and the official Premier Facebook account, you were responsible for maintaining.

MS. IVEY: Correct.

MS. CHAYTOR: And from what you're telling me, that meant posting to those accounts as well as monitoring what was posted to those accounts.

MS. IVEY: Yes.

MS. CHAYTOR: Okay. What did that mean to monitor? What was the purpose in monitoring social media accounts?

MS. IVEY: The main purpose of that was to monitor any constituency inquiries. Constituents often use that as a form of correspondence with the Premier's office and a contact with the office if they needed issues addressed. So I would monitor those, and oftentimes they were to be directed to an appropriate department or a staff person and I would filter those to the appropriate person.

MS. CHAYTOR: So if somebody posted something on the Premier's Twitter account or his Facebook account that seemed to be somewhat of a complaint, what would you do with that?

MS. IVEY: There was staff in the office who would respond to that and try to resolve the issue for the individual.

MS. CHAYTOR: Okay. So you would try and direct them to the right person who could answer —

MS. IVEY: Yes.

Ms. Ivey's evidence indicated that while the monitoring of social media formed a portion of her job responsibilities, it only occupied a small part of her total duties. Ms. Ivey stated that the primary purpose for monitoring of social media was to facilitate the flow of information regarding Government initiatives or programs to the public and to receive feedback pertaining to the same.

In completing these duties, Ms. Ivey frequently would have occasion to come across various communications and postings by way of emails, Twitter, Facebook or blogs that could be considered unfavorable or critical of the actions and activities of government or public officials.

Ms. Ivey disclosed through her evidence that while she was provided with no specific training regarding the monitoring of social media, she did indicate that she was provided with some direction in regards to "*matters of concern*" that may be brought to her attention. Ms. Ivey has indicated that Cst. Smyth, in his role as senior member of the PSU, had previously provided her with instructions that should such matters come to her attention that they are to be forwarded to the PSU for their review and follow up. [Hearing Transcript p. 145 – Jan 9, 2017]

MS. CHAYTOR: Okay. And at the time when you first went there, was there any kind of briefing given to you by the protective service unit as to what their involvement would be?

MS. IVEY: Yes, verbally. We had some discussion, generally, about their role.

MS. CHAYTOR: Okay. And do you recall was this done by way of a meeting or was there some written protocol given to you?

MS. IVEY: No, there wasn't any written protocol and it was - I think it was just during a conversation.

MS. CHAYTOR: A conversation with you personally or was there a meeting, a more formal get together?

MS. IVEY: No, I think, I think it was just myself present.

MS. CHAYTOR: Okay.

MS. IVEY: (Inaudible)

MS. CHAYTOR: And so – and this meeting is with Joe Smyth?

MS. IVEY: Yes.

MS. CHAYTOR: Okay, so tell me about that.

MS. IVEY: I do recall the conversation that we had during I think it was the Premier's health summit. And I don't recall the date that that occurred. And we were just talking about security in general. And he told me if I was ever unsure of anything to, whether it be social media or some event that we were at, anything, any concern at all, just to pass it along and there were the ones to deal with that and assess it.

MS. CHAYTOR: Okay. So when you first went to the Premier's office, there was no sitting down as such –

MS. IVEY: There was no orientation, no.

MS. CHAYTOR: -and introducing the protective service unit and the types of matters to pass along?

MS. IVEY: No, no orientation like that.

MS. CHAYTOR: Okay. So this was more of an informal conversation you had with him at another event.

MS. IVEY: Correct.

MS. CHAYTOR: Okay, all right. Were there times after that then that message was reinforced to you that if there was anything you're not sure of, to pass it along to the PSU?

MS. IVEY: I believe that was reiterated via an email that came from Sergeant Smyth. Again, I don't remember the date of that.

Ms. Ivey confirmed that there were no formal protocols or manuals in place pertaining to security issues and that such instructions or directions were obtained in an informal and ad hoc fashion.

On the morning of April 3rd, 2015, when Ms. Ivey came across the series of tweets in question, she indicated that she was familiar with the author's (Donald Dunphy) history as a frequent user of the NL Poli tweeter site and that she had no previous concerns with the numerous communications she had reviewed. While Ms. Ivey was not aware of Mr. Dunphy's full name at the time, she did recognize his twitter hash tag. Accordingly to Ms. Ivey, that in referring along the tweet in question, that she was not acting in any "alarmist" fashion, having been exposed on numerous occasions to the tone and tenor of Mr. Dunphy's previous twitter communications. [Hearing Transcript p. 151 – Jan. 9, 2017]

In keeping with the previous direction she had been provided with and the authority vested in her position as Special Assistant, Communications, Ms. Ivey forwarded an email to Cst. Smyth, as well as Chief of Staff Joseph Browne and Cpl. Doug Noel, attaching a portion of the tweet at issue which was of concern. It is worthy of note that in the email in question, Ms. Ivey did note that ... "He posted this comment, along with several others, under a post made by Sandy Collins last evening". [Exhibit P-0076]

Much was made of this aspect by Counsel for the Dunphy family as well as Counsel for the Community Coalition for Donald Dunphy throughout the Inquiry in their cross-examination of various witnesses in that they have suggested or eluded that:

- (i) Ms. Ivey may have misinterpreted the tweet in question having focused only on the last line of the series of tweets and on the inflammatory language, failing to have a full and complete understanding of the series of tweets and consequently read them as a threat against the Premier.
- (ii) That by only forwarding a portion of the tweets in question, Ms. Ivey may have precipitated Cst. Smyth having visited the home of Mr. Dunphy under the misunderstanding that the matter may have been of greater concern. [See Hearing Transcript Pg. 4-11 – Jan. 10, 2017]

By way of follow up to her initial email, Ms. Ivey was subsequently contacted by Cst. Smyth in regards to his conducting an investigation pertaining to the matter. [Exhibit P-0079] As part of responding to these queries, Ms. Ivey utilized the resources available to her to obtain additional contact information pertaining to Mr. Dunphy. In furtherance of this, she contacted Mr. Ralph Tucker of WHSCC, a person who she had known in other capacities, to see if he could be of any assistance to Cst. Smyth in obtaining any additional information in regards to Mr. Dunphy. To this end, Ms. Ivey simply served as a conduit to relay on the said contact information.

In answer to issue (i) noted above pertaining to Ms. Ivey having misinterpreting the tweet(s) in question, Ms. Ivey's evidence was quite clear and unequivocal and she did not see it as her role to interpret the series of tweets at issue. The following excerpts confirm her evidence in this regard. [Hearing Transcript p. 172 – Jan. 9, 2017]

MS. BREEN: Okay. Ms. Ivey, have you had an opportunity since that morning to go back and review the full twitter chain again?

MS. IVEY: Yes, I have.

MS. BREEN: Okay. And you've read it in sequential order?

MS. IVEY: Yes.

MS. BREEN: Okay. Today, do you see that there was quite an innocuous interpretation of the language that he was using?

MS. IVEY: Again, I wasn't sure what he was meaning. I'm still confused by it, so that's – and I would probably do the same thing again today. I'm not an analysis expert on his choice of words.

MS. BREEN: No, and I'm certainly not suggesting that you have particular expertise in interpreting, but do you see now that when you read the tweets in sequential order when he's referring to the "2 prick dead MHA's" that the tweets right below those or that came first were referring to the fact that God had taken them and that they might be – though they're dead, there's family members still here. Do you see that interpretation?

MS. IVEY: Well yes, I saw that then, but it is just – again, the language was so strong that I just thought, again I was quite sure and I thought it was warrant – it warranted a review by those who knew what they were doing.

MS. BREEN: Okay. And I understand you're saying it wasn't your job to put a final interpretation on it. You had been told if anything of concern comes up – and it doesn't sound to me that anyone ever really sat with you and defined exactly, you know, the

concerns that you have, because you would agree on the premier's Twitter, I assume, you see a lot of things that you may have a concern about –

MS. IVEY: Yes.

It is respectfully submitted that despite extensive cross-examination by all Counsel, Ms. Ivey's evidence was consistent and credible in that at no time did she view the tweets as a "threat against the Premier", but merely a "matter of concern" which required review by the Protective Services Unit.

In respect to the issue (ii) regarding Ms. Ivey's having referred of only a portion of the series of tweets in question and that her actions may have precipitated the unwarranted home visit by Cst. Smyth, Cst. Smyth confirmed in his direct evidence that he was not only aware of the full series of tweets in question, but that he had reviewed them in full in addition to others, prior to his having made the decision to attend at the home of Mr. Dunphy some two days later.

[Hearing Transcript p. 87 – Jan. 16, 2017]

MS. CHAYTOR: Okay. And at the time that you visited Mr. Dunphy on April 5, 2015, had you opened a file on him?

CST. SMYTH: I had not generated the actual file.

MS. CHAYTOR: Okay. All right.

And I'll ask you some more questions about that later, but that's the type of – you would – that's enough of a, enough background checking that has to happen that, that person would have a file open, a personal-of-interest file in your office.

CST. SMYTH: By the time, with Mr. Dunphy, I had reviewed his social media feed. I had spent, I think, that Saturday, probably about an hour or so going through about a year's worth of commentary. Based on what I had seen there I would have generated a file, based on that information at some point in time.

Whether that had been the next day when I spoke to him or the next opportunity I had, I – at that point I had pretty much made a decision there would be a file generated on this person. That if somebody was to come into my job without receiving any formal verbalized briefing from me, that would be able to open up my persons-of-interest list and document and be able to quickly reference Mr. Dunphy as somebody that had a long-standing unresolved grievance that had elements contained within it that were possibly not contained in reality.

MS. CHAYTOR: Okay. And so he would have been someone who a file would be generated for?

CST. SMYTH: Yes.

Furthermore, the evidence of Cst. Smyth when reviewed in its totality, will confirm that at no time did he receive instructions or direction from Ms. Ivey, or anybody else within the Office of the Premier, to investigate, question or attend at the home of Donald Dunphy. Ms. Ivey was acting within the directions provided to her.

In reviewing the evidence of Ms. Ivey as a whole, it would be our respectful submission that her evidence was forthright, honest and credible. While her limited involvement may appear to be insignificant in the totality of all relevant considerations surrounding the death of Mr. Dunphy, much has been made of the same.

Numerous press articles relating to the Dunphy matter suggest that the incidents arose as a result of a member of the Premier's staff having referred a threat against the Premier to his security detail. In an Editorial Article published by The Telegram on Friday, April 10, 2015, Columnist Brian Jones stated in an Article titled, "Police Silence Shows Contempt for Public, Dunphy

"....Anyone who interpreted these tweets as a threat to the Premier or any other politician should be fired for their sheer stupidity.

Davis could have, and should have, declared this fact Monday: 'The person on my staff who told my security detail that a threat had been made has been fired'".

Not only is the same inaccurate and a misleading description of the history of this matter, but such misinformation has facilitated much of the misguided and negative social media that exists pertaining to those public officials holding office at the time.

To this end, a clear and unequivocal statement by the Commissioner pertaining to Ms. Ivey's actions is critical given that her involvement in the incidents surrounding Mr. Dunphy's death have been seen as a precipitating factor in the shooting of Mr. Dunphy. An exoneration of any wrongdoing would be a clear indication of the absence of any questionable involvement of the Office of the Premier.

It is worthy of note that during the eight weeks the Commission heard evidence, Counsel for the Dunphy family repeatedly attempted to take issue or suggest that the actions of Ms. Ivey may have played a larger contributing factor than is otherwise evident.

This became so evident that during cross-examination by Mr. Simmons of Mr. Davis, the Commissioner saw fit to make the following commentary: [Hearing Transcript p. 126 – Feb. 24, 2017]

MR. SIMMONDS: Okay.

Then, can you offer any insight? Because this is – it's been a real issue and I'm sure will likely be continue to be in submissions to the Commissioner. What was the urgency that it had to be dealt with on Good Friday, investigated, contact made with Ralph Tucker through a phone number supplied by Ms. Ivey, Mr. Tucker speaking to Mr. Mahoney, Mr. Mahoney on a Saturday afternoon calling back to Officer Smyth and then Officer Smyth going down there?

And Officer Smyth, let's be blunt, used some very unattractive language here when tweeted or sent a message to one of his friends: I'm going down to arrest a lunatic who threatened the Premier. Nowhere in anything we've seen was that ever anything close to that said.

Would you agree with -? Did you ever become aware of anything like that?

MR. DAVIS: Well, you just – you just said a lot and, just to be clear, I can't speak to why Ms. Ivey did what she did, why Mr. Tucker made the decisions as he did, or Mr. Mahoney or Constable Smyth, and you referenced all of them in your preamble to your question. So, just to be clear, I can't answer to why any of those people –

MR. SIMMONDS: Can you answer for Ms. – I'm sorry, can you answer Ms. Ivey?

THE COMMISSIONER: Could I – well, could I just intervene? It's been bothering me a bit, actually, since about the day after Ms. Ivey testified because I think she had instructions, which, as she pointed out, didn't require her to start interpreting tweets. When she saw something that was of concern to her, whether rightly or wrongly, the

written direction that we've received, I think – I forget which document it was – indicated – I think it was Constable Smyth's instructions to staff, was it not?

MR. SIMMONDS: I believe you're correct, Commissioner.

THE COMMISSIONER: The instructions said, basically, the slightest concern, pass it on, pass it on to PSU. They'd interpret; they'd decide whether to act on it. So, and it's come up several times since, and really, in fairness to Ms. Ivey as a witness before this inquiry, I feel that, you know, I don't want – I don't want any more piling on. Not from you; you're not doing it, Mr. Simmonds. I'm not saying that, but generally in the course of –

MR. SIMMONDS: I understand.

THE COMMISSIONER: -when it's brought up, you know, why did she do this? And I think there's been some adverse press or public comment on it.

Ms. Ivey did what she was instructed to do, as far as I can see, and it was for the police to interpret, PSU to interpret. Now, you didn't – I'm not raising this because of your comment, Mr. Davis, but it gives me an opportunity because it's come up a number of times in that context and I think I have an obligation to ensure that witnesses before the inquiry are treated fairly and I don't think Ms. Ivey necessarily as been. Intent – it's not intentional on anybody's part, but the way it's come out. She did what she was instructed to do as far as I can see. She did her job and nothing else in that respect.

Accordingly, it is our respectful submission that Ms. Ivey's actions, in referring the tweet in question on to the Protective Services Unit, was in keeping with her employment responsibilities and pursuant to the specific direction and instruction provided to her by members of the PSU. Furthermore it should be noted that at no time did Ms. Ivey ever reference the matter as a "threat against the Premier".

HEATHER MACLEAN

Ms. Heather MacLean was called as a witness at the Inquiry in her capacity as Director of Communications in the Office of the Premier at all relevant times, having been hired in November of 2014, having had extensive experience working in numerous government departments in a communication capacity.

Ms. MacLean was able to provide evidence to the Commissioner that, with the exception of a generic government policy pertaining to Social Media (Exhibit #P-0069), there were no other specific policies, protocols or manuals in the office of the Premier pertaining to the monitoring of social media. She confirmed that from a communications perspective, the purpose for monitoring social media was:

“It was more or less to gauge public response to government policy announcements, decisions, speeches, commentary going on with the Premier and Ministers and members of government”. [Hearing Transcript – February 22, 2017]

When questioned in regards to any form of briefings provided by the PSU, Ms. MacLean indicated that there was no briefing per se, but that she had a brief conversation with Cst. Smyth in terms of what their role and responsibilities were. In terms of her understanding of when matters were to be referred on to the Protective Services Unit, Ms. MacLean’s evidence was consistent with that of Ms. Ivey.

“The direction was very simple. If we were out at a public venue and noticed something that we had questions about and made us feel uncomfortable or we saw or read something, then just to let them know and that they would take it from their”. [Hearing Transcript p. 108 – February 22, 2017]

With respect to the events which lead up to the shooting on April 5th, 2015, Ms. MacLean had limited evidence in respect to her involvement in the matter. Ms. MacLean noted that she had never heard of Mr. Dunphy previously, nor had his name been mentioned within the Premier's Office.

While an email correspondence dated April 4th, 2015 [Exhibit P-007] suggested that Ms. MacLean had been contacted on the day preceding the shooting, she confirmed that at no time prior to the fatal accident was she ever contacted in relation to the matter and this appears to be a typographical error. [Hearing Transcript p. 110 - Feb. 22, 2017]. It was not until later in the afternoon of April 5th, 2015, that she was contacted by the Premier and summoned to an urgent meeting at his office.

Ms. Maclean's evidence is consistent with both Mr. Davis and Mr. Browne in that the meeting of April 5th, 2015 was relatively brief given the limited information they had and in light of the fact the matter was in the hands of the police. Given the same they felt there was little they could do at the time. Ms. Maclean confirmed that it seemed that CBC Reporter David Cochrane had more information at that point in time than they did. [Hearing Transcript p. 112 - Feb. 22, 2017]

The only definite decision that was made was that it was decided that the Premier would make a public statement the following day to the Province by way of a media briefing. Ms. MacLean advised that one of the topics discussed at the meeting was the offering of condolences to the Dunphy family at the briefing the next morning.

"We decided the Premier would speak on Monday morning and we had a conversation about offering condolences to the family and we recognize that there was an active police investigation so we weren't going to be able to speak to any level of detail, but we felt it was important to make the Premier available quite quickly to make his

statement of condolence and to respond to any questions that the media might have".
[Hearing Transcript p. 114 - Feb. 22, 2017]

MR. WILLIAMS: And as I understand, you're direct evidence to Ms. Chaytor to be that during that discussion there was specific conversation with respect to reaching out to the Dunphy family during that media briefing the next day?

MS. MACLEAN: Yes it was very top of Premier Davis' mind to immediately offer condolences to the family, right off the bat at the media availability.

MR. WILLIAMS: There's been much attention made that Premier Davis had spoken to Constable Smyth later that evening, I believe it was in the late hours of that evening, but your evidence today was that within three hours of this event showed having occurred, he had brought the attention of you as his Communications Director, of formulating into his briefing, reaching out to the Dunphy family?

MS. MACLEAN: Correct.

MR. WILLIAMS: Okay and why then was it felt that it was appropriate to reach out to the Dunphy family in that manner as opposed to picking up the phone for example at that meeting?

MS. MACLEAN: Well I believe the, I mean the shooting had happened that same day, he didn't have any knowledge or relationship with anyone on the Dunphy side so he was sensitive to the fact in terms of what they may be going through at that particular time and didn't want to put any undue stress on the family so, the conversation we had was that we felt it was most appropriate to (inaudible) a public matter on the next afternoon.

MR. WILLIAMS: But he specifically turned his mind to addressing that issue the following day.

MS. MACLEAN: Absolutely. [Hearing Transcript p. 147 – Feb. 22, 2017]

When questioned by Commission Counsel regarding the exchange of speaking notes as between the Office of the Chief of the RNC and the Premier's Office, Ms. MacLean advised that the same would not be unusual in regards to communications practice. [Hearing Transcript p. 115 – Feb. 22, 2017]

MS. MACLEAN: It wouldn't be usual but I would say the circumstance that we were in is also not usual, that there was a shooting death where there was a protective unit services member who was involved in a shooting, so it wasn't something that we dealt with on a regular basis. This was more, this was happening prior to the Premier making himself available to the media, and speaking to the public that same day. So, I was imagine this would be gathering information in terms of when the RNC, or RCMP might be making a statement; what they might say, and what time they might be saying it. So, when the Premier spoke to me at 12:30 – which I would imagine would probably follow the RNC and RCMP – that he'd be prepared for any questions that might come at him.

Ms. MacLean goes on to confirm that a similar practice or courtesy was in place in the days immediately following with the RCMP. On April 7th, 2017, Cpl. Greg Hicks, media spokesperson for the RCMP, supplied Ms. MacLean with particulars pertaining to the RCMP's media briefing that was occurring on that date. (Exhibit P-05537) In addressing the rationale and the purpose of the exchange of public information as amongst communications personnel, Ms. MacLean states: [Hearing Transcript p. 119 - Feb. 22, 2017]

MS. MACLEAN: I believe in the second email you'll see that it was more with respect to timelines about making a briefing.

MS. CHAYTOR: I'm sorry about?

MS. MACLEAN: It was more about timelines and logistics in terms of when they were going to be making a statement and what they were going to be saying. We were coordinating timing.

MS. CHAYTOR: Okay. Timing for what? This is anticipated –

MS. MACLEAN: What they were going to be saying and when. Just so that the premier is aware. Even though the premier may not have had a separate additional scrum with respect to the Donald Dunphy shooting he may have been out publicly speaking at an event and he would have been speaking to the media at a scrum, maybe for a different issue or announcement. So it was just preparing, making sure we will have the information understanding when and what the RCMP are going to say. If the RCMP were to make a statement it wouldn't be unlikely for us to get a request from the media within a few minutes looking for the premier's response to the RCMP comments. So it was just really doing my job to be organized and make sure the premier was briefed enough to see what was going on.

MS. CHAYTOR: And Greg Hicks then provides to you as well as the RNC Media Relations what will be going out in 10 minutes. So you're given an advance. He says: "please keep within your respective depts." So the he does give you an advanced copy of the media briefing that's going out.

MS. MACLEAN: Correct.

MS. CHAYTOR: (Inaudible)

MS. MACLEAN: Yes okay.

MS. CHAYTOR: And did you have any concerns of the appropriateness of the Premier's office requesting and receiving information on this matter from the police force that's investigating the incident before the public is actually informed about the incident?

MS. MACLEAN: No I didn't, we're looking for particular details on the incident and we were looking for logistical information in terms of what they were going to say and when and who they would be speaking to, so we'd have the Premier prepared should he get a follow up call from the media.

JOSEPH BROWNE

Mr. Joseph Browne was called as a witness at the Inquiry in his capacity as Chief of Staff in the Office of the Premier at all relevant times. Mr. Browne had served as Chief of Police with the Royal Newfoundland Constabulary from March of 2006 until his retirement in May of 2010.

In August of 2014, Mr. Browne was approached by Mr. Davis, who had recently been elected as leader of the Progressive Conservative Party and consequently Premier, to take on the responsibility of Chief of Staff for his new administration. Mr. Davis indicated in his evidence that he chose Mr. Browne given his strong administrative and management experience.

In his new role, Mr. Browne was responsible for not only administrative and operational responsibilities within the Office of the Premier for whom all staff would report to, but additionally there would be a substantial amount of interaction as between the Premier's Office and the Executive Counsel in regards to ongoing legislative matters.

Mr. Browne's evidence would suggest that while he played a supervisory role to Ms. MacLean, the Director of Communications and in turn Ms. Ivey who reported to her, this division worked somewhat autonomously given their expertise in the area. In addition, Mr. Browne confirmed that in his role as Chief of Staff he had little involvement with the PSU and they had no reporting responsibilities to him.

In regards to matters pertaining to the monitoring of social media, Mr. Browne indicated that while he had limited personal knowledge surrounding the same, he was not aware of specific policies within the Office of the Premier dealing with the same with the exception of the general government policy regarding social media [Exhibit P-009]. He was not aware of any specific protocols, policies or manuals dealing with issues pertaining to security for the Premier or any other government officials.

As with Ms. MacLean, Mr. Browne played a relatively insignificant role in the events surrounding the death of Mr. Dunphy on April 5th, 2015.

Mr. Browne confirmed that he was copied on the original email from Ms. Ivey on April 3rd, 2015 containing the tweet of concern from Mr. Dunphy and that consequently he took some time to review in part some of Mr. Dunphy's social media history. He learned that he was a disgruntled Workers Compensation client who utilized twitter as a venue to express his opinions. [Exhibit P-0077] Upon learning of this he forwarded such information on to Cst. Smyth by way of background information, but with the exception of this aspect he had no other involvement in the matter prior to learning of the shooting in the late afternoon of April 5th, 2015.

In regards to Mr. Browne interpreting the tweet in question that had been posted by Mr. Dunphy, Mr. Browne indicated that while he did not interpret it as a threat, there was language that he would consider to be of concern. He confirmed that he fully understood why Ms. Ivey would forward it along to the PSU.

Mr. Browne confirmed that with the exception of his isolated response on April 3rd, 2015, he had no other involvement with Cst. Smyth or any other members of the PSU regarding the Dunphy matter prior to the death of Mr. Dunphy. Mr. Browne confirmed that he did not at any time either direct an investigation in relation to Mr. Dunphy, nor did he instruct Cst. Smyth to attend upon the home of Mr. Dunphy.

In his evidence, Mr. Browne indicated that he first learned of the fatal shooting on the afternoon of April 5th, 2015, at approximately 3:17 p.m. when he received a call from RNC Police Chief Bill Janes who advised him of the fatal shooting and that a member of the PSU had been involved. Mr. Browne stated that he then made a number of attempts to contact the Premier and ultimately reached him while he was attending a hockey game in his district.

Subsequent evidence pertaining to the remainder of the days' activities confirm Mr. Davis and Ms. MacLean's account of events, that a brief meeting was held later in the afternoon at the Premier's Office to discuss matters. Mr. Browne confirms that at the time they had little information and given that the matter was then in the hands of the police there was little else they could do, but that the Premier would speak publicly the next day.

With the exception of a number of ancillary discussions with members of the Premier's Office and PSU, for which there is no material significance of, Mr. Browne did not play any further role in matters pertaining to the shooting of Mr. Dunphy.

When questioned by Commission Counsel specifically in regards to his capacity as a former Police Chief regarding the appropriateness of the exchange of information as between the Director of Communications and the RNC/RCMP, Mr. Browne indicated that he did not see anything inappropriate with the same given the uniqueness of the situation. [Hearing Transcript P. 48 – Feb. 27, 2017]

MS. CHATORY: 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 ...

Mr. Browne was able to provide some valuable insight into the practical role of the Protective Services Unit and the perception of the same both by the Premier and the public at large. Mr. Browne did confirm that Premier Davis had shown some reluctance at times in utilizing the services of the PSU, but that if the Premier was going to have a Protective Services Unit it needs to be adequately resourced. [Hearing Transcript p. 19 – March 1, 2017]

As it pertains to the operations of the PSU, Mr. Browne felt it was a valuable and necessary service that should be maintained and strengthened. He indicated that if the PSU is going to be a worthwhile functioning unit, that it required more resources as two members doesn't make sense.

While he felt there did not necessarily need to be a legislative mandate, he did feel that there should be a formalized policy which clearly articulates the duties and responsibilities of the Unit and that the formalized existence of the Unit may help ease public perceptions regarding such services. In addition, Mr. Browne felt that all new administrations would benefit from a more formalized briefing session with public officials with staff clearly delineating each of their respective roles and responsibilities. [Hearing Transcript p. 17 – March 1, 2017]

Mr. Browne did endorse the notion of possibly clearly separating the close protection and criminal intelligence services, such as that the criminal intelligence responsibilities would be wholly contained within the existing RNC Criminal Intelligence Division and the close security operations would fall solely under the Protective Services Unit.

As regards the establishment of a Serious Incident Response Team, Mr. Browne was able to provide valuable evidence given his unique position, both as a former Chief of Police and as well as a Chief of Staff within the Office of the Premier. [Hearing Transcript p. 14 – March 1, 2017]

MS. O'BRIEN: I would like to ask you your thoughts on one of the issues that has come up here at the Commission is, how's that for investigations of police related serious incidents for this to happen in this Province, and obviously that's become an issue of some concern, and as former Chief of Police of the RNC do you have any thoughts on/or example a potential suggestion being a Serious Incident Response Team or otherwise, how in your opinion or do you have any thoughts on that as to how best those incidents can be handled?

MR. BROWNE: Right. I think the idea of a Serious Incident Response Team is a good one they're in place I know in many jurisdictions across Canada. There are some challenges with it that would just have to be considered I guess before the formation of one. It's done mostly Commissioner I think to deal with the optics of perception of police, investigating police, I think the reason for the most part these civilian led organizations are traded with that over-sight that is not directly related to police, so that makes sense. The issue then becomes who, who do you find that's investigators to work in these units, these response teams, so you would need clearly people who would have a training and experience, not just training but experience in conducting serious investigations, major crimes, and typically that's found within the policing community, now there are others that you could find but by and large that's your resource pool – our former police officers.

So the challenge then becomes, its civilian led and that makes a lot of sense but if the investigators

MS. O'BRIEN: So your saying civilian led?

MR. BROWNE: right, but the investigators are former police and they are investigating the actions of a police agency, I'm not sure the optics change a lot or at least it could be raised as to what is still the police investigating the police, even if there is some distance

between their service, separation from their service, so sometimes you can deal with that then by not having the investigators being former members of the organizations, but in this Province that's a little challenging because there are only two police agencies, we don't have any municipal police agencies in Newfoundland we have the RCMP and the RNC and that's it.

In every other jurisdiction in Canada there are municipal agencies; there are regional police forces; there are provincial forces; and too then there's the Federal presence in most, well, in all provinces. Here we have two.

So if we were to set one up here and recruit locally, you would get investigators very likely, that are former members of the RCMP who remain in Newfoundland and who have worked here and former members of the RNC. So they would probably be your investigators. So if they were called in to investigate the actions of an RNC officer or an RCMP officer, you would still have that challenge, you'd have still perhaps to deal with the perception.

If you decided then that was an issue and the government wished to recruit outside of the province. That could happen. But then you would have to consider making the position attractive enough that somebody would relocate, if the unit was positioned or located in the province

PAUL DAVIS

One of the more anticipated witnesses leading up to the commencement of the Inquiry was Paul Davis, former Premier of Newfoundland and Labrador. Mr. Davis' relevance to this Inquiry was not so much in the position that he held at the relevant time, but more importantly, the role that the Office of the Premier may have played and the involvement of the Protective Services Unit, which served as the Premier's security detail at the time.

The tragic circumstances that occurred on April 5th, 2015, resulted in immediate and widespread speculation, innuendo and unfounded allegations regarding the involvement of Mr. Davis personally and the role of his office in the events that unfolded on that date. The allegations that surfaced in the days, weeks and months that followed what appeared on social media were of such a tainted nature, that they went so far as to suggest that Mr. Davis had personal involvement in the matter. One blog went to the extreme so as to state it had all appearances of a "state sponsored killing". [Exhibit – P0706]

Given the local, as well as the national attention that this incident garnered, it is essential that the Commission of Inquiry consider any legitimate basis for such damaging assertions, to not only the reputation of Mr. Davis personally, but as well as the Office of the Premier, which was subject to such implications. Accordingly, it is respectfully submitted that it is essential that the Commissioner consider all the evidence put forth in relation to the involvement of Mr. Davis and that of his staff at all material times and speak to any conclusions he is able to reach based upon the same.

The undisputed evidence put forth at the Inquiry, which we would respectfully submit has gone unchallenged, is that Mr. Davis had no personal knowledge of the tweet in question or the events leading up to the late afternoon of April 5th, 2015. [Hearing Transcript p. 49 – Jan. 25, 2017]

The evidence entered by the witnesses who were involved in the matter when the original tweet was first received on the morning of April 3rd, 2015, until the shooting occurred; being Donna Ivey, Doug Noel, Joe Browne, Tom Mahoney and Joe Smyth, have all indicated, in no uncertain terms, that at no time prior to the shooting in question did any of these witnesses ever bring to the attention of Mr. Davis any information in regards to the tweet in question or any matter pertaining to Mr. Dunphy.

The direct evidence of Mr. Davis confirms that on the Easter holiday weekend, commencing on Thursday, April 2nd, 2015, he had been involved in a number of political and family events over the course of the weekend. Mr. Davis indicates that he was travelling with fellow MHA Sandy Collins when Mr. Collins posted a tweet stating that he was travelling with the Premier and listening to the music of Sherman Downey. It was in response to this tweet that Mr. Dunphy posted his response to the site NL Poli in respect to the same. [Hearing Transcript pg. 76 – Feb. 24, 2017]

It is important to note, and as confirmed in the evidence of Mr. Davis and his Communications Director, Ms. Heather MacLean and Donna Ivey, Communications/Special Assistant, that given the tremendous work load and volume of communications, Mr. Davis did not monitor his twitter account, as this was the responsibility of communications staff. [Hearing Transcript p. 138 – Feb. 24, 2017]

For purposes of this submission, we shall proceed on the presumption that the parties with standing do not dispute, nor challenge the position that Mr. Davis did not have any information or knowledge pertaining to the tweets in question, nor any follow up communications pertaining to the same, at any time leading up to the shooting on April 5th, 2015. When questioned by Counsel specifically in relation to this particular issue, Mr. Davis stated unequivocally: [Hearing Transcript p. 139 – Feb. 24, 2017]

MR. WILLIAMS: Okay.

Moving on to the events of April 5, 2015, for the record, had you ever heard of Donald Dunphy prior to the events of April 5, 2015?

MR. DAVIS: No.

MR. WILLIAMS: Had you ever dealt with Donald Dunphy in any capacity in your role as a minister in any other government department?

MR. DAVIS: No.

MR. WILLIAMS: Had you ever read or viewed any social media positions by Donald Dunphy posted to any of your accounts, whether they be Facebook, Twitter, email or any other accounts prior to April 5, 2015?

MR. DAVIS: No.

MR. WILLIAMS: Had any other minister or other government official ever brought to your attention ever brought to your attention any matter concerning Donald Dunphy prior to April 5, 2015?

MR. DAVIS: No I have no recollection or knowledge of knowing Mr. Dunphy or knowing of Mr. Dunphy prior to April 5.

MR. WILLIAMS: So at any time between April 3, 2015 and late in the afternoon of Sunday, April 5, did you have any discussions with Chief of Staff Joe Browne; Communications Director Heather MacLean; Communications Assistant Donna Ivey; or

Constable Smyth with respect to any matters pertaining to Donald Dunphy or the tweets he had posted?

MR. DAVIS: No.

MR. WILLIAMS: So contrary to any social media postings stating otherwise did you at any time play any role; provide any direction or any instruction to the Protection Services Unit to either investigate or attend at the home of Donald Dunphy on April 5, 2015?

MR. DAVIS: No.

MR. WILLIAMS: The first you ever learned of this matter was two hours subsequent to his death?

MR. DAVIS: When I received – conversation with Joe Browne was the first I knew of the matter.

It was not until the afternoon of April 5th, 2015, at approximately 3:30 p.m. while attending at a local hockey tournament in his district with his wife, that Mr. Davis received a brief telephone call from his Chief of Staff, Joe Browne advising that a member of the Protective Services Unit had been involved in a fatal shooting in a small rural community. Evidence of telephone records of both Mr. Davis and Mr. Browne would confirm the conversation was relatively short in duration and that Mr. Davis requested that members of his senior staff meet immediately at his office at Confederation Building to review matters. [Exhibit P-0252]

In attendance at the meeting on April 5th, 2015, were Mr. Davis, Chief of Staff Joe Browne, Asst. Chief of Staff Darrell Hynes and Communications Director Heather MacLean. The purpose of

the meeting was to garner and share any information that was known, as well as to determine what immediate action, if any, may be required by the Premier at that time.

Given the very limited information that Mr. Davis and staff had, it was determined that given that the matter was then in the hands of police officials, they would take no further action at that time, but that Mr. Davis would speak to the Province by way of media scrum the following morning. It is of importance to note that while the meeting was relatively brief in nature, there was specific reference to reaching out to the Dunphy family to express the Premier's sorrow and condolences to the family.

MR. WILLIAMS: Did you put your mind to actually addressing the Dunphy family during that meeting?

MR. DAVIS: Yes.

MR. WILLIAMS: And what was determined?

MR. DAVIS: At my first opportunity when I, we anticipated I would speak the next day, media were already calling. Media were calling before we even had our meeting. So we anticipated we'd be speaking to the media, speaking to the people the next day through the media and at my first opportunity I would express my condolences to the family.

MR. WILLIAMS: There's much made of your having called Constable Smyth that I think we established through your direct evidence was between 10:30 and 11:00 on the evening of the 5th?

MR. DAVIS: Yes.

MR. WILLIAMS: Is it fair to say that you actually put in your mind to how to address the Dunphy family within two hours of learning of Mr. Dunphy's death?

MR. DAVIS: It was topic of discussion very early – we had a short meeting when we got together and that was an important part of the discussion.

MR. WILLIAMS: And so you put your mind to that long before you ever called Constable Smyth?

MR. DAVIS: Yes.

When specifically asked why he did not call the Dunphy family, Mr. Davis indicated: [Hearing Transcript p. 92 – Feb. 24, 2017]

MS. CHAYTOR: Did you reach out to Meghan Dunphy or any members of the Dunphy family?

MR. DAVIS: No.

MS. CHAYTOR: As premier of the province did you on occasion do that, reach out to families who had undergone a tragic loss?

MR. DAVIS: I have, yes.

MS. CHAYTOR: Why didn't you do so in this case?

MR. DAVIS: I didn't feel it was appropriate. We had set a plan in place to offer my condolences publicly the next day. I don't think I knew that – knew anything about Mr. Dunphy's family at that point in time.

Today I can think of – and I don't know if it's before or after this, but today I can think of two other examples when a time I did and a time I didn't. And both times when I did it was wrong and when I didn't it was wrong in the past. So it was a difficult decision but we felt that the right thing to do was, at my first public opportunity on Monday, to offer my condolences.

The importance of this aspect of the meeting, which was held within two (2) hours of Mr. Davis learning of the fatal shooting of Mr. Dunphy, is that it confirms that Mr. Davis did consciously turn his mind to reaching out to the Dunphy family in the hours immediately following the incident. Considering all circumstances surrounding the matter, it was decided after consultation with staff that the best manner in which to express such condolences, was by way of public statement the following day.

This aspect of the testimony is of relevance given that much of the scrutiny leveled against Mr. Davis in the aftermath of the shooting was his failure to reach out to the Dunphy family, as he did with Cst. Smyth late in the evening of April 5th, 2015. Clearly Mr. Davis had turned his mind to the Dunphy family, very shortly after learning of the incident and five to six hours before speaking with Cst. Smyth.

In respect to the telephone call to Cst. Smyth later that evening, Mr. Davis' rationale for the same was explained as follows: [Hearing Transcript pgs. 92 & 99 – Feb. 24, 2017]

MS. CHAYTOR: What did you and Constable Smyth speak about the evening of April 5?

MR. DAVIS: It was a very short conversation.

MS. CHAYTOR: What did you speak about?

MR. DAVIS: I called him to say you must – just calling to let him know I was thinking about him. I intentionally did not want to discuss the event. He made a comment to me that he did what he had to do, it was the only comment he made, and I just wished him well.

MR. DAVIS: Mr. Commissioner, if I may, I tend to agree with Constable Smyth's comment there, I have to say. I probably should not have called him.

MS. CHAYTOR: And why is that now, Mr. Davis? Why is it that you think in hindsight you should not have called him?

MR. DAVIS: Yes.

MS. CHAYTOR: Any why?

MR. DAVIS: You know, I called him – I have the reason why I did call him. I explained to you why I did call him. But knowing the circumstances that existed, that there was still going to be an investigation, there was going to be a lot of discussion in the future, if I did not call him it probably would have simplified some of those complications. I should not have called him.

It is respectfully submitted that the only other remaining issue of significance involving Mr. Davis' involvement pertaining to matters regarding the shooting, would be the media scrum he gave the following day addressing matters. As was previously noted, when Mr. Davis commenced his remarks, he spoke directly to the Dunphy family. [Exhibit P-0547]

Premier:

Thank you first of all for coming out this afternoon. I can tell you that I was shocked, deeply saddened yesterday to learn of the events that had taken place yesterday. This is just a terrible tragedy for so many reasons. You know my thoughts and prayers are with the Dunphy family, with the people of Mount Carmel in the area where this took place and with those that have been impacted by this very tragic event.

Later in the question and answer session with the media, Mr. Davis was repeatedly pressed in relation to his interpretation of the tweet. In speaking to this matter before the Inquiry, Mr. Davis elaborated on what it was he was trying to convey through his comments. [Hearing Transcript p. 107 – Feb. 24, 2017]

MR. DAVIS: So, Mr. Commissioner, if you read the transcript from the beginning, or even before I go into the scrum, I can't – I don't think I can adequately describe how difficult this day was for me personally. The aftermath, after Mr. Dunphy's death, was – and response – was quick and it was – I think I can describe it as brutal in many ways. It not only impacted me, and where it was addressed to me, people were making and beginning to make some very serious allegations and I can't describe to you the impact this was having on the people around me, and my family and the people around me.

At least three times before I made that statement, reporters had referenced this as a threat in this – during this scrum. There's at least three. I think there's six times during the scrum that the word threat or threatening – at one point in time a suggestion it's not threatening – was stated by reporters. At no time did I indicate it to be threatening, and I also knew that the interpretation of the tweet was a significant issue to be determined and discussed and would be – and I anticipated it would be for a long time.

And I in no way wanted to try and offer an interpretation based on the limited knowledge I had of what had taken place. I had no idea of discussions or if Mr. Dunphy had articulated to anybody what he meant by that, and so on.

So after I'd been asked about, I think, three times before, if we go back and look through it -

The final aspect of Mr. Davis' testimony which is of relevance to this Inquiry and the mandate of the Commissioner is the interaction which Mr. Davis, as Premier, had with the Protective Services Unit and his perceptions pertaining to the same.

By his own admissions Mr. Davis allowed that he was cognizant of not frequently utilizing the services of the PSU. This hesitancy was confirmed by members of senior staff as well as members of the Protective Services Unit. This was readily apparent in BBM messaging as between PSU members Smyth and Noel in the days shortly before the incident. [Exhibit No.]

The rationale for having such reluctance was primarily based upon public perception of having security guards and the waste of public resources pertaining to the same. While Mr. Davis readily acknowledges his own reluctance to utilize the services of the PSU, he felt it was a very essential element and "absolutely" necessary component of the required security measures in the Office of the Premier. [Hearing Transcript p. 143 – Feb. 24, 2017]

Accordingly, it is respectfully submitted on behalf of Mr. Davis, that the objective, credible and corroborated evidence which he presented before this Inquiry in respect to his involvement in the events surrounding and subsequent to the shooting of Donald Dunphy, is that they were limited and inconsequential. It is respectfully submitted that while members of Mr. Davis' senior staff may have had slightly more involvement, we would argue that none of their actions would be outside the scope of their necessary job responsibilities at the time. It is respectfully submitted and supported by the evidence, that all members of the Premier's staff were acting

within the scope of their employment and in furtherance of their specific job requirements, particularly given the unique circumstances they were faced with at the relevant time.

PHASE II POLICY PHASE

Pursuant to the mandate of the Commission, the Inquiry held a one day symposium which considered five topics of concern:

- (i) Investigation of Officer Involved – Serious Incidents in Newfoundland and Labrador
- (ii) Police Communications to the Public Following Serious Incidents and During Active Investigations
- (iii) Use of Force Training for Police, including De-escalation Techniques for Dealing with People in Crisis
- (iv) Protective Freedom of Expression in an Age of Social Media
- (v) Policies and Protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members

While there is much which could be said on all topic areas, Mr. Davis submission will be restricted to remarks pertaining to the latter two topics as they have the most significance to Mr. Davis in his role as a former Premier and as someone at the center of a social media storm following the Dunphy shooting.

Protecting Freedom of Expression in an Age of Social Media

Clearly Freedom of Expression is one of the most fundamental building blocks of any democratic society. In Canada, Section 2(b) of the Charter of Rights and Freedoms protects:

“Freedom of thought, belief, opinion and expression, including freedom of the press and other media communications”.

Such an indispensable right forms an integral aspect of every society can be defined in any number of ways but must have at its core underlying principles such as the right to express one's ideas and opinions freely through speech, writing and other forms of communications, but without deliberately causing harm to others' character and/or reputation by false, defamatory or misleading statements.

It is respectfully submitted that the debate surrounding Freedom of Expression in the wake of the Dunphy shooting should not be focused so much on attempts to suppress the firmly entrenched right to express opinion, but rather what is deemed to be acceptable or permissible in the age of social media.

The day of penning your name to an editorial letter in your local community paper or providing your identity to an open line host prior to voicing opinions, has frequently given way to a much larger beast in social media. Now those who wish to voice opinions have any number of forums in which to do so outside of the traditional media streams and can utilize such mediums as Facebook, Twitter, Instagram and Blogs to do so. While all would agree that the most substantial benefit of such outlets is to allow more public forums for expressing opinion and in a more immediate fashion, there are also negative implications which need to be considered.

Perhaps the single largest concern is that much too frequently such social media forums facilitate anonymous and faceless authors who strew malevolent and targeted commentary, typically at public officials, without cost or consequence for doing the same. It is this breach of liberty for which we must be most concerned with and that while maintaining the fundamental right of freedom of expression, it cannot be such that it totally disregards individual rights.

As can be demonstrated by many of the horrific national and international tragedies which have taken place in recent years, such social media forums have served as a hospice for telltale signs of the authors of such tragedies and subsequently journalists have unearthed social media profiles full of warning signs.

As was expressed by some of the panel members during the symposium, there needs to be a discussion such that any restrictions that are placed on the freedom to express ones opinion does not foster a “chilling effect”. While much truth lies in this concern, societal attitudes need to be shaped so that in order to maintain this fundamental right, there needs be some appropriate measures to allow for the monitoring of such rights so as not to permit the fringe members of society, who utilize social media for totally unacceptable purposes, to abuse their privilege by way of threatening or defamatory comments. It is the need to perform a balancing act and the discussion around what is the most acceptable means for doing so, that needs to be determined through public debate.

As quoted by Novelist George Orwell, “If liberty means anything at all, it means the right to tell people what they do not want to hear”. If we are to uphold and protect such fundamental freedoms, then there needs to be sufficient safeguards in place against those who choose to abuse such a fundamental right. It is this sensitive component of the debate that needs to be more publicly debated.

Clearly with the passage of time, society will dictate as to what is to be seen as acceptable restrictions on individuals right to freedom of opinion, but total unfettered privilege cannot become the norm.

As noted in the published article, Social Media Surveillance and Law Enforcement and submitted for consideration by Inquiry Counsel, interpreting behavior on social media is a difficult task.

In discussing many of the complex issues surrounding this area, the authors raised the concern regarding the concept of “Context Collapse”. In addressing the issue they state:

“On most social media sites like Facebook and Twitter, individuals construct public or semi-public profiles where they not only interact with their friends, but also with their network of friends. Interpreting those social media interactions can be challenging for a number of reasons. One is “context collapse”, a feature of online communications where messages intended for a limited audience become misconstrued for a wider audience once original context is lost. There is a limit to what can be extrapolated from social media activity – it only reflects a cross-section of peoples’ lives, and in the absence of the physical contact that frame face-to-face interaction, messages can be interpreted incorrectly.” (Emphasis Added)

This theory is worthy of consideration in the Donald Dunphy context. In this scenario we had a gentleman who habitually posted tweets of mixed messages regarding ongoing matters of concern to him. While nobody suggests that Mr. Dunphy’s right to publish such commentary should be in any way interfered with, when the messaging, or the context of the messaging, may not be abundantly clear and may raise a security concern, personal face-to-face follow up may be warranted. While there are many other complicating issues pertaining to the Dunphy case, it does identify the issue of where messaging interpretation can be problematic.

It is important to note that in such rare instances where such interaction is deemed necessary, it is not to be construed as so as to impose a chilling effect, but moreover, to provide an opportunity for proper context so that messages can be accurately interpreted. In such circumstances, only personal contact may allow such assessment.

Policies and Protocols of Government or the Royal Newfoundland Constabulary with respect of the Premier and Cabinet Members

It became abundantly clear through the Inquiry process, that with the exception of the RNC policy pertaining to the operations of the Protective Services Unit which was adopted in 2013 [Exhibit P0031], there exists little to no other policy or protocols pertaining to the security of the Premier, Cabinet Ministers or other Government officials.

As became evident through the evidence of Cst. Smyth, Paul Davis and members of his senior staff (Joseph Browne, Heather MacLean and Donna Ivey), there does not appear to be any formal sense of structure as to how or when the services of the PSU were to be utilized.

The Unit was relatively a new entity having only been officially structured during the tenure of former Premier Kathy Dunderdale. Previous to this it appeared that close security details were only utilized when the need arose or there was a specific event or incident of concern. The nature and practice of the Unit appears to have been somewhat ad hoc given the individual preferences of the Premier at the time. Despite the Unit operating somewhat at arms' length from Government in that it was structured, funded and operated under the command of the RNC, there was non-formalized process as to how the day to day operations and responsibilities were to function. With the exception of some administrative controls, the PSU appeared to work as a relatively autonomous entity without clear and enunciated reporting guidelines.

While responsibility for this approach can be attributed in part to the fact that the PSU was relatively a new entity, remaining fault lies in that there is no clear mandate and policy guidelines to provide the necessary directions and supports required for day to day operations.

This deficiency was recognized and acknowledged by a number of relevant witnesses, each of which had their own recommendations in terms of improvements. It was the evidence of Acting Inspector Joe Gullage that the Unit should be established under its own separate legislative mandate with separate and defined functions, one being close protection services, the second being criminal intelligence work.

Chief Bill Janes on the other hand felt there should be a balance with respect to input from the Premier's Office and the independence of operations by the PSU itself. In terms of whether or not the PSU was essential on a go forward basis, Chief Janes stated he felt "the Unit should

remain in place, but perhaps taking the decision making out of the hands of the Premier”.
[Inquiry Testimony – Feb. 28, 2017]

Finally, in addressing this issue, Mr. Davis illustrated through personal experience, occasions where he has been confronted with negative and disparaging commentary, as well as harassment from the public for matters for which he has had no direct affiliation with. While public criticism is deemed to be part of the job of any public official, it is when it crosses the line into threats and intimidation we need to be concerned with. It is quite coincidental that the issue of “cyber bullying” had gained much attention during the time the Inquiry was ongoing.

Mr. Davis also acknowledged that while no formal policies, procedures or manuals exist pertaining to security protocols, during his tenure, he was reluctant to make use of such close security detail. Through the course of Mr. Davis evidence there were objective and independent illustrations that there exists a real and immediate concern for public officials, in particular the Premier, to have sufficient security measures in place for protection. Having referenced numerous examples of the same when asked specifically regarding the necessity of the PSU, Mr. Davis’ unequivocal response was, “absolutely”. [Hearing Transcript p. 143 – Feb. 24, 2017]

CONCLUSION

During the course of 35 sitting days, the Commission of Inquiry respecting the Death of Donald Dunphy heard an extensive amount of evidence from some 60 plus witnesses, all of whom gave very candid and relevant evidence to assist the Commissioner in fulfilling the mandate tasked to him under the Terms of Reference.

While much of the evidence was pertinent to the circumstances surrounding the tragic death of Mr. Dunphy, the Inquiry was tasked with such other ancillary considerations pertaining to what security measures existed at the time for public officials, as well as the interactions that social media may have played in the events of that day. As has been reiterated previously in this submission, the interests of Mr. Davis are not so much connected to the actual incident itself, but in matters proceeding and to a lesser extent following the event.

It is respectfully submitted on behalf of Mr. Davis, that upon review of all of the evidence before the Commissioner, it is abundantly clear that neither Mr. Davis, nor any member of his staff played any significant role in the events proceeding Mr. Dunphy's death, nor in the activities following the same.

There is an abundance of evidence that establishes that Mr. Davis had absolutely no knowledge of Mr. Dunphy before April 5th, 2015, nor did he play any role in matters pertaining to the tweets in question that ultimately gave rise to his death.

As regards to the involvement of members of the Premier's senior staff, it is also respectfully submitted, that they all acted in a responsible and professional manner; acting within the scope of the duties they were tasked with performing in this fast paced political environment.

While the passage of time allows for the benefit of critical analysis, hindsight must always be leveraged in keeping with the uniqueness of this tragic event and the emotional circumstances for all involved.

Given the widespread criticism and innuendo that was circulated in the days, weeks and months that followed, even to current date, a clear statement from the Commissioner is warranted in these circumstances. It is not only the personal reputation of the individuals involved that is of concern, but more importantly, that the suggestion that the Office of the Premier of the Province or those affiliated with it, may have in some way colluded, conspired or in any way participated in the intentional death of Mr. Dunphy must be dispelled.

As a consequence of reviewing the facts leading up to Mr. Dunphy's death, the Commissioner had the benefit of hearing evidence as to the structure and day to day operations of the Protective Services Unit. While it appears that the PSU operated somewhat autonomously it is submitted that clearly changes need to be made. The ad hoc operational style needs to be eliminated and the Unit needs to be properly resourced with clear objectives which specifically detail and define their areas of responsibility and manner of operation.


Any political direction or reporting has to be removed so as to reduce the existing stigma associated with the same. There appears to be overwhelming agreement for the necessity and operation of such a security unit and a clear endorsement by the Commissioner will assist in facilitating a more widespread public acceptance of the same.

It is respectfully submitted that there needs to be a complete and independent review of the structure, operation and mandate of the Protective Services Unit with a view to strengthening its capacity and functioning at a time where there appears to be an increasing need for the same.

As regards to the implementation of a Provincial SIRT Team, it is submitted that while such an entity is warranted, there needs to be careful consideration given to the establishment of the same given the geographic and staffing considerations. The suggestion of a Regional or Atlantic Team may be worthy of further investigation.

Accordingly, the above summarizes the submissions on behalf of Mr. Davis, all of which is respectfully submitted for consideration by the Commission.

DATED at St. John's, Province of Newfoundland & Labrador, this 7th day of April, 2017.


THOMAS E. WILLIAMS, Q.C.
COUNSEL FOR PAUL DAVIS

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