Social Media and Civil Rights

in light of the Death of Donald Dunphy

Prepared By:
The Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador with Special Contributions by Mr. Ed Hollett and incorporating legal research by Ms. Allison Conway and Mr. William Hiscock.
Introduction

The Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador (hereinafter “The Coalition”) was granted standing to present the within paper at phase two of the Commission of Inquiry into the Death of Donald Dunphy by a decision of the Honourable Commissioner Barry, dated November 8, 2016. The Coalition was granted funding to participate on February 13, 2017.

The Coalition is, as the name suggests, a group of individuals from different professional backgrounds who have come together out of a shared interest in, and a concern for, civil liberties. The members of the coalition are lawyers, journalists, public relations consultants, and retired human rights advocates. Some of them have experience in first ministers’ offices or have been active in politics themselves.

The Coalition’s primary interest in this Inquiry was not in the events of April 5, 2015, but rather in the general situation within the Royal Newfoundland Constabulary and within the Government of Newfoundland and Labrador that led to the investigation of a particular public comment in the first place.

The Commissioner has requested that this paper address the use of social media in promoting the public’s right to free expression and as a tool for critiquing government policy and action. This paper is also meant to address the monitoring of and response to social media by Government or the Royal Newfoundland Constabulary and, specifically, the potential risk of such activities having a chilling effect on freedom of expression.

In order to address those points, this submission will first describe what social media is and establish its typical role for individuals and for organizations. We will then review what Canadian Courts have said in relation to our protected right to freedom of
expression, as enshrined in the *Canadian Charter of Rights and Freedoms*, s 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. We then propose to look at the issues as they relate to the present case, and finally to suggest some areas where we feel the Commission’s comment is particularly warranted. Lastly, we will review some of the testimony presented in the evidentiary portion of the Inquiry to identify some general details of the way the Government of Newfoundland and Labrador and the Royal Newfoundland Constabulary used social media in the period prior to the events of April 5, 2015.

A. Social Media

General

Social media is a form of communication. Social media programs use specifically designed software and the Internet to allow individuals and organizations to share opinions, ideas, pictures, links to other online content, and both pre-recorded and live video to a broad audience, instantaneously. Individuals create accounts free of charge at websites maintained by the social media developer. As part of that, individual users can set up a user profile that contains basic information about the user – identity, contact information, photographs – all set by the person creating the account. Users can then make comments and add images, video and so-on to that account. They can share that information with others.

The Oxford Dictionary defines social media as “websites and applications that enable users to create and share content or to participate in social networking.”¹ The Oxford Dictionary defines social networking as “The use of dedicated websites and applications to interact with other users, or to find people with similar interests to one's own”²

¹ https://en.oxforddictionaries.com/definition/social_media
² https://en.oxforddictionaries.com/definition/social-networking
Depending on the particular form of social media involved, users can control access to their comments to some degree. That is, they can determine who sees the comments. They can create lists of contacts and share information only with those contacts or they can broadcast information generally. Facebook and Twitter, two of the most widely used forms of social media, also have features that allow users to exchange messages privately.

There are no rules about identity online. Individuals may use pseudonyms, for example. Some users create online accounts - sometimes called parody accounts - for celebrities and other public or historical figures. Both Richard III and Henry the Eighth are online through Twitter accounts maintained by anonymous individuals. Nor are there any general rules about how many online accounts any one person or organization may create and control. Organizations that deal with the public will frequently create online accounts for each branch of their operation, in addition to a main corporate account. Depending on the nature of the organization, specific individuals within the organization may have social media identities online and, with organizations like the National Aeronautics and Space Administration, each of the agency’s programs and operating space probes have an individual user account maintained by an employee of NASA that provides information about that specific project or mission.

Social media use in the United States is comparable. About 80% or more of the population uses the Internet daily. According to Pew Research Centre (2016), 68% of Americans use Facebook and 21% use Twitter. A 2016 poll by Insights West found that 75% of Canadians use Facebook daily or up to three times a week and about 27% use Twitter at the same range of frequencies.

---

3 http://www.pewinternet.org/fact-sheet/social-media/
Men and women use social media in the same proportions, according to PEW. Facebook is by far the most popular form of social media and dominates all age cohorts to the same degree. It also dominates other demographic segments equally. In other words, Facebook users mirror our society as a whole with respect to age, income, education levels and residency (urban/rural). Twitter, by contrast, tends to be used mostly by younger, well-educated, more affluent people living in major centres.

Frequency of social media use is comparable in the United States and Canada, and across the different forms of social media. Most people - upwards of 60% of users for each type of media - use it daily.

There are some significant differences between social media programs. Twitter, for example, restricts each comment, or “tweet”, to a maximum of 140 characters. That limit includes any addressing of a message to specific users and any identifying tags, called hashtags, which allow users to track other comments on a similar topic. The more users and hashtags in a single message, the less space one has available for other content.

Facebook, by contrast, has no such limits which may be why it appeals to a wider range of users. It includes functions like addressing and tagging, but they are not essential to using the medium as is often the case with Twitter. Running out of characters on Twitter sometimes promotes the use of abbreviations that some may find confusing or taxing.

**Evolution of Social Media**

The Internet itself is a means of global communication. Developed initially in the 1970s to connect users within the United States defence research community, the publicly accessible Internet emerged about 20 years later and immediately became popular for
personal and corporate communication of all types. Programmers developed means of
communication in addition to email. These included person-to-person messages in near
real time such as ICQ and Microsoft Messenger.

The first version of the Internet also included websites that allowed users to
discuss topics of mutual interest in spaces called bulletin boards or in “chat rooms”. These required some specialised knowledge such as how to connect to the service. Nonetheless, they are broadly similar to social media and in many respects were the precursor to modern social media.

The advent of more sophisticated and capable mobile devices – smartphones and
tables – spurred the development of more sophisticated social communications
programs. Social media as we now discuss it is relatively new. The first Facebook site
went live on the Internet in 2004. Initially restricted to Harvard University students and
alumni, its popularity spread rapidly and the company expanded access to anyone over
the age of 13 years.

Twitter developers exchanged the first message between cell phones in 2006 but
widespread use of the new medium took another two to three years. Twitter uses the
same communications technology protocol as text messaging on cellular phones. It is
called Short Message Service or SMS. It took another two years after that – 2011 – for
Twitter to become such a phenomenon that The Globe and Mail noticed it.

5 https://en.wikipedia.org/wiki/Facebook
6 https://en.wikipedia.org/wiki/Twitter
7 https://en.wikipedia.org/wiki/Short_Message_Service
8 http://www.theglobeandmail.com/technology/digital-culture/the-history-of-twitter-140-characters-at-a-
time/article573416/
Political Use of Social Media

Politicians and their supporters quickly recognized the power of social media to disseminate political information rapidly to a wide audience without filters or interpretation by third parties such as the conventional news media. Blogs are another form of social media that developed in the late 1990s as personal diary programs for daily entry of content. By 2004, an alternate use of the initial concept appeared with the use of the basic software to post information on any topic for an audience that could be public or restricted to dedicated users. Blogs rapidly appeared that focussed on specific topics such as motherhood or cameras, written either by people with no particular background in a topic or by those with considerable expertise. Political blogs had a significant impact on the 2004 election campaigns in the United States, and to a lesser extent, on the federal campaign in Canada.

Politicians and political parties weren't the only ones to recognise the value of mass communication. Political activists also found that they could reach a wide audience that might have ignored them previously or that they might not have been able to reach because of the cost of conventional broadcasting. Social and political activists, including individuals with a grievance, could also use social media as another, public way to draw attention to themselves and their cause. In practical terms, a tweet by a person trying to get a road repaired could have the same impact as a call to an open line show or a letter to the local paper in generating a response by a politician keen to keep any negative comments about his performance to a minimum. The difference is that a tweet can bring response far more rapidly than other methods of communication.

Political Communications and Social Media

Efforts by the provincial government to manage public opinion between 2003 and 2015 have been well examined by academics and other observers. Political scientists
Alex Marland⁹ and Matthew Kerby¹⁰ have documented the use of talk radio by politicians and their supporters to influence public opinion and public opinion polls. This confirms similar work by Ed Hollett in 2006¹¹. In 2013, the Telegram obtained copies of emails and text messages that show how Conservative politicians organized their colleagues and political staffers on everything from calls to open line shows to votes in online polls about government performance.¹²

That was in addition to the operation of the provincial government’s communications apparatus. A key part of the government’s communication function is monitoring media for references to the government and its programs. This information is analysed as part of ongoing communications activity. With the advent of social media, governments across Canada, including the Government of Newfoundland and Labrador, adapted their monitoring program to capture online comments as well.

Both activities are intimately connected. In addition to the information coming from public servants in the government’s communications media monitoring, politicians and their staffers monitor social media just as their predecessors listened to open line shows. Political staffers operate online in social media either under their own names or, more often, using pseudonyms to attack opponents, spread favourable messages and generally carry out an ongoing political campaign of the sort that used to be confined to the period of an active election.

---

¹⁰ “The audience is listening.” http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.848.7727&rep=rep1&type=pdf
¹² http://www.pressreader.com/canada/the-southern-gazette/20130305/281805691351604
An example from 2013 illustrates what this state of permanent campaigning can do to both political thinking and political action. Conservative members of the House of Assembly voted to eject New Democratic Party member Gerry Rogers from the House of Assembly because of comments made by someone else on a Facebook group to which, unbeknownst to Rogers, she had been added. The CBC story of the incident has an extremely misleading headline - "Rogers removed from house [sic] over Facebook threats"13 - that implied Rogers had made the threats herself.

The official record of the House of Assembly14 makes it plain that Rogers did not know about any threats or endorse the comments in any way. We do know the details of some of the troubling remarks, though. One individual, identified by name in the House, wondered why no one had "jfk'ed" the Premier already because of the budget. Government House Leader Darin King noted some other comments had connected the Premier - somehow - to the Boston Marathon bombings. King, who was also Justice Minister at the time, also mentioned threats to burn the Premier's house to the ground.

The word "threat" appears 16 times in the remarks made in the House that day. None of the comments actually mentioned in the House appear to be a threat of violence aimed at the Premier, although they are very strongly worded. Some might find them disconcerting. What is particularly noteworthy for the purposes of the Inquiry is the intensity of the response these comments generated among politicians. They were not merely playing a political game. Conservative politicians appeared to be genuinely, deeply fearful of the comments. They perceived them as threats.

While it would take research well beyond the scope of this Inquiry to confirm this beyond any doubt, it is strongly suggestive of the way the politicians perceived online

comments. They treated even patently ludicrous assertions such as a claim that the Premier caused the Boston Marathon bombing as if it was real or that someone might actually believe it.

Former Premier Paul Davis’ evidence on February 25, 2017 is strikingly similar and it is that symmetry which suggests such a mindset was widespread throughout the administration in which Mr. King and Mr. Davis served. Mr. Davis said in his testimony that he was very concerned about suggestions in the aftermath of the shooting that he had directed a political assassination carried out by a police officer. Mr. Davis’ tone and demeanour did not suggest he was merely annoyed by the comment or mildly troubled by it, but that he found it credible and therefore worthy of considerable emotional investment on his part. An external observer would feel very different.

The reaction shown by Mr. Davis in 2017, and by himself and his colleagues in 2013 are, however, consistent with the political approach they demonstrated that any opinion contrary to their own was something that demanded action. Premier Danny Williams, for example, was known to refer publicly to his critics as dissidents or traitors. He regularly monitored open line shows and on one memorable occasion interrupted a budget meeting to call an open line show in order to berate the host for critical comments he had made.

This is the sort of hyper-sensitivity to criticism and critical political commentary that appears to have permeated the provincial government. This does not draw a direct connection between political belief and police action in the matters that are the subject of this Inquiry. It does suggest the extent to which the politicians in positions of authority, and their immediate political staff, viewed the world in an exaggerated way. In that world, threats came in many forms, as one can see in the flexible way that some witnesses at the Inquiry have tended to use the word.
It is in that context that we will now turn our attention to a general discussion of the law regarding freedom of expression in Canada before returning to a more particular discussion of the events prior to April 5, 2015.

B. Fundamental Rights Enshrined by s. 2(b) of the Charter

Section 2(b) of the Charter, enshrines the fundamental right to “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication...”

The Supreme Court of Canada has consistently emphasized the primacy and import of the rights enshrined by s. 2(b). Justice Cory in Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326, said as follows:

“It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.”

Twenty years later, in Grant v Torstar Corporation, 2009 SCC 61, Chief Justice McLachlin echoed these sentiments when she began her decision by writing:

“[1] Freedom of expression is guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. It is essential to the functioning of our democracy, to seeking the truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization.”
She went on to elaborate on the rationale behind the stalwartness of the rights enshrined by s. 2(b), as follows:

"[47] The guarantee of free expression in s. 2(b) of the Charter has three core rationales, or purposes: (1) democratic discourse; (2) truth-finding; and (3) self-fulfillment: Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 976. These purposes inform the content of s. 2(b) and assist in determining what limits on free expression can be justified under s. 1.

[48] First and foremost, free expression is essential to the proper functioning of democratic governance. As Rand J. put it, “government by the free public opinion of an open society . . . demands the condition of a virtually unobstructed access to and diffusion of ideas”: Switzman, at p. 306.

[49] Second, the free exchange of ideas is an “essential precondition of the search for truth”: R. v. Keegstra, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at p. 803, per McLachlin J. This rationale, sometimes known as the “marketplace of ideas”, extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.

[50] Third, free expression has intrinsic value as an aspect of self-realization for both speakers and listeners. As the majority observed in Irwin Toy, at p. 976, “the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed”.

Legal Test under s. 2(b) of the Charter

The test for determining whether there has been a breach of s. 2(b) is a two-step approach, as outlined by the Supreme Court of Canada in Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927. The British Columbia Supreme Court succinctly outlined the test in the recent case of BC Freedom of Information and Privacy Association v British Columbia (Attorney General), 2014 BCSC 660. The Court wrote:
"[29] The Supreme Court of Canada has adopted a two-step approach to determining whether there has been a violation of s. 2(b): see Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at paras. 40, 45 [Irwin Toy]. First, the Court must inquire as to whether the government activity at issue falls within the sphere of conduct protected by the guarantee of freedom of expression. Second, if the activity is not excluded from the protection of s. 2(b) of the Charter, the Court must proceed to the second step and ask whether the purpose or effect of the government action is to restrict freedom of expression.

[30] A broad and inclusive approach is to be given to the protected sphere of free expression under the first step of the test: see Irwin Toy, at para. 43.

[31] Under the second step of the test, the Court must first consider the purpose of the government action or legislation in question. If its purpose was to restrict expression, then there has been a limitation by law of s. 2(b), and an analysis under s. 1 of the Charter is required to determine if the infringement is justified (Irwin Toy, at para. 47).

[32] With respect to the purpose test, the majority in Irwin Toy cautioned against "drifting to ... extremes". As stated at para. 48:

When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes. On the one hand, the greatest part of human activity has an expressive element and so one might find, on an objective test, that an aspect of the government's purpose is virtually always to restrict expression. On the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression. To avoid both extremes, the government's purpose must be assessed from the standpoint of the guarantee in question.

[33] The majority in Irwin Toy went on to provide the following guidance in applying the purpose test, at para. 49:

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described this distinction as follows (Freedom of Expression (1981), at pp. 59-60:

The bold line...between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and
regulation of time, place or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful" information, ideas, or emotions and the state's often justifiable desire to secure other interests from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.

[34] If the legislation survives the purpose test, the onus shifts to the plaintiff to demonstrate that the effects of the impugned provision are unconstitutional. In order to so demonstrate, the plaintiff must state its claim with reference to the principles and values underlying the freedom: see Irwin Toy, at para. 52. The majority in Irwin Toy provided further guidance on the application of these values to the test as follows (at para. 53):

We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They ... can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case by case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

[35] If, on the basis of the two-step test set out in Irwin Toy, the purpose or effect of the government action or legislation in question is determined to be the restriction of expression, then there has been an infringement of the right protected by s. 2(b), and an analysis under s. 1 of the Charter is required to determine if the infringement is justified.

Considerations Specific to Freedom of Expression in the Digital Age

While the importance of the rights enshrined by s. 2(b) has not wavered, the ways in which citizens exercise these rights has changed dramatically since the inception of the Charter in 1982. The medium for the exercise of s. 2(b) rights has been enhanced with improvements in technology. Citizens now possess much broader means for exercising their s. 2(b) rights. Courts have kept pace with these advancements and recognize the values and dangers associated with freedom of expression in the digital age. Justice Brent Knazan discussed Twitter in his recent decision in R v Elliott, 2016 ONCJ 35, and had the following to say:

“Twitter not only expands access to readers to those who do not have access to the mass media, it is an alternative to the mass media. It has the potential to develop so that more and different points of view can be promoted, including those that are not reflected in traditional media. Since tweets can include links, I can conclude, just from the evidence, that Twitter can spread well-considered articles as well as the tweeter’s opinion. Any limitation on its use that is not necessary to prevent criminality will limit this potential. It will not be consistent with the freedom of expression that is essential to a free and democratic society.”

The Expectation of Anonymity and Associated Challenges

In this digital age of expression, another complicating factor in ensuring that s. 2(b) rights are protected is the creation of accounts under pseudonyms or parody accounts. This type of anonymous expression may not have been possible when the Charter came into effect in 1982, but is becoming more and more commonplace as those wishing to express thoughts or opinions choose to anonymize themselves prior to doing so.
Our courts have recognized that the right to freedom of expression may support a reasonable expectation of anonymity and privacy in the social media context. The Honourable Justice Goodridge considered the interaction of anonymity in social media in the context of Charter rights in *King v Power*, 2015 NLTD(G) 32. In rendering his decision, Justice Goodridge made the following remarks:

"[24] There will be many circumstances where the interests of privacy and freedom of expression support a reasonable expectation of anonymity of persons engaged in communications through social media. Preserving this anonymity can be a positive feature of a free and democratic society, for example, when it promotes debate and discussion on controversial issues. However, preserving this anonymity cannot be automatic and the reasonableness of an expectation of anonymity must be assessed on a case-by-case basis."

While, as identified above, preservation of anonymity can be positive in some contexts, it does raise issues in the context of information from anonymous sources being utilized to inform police investigations and intelligence operations of that nature. In the article "Social Media Surveillance and Law Enforcement"15, the authors emphasize the dangers of reliance on this type of information:

"Surveillance technologies can grant an air of objectivity to assessments that are not necessarily indicative of realities on the ground, due to outdated, inaccurate, or incomplete information. For example, it is not always possible to trace a social media posting back to an individual, given the existence of fake and shared online accounts. Moreover, ephemeral details become permanent records that individuals are not always able to redress in retrospect."

**Challenges in Context and Interpretation**

Related to the abovenoted concerns is the danger of reliance on incomplete information or information taken outside its original context. The authors of "Social

---

"Interpreting behavior on social media is a difficult task for anyone. Without a doubt, inaccurate interpretations of social media data are not unique to law enforcement, but the consequences in a criminal justice context can be uniquely severe. 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 networks of friends. Interpreting those social media interactions can be challenging for a number of reasons. One is ‘context collapse’, a feature of online communication where messages intended for a limited audience become misconstrued for a wider audience once context is lost. There is also a limit to what can be extrapolated from social media activity – it only reflects a cross-section of people’s lives, and in the absence of the physical cues that frame face-to-face conversation, messages can be interpreted incorrectly. For example, flashing a gang sign on Facebook may be a way to joke with friends, proclaim solidarity or neighborhood affiliation, or harmless posturing....

But for law enforcement these types of messages can be confounding. Is an individual who posts about drugs and violence on social media actually engaging in those activities? One worry is that a lack of training for and understanding by investigators about what they are seeing online could lead to the criminalization of innocent individuals..."

C. Intelligence and Close Protection

Intelligence is the result of information that has been subjected to analysis. The American Central Intelligence Agency\textsuperscript{16} follows a simple five-step process consisting of:

1. Planning and Direction
2. Gathering
3. Processing

\textsuperscript{16} The Intelligence Cycle, https://www.cia.gov/kids-page/6-12th-grade/who-we-are-what-we-do/the-intelligence-cycle.html
4. Analysis and Production

5. Dissemination

These ideas are not new and the modern use of intelligence by police forces is taken directly from the practice of intelligence gathering and analysis used by military and civilian agencies globally. ¹⁷

There is nothing particularly novel about the analysis of information that produces intelligence. It is, in simplest terms, a method familiar to academics, lawyers, doctors, and others. Information is placed in an appropriate context in order to discern meaning.

"To be truly effective, intelligence work needs direction so that collection supports priorities and provides decision-makers with evidence-based assessments of their environments, warnings of new threats that may be just over their operational horizon, and support for their strategic priorities and other pressing needs."¹⁸ Typically, the analysis function would be separated from the operational function based on the well-established organizational principle of the separation of duties.

The Protective Services Unit, established in 2011, identified intelligence as a second function of the unit, with the unit’s primary role being close protection of the Premier and other officials, as needed.¹⁹ On the face of it, the people who were doing close protection were the same people who would be conducting the forward-looking analysis that is at the heart of an intelligence-based approach.

¹⁸ Adrian James, Understanding police intelligence work, (Bristol: Policy press, 2016).
In practice, the Protective Services Unit operated as a conventional close protection unit or a conventional police unit other than the type employed to combat organized crime. In that approach, police respond to complaints and investigate them after the fact to determine whether or not they meet the criminal code requirements of an offence.

The distinction is best seen in the way the intelligence cycle operates. A key element of intelligence analysis is data collection. Analysts must have information to assess. Information can come from many sources, including from the operational unit or units. But most often, the intelligence organization must conduct data collection operations of its own to ensure it has as complete a scan as possible of the environment affecting or likely to affect the operation.

One can find a useful illustration of how this approach works in close protection in a recent article20 on the United States Secret Service use of social media surveillance to identify and address potential security risks. The Internet Threat Desk is responsible for identifying potential threats. "The first part of this mission – finding threats – is in many ways made easier by the Internet: all you have to do is search! Pulling up every tweet which uses the words ‘Obama’ and ‘assassinate’ takes mere seconds, and the Secret Service has tried to make it easier for people to draw threats to its attention by setting up its own Twitter handle, @secretservice, for users to report threatening messages to."

This is admittedly a simple if not simplistic description of the process. Agents can employ readily-available technology to conduct a wide search of the Internet for keywords. They can then filter the results of this wide search using set criteria until they have identified specific individuals who can then be investigated further.

---

20 "The secret agents who stake out the ugliest corners of the Internet" The Atlantic
https://www.theatlantic.com/technology/archive/2015/07/secret-service-online-threat-president/399179/
Evidence at the Inquiry from both Constable Smyth and Donna Ivey describe the information collection activities of the close protection unit. It is not systematic, nor is it broad. The Protective Services Unit relied on political staff to refer individual communications to the unit. Officers did not conduct any scans of their own, even of the easily identified locations on the Internet.

Constable Smyth testified that the unit “didn’t generally follow, broadly, people’s social media. We didn’t have the resources at the time to do that. If there was a certain concern brought to our attention, we would evaluate and examine the entirety of that person’s social media feed as a means of furthering that intelligence gathering. But as a general rule, we didn’t have anybody assigned to a computer and just surfing through social media commentary and finding these things.”

Ms. Ivey noted that she had forwarded the specific Twitter comments from Donald Dunphy to the protective unit, as staff routinely did, since they were “of concern.” Neither Ivey nor Smyth gave a clear indication of what would constitute “concern”. Individuals working in a partisan office or under the stress of daily political work think differently from others, even allowing for the particular approach of the permanent campaign noted earlier. What they perceive as troubling, threatening, or of concern may not be a fully accurate, objective observation.

That does not mean their perceptions are wrong. What it does mean, however, is that police officers providing close protection need additional information to balance those inputs from particular sources, like political staffers. It

---

22 http://www.ciddd.ca/documents/exhibits/P-0068.pdf
does not appear the close protection unit with which Constable Smyth worked had that balancing information.

This haphazard approach to information collection inevitably skewed the information flowing to the officers involved in close protection. They could not gain an accurate picture of the environment in which they were operating and hence, their ability to assess any information sent to them was hampered. The events of April 5, 2015 and the subsequent death of Donald Dunphy is a case in point. Evidence at the Inquiry to date indicates that until Donna Ivey referred a series of tweets to the protective unit, no one in the protective unit was aware of him. This is astonishing given that Dunphy had frequently made public comments on Twitter and on open line shows.

There is another way in which this close relationship between the police unit and the political staff may have produced other difficulties. Given his position as the NCO i/c, Constable Smyth received nationally-generated alerts from other police services and national intelligence agencies warning generally of potential issues that may or may not be relevant to local situations. Constable Smyth was apparently in the habit of passing those on directly, unfiltered or with limited additional comment, to civilians within the Premier’s Office.

The example noted in testimony was of a video warning of the potential, generally, for lone wolf attacks issued in the wake of the attack on Parliament Hill. Constable Smyth’s explanation for providing the lone wolf warning to Premier Davis is that he met two of the three criteria for potential targets in that he was a prominent figure and former police officer.\(^{23}\) Smyth had no other reason for concluding that Davis might be the target of an attack. He could offer no indication that anyone nationally had identified messages that appeared to refer to Davis, that

any local individuals appeared to be influenced by the Islamic State organization, or indeed that there was any reason to believe in any way that this generic national warning contained any relevance to the Premier’s Office. If there had been such specific intelligence available, Smyth would have received it and the information would have been classified accordingly.

Rather it points to the extent to which Constable Smyth reached a conclusion - that Davis was at high risk – solely because he met two criteria of three on a very general warning sent nationwide. Constable Smyth’s actions in this instance confirm as well that he had no other information on the local environment that he could use to justify either an increased level of vigilance or a continuation of routine behaviour. In other words, Constable Smyth’s email does not contain an intelligence assessment.

This flow of information could easily skew perspectives. From testimony at the Inquiry to date, political staff clearly looked to the police as subject matter experts on security. On the one hand, the police received information from political staffers which they assessed as threats until proven otherwise. Constable Smyth’s discussion of individuals investigated as potential threats for targeted violence seems to assume the individuals are threats until they have been cleared. The approach seems to have been one of proving a negative, starting from the assumption that threats exist and are everywhere to be discovered. At the same time, police from time to time reflected back to stressed political staff the perception of an active threat environment, as in the lone wolf attack warning. Therefore, it would not be surprising in that situation to find a state of continued stress bordering on paranoia or an escalating sense of fear with nothing to counter-balance it.

---

24 Exhibit P-219 in the Public Inquiry into the Death of Donald Dunphy
Evidence available to date suggests that the Protective Services Unit, established in 2011, did not function based on intelligence assessments as those terms would be generally understood. It did not routinely gather data even though electronic monitoring of all media, including online social media, had existed for a decade before the unit was established. In 2011, companies such as Lexus Nexus had begun to offer a modification of their earlier media monitoring services to include social media. It is not clear whether Constable Smyth was aware of this information-gathering service or of the techniques involved as he established the new unit and drafted its policies and procedures manuals.

What the unit appears to have been doing is conducting ad hoc investigations of complaints, as time permitted, in the fashion of a typical police service. The unit had no control over the number or types of complaints it received and appears to have had no means of filtering or limiting them. This is precisely the same circumstances one would find in other parts of the force where officers have no control over the number of car thefts, assaults, or petty thefts. They respond as best they can, after the fact. Intelligence analysis - that is, information discerned in advance - seems confined to specific types of criminal activity such as drugs and associated activities.

This would explain the perception Constable Smyth had of a very high threat level starting in 2013 and persisting, according to his testimony on January 16, 2017, through to the time of his arrival in Mitchell’s Brook and after. He appears to have based his judgment on the volume of complaints, not on their substance. That is demonstrated in his threat assessment and request for additional officers in April 2013. The obvious confirmation of this is that Donald Dunphy was unknown to Constable Smyth prior to the communication from Ms. Ivey.
That would also explain the perspective former Premier Paul Davis took on claims that he had ordered a political hit by a fellow police officer against a troublesome critic. To people outside the former Premier’s world that seems like a truly ludicrous idea. But inside that world where threats seem to be everywhere, it is possible to lose perspective. Decisions are justified inside that world based on the belief that those inside know something the rest of us do not. What they cannot appreciate, sometimes, is that they are only seeing their own views reflected back to them.

Conclusion

We believe that we have given the Commissioner a general overview of social media and the matter of free expression in the digital age. This overview is within the scope of resources available and the scope of the Inquiry. The public Internet has been with us now for more than two decades. Collectively, Canadians have plenty of experience dealing with it and its implications. We will continue to face the implications as long as the Internet is here. This is the first question the Commissioner asked us to address.

When the Coalition members first looked at this Inquiry we were concerned about the prospect that government and police actions may have had the effect of stifling legitimate expression. This is the second part of what the Commissioner has asked the Coalition to do in this paper.

We cannot say definitely that such is the case. We have had neither the time nor the resources to conduct the sort of review necessary to reach that conclusion. We believe that both the police and the Executive Council should consider retaining an external consultant to review police files from the Protective Services Unit during
the period solely for the purpose of assessing the operational effectiveness of the approach taken to close protection between 2011 and 2015.

Constable Smyth’s brief history of the Protective Services Unit is simply wrong on several points. The police have always been responsible for providing close protection for members of the Executive Council. They have typically done so, only as required, by knowledge of an actual or perceived risk or threat. Premiers of this province have only had daily close protection at two different time periods. One period was in the 1980s and, for a period two or three years, was provided by a single officer. The other period was during the life of the unit that is currently the subject of this Inquiry. Close protection has always been provided to the Premier by trained officers employed as police officers.

The review we propose would also indicate whether or not the investigations conducted by the unit and the interventions noted during the testimony at the Inquiry were warranted.

Leaving aside the events in Mitchell’s Brook, we believe there is reason to be concerned about the organization and operation of the close protection unit for the Premier and the potential that it had an impact on freedom of expression. The observations we have made in this paper, while by no means authoritative or definitive, suggest an environment in which good people with the very best intentions can err through no fault of their own.

We believe the police and the provincial government can find valuable lessons they ought to learn now so that they do not have to be re-learned later.
Bibliography

24. Exhibit P-219 in the Public Inquiry into the Death of Donald Dunphy