



Commission of Inquiry Respecting the Death of Donald Dunphy

Via Email and Regular Mail

November 8, 2016

Mr. Will Hiscock
Budden & Associates
1st Floor, 401 Empire Avenue
St. John's, NL A1E 1W6

Dear Mr. Hiscock:

RE: Your Client: Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador

I have considered your client's application for standing and funding at the Commission of Inquiry into the death of Donald Dunphy, dated October 14, 2016.

1. Proposed Role

I have also reviewed your subsequent emails, including that of October 21, 2016, where you responded to the email of October 20, 2016, from Commission Counsel suggesting that your client might have limited standing at a proposed second phase of the inquiry (apart from the fact-finding phase).

You responded that your client does not believe that the proposed limited role is sufficient, even with the suggestion that you might be permitted to have input at the fact-finding stage through suggestions made by your client to Commission Counsel for proposed questions or lines of questioning during the first phase of the inquiry.

2. Potential Contribution and Expertise

In response to my request for documentation establishing some expertise of your client in areas contemplated for inquiry, and specifically regarding the monitoring of and response to social media, you have forwarded biographies of the seven members of your coalition and explained that the organization was only formed after the Inquiry commenced, with no formal structure at the time of the application.

You submit the seven members constitute a diverse group of citizens who utilize social media and other similar forms of public communication to (a) discuss policy issues; (b) question Government actions and policies; (c) express views on matters of public interest; and (d) further civil discourse in our province.

3. Terms of Reference

In your application for standing and funding, you rely upon the Commission's Terms of Reference and in particular, 3(1)(h)ii, 3(1)(h)iii, and 3(1)(k). You note that although your members come from differing ideology and political perspectives, they share "a common interest in ensuring that the collection and utilization of social media commentary by either the Office of the Premier or the RNC does not have a chilling effect on, or otherwise suppress, your members' rights of free opinion and expression". You say your client seeks standing "only on the isolated issue of the monitoring and response to social media and other terms of the inquiry only insofar as they relate to that issue".

4. Criteria for Standing

Section 5(1) of the *Public Inquiries Act, 2006* ("the Act") deals with participation in an inquiry. It provides:

- 5(1) a commission shall give those persons who believe they have an interest in the subject of the inquiry an opportunity to apply to participate.
- 5(2) a commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering:
 - (a) Whether the person's interests may be adversely affected by the findings of the commission;
 - (b) Whether the person's participation would further the conduct of the inquiry; and
 - (c) Whether the person's participation would contribute to the openness and fairness of the inquiry.

(a) Adverse Effect

You claim that your client's interests may be adversely affected by the findings of the Commission in that the findings may lead to a reservation on the part of [your client's members] to speak freely and openly on social media platforms for fear that the information may be collected and utilized for unlawful purposes or to retaliate against [your members] if the views they express are critical of government officials, or government policy.

(b) Further the Conduct of the Inquiry

On the second criterion of s.5(1) of the Act, you submit your client's "participation in the matter will further the conduct of the inquiry by providing the perspective of those with a significant interest in the policies, protocols or manuals of the Office of the Premier and RNC relating to the monitoring of and response to social media". You also refer to your client's "perspective and personal familiarity of the activities of those who use social media in this Province to discuss political and policy matters and to attempt to use said social media to enhance and further public dialogue and debate".

(c) Openness and Fairness of the Inquiry

On the third criterion of s.5(1) of the Act, you argue that your client's "participation will contribute to the openness and fairness of the inquiry as well as the public's perception that the inquiry is open and fair by providing the perspective of several prominent political and social media commentators, who are bound only by their common interest in the importance of protecting their, and the general public's, right to free expression and opinion". You stress that your client's members support differing political parties and in your opinion are therefore a clearly non-partisan group seeking standing on issues with significant potential impact on politics in this Province. You note your client's members are active users of Facebook and Twitter, "who have also authored letters to the editor, commented on political issues on television and radio, acted variously as journalists, newspaper editors, researchers, activists, organizers, and newspaper columnists".

Among other topics you seek to address "relevant aspects of the *Canadian Charter of Rights and Freedoms*, the *Privacy Act*, RSNL 1990, c.P-22, the policies and protocols of other relevant offices both in this jurisdiction and elsewhere, and other relevant legislation and rules insofar as they may affect the public's rights and reasonable expectations with respect to the public's use of social media and the government's monitoring and response to such use".

5. Phases of the Inquiry

I have determined that the most efficient and effective method of proceeding will be to divide the Inquiry into two phases; first, a fact-finding phase and, second, a policy phase, which will involve public presentations by experts or those with particular useful knowledge or expertise, on topics relating to:

- (i) communications to the public or media by the police following serious incidents and during active investigations.
- (ii) the use of social media in promoting the public's right to free expression and as a tool for critiquing government policy and action.

- (iii) 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.
- (iv) use of Force by police including De-escalation Techniques, particularly in dealing with persons in crisis.
- (v) policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.

6. Decision on Standing

It is my opinion that you have made a good case for your client being permitted to participate in the Inquiry. However, for the reasons which follow, I have concluded that your client's participation should be limited to participation in the second phase with respect to the following issues:

- a. communications to the public or media by the police following serious incidents and during active investigations;
- b. the use of social media in promoting the public's right to free expression and as a tool for critiquing government policy and action;
- c. 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; and
- d. policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.

(a) Adverse Effect

I am not persuaded that any potential adverse effect caused to your client by the findings of the Commission would be different from that sustained by any member of the general public in terms of the chilling effect on freedom of expression. It follows that your client has demonstrated no better case for standing than any other citizen of the province with respect to the criterion of Section 5(2)(a) of the *Act*.

(b) Further Conduct of Inquiry

Your client's participation might further the conduct of the inquiry by promoting its particular perspective. At the same time, I believe there is a significant risk that the very broad issues your client wishes to pursue may impair the conduct of the Inquiry by moving its focus from the

social media issues specifically arising by the circumstances surrounding Mr. Dunphy's death to the impact of social media generally.

(c) Openness and Fairness:

You have not established how full participation by your client will contribute to the openness and fairness of the Inquiry. Your emphasis upon what you see as your client's "unique and critically important perspective" ignores Rule 2 of the Commission's Rules of Procedure and Practice, which contemplates that Commission counsel will have the primary responsibility of representing the public interest, including ensuring that all issues that bear on the public interest are brought to the Commission's attention. I am satisfied Commission Counsel will be able to thoroughly explore the issues raised by your client, particularly if your client takes up the Commission's offer to consider particular lines of questioning relevant to the social media aspects of this case that your client would like posed to any witness. With regard to your submission, in your email of October 27, 2016, that "there is no other party with standing who has an obvious interest in [your client's issues] being fully canvassed as the terms of reference direct this Commission to do", I note that by Rules 1.A.2 Commission Counsel have standing throughout the Inquiry and the primary responsibility for representing the public interest and ensuring that all interests are brought to my attention.

Your client submits that limited standing, specifically, not giving it a role in the fact finding tasks of the Commission, is not sufficient. You argue that your client should be involved in the fact finding phase "to be able to thoroughly canvass the development and day to day works of the social media monitoring by both the Office of the Premier and Royal Newfoundland Constabulary". I am satisfied this canvassing can be adequately carried out by Commission Counsel. I am also satisfied that your client will have adequate opportunity to express its concerns and recommendations at the second phase of the Inquiry, if it so wishes. I have an obligation to balance costs and time constraints against what a party might contribute to the Inquiry and how the party should participate. I have concluded that full standing for your client would add unnecessary cost and delay.

SUMMARY AND DISPOSITION

1. The application of the Ad Hoc Coalition for Civil Liberties in Newfoundland and Labrador ("the Ad Hoc Coalition") for full standing at the Inquiry is denied.
2. The Ad Hoc Coalition is granted limited standing for the second phase of the Inquiry and may participate in that phase through counsel, if it so wishes, by a public presentation upon any of the following:
 - a. communications to the public or media by the police following serious incidents and during active investigations;
 - b. the use of social media in promoting the public's right to free expression and as a tool for critiquing government policy and action;

- c. 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; and
 - d. policies and protocols of Government or the Royal Newfoundland Constabulary with respect to the security of the Premier and Cabinet Members.
3. The Ad Hoc Coalition shall inform the Commission by November 14, 2016 whether it wishes to participate as noted in the second phase.
 4. Counsel for the Ad Hoc Coalition shall coordinate with Commission Counsel the content and manner of its presentation, the production of documentation relevant to their limited participation, and the remuneration it requests the Commission to recommend for its counsel regarding Phase 2.

Yours truly,



LEO BARRY
Commissioner