



# **ALONE AND COLD**

## **CRIMINAL JUSTICE BRANCH RESPONSE**

**THE DAVIES COMMISSION**

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**INQUIRY INTO THE RESPONSE OF  
THE CRIMINAL JUSTICE BRANCH**



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MAY 19, 2011

Library and Archives Canada Cataloguing in Publication

Alone and Cold; Criminal Justice Branch Response—Davies Commission Inquiry into the Response of the Criminal Justice Branch (B.C.)

Final report of the Davies Commission Inquiry into the Response of the Criminal Justice Branch.

"Commissioner, William H. Davies".

Available also on CD-ROM.

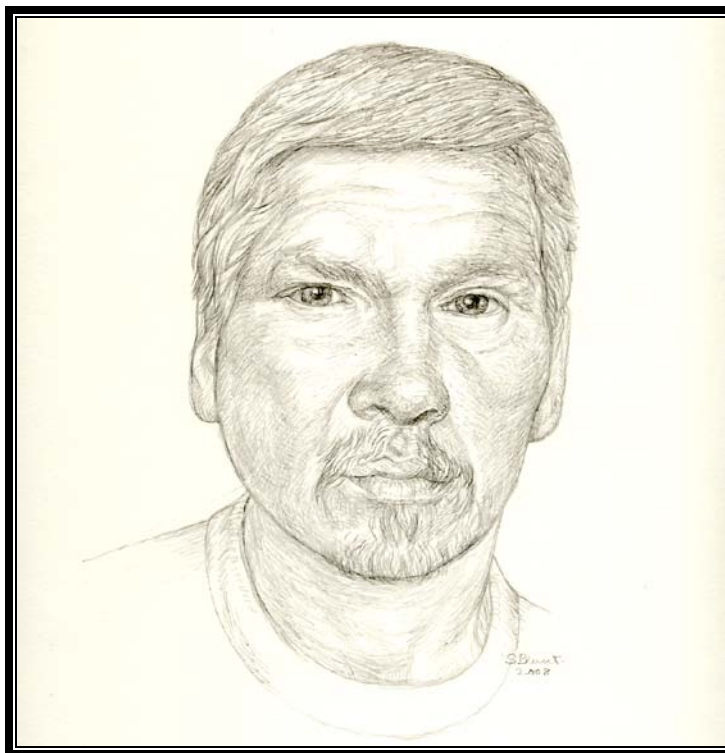
ISBN 978-0-7726-6379-5

1. Paul, Frank Joseph--Death and burial. 2. Alcoholics--Services for--British Columbia--Vancouver. 3. Homeless persons--Services for--British Columbia--Vancouver. 4. Police services for alcoholics--British Columbia--Vancouver. 5. Police misconduct--British Columbia--Vancouver. 6. Justice, Administration of--British Columbia. 7. Governmental investigations--British Columbia. I. Davies, William H II. Title.

362.292'80971133

C2011-909015-5

HV5309 B7 D33 2011



**FRANK JOSEPH PAUL**

**Born: July 21, 1951, Big Cove (now Elsipogtog), New Brunswick**

**Died: December 5 or 6, 1998, Vancouver, British Columbia**



THE DAVIES COMMISSION

William H. Davies, Q.C., Commissioner

May 19, 2011

The Honourable Barry Penner, Q.C.  
Attorney General of British Columbia  
Room 234, Parliament Building  
PO Box 9044 Stn Prov Govt  
Victoria, BC V8W 9E2

Dear Mr. Attorney:

**Final Report of The Davies Commission**

I am pleased to deliver this Final Report to you, as provided for in section 27 of the *Public Inquiry Act*, S.B.C. 2007, c. 9.

This report addresses the response of the Criminal Justice Branch of the Ministry of Attorney General to the death of Frank Paul. All other aspects of my original mandate were reported upon in my February 12, 2009 Interim Report entitled *Alone and Cold: The Davies Commission Inquiry into the Death of Frank Paul*.

Yours very truly,



William H. Davies, Q.C.

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**LETTER OF TRANSMITTAL**



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**A. Overview**

This report completes the work initially undertaken after my appointment in March 2007, to investigate and report on the circumstances of the death of Frank Paul in December 1998, and the official response to his death. My earlier report (delivered in February 2009) examined the facts surrounding his death, as well as the responses of all relevant official bodies except for the Criminal Justice Branch. My inquiry into the Branch's response was postponed because of the Branch's challenge to this inquiry's authority to inquire into matters of prosecutorial discretion, which the Branch contended were protected from external review. The BC Court of Appeal has now clarified that, with some restrictions, my inquiry into these matters could proceed.

A central issue concerning the Criminal Justice Branch's response is whether the prosecutors involved discharged their duties with integrity. Based on Commission Counsel's extensive investigations and on the conduct of public hearings, I have concluded that the Branch conducted itself honourably and with integrity in its consideration of whether criminal charges should have been laid in what was, unquestionably, a complex inquiry into police involvement in Frank Paul's death. In short, the Branch considered the available facts professionally, addressed all possible criminal charges in light of the applicable law, and applied the facts and law to whether there was a substantial likelihood of conviction—the charge approval standard in British Columbia.

Although I make several criticisms of, and suggestions for, improvement in the Branch's policies and procedures in this report, I am satisfied that there is no basis for any suggestion that the prosecutors in the Frank Paul case conducted themselves improperly when considering whether to charge the police officers.

I also examined whether an institutional conflict of interest exists when members of the Branch conduct charge assessments in police-related cases. Readers of my first report may remember that I recommended the establishment of an independent, civilian-led investigative body to conduct criminal investigations in police-related cases. In this report I examine whether avoiding conflict of interest concerns in police-related cases requires analogous changes at the charge assessment stage.

I do not suggest that any prosecutor in this case showed a preference toward police officers who were under suspicion. There is an existing policy addressing conflicts of

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interest. I am, however, concerned that, given the close and ongoing working relationship between the police and Branch prosecutors, informed members of the public may reasonably conclude that there is a risk of preferential treatment in police-related cases. Broader measures need to be taken to ensure the public's confidence in charging decisions that affect police officers. In my view, this requires that charging decisions in such cases be made by lawyers from outside the Branch.

In the past three years, this inquiry has shone a spotlight on homelessness in our communities, and on the plight of homeless chronic alcoholics and on our society's antiquated responses to them. I acknowledge that recently the Province and the City of Vancouver have dedicated considerable resources to expanding the number of supportive housing units, and that the general community has donated substantial funds to address the needs of our most vulnerable and needy residents. Also, the Province has opened the Burnaby Centre for Mental Health and Addiction, a 100-bed mental health facility that houses integrated mental health, addictions, and primary care residential services—the type of medical treatment that would have benefited Frank Paul.

However, more needs to be done. In my first report I recommended replacing the Vancouver Police Department's drunk tank with:

- a civilian-operated program for attending to chronic alcoholics who are incapacitated in a public place,
- a civilian-operated sobering centre,
- an enhanced civilian-based detoxification program,
- the provision of permanent low-barrier housing designed for the specific needs of chronic alcoholics, and
- the provision of community-based, multi-disciplinary assertive community treatment services.

I am pleased that on December 9, 2010, the BC Civil Liberties Association hosted a conference at SFU in downtown Vancouver, to examine the need for a sobering centre similar to what I recommended. It appears that there is broad support within the Vancouver Police Department and the Aboriginal community for this type of initiative, but provincial leadership will be required to ensure that there is an effective and coordinated response.



I am also pleased to note that the Province has accepted my recommendation for the establishment of an Independent Investigations Office, which was adopted and strengthened by Commissioner Thomas Braidwood, Q.C., arising out of the death of Robert Dziekanski at the Vancouver International Airport. My recommendations in this report assume that in the future this type of civilian body will conduct investigations concerning possible criminal conduct by police officers.

When this inquiry began, our focus was on the untimely and unnecessary death of one man, Frank Paul. He had suffered mightily over the years, was barely able to care for himself on Vancouver's harsh streets, and died alone and cold in an alleyway on a wet December night. While his death was a tragedy to be mourned, comfort can be found in the legacy that he has left—a society established in his name, the prospect of reforms to the way police-related deaths and serious injuries are investigated and the way charge assessments in such cases are conducted, and, hopefully, a client-centred approach to dealing with homeless chronic alcoholics.

It has been a distinct privilege for me to lead this inquiry on what has proved to be a remarkable journey. This inquiry would never have happened but for the resolve and determination of members of the Aboriginal community and their advocates who relentlessly sought to shine a light on Frank Paul's lonely death.

## **B. Executive Summary**

### **1. The Commission of Inquiry**

On April 29, 2010, the Lieutenant Governor in Council appointed me to conduct a hearing and study commission to inquire into the Criminal Justice Branch's response to the death of Frank Paul. This was the only issue remaining from the inquiry established in March 2007 that culminated in my February 12, 2009 report entitled *Alone and Cold: The Davies Commission Inquiry into the Death of Frank Paul*. The new Terms of Reference (see Appendix A) instructed me:

- (b) To make findings of fact regarding the response of the Criminal Justice Branch in relation to the death of Mr. Paul.
- (c) To examine the rules, policies and procedures of the Criminal Justice Branch respecting its role and response when an individual dies in circumstances similar to the circumstances of Mr. Paul's death.

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- (d) To recommend changes considered necessary to the rules, policies and procedures referred to in paragraph (c).

The commission held five days of evidentiary hearings into the Branch's response to Mr. Paul's death, at which five witnesses testified under oath or affirmation. I also convened a one-day policy hearing to examine the charge assessment process in police-related death cases and two days for closing oral submissions. During the evidentiary hearings, I was guided by the BC Court of Appeal's ruling<sup>1</sup> that, while I could inquire into the Branch's response, requiring anyone to second-guess or justify their decision not to prosecute was beyond the scope of the inquiry.

### **2. The Criminal Justice Branch's response to Mr. Paul's death**

#### **Organization of the Criminal Justice Branch**

The Branch is responsible for conducting charge assessments and, where charges are approved, prosecuting criminal cases throughout British Columbia. The Assistant Deputy Attorney General is in charge of the Branch. The Branch's headquarters are in Victoria, and the province is divided into five regions. The Branch applies a two-pronged charge assessment standard—whether there is a substantial likelihood of conviction and, if so, whether a prosecution is required in the public interest.

When an allegation of criminal conduct is made against a police officer, the Branch has a distinct policy respecting charge assessments because of the potential for there to be an apprehension of favourable treatment being accorded police officers, given the close working relationship that exists between police officers and Crown prosecutors. In such cases, charge assessments are conducted by Regional Crown Counsel, or by the Director of Legal Services in headquarters. When there is a significant potential for real or perceived improper influence in prosecutorial decision-making, the Assistant Deputy Attorney General may appoint a senior lawyer from private practice as a special prosecutor.

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<sup>1</sup> (2009), 308 D.L.R. (4<sup>th</sup>) 577 (B.C.C.A.).

**Charge assessments in the Frank Paul case**

At about 8 p.m. on December 5, 1998, Mr. Paul was arrested (for the second time that day) for being intoxicated in a public place. The probationary constable who drove the Vancouver Police Department police wagon delivered him to the jail at approximately 8:20 p.m. The sergeant in charge of the jail refused Mr. Paul entry. The constable took Mr. Paul away and, at about 9 p.m., removed him from the police wagon and left him in the south lane of the 300 block of East 1<sup>st</sup> Avenue, Vancouver. Mr. Paul's body was found there at approximately 3 a.m. the next morning. The forensic pathologist attributed death to hypothermia due to acute alcohol intoxication.

The circumstances of Mr. Paul's death raised a question of whether any of the officers who dealt with him committed a criminal offence, and specifically, whether his death was a culpable homicide. There were three relevant offences: failing to provide the necessities of life; criminal negligence causing death; and manslaughter by criminal negligence. All three are negligence-based criminal offences. Among other elements they require: proof of a marked, or marked and substantial, departure from a standard of care that a reasonable person would provide; objective foresight of the risk of non-trivial bodily harm; or, in the case of failing to provide necessities, objective foresight of endangerment of life or permanent injury to the victim's health. As with all criminal offences, the Crown, in order to secure a conviction, would have to be able to prove beyond a reasonable doubt all the essential elements of any offence that was charged.

Between 1999 and 2004, four charge assessments were conducted.

a. First charge assessment

In May 1999, Regional Crown Counsel reviewed the police investigator's Report to Crown Counsel, identified some gaps, and required further information from the officer, including statements from several witnesses. He considered three criminal offences: failing to provide the necessities of life; manslaughter; or criminal negligence causing death. The officers said they believed that Mr. Paul's intoxication did not render him incapable of caring for himself. Any inference that the death of Mr. Paul had been objectively foreseeable and that the actions leading to his death represented a marked departure from the conduct of a reasonable and

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prudent person, could be countervailed by the perceptions of events by the accused (even if wrong). For that reason, there was a reasonable doubt as to the objective foresight in all the circumstances of endangerment. Ultimately, Regional Crown Counsel recommended to the Director of Legal Services that the Crown would not succeed in showing an intentional failure to perform a duty on the part of either the sergeant or the constable.

The Director of Legal Services (who did not testify for health reasons but did provide a written statement) asked another lawyer in the Branch to research the offence of failing to provide necessaries of life. After considering that research and Regional Crown Counsel's memorandum, he decided in December 1999 not to approve charges. Although the officers owed a duty to Mr. Paul to provide the necessaries of life, the Crown could not prove that they failed to perform their duties in a manner that demonstrated a marked departure from the conduct of officers in similar circumstances. There was also considerable doubt respecting an objective foreseeability that harm would come to Mr. Paul.

### **b. Second charge assessment**

In December 2000, the Deputy Police Complaint Commissioner asked the Branch to reconsider the "no-charge" decision, based on two pieces of new evidence—Vancouver Police Department videotapes from the police wagon bay and the jail and a forensic pathologist's report. The Director of Legal Services, after reviewing all the evidence, was satisfied that the Crown could prove that the sergeant refused Mr. Paul entry into the jail and that the constable later left Mr. Paul in the alley where he was later found dead.

However, the case raised legal challenges for the Crown, and he asked another lawyer in the Branch to review the file. The other lawyer did not review the videotapes showing Mr. Paul being dragged into and out of the police station, because she was satisfied from other evidence that he was incapacitated. The forensic pathologist's opinion was that hypothermia would have been manifesting itself while Mr. Paul was at the jail, but that could only be determined by testing his body temperature, which had not

occurred. The other lawyer considered the same three criminal offences, but concluded that the Crown could not meet the substantial likelihood of conviction standard. Even if a risk of bodily harm was objectively foreseeable, she reasoned, it was not clear that the officers' decision to place Mr. Paul in the alley was a marked or substantial departure from what one could expect of a reasonably prudent person.

The Director reviewed her memorandum and discussed various aspects of the case with another lawyer in the Branch. He concluded that the officers did not exercise reasonable care, but the Crown could not prove a marked departure beyond a reasonable doubt. On the criminal negligence offence, the Crown would not be able to prove objective foresight of risk—of either death or non-trivial bodily harm—to the criminal standard. In August 2001, he concluded that charges should not be approved.

c. Third charge assessment

In February 2004, the Police Complaint Commissioner provided new information to the Assistant Deputy Attorney General—a second statement from one witness and a first statement from another. The deputy referred the matter to Regional Crown Counsel in Vancouver to conduct a new assessment. Regional Crown, with the assistance of a Vancouver Police Department sergeant, reviewed the investigative file and the new evidence, and interviewed three other witnesses identified from the videotape. In April 2004, he concluded that the new evidence was not sufficient to warrant altering the earlier no-charge decisions, based in part on his conclusion that the Crown was not in a position to prove a wanton and reckless disregard for Mr. Paul's safety. In his view the case raised numerous issues beyond criminal culpability, including police procedures in handling people in Mr. Paul's condition, the availability of services for such persons, the police "breach" policy, police training, and the quality of the police investigation into Mr. Paul's death, but a criminal prosecution must not be undertaken as a means by which these issues can be investigated.

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### **d. Fourth charge assessment**

After reviewing the three previous charge assessments, the Assistant Deputy Attorney General decided in April 2004, out of an abundance of caution, to seek a further charge assessment from the lawyer (now in private practice) who had conducted the first charge assessment. In June 2004, that lawyer wrote a lengthy letter to the Assistant Deputy Attorney General, setting out his reasons for concluding that there was not a substantial likelihood of conviction against the sergeant or the constable.

### **The Branch's June 2004 media statement**

The Branch released a media statement chronicling the four charge assessments and other significant events in the case, stating that there would be no criminal charges resulting from Mr. Paul's death. It stated the reasons for that decision as follows:

Given the available evidence, the Crown is unable to establish that any police officer failed to perform a duty upon them in such a manner that demonstrated a marked departure from the conduct of a reasonably prudent person or that it was objectively foreseeable that the conduct of the officers in failing to provide a more adequate shelter for Mr. Paul endangered his life or was likely to cause permanent damage to his health.

### **The integrity of the Branch's response**

To maintain the public's trust and confidence, and to be deserving of the independence our law affords them, Crown prosecutors must conduct themselves with integrity. In cases that involve a vulnerable victim, where potential accused persons occupy a position of trust, and where the Branch faces a legally difficult charge assessment, public confidence in the Branch's decisions and in the soundness of its policies and processes is particularly important.

I am satisfied that the Branch's prosecutors were not subjected to improper pressures from the Vancouver Police Department, nor was there any evidence of improper political pressure or influence. Although counsel for the Police Complaint Commissioner urged one of the prosecutors to approve charges, the prosecutor demonstrated an appropriate sensitivity to balancing the need to

consider all relevant information with the need to conclude his review independently, objectively, and free from outside influence.

I am also satisfied that all the charge assessments were conducted honestly, conscientiously, and free from any bias or discrimination, either for or against Mr. Paul and the police officers involved. The legal opinions do not reveal any lack of fairness, independence, or objectivity. Although I express no conclusion as to whether charges should have been laid, the charging decision in this case was not straightforward, and it was a decision on which reasonable people could reach different conclusions. The evidence does not provide a foundation for the suggestion that the no-charge decisions reflected a devaluation of Mr. Paul's life as an Aboriginal.

### **Charge assessments in conflict of interest situations**

The inquiry commissioned a research paper from a senior Vancouver criminal lawyer identifying the legal and ethical issues that may arise during the charge assessment process in police-related cases. I concluded that my examination must extend to the broader issue of conflicts of interest generally.

The Branch has several policies that deal, directly or indirectly, with conflict of interest situations. For example, a prosecutor cannot act in a case involving an accused, victim, or material witness who is a relative or friend, or anyone else in respect of whom there is an objectively reasonable perception of a conflict of interest. When the potential accused is a government agency or a police officer, other policies establish special procedures, such as referring the charge assessment to Regional Crown Counsel. In instances of real or apprehended conflicts of interest, charge assessments and resulting prosecutions may be assigned to lawyers in private practice, either ad hoc counsel or special prosecutors.

When the potential accused is a police officer, charge assessment and prosecution practices vary across Canada. In Alberta, the director of the civilian-led Alberta Serious Incident Response Team makes the charging decision, after receiving and considering an opinion from a Crown prosecutor. A similar practice exists in Ontario, with the director of the civilian-led Special Investigations Unit. In Manitoba, prosecutions against police officers (as well as judges, lawyers,

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politicians, and their immediate staff and family) are assigned to lawyers in private practice. In most other provinces, police-related cases are handled by Crown lawyers, either locally, in a different region, or through a specialized prosecution office.

At its core, conflict of interest concerns the risk of divided loyalties. In conducting a charge assessment, Crown Counsel must act with undivided loyalty to the public interest. When other interests (e.g., personal, financial, career) interfere with that duty of undivided loyalty, a conflict of interest exists, which may be actual or perceived.

It is important to distinguish between personal and institutional conflicts of interest. When a potential accused is a spouse, family member, or friend of the prosecutor who would normally perform the charge assessment, there is a risk that the understandable desire to protect that person from harm may influence the decision-making process. Financial interests might also come into play—a prosecutor, in expectation that helping out the potential accused might lead to lucrative employment down the road, might decline to approve charges.

What measures are required to remove the risks of this type of conflict of interest? The Branch's current policy makes it clear that the conflicted prosecutor cannot act, but offers no guidance respecting who can act, such as a prosecutor in the office next door, Regional Crown Counsel, a prosecutor in a different region, a senior prosecutor in provincial headquarters, a lawyer in private practice, or a lawyer or prosecutor from another province.

In answering that question, I was guided by the following: “When would an informed member of the public acting reasonably be satisfied that the charging decision would be made impartially?” I conclude that it would be inappropriate to assign the case to another prosecutor in the same region (or even to Regional Crown Counsel) because there are too many ongoing relationships among them. Charge assessment decisions in such circumstances should be assigned to a different region, but only to a specific prosecutor who has no personal relationship with the disqualified prosecutor. In my opinion, the costs of these measures would not be prohibitive.



Institutional conflicts of interest do not depend on a personal relationship between the prosecutor and a police officer suspected of a crime, but arise because of the ongoing professional relationship that exists between the Criminal Justice Branch and the police agency in which the potential accused is employed. The Branch's current policy recognizes the existence of this type of institutional conflict, and addresses it by disqualifying line prosecutors in the local office and requiring that Regional Crown Counsel conduct the charge assessment. A somewhat different form of institutional conflict arises when the potential accused has the capacity to exert improper influence over prosecutorial decision-making (or at least an informed member of the public acting reasonably might believe that capacity exists), in which case the Assistant Deputy Attorney General is authorized to appoint a special prosecutor.

I have concluded that informed members of the public acting reasonably would not be satisfied that having a charge assessment in a police-related case done by Regional Crown Counsel, by another region, or by the Branch's provincial headquarters would ensure that it was performed impartially. In this type of institutional conflict, the entire Branch should be separated from the decision. The apprehension of conflict is only removed when the charge assessment is assigned to someone outside the Branch, either a lawyer in private practice or a lawyer or prosecutor in another province.

I have also concluded that when the Province establishes the new Independent Investigations Office recommended in my earlier report, British Columbia should not adopt the Alberta and Ontario practice of the director making charging decisions, given our long and respected tradition of keeping the police investigatory and quasi-judicial charge assessment roles separate. I have concluded that the director should deliver his or her reports recommending charges to the Assistant Deputy Attorney General for selection and appointment of prosecuting counsel from outside the Branch.

Extrapolating caseload data from Ontario to British Columbia, I estimated that the new Independent Investigations Office might refer approximately 30 files annually to the Assistant Deputy Attorney General for charge assessment decisions under the proposed policy.

**Proposed reforms of Criminal Justice Branch policies**

I recommend that several of the Branch's other policies be revised, and that several new policies be adopted:

- **Inadequate or incomplete Reports to Crown Counsel.**  
Although the police and the Crown must respect each other's independence, that does not preclude the Crown from taking a firm position with the investigating officer, when necessary. The Report to Crown Counsel must be complete, accurate, and detailed.
- **Written charge assessment reports.**  
The Branch should decide the circumstances in which detailed written charge assessment reports should be required. When they are required, they should include consideration of what offences were considered, the essential elements for each offence, what evidence was relevant to each significant element, and the reasons for the charging decision.
- **Timeliness of completing charge assessments.**  
The Branch should ensure that there is a file management system in place that alerts Administrative Crown Counsel when a pending charge assessment decision has been outstanding for 30 days.
- **Reconsideration of a no-charge assessment based on new evidence.**  
The Branch should develop a policy respecting the reconsideration of a no-charge decision based on new evidence, which addresses who should conduct the new charge assessment and what standard should be applied.
- **Reconsideration of a no-charge assessment that may have been wrong.**  
The Branch should develop a policy respecting the reconsideration of a Branch prosecutor's no-charge decision when there is a concern that the original decision may have been wrong. The policy should address issues such as what threshold of reliability is required, the nature of the reconsideration, who should conduct it, and the duty to take into account concerns about abuse of process.
- **Notification of the victim or the victim's family.**  
The Branch should develop a detailed policy respecting notification of those affected by a charging decision, with special reference to victims or their families, which clarifies who is responsible for notification.
- **The Branch's public statements.**  
When the Branch issues a public statement containing the reasons for a

decision not to prosecute, they should include a summary of material facts, the identity of the potential accused (in most cases), the criminal offences that were considered, and the reason(s) why the evidence in relation to each offence was insufficient to warrant approval of charges.

## **C. Summary of Recommendations**

### **RECOMMENDATION 1**

#### **CHARGE ASSESSMENTS IN PERSONAL CONFLICT OF INTEREST SITUATIONS**

**I recommend that the Criminal Justice Branch amend its existing written policies so that they provide substantially as follows:**

- 1. A member of the Branch shall not provide legal advice to an investigating officer, or conduct a charge assessment or prosecution in a matter in which:**
  - a. an accused or potential accused, a victim, or a material witness is a relative or friend of the member, or**
  - b. the member's personal interest (including the member's relationship with an accused or potential accused, a victim, or a material witness) is such that an informed member of the public acting reasonably would conclude that there is a risk that the member might not act with undivided loyalty to the public interest.**
- 2. A member of the Branch who believes that another member of the Branch working in the same Branch region has a disqualifying conflict in a matter shall not provide legal advice to an investigating officer, or conduct a charge assessment or a prosecution in that matter.**
- 3. In any situation described in paragraph 1 or 2, responsibility for providing legal advice to an investigating officer, or conducting a charge assessment or prosecution, shall be assigned to:**

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- a. a member of the Branch working in a different Branch region, or**
  - b. a lawyer in private practice.**
- 4. A member of the Branch or lawyer in private practice shall not accept a referral under paragraph 3 where his or her relationship with the disqualified member is such that an informed member of the public acting reasonably would conclude that there is a risk that the member or lawyer might not act with undivided loyalty to the public interest.**

### **RECOMMENDATION 2**

#### **CHARGE ASSESSMENTS IN INSTITUTIONAL CONFLICT OF INTEREST SITUATIONS**

**I recommend that the Criminal Justice Branch amend its existing written policies so that they provide substantially as follows:**

- 1. A member of the Branch shall not provide legal advice to an investigating officer, or conduct a charge assessment or prosecution in relation to an accused or potential accused who is:**
  - a. an officer of a municipal police department or of the RCMP serving in British Columbia, whether or not the offence is alleged to have occurred while the officer was on duty.**
  - b. a British Columbia cabinet minister.**
  - c. a senior British Columbia public or ministry official.**
  - d. any other person, if an informed member of the public acting reasonably would conclude that, because of the relationship between the accused or potential accused and the Branch, there is a risk that a member of the**

**Branch might not act with undivided loyalty to the public interest.**

- 2. In any situation described in paragraph 1, the Report to Crown Counsel shall be delivered to the Assistant Deputy Attorney General, who shall refer the request for legal advice, or the charge assessment and any resulting prosecution to one of the following:**
  - a. a special prosecutor appointed under the *Crown Counsel Act*, or**
  - b. a lawyer in private practice in British Columbia or another Canadian jurisdiction, or**
  - c. a Crown prosecutor in another Canadian jurisdiction.**

### **RECOMMENDATION 3**

#### **INADEQUATE OR INCOMPLETE REPORTS TO CROWN COUNSEL**

**I recommend that page 6 of Crown Counsel policy CHA 1 (Charge Assessment Guidelines) be amended to read substantially as follows:**

#### **Report to Crown Counsel**

- 1. In order that Crown Counsel can appropriately apply the charge assessment standard, it is essential that a Report to Crown Counsel provide a complete, accurate, and detailed statement of the available evidence.**
- 2. A Report to Crown Counsel shall include the following information:**
  - a. a comprehensive description of the evidence supporting each element of the suggested charge(s),**

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- b. a recommendation respecting who should be charged and for what offence(s),**
  - c. where the evidence of a civilian witness is necessary to prove an essential element of the charge (except for minor offences), a copy of that person’s written statement,**
  - d. necessary evidence check sheets,**
  - e. copies of all documents required to prove the charge(s),**
  - f. a detailed summary or written copy of the accused’s statement(s), if any, and**
  - g. the accused’s criminal record, if any.**
- 3. In a complex case, the material in the Report shall be organized and indexed.**
- 4. When a Report to Crown Counsel does not comply with these standards, Crown Counsel shall communicate with the investigator respecting the additional information and/or materials required and may, where appropriate, seek guidance or assistance from Administrative Crown Counsel.**
- 5. When, following the procedures described in paragraph 4, Administrative Crown Counsel is not satisfied that he or she has received the additional information and/or materials required, Administrative Crown Counsel may ask Regional Crown Counsel to assist in resolving the matter with the police.**
- 6. When, following the procedures described in paragraphs 4 and 5, the Branch is not satisfied that it has received the additional information and/or materials required, the Branch shall advise the investigating officer that a charge assessment decision cannot be made.**

**RECOMMENDATION 4**

**WRITTEN CHARGE ASSESSMENT REPORTS**

**I recommend that the Branch develop a policy that:**

- 1. identifies the types of situations in which a prosecutor conducting a charge assessment should be required to complete a detailed written charge assessment report; and**
- 2. identifies the categories of information that should be addressed by the prosecutor in a detailed written charge assessment report.**

**RECOMMENDATION 5**

**TIMELINESS OF COMPLETING CHARGE ASSESSMENTS**

**I recommend that the Branch ensure that there is a file management system in place that alerts Administrative Crown Counsel when a pending charge assessment decision has been outstanding for 30 days.**

**RECOMMENDATION 6**

**RECONSIDERATION OF A NO-CHARGE DECISION BECAUSE OF CHANGED CIRCUMSTANCES**

**I recommend that the Branch develop a written policy respecting the reconsideration of a no-charge decision based on new evidence and/or changed circumstances that may materially affect the charge assessment decision. The policy should address who will conduct the new charge assessment.**

**RECOMMENDATION 7**

**RECONSIDERATION OF A NO-CHARGE DECISION THAT MAY HAVE BEEN WRONG**

**When there is a concern that an original no-charge decision may have been wrong, I recommend that the Branch develop a written policy respecting the**

## **PART 1—OVERVIEW AND EXECUTIVE SUMMARY**

**reconsideration of a Branch prosecutor’s no-charge decision. The new policy should address such issues as:**

- 1. the level of certainty that must be met that the original decision was wrong, before the charge assessment will be reconsidered;**
- 2. whether the reconsideration should take the form of a new charge assessment (applying the substantial likelihood of conviction standard) or a review (applying a reasonableness standard);**
- 3. who should conduct the reconsideration; and**
- 4. the duty to take into account whether it may constitute an abuse of process to approve a charge following an earlier decision not to charge.**

### **RECOMMENDATION 8**

#### **NOTIFICATION OF THE VICTIM OR THE VICTIM’S FAMILY**

**I recommend that the Branch amend its existing written policies respecting notification of those affected by a charging decision to:**

- 1. address specifically the notification of victims or their families;**
- 2. clarify who is responsible for notification; and**
- 3. require written documentation of the notification particulars.**

### **RECOMMENDATION 9**

#### **THE BRANCH’S PUBLIC STATEMENTS**

**I recommend that the Branch’s policy DIS 1.1 be amended to provide that a public statement released by the Branch containing the reasons for a decision not to prosecute include:**

- 1. a summary of material facts that will give a reader a fair understanding of what occurred;**



- 2. the identity of the potential accused, unless there are valid reasons to withhold that information;**
- 3. the criminal offences that were considered;**
- 4. the reason(s) why the evidence in relation to each offence was insufficient to warrant approval of charges; and**
- 5. the reason(s) for a significant delay in completion of the charge assessment.**

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**PART 2—THE COMMISSION OF INQUIRY**

**A. The Commission**

**1. Appointment of Commissioner**

In February 2007, the BC Solicitor General announced that, in view of the public concern and need to ensure public confidence in the administration of justice, there would be a public inquiry into the December 1998 death of Frank Paul.

On March 9, 2007, the Solicitor General announced my appointment as sole Commissioner under the BC *Public Inquiry Act*. The Lieutenant Governor in Council designated this inquiry as a hearing and study commission and, on August 10, 2007, published the Purpose and Terms of Reference, which stated in part as follows:

**Purposes of the commission:**

- (a) to provide Mr. Paul's family and the public with a complete record of the circumstances relating to Mr. Paul's death;
- (b) to recommend changes considered necessary to the rules, policies and procedures referred to in section 4(c), (d) and (e).

**Terms of reference:**

- (a) to conduct hearings, in or near the City of Vancouver, into the circumstances surrounding the death of Mr. Paul;
- (b) to make findings of fact regarding circumstances relating to Mr. Paul's death, including findings of fact respecting the response of the British Columbia Ambulance Service, the Vancouver Police Department, the BC Coroners Service, the Office of the Police Complaint Commissioner and the Criminal Justice Branch of the Ministry of Attorney General to the death of Mr. Paul;
- (c) to examine the rules, policies and procedures of the Vancouver Police Board and of the Vancouver Police Department respecting police interaction with persons who are incapacitated by alcohol or drug use, including directions for the handling, detention, transportation and release of individuals who, as a result of alcohol or drug use, are incapacitated, violent, unable to care for themselves, self-destructive or unconscious;
- (d) to examine the rules, policies and procedures of the British Columbia Ambulance Service respecting the interaction of staff of

## PART 2—THE COMMISSION OF INQUIRY

the British Columbia Ambulance Service with persons who are incapacitated by alcohol or drug use, including directions for the handling and transportation of individuals who, as a result of alcohol or drug use, are incapacitated, violent, unable to care for themselves, self-destructive or unconscious;

- (e) to examine the rules, policies and procedures of the BC Coroners Service, the Office of the Police Complaint Commissioner and the Criminal Justice Branch of the Ministry of Attorney General related to the role and response of each of those offices where an individual dies in circumstances similar to the circumstances of Mr. Paul's death;
- (f) to recommend changes considered necessary to the rules, policies and procedures referred to in paragraphs (c), (d) and (e);
- (g) to identify the health care and social service programs and facilities available in the City of Vancouver that the police may access if a municipal constable determines that a person should not be detained but the person requires immediate health care or social services because the person is incapacitated by alcohol or drug use....

Between November 2007 and April 2008, I held 60 days of evidentiary hearings at which I heard from 68 witnesses, followed by nine days of closing oral submissions. I also convened nine days of informal roundtable discussions of the policy issues arising from the terms of reference, and commissioned a research paper into Aboriginal chronic alcoholics in Vancouver's Downtown Eastside.

On February 12, 2009, I delivered to the Attorney General my Interim Report, entitled *Alone and Cold: The Davies Commission Inquiry into the Death of Frank Paul*. The report summarized the events leading up to Mr. Paul's death, and the response to his death by the Vancouver Police Department, the BC Ambulance Service, the BC Coroners Service, and the BC Police Complaint Commissioner. It also examined and made recommendations respecting three important policy issues that emerged from the evidentiary hearings:

- homeless chronic alcoholics,
- the criminal investigation of police-related deaths, and
- the professional standards investigation of police-related deaths.

The one aspect of my mandate that was not addressed in my Interim Report related to the response of the Criminal Justice Branch of the Ministry of Attorney General to Mr. Paul's death. According to the Branch, five separate charge assessments were conducted between 1999 and 2004 to determine whether any criminal charges should be laid arising out of Mr. Paul's death. In all instances, charges were not approved.

Commission Counsel intended to call all of those prosecutors who had conducted charge assessments (two of whom had since been appointed to the Bench) and the Assistant Deputy Attorney General who oversees the Branch and who reviewed all of the charge assessments. However, counsel for the Branch brought an application before me, challenging my jurisdiction to inquire into the Branch's response to Mr. Paul's death. I postponed consideration of the Branch's response to Mr. Paul's death until this legal challenge was resolved.

On February 27, 2008, I dismissed the Branch's application. My decision was upheld by the BC Supreme Court on June 24, 2008, and by the Court of Appeal for British Columbia on July 23, 2009. On April 8, 2010, the Supreme Court of Canada dismissed the Attorney General's application for leave to appeal, clearing the way for the commission of inquiry to examine the Branch's response to Mr. Paul's death.

## **2. Terms of reference**

On April 29, 2010, the Lieutenant Governor in Council established a new hearing and study commission to inquire into the Criminal Justice Branch's response to Mr. Paul's death and appointed me as sole Commissioner. The Purposes and Terms of Reference tracked the language of the original August 2007 appointment, reading in part as follows:

### **Purposes of the commission:**

- (3) The purposes of the commission are as follows:
  - (a) to provide Mr. Paul's family and the public with a record of the response of the Criminal Justice Branch in relation to the death of Mr. Paul;
  - (b) to recommend changes considered necessary to the rules, policies and procedures referred to in section 4(c).

**Terms of reference:**

- (4) The terms of reference of the inquiry to be conducted by the commission are as follows:
  - (a) to conduct hearings, in or near the City of Vancouver, respecting the response of the Criminal Justice Branch in relation to the death of Mr. Paul;
  - (b) to make findings of fact regarding the response of the Criminal Justice Branch in relation to the death of Mr. Paul;
  - (c) to examine the rules, policies and procedures of the Criminal Justice Branch respecting its role and response when an individual dies in circumstances similar to the circumstances of Mr. Paul's death;
  - (d) to recommend changes considered necessary to the rules, policies and procedures referred to in paragraph (c);
  - (e) to submit a final report to the Attorney General on or before May 31, 2011.

**3. The commission team**

The commission re-established office space in downtown Vancouver, and Dr. Leo Perra assumed the role of Executive Director. D. Geoffrey Cowper, Q.C., and Keith R. Hamilton, Q.C., continued as Commission Counsel and Policy Counsel, respectively. Andrew Nathanson joined the team as Associate Commission Counsel, and he was assisted by articled law student Joel Payne. Mr. Chid Desantos served as Registrar.

To repeat what I said in the Interim Report, I accept sole responsibility for my findings of fact and recommendations, but in all other respects it has been a team effort. My legal team conducted a thorough review of the consideration given and actions taken by all members of the Criminal Justice Branch who dealt with the Frank Paul file. Our Executive Director and his able staff efficiently managed the administration involved in the conduct of what became a lengthy inquiry. I am indebted to the entire team, who were devoted in assisting me in dealing with my terms of reference. For a complete listing of commission staff, see Appendix D.



## B. The Judicial Decisions

As noted earlier, in December 2007, the Branch brought an application before me, challenging my jurisdiction to make findings of fact respecting the Branch's response to Mr. Paul's death. The Branch's position was that no individual prosecutor involved in the Frank Paul case could be subjected to questioning about the facts he or she considered in reaching the decision that no charges were warranted, nor questioned on matters relating to the exercise of discretion in the case.

Following three days of oral submissions, and after consideration of written submissions, I dismissed the Branch's application (for my February 27, 2008 Ruling, see Appendix I of my Interim Report). I concluded that I was authorized to inquire into the charge assessment processes followed in the Frank Paul case, including an examination of all relevant information and documents, and the questioning of the individuals who made charge assessments. That questioning could include an examination of their charge/no-charge decisions and the reasons for them. However, I stated that I did not propose to express any opinion about those decisions.

### 1. BC Supreme Court

The Branch applied to the BC Supreme Court for judicial review of my Ruling and on June 24, 2008, the Court dismissed the application.<sup>2</sup> The Court ruled that the Lieutenant Governor in Council's direction to me to inquire into the Branch's response to the death of Mr. Paul was a clear indication in all the circumstances that the Crown was waiving any claim of immunity. Further, by personally signing the Order in Council establishing the inquiry's Terms of Reference, the Attorney General was effectively giving the Assistant Deputy Attorney General in charge of the Branch a lawful binding directive under s. 6 of the *Crown Counsel Act* to waive both immunity and privilege. The Court added, at para. 69:

I also consider it beyond the scope of the Inquiry to require any individual who made a decision not to charge anyone with respect to the death of Mr. Paul to second guess his or her decision or to justify it. The

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<sup>2</sup> (2008), 84 Admin. L.R. (4<sup>th</sup>) 297 (B.C.S.C.) The Court's judgment is available at <http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc817/2008bcsc817.html>

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Commissioner is entitled to look at the facts that were before the individuals who made those decisions, get the facts related to the decisions, but not challenge or debate with those individuals the propriety of their decisions. In that way, the Commissioner may open the doors he wishes to open but, at the same time, minimize any transgression into the lawful independence of the CJB [Criminal Justice Branch].

### 2. Court of Appeal for British Columbia

On July 23, 2009, the Court of Appeal for British Columbia dismissed the Attorney General's appeal.<sup>3</sup> The Court recognized that, in order to limit pressure on the Attorney General, courts extend a broad immunity to the Crown in respect of prosecutorial discretion:

[60] Prosecutorial independence is a constitutionally protected value. Even if their statutory mandates extend to inquiring into issues touching on prosecutorial discretion, tribunals must not proceed in a fashion that is apt to place undue pressure on the Attorney General or on Crown counsel such that their independence may be compromised. A tribunal may be required to adjust its procedures, or even limit the scope of its inquiries, to avoid interfering with prosecutorial discretion. If a tribunal fails to do so, the courts undoubtedly possess the power to protect constitutional norms by restricting the scope of inquiries.

The Court added that, at the same time, courts must be alive to the very real need for public confidence in the prosecutorial system. Prosecutorial independence is a sacrosanct value, but not all attempts to establish a form of public accountability for exercises of prosecutorial discretion ought to be eschewed. In British Columbia, for example, the Branch's own policy and the *Freedom of Information and Protection of Privacy Act* require that adequate reasons be given in certain circumstances when a decision is made not to approve charges.

The Court ruled that in the Frank Paul case, "it is clear that the intention of the Lieutenant Governor in Council was to inquire into the exercise of prosecutorial discretion in the aftermath of Mr. Paul's death. There is simply no other plausible interpretation of section 4(b) of Order in Council 572/2007" (para. 68). This was a case where a fact-finding and advisory body had been established for the

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<sup>3</sup> (2009), 308 D.L.R. (4<sup>th</sup>) 577 (B.C.C.A.). The Court's judgment is available at <http://www.canlii.org/en/bc/bcca/doc/2009/2009bcc337/2009bcc337.html>

express purpose of inquiring into the exercise of prosecutorial discretion by the Branch. The Court stated that the Attorney General’s participation in the Executive Council and signing the Order in Council could not be said to have “waived” Crown immunity, but that his participation in the process provided assurance that he must not have considered the mandate of the commission to be an unlawful incursion on prosecutorial independence:

- [77] The role of the Attorney General in the establishment and continuation of the Commission of Inquiry is of great importance. Prosecutorial discretion, ultimately, rests with the Attorney General. As the Attorney General concedes on this appeal, he is entitled to establish a system to review exercises of prosecutorial discretion, and for improving the policies that govern its exercise. He is also entitled to take steps to satisfy the public that prosecutorial discretion is being exercised in a principled way. The Attorney General is in a unique position to gauge the necessity for a public airing of issues surrounding prosecutorial discretion, and to balance the need for prosecutorial independence with public accountability. Thus, it will be a rare case where a commission of inquiry that is established with a specific mandate of inquiring into an exercise of prosecutorial discretion, and which is established with the apparent approval of the Attorney General, will be found by a court to constitute an unlawful interference with prosecutorial independence.
- [78] Quite apart from the presumed opinion that the Attorney General held when the terms of reference were established, we are of the view that the circumstances of the establishment of the Commission greatly limit any possibility of interference with prosecutorial independence.
- [79] The tribunal is not established for the purpose of determining whether charges will be laid in this case; that decision has long since been taken. Instead, the tribunal is required to review what took place in the aftermath of Mr. Paul’s death, with a view to recommending procedures that will improve the exercise of prosecutorial discretion in the future. As such, its function is to enhance, rather than detract from prosecutorial independence.

The Court ruled that the commission’s mandate in this case, as set out in the Terms of Reference, does not violate the principle of prosecutorial independence. It was carefully established to inquire into exercises of prosecutorial discretion,

## **PART 2—THE COMMISSION OF INQUIRY**

and several factors demonstrate that the constitutional principle of prosecutorial independence is not at risk:

- the participation of the Attorney General in the establishment of the commission of inquiry,
- its specific terms of reference and expertise, and
- the limitations on its functions suggested by the Commissioner's stated understanding of his mandate. On this issue, the Court cited with approval the observations made by the Supreme Court judge, which I quoted earlier:

[69] I also consider it beyond the scope of the Inquiry to require any individual who made a decision not to charge anyone with respect to the death of Mr. Paul to second guess his or her decision or to justify it. The Commissioner is entitled to look at the facts that were before the individuals who made those decisions, get the facts related to the decisions, but not challenge or debate with those individuals the propriety of their decisions. In that way, the Commissioner may open the doors he wishes to open but, at the same time, minimize any transgression into the lawful independence of the CJB [Criminal Justice Branch].

### **C. Evidentiary Hearings**

#### **1. Rules of procedure**

In the first inquiry, I had approved a 31-paragraph Practice and Procedure Directive for Evidentiary Hearings, based in part on precedents used by other public inquiries from across Canada. The Directive continued to guide us in these new proceedings.

#### **2. Participants and counsel**

In the first inquiry, I granted participant status to 14 individuals and organizations, according to the criteria set out in section 11 of the *Public Inquiry Act*. Given the limited focus of this new inquiry, only some of them indicated an interest in participating in these new proceedings. The names of those participants and their counsel are set out in Appendix B.

### **3. Hearings**

At the commencement of the evidentiary hearings, I directed that the exhibits entered during the first commission of inquiry also be entered as exhibits in this inquiry. I also agreed to enter as exhibits four binders of documents prepared by Commission Counsel:

- **Exhibit CJB 1**—ten legal opinions, charge assessments, and reporting letters.
- **Exhibit CJB 2**—the Criminal Justice Branch’s file, in chronological order.
- **Exhibit CJB 3**—supplemental documents from the Criminal Justice Branch, as well as a *Vancouver Courier* article and a letter to the editor from Michael Hicks, Regional Crown Counsel for the Vancouver region.
- **Exhibit CJB 4**—excerpts from the Criminal Justice Branch’s *Crown Counsel Policy Manual*, organized historically.

I conducted five days of evidentiary hearings on November 3, 4, 8, 9, and 10, 2010, at which five witnesses testified under oath or affirmation and were subject to cross-examination. I heard closing submissions on December 14 and 15, 2010.

Our evidentiary hearings were conducted at the Federal Court in a Vancouver office tower. It was conveniently situated in the downtown core and was ideal for accommodating counsel, as well as members of the public and representatives of the print and electronic media. I extend my sincere thanks to the Federal Court, and particularly to Mr. Sam Thuraiamy and to Trial Coordinator Ms. Julie Gordon and her staff, for providing the courtroom and offices.

### **4. Ruling on the proper scope and manner of cross-examination**

Our evidentiary hearings were conducted in accordance with the restrictions imposed by the courts regarding the matters that I could inquire into. To assist counsel, I made a Ruling on the proper scope and manner of cross-examination that I would allow, which is included as Appendix E to this report.

## **D. Policy Issues**

### **1. Terms of reference**

Two paragraphs of the Terms of Reference called for an inquiry into policy issues. I was directed:

- to examine the rules, policies and procedures of the Criminal Justice Branch respecting its role and response when an individual dies in circumstances similar to the circumstances of Mr. Paul's death;
- to recommend changes considered necessary to the rules, policies and procedures referred to in paragraph (c).

### **2. The commission's research and policy hearings**

Commission Counsel retained Mr. David Layton,<sup>4</sup> a senior Vancouver criminal lawyer, to prepare a research paper identifying the legal and ethical issues that may arise during the charge assessment process in police-related death cases. Mr. Layton's 101-page paper was circulated to all participants, was posted on the inquiry's website, and is included on the CD version of this report. I extend my sincere thanks to Mr. Layton for his complete and thoughtful analysis.

Commission Counsel organized a one-day roundtable discussion on November 23, 2010. In the morning session, Mr. Layton summarized his research paper and then answered questions from counsel. In the afternoon, counsel for the Criminal Justice Branch organized a four-person panel to discuss the Branch's charge assessment processes (with a special focus on police-related death cases), and to answer questions from counsel. The four panelists, to whom I express my appreciation for their thorough and informative presentations, were:

- **Richard de Boer**, Director of Policy and Legislation, Criminal Justice Branch headquarters,

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<sup>4</sup> Mr. Layton is associate counsel with the Vancouver law firm of Ritchie Sandford. He has law degrees from Dalhousie University and Oxford University (BCL), where he was a Rhodes Scholar. He clerked for Mr. Justice Dickson of the Supreme Court of Canada. He has written extensively on criminal law topics, and is the co-author with the late Mr. Justice Michel Proulx of the textbook *Ethics in Canadian Criminal Law*. He is the ethics advisor for the University of British Columbia's Innocence Project, and has taught at both the UBC and University of Victoria faculties of law.

- **Brian Rendell**, Director of Legal Services, Criminal Justice Branch headquarters,
- **Melissa Gillespie**, Regional Crown Counsel for the Fraser Region, and
- **Grant Wong**, Deputy Regional Crown Counsel for the Vancouver Region.

The commission team also undertook its own examination of these issues, including consultations and literature reviews. In Parts 5 and 6 of this report, I will examine in detail the British Columbia system for making charge assessments in police-related death cases and other policy issues, and will make recommendations for reform.

## **E. The Inquiry's Report**

### **1. The report**

As stated earlier, this report addresses only the response of the Criminal Justice Branch to Mr. Paul's death, as all other issues were dealt with in my Interim Report.

Section 28 of the *Public Inquiry Act* establishes the procedures to be followed after completion of a commission's report.

### **2. The minister's responsibilities**

Section 28 directs a commission to make its report to the minister (in this case the Attorney General), setting out:

- (a) any findings of fact made by the commission that are relevant to the commission's terms of reference, and the reasons for those findings, and
- (b) if required by the commission's terms of reference, any recommendations of the commission.

The minister must submit the report to the Executive Council (Cabinet) at its next meeting. On receiving the report, the Executive Council may direct the minister to withhold portions of the report because of privacy rights, business interests, or the public interest. If it so directs, the minister must remove any

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portions to be withheld and, in the report, identify any withheld portions and, to the extent possible, summarize them.

Following its review of the report, the Executive Council must then direct the minister to lay the report (except any withheld portions) before the Legislative Assembly. The minister:

- must promptly lay the report before the Legislative Assembly if it is in session or will be in session within 10 days of receiving the direction,
- in any other case, must promptly file the report with the Clerk of the Legislative Assembly, and
- must make available to a participant a copy of the report if it includes a finding of misconduct against that participant or alleges misconduct by that participant.

Section 28(8) is clear that: “A person [which I interpret to include a commissioner] must not release a report of a commission except in accordance with this section.”



## **PART 3—THE CRIMINAL JUSTICE BRANCH’S RESPONSE TO MR. PAUL’S DEATH**

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## **A. Witnesses Called by Commission Counsel**

In this section of the report I will summarize in a neutral and non-evaluative manner the activities of the Ministry of Attorney General’s Criminal Justice Branch in deciding whether anyone should be charged criminally arising out of Frank Paul’s death.

Commission Counsel called five current and former members of the Criminal Justice Branch to testify respecting the organization of the Branch; its rules, policies, and procedures respecting the charge assessment process; and their involvement in charge assessments in the Frank Paul case:

- **Robert Gillen, Q.C.**, has been, since 2001, the Assistant Deputy Attorney General in charge of the Criminal Justice Branch. He previously served for 13 years as Regional Crown Counsel for Vancouver Island and, before that, acted as defence counsel for five years.
- **Gregory Fitch, Q.C.**, has been, since 2001, the Director of Criminal Appeals and Special Prosecutions within the Criminal Justice Branch. He previously served as the Branch’s Director of Legal Services and, before that, as head of the appeals section.
- **Mr. Justice Austin Cullen** was appointed Regional Crown Counsel for the Fraser Region in 1991, as Regional Crown Counsel for Vancouver in 1997, and as Acting (and subsequently permanent) Assistant Deputy Attorney General in 1999. He was appointed as a justice of the BC Supreme Court in 2001.
- **His Honour Judge Michael Hicks** joined the Branch in 1983. He was appointed as Deputy Regional Crown Counsel in Vancouver in the mid-1990s, and subsequently served as the acting and then permanent Regional Crown Counsel. He was appointed as a judge of the BC Provincial Court in 2005.
- **Joyce DeWitt-Van Oosten, Q.C.**, was a prosecutor in Vernon for seven years, including as Administrative Crown Counsel. She subsequently worked with the Legal Services team, and then in the Criminal Appeals and Special Prosecutions office. Since 2008 she has been the Deputy Director of the Prosecution Support Group.

One other former Director of Legal Services who was involved in the charge assessment process in this case, **Peter Ewert, Q.C.**, was unable to testify for medical reasons. His Will Say statement was filed as an exhibit (Exhibit CJB 15), and I will rely on it in order to summarize his involvement in the charge assessment process. In addition,

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**Carla Taylor** (now Carla **MacPhail**), who assisted Mr. Fitch, provided a Will Say statement (Exhibit CJB 17).

**B. Organization of the Criminal Justice Branch**

Mr. Fitch testified that the Criminal Justice Branch is responsible for conducting charge assessments and, where charges are approved, for prosecuting criminal cases throughout British Columbia. For administrative purposes the province is divided into five regions (Vancouver Island, Vancouver, Fraser, the Interior, and the North). A Regional Crown Counsel is in charge of all prosecutors within each region, and within a region, major population centres have an Administrative Crown Counsel who reports to the Regional Crown Counsel.

The Branch’s headquarters, situated in Victoria, is led by the Assistant Deputy Attorney General. The Director of Legal Services, who also works in headquarters, reports to the Assistant Deputy Attorney General.

Mr. Gillen said that of the approximately 460 prosecutors employed by the Branch, seven of them self-identified as being of First Nations heritage. The Branch and the Crown Counsel Association are working on a diversity project, in order to attempt to have its personnel be representative of the population of the province as a whole.

Mr. Gillen added that under the *Crown Counsel Act*, the Branch operates independently of the Attorney General and the Deputy Attorney General. Section 5 of the Act provides that the Attorney General or Deputy Attorney General may give direction to the Assistant Deputy Attorney General with respect to the approval or conduct of a specific prosecution or appeal, but only if the direction is in writing and is published in the Gazette. Under section 6, any directive respecting the Branch’s policy on the approval or conduct of prosecutions, or respecting Branch administration, must also be in writing.

**C. The Charge Assessment Process**

**1. The general rule**

Mr. Fitch testified that when the police in British Columbia complete an investigation and conclude that criminal charges should be considered, they prepare a Report to Crown Counsel, which will typically include a narrative or summary of the events, a list of potential witnesses, witness statements if

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available, and other documentary evidence such as photographs and expert reports. They will normally include the investigating officer’s recommendation respecting what charge or charges should be laid.

He said that, unlike the practice in most other provinces, it is the statutory responsibility of the Branch to decide whether criminal charges will be approved. The Branch has, under the authority of the *Crown Counsel Act*, established a policy respecting charge assessments (Charge Approval Guidelines), which is intended to condition or shape the exercise of prosecutorial discretion against standards that apply equally to every case: “Having a fixed standard promotes consistency in approach, equality of treatment, and at the end of the day our policies are designed to promote public confidence in the administration of criminal justice” (November 3, 2010, p. 29).

The two-step charge assessment policy dated October 1, 1999 (Exhibit CJB 4, Tab A3, p. 2) states in part:

There are two components to the charge approval standard. The evidence available must be examined to determine:

1. whether there is a **substantial likelihood of conviction** and, if so,
2. whether a **prosecution is required in the public interest...** (emphasis in original)

A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court. In determining whether this standard is satisfied, Crown Counsel must determine:

- (a) what material evidence is likely to be admissible;
- (b) the weight likely to be given to the admissible evidence; and
- (c) the likelihood that viable, not speculative, defences will succeed.

Mr. Fitch emphasized that a prosecutor applying this policy does not get to the second aspect of the standard (“public interest”) unless satisfied that the first aspect (“substantial likelihood of conviction”) has been satisfied. He said that a police officer’s recommendation respecting charges will vary in importance, depending on the nature of the case. In cases turning on difficult technical legal

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concepts, recommendations will be of less assistance to the prosecutor than in a case in which the facts and law are clear.

According to Mr. Fitch, the “substantial likelihood of conviction” threshold is the highest standard in Canada. Some other provinces use a “reasonable likelihood of conviction” test, while Ontario applies a “reasonable prospect of conviction” standard. In settling on a high threshold, British Columbia took into account the reputational damage that can be caused to people, especially in high-profile cases, when charges cannot be substantiated at trial.

Mr. Fitch said that in determining whether there is a substantial likelihood of conviction, a prosecutor must engage in a legal analysis about what evidence is likely to be admissible, as well as viable (but not speculative) defences. He added that the policy provides one exception to the “substantial likelihood of conviction” threshold. In cases of high-risk violent or dangerous offenders, or where public safety concerns are of paramount consideration, a lower “reasonable prospect of conviction” test is applied.

In cases where the substantial likelihood of conviction threshold is met, the Branch policy enumerates public interest factors in favour of prosecution. These include:

- The allegations are serious in nature.
- A conviction is likely to result in a significant sentence.
- Considerable harm was caused to a victim.
- The use, or threatened use, of a weapon.
- The victim was a vulnerable person.
- The alleged offender was in a position of authority or trust.  
(Exhibit CJB 4, Tab A3, p. 3)

Mr. Fitch testified that police officers hold important positions of public trust and have to be held to account, adding:

When they significantly breach their public trust in most cases, absent exceptional circumstances, and depending of course on the seriousness of

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the offence, but in most cases where the offence is serious I would think that the public interest would, because of the office the officer holds and trust that reposes in them, the public interest would require a prosecution. (November 3, 2010, p. 40)

The Branch policy also states that one of the basic requirements of every Report to Crown Counsel is “a comprehensive description of the evidence supporting each element of the suggested charge(s).” Mr. Fitch said that it is preferable that police officers endeavour to identify the charges that they believe to be appropriate, especially in cases where the officer can convey the dynamics of the situation, such as in domestic assault cases. Recommendations are sometimes very important in helping to assess the “public interest” test. It would not be inappropriate for a prosecutor to send a report back to the officer, if the prosecutor was of the view that a recommendation would be of assistance in making the charge assessment decision.

Mr. Fitch said that the relationship between police officers and prosecutors is one of “mutual independence” (November 3, 2010, p. 44). Police are independent in their investigative activities, and prosecutors are independent in the discharge of prosecutorial discretion, but independence cannot stand in the way of communication. With the increasing complexity of crime, it is routine for the police and Crown to work closely and cooperatively as an investigation unfolds. It is a symbiotic relationship, but it is critically important, at the end of the day, that the two roles stay separate. He emphasized:

A prosecutor does not have an ability to direct a police investigation. A prosecutor can request a police officer or service that additional investigative steps be taken and a good prosecutor will explain why that recommendation is being made so that the police officer understands that there is a gap, for example, in the ability of the Crown to prove its case that needs to be addressed. (November 3, 2010, p. 46)

The Branch policy states that in all cases it is an important obligation on Crown Counsel to make charge assessments in a timely manner. Mr. Fitch said that the policy is not more specific about timeliness, but he provided some statistics from the Criminal Justice Branch’s Annual Report:

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<b>Number of days to complete charge assessments after submission of report</b>	<b>Percentage</b>
• By the end of the first full working day	56
• By the end of the third working day	64
• By the end of the seventh working day	76
• Within 15 days	86
• Within 30 days	93

Mr. Gillen testified that there are limited circumstances in which he would become involved in the charge assessment process or in a prosecution, such as in direct indictment cases, dangerous offender proceedings, or when the Branch is facing very difficult charging decisions. When he does review a charge assessment decision, he normally relies on a synopsis of the case and legal opinions. It is very unusual for him to review statements and exhibits. He agreed with his written Will Say statement (Exhibit CJB 4, Tab 11, p. 2): “When I review a decision, I basically perform a reasonableness check on the judgment of the senior Crown Counsel who is briefing me.”

**2. Allegations against peace officers**

Mr. Fitch said that the Branch has a distinct policy that applies when an allegation of criminal conduct is made against a police officer. He said:

There is a distinct policy because of the potential, at least for there to be an apprehension of favourable treatment being accorded police officers in the course of a Crown conduct of a charge approval assessment. Relationships between police officers and Crown Counsel develop locally and it is the intent of the policy again to enhance public confidence in principled decision-making by Crown Counsel to lift those cases out of the regular way in which a file would be dealt with and create a separate process for dealing with files where allegations of criminal conduct are made against police officers. (November 3, 2010, pp. 51–52)



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The October 1, 1999 version of the “Allegations Against Peace Officers” policy (Exhibit CJB 4, Tab 4B2, p. 1), which was the operative policy when all charge assessments were conducted in the Frank Paul case<sup>5</sup>, states in part:

When an investigation into the misconduct of a peace officer is concluded and a Report to Crown Counsel is received containing allegations of the commission of a criminal offence by a peace officer, regardless of whether the alleged offence occurred in the course of duty, the following procedure is to be followed:

1. The Report to Crown Counsel is to be forwarded to the Administrative Crown in the location where the offence allegedly occurred.
2. The Administrative Crown Counsel is to review the file for completeness and forward the file to Regional Crown Counsel together with their comments.
3. Regional Crown Counsel is to review the file and forward it to the Director of Legal Services, together with their recommendation. The file should be accompanied by a memo containing a brief recital of the relevant facts sufficient to enable confirmation of the validity of the recommendation without reference to the police file....
4. The Director of Legal Services will make a decision with respect to laying a charge and convey that decision back to Regional Crown Counsel. Disagreements between Regional Crown Counsel and the Director of Legal Services will be resolved by the Assistant Deputy Attorney General.
5. The decision is to be conveyed by Regional Crown Counsel to Administrative Crown Counsel.

Mr. Fitch testified that according to this policy, it is the Director of Legal Services who makes the charge assessment decision, acting on the Regional Crown Counsel’s recommendation. If there is a disagreement between the Director and Regional Crown Counsel, the matter is referred to the Assistant Deputy Attorney General for decision. For workload reasons, paragraph 3 of the policy puts the onus on Regional Crown Counsel to make a recommendation to, and prepare a

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<sup>5</sup> I note that in May 1999, when the Report to Crown Counsel was first sent to the Branch for charge assessment, the January 1, 1991 policy was still in effect (Exhibit CJB 4, Tab 4B1). It provided that Regional Crown Counsel was to review the file and forward it to “designated Senior Counsel” in Vancouver, together with Regional Crown Counsel’s recommendation. That Senior Crown Counsel was to make the charge assessment decision. Disagreements between Regional Crown Counsel and designated Senior Crown Counsel were to be resolved by the Assistant Deputy Attorney General.

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memorandum for, the Director, so that the Director can make the charge assessment decision without having to review the entire police file. Mr. Fitch testified that under this policy the Director is required to make about 175–200 charge assessment decisions annually.

If charges are approved, the policy requires that Regional Crown Counsel decide who will prosecute the officer and that “Regional Crown Counsel should consider the appropriateness of using local Crown Counsel, requesting Crown Counsel from outside the local jurisdiction, or retaining ad hoc counsel from the private bar” (Exhibit CJB 4, Tab B2, p. 2). Mr. Fitch explained that ad hoc counsel are appointed to conduct prosecutions when there is a real or apparent conflict of interest, or when the Branch wishes to take advantage of specialized expertise that might exist in the private bar.

The appointment of special prosecutors is different. They are senior lawyers from the private bar who are appointed under the *Crown Counsel Act* by the Assistant Deputy Attorney General, chosen from a list maintained by the Deputy Attorney General, the Assistant Deputy Attorney General, and the president of the Law Society. They are appointed when there is a significant potential for real or perceived improper influence in prosecutorial decision-making. Once appointed, a special prosecutor’s decision whether or not to charge or to appeal is final, subject to a direction in writing from the Attorney General, the Deputy, or the Assistant Deputy.

**3. When a peace officer may have caused the death of another person**

The same 1999 “Allegations Against Peace Officers” policy described above has a special provision applicable to police-related death cases. Paragraph 7 states:

All allegations that the actions of a peace officer have caused the death of another person are to be forwarded by Regional Crown Counsel directly to the Director of Legal Services in the format set out in #3 above, for review and decision. The Director of Legal Services will provide a copy of this material to the Assistant Deputy Attorney General.

Mr. Fitch testified that in such cases the Regional Crown Counsel’s involvement would be the same as in non-death cases—reviewing the file, making his or her recommendation to the Director, and including a memo containing a brief recital

of the relevant facts sufficient to enable confirmation of the validity of the recommendation without reference to the police file. Under the 1999 policy, it was the Director himself who made the charge assessment decision. The only difference was that the Director would then provide a copy of the material to the Assistant Deputy Attorney General.

Mr. Fitch testified that, prior to this inquiry, he had never heard of a neutral Report to Crown Counsel, in which the police officer did not make a recommendation respecting charges. However, he did remember reviewing one police-related death case in which the report did not include a recommendation.

#### **4. Cases involving senior police officers**

The Branch has a separate policy respecting charge assessments when “senior police officers” (among others) are alleged to have committed a criminal offence (*Crown Counsel Act*—Special Prosecutors; see Exhibit CJB 4, Tab D1, for policy applicable as of October 1, 1999). The policy states in part (at p. 2):

The ADAG (Assistant Deputy Attorney General) will appoint a special prosecutor, in the public interest, in cases where the ADAG believes there is a significant potential for real or perceived improper influence in prosecutorial decision-making. In practice, most special prosecutors are appointed in cases involving Cabinet Ministers and other senior public or Ministry officials, senior police officers, or persons in close proximity to them. Above all other considerations, the ADAG regards the need to maintain public confidence in the administration of criminal justice as the paramount consideration when deciding whether a case requires the appointment of a special prosecutor.

#### **5. Circumstances in which a charge assessment decision will be reviewed**

Mr. Fitch told me that there is no written policy directing when a charging decision should be reviewed. However, he said, “When new information which could have a material bearing on a charge approval decision comes to the attention of Crown Counsel we have a responsibility to review that information....” He also said there was an equal responsibility to review and determine whether the prosecution continues to meet the charge approval standard when, after charges are approved, “information comes to light which

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suggests that there is no longer a substantial likelihood of conviction” (November 3, 2010, pp. 64–65).

He said that in cases in which the original decision was not to approve charges, a review would be a shared decision, depending who had charge of the file when that new information came to light. The decision to review is a matter of discretion, which will depend on the strength of the new information. Any such review will still apply the substantial likelihood of conviction standard.

Mr. Gillen agreed, adding that there are a variety of ways that a review might arise—a police officer may present new evidence or defence counsel may provide the Crown with the theory of the defence that would be enough of an impediment to warrant stopping the prosecution.

**D. The Charge Assessments in the Frank Paul Case**

**1. Factual background**

In this section I will summarize the evidence I heard relating to the Criminal Justice Branch’s initial charge assessment in the Frank Paul case, and the three subsequent charge assessments. Before doing so, I will provide some background information to put the summary into an appropriate context.

At about 8 p.m. on December 5, 1998, Mr. Paul was arrested (for the second time that day) for being intoxicated in a public place. The driver of the Vancouver Police Department police wagon, probationary Constable David Instant, delivered him to the jail at approximately 8:20 p.m. Sergeant Sanderson, who was in charge of the jail, refused Mr. Paul entry. Cst. Instant took Mr. Paul away, and at about 9 p.m., he removed him from the police wagon and left him in the south lane of the 300 block of East 1<sup>st</sup> Avenue, Vancouver. Mr. Paul’s body was found there at approximately 3 a.m. the next morning. Forensic pathologist Dr. L. H. Gray attributed death to hypothermia due to acute alcohol intoxication. The pathology report recorded Mr. Paul’s post-mortem blood alcohol level as 0.29.

Detective Doug Staunton of Vancouver Police Department’s Homicide division (within the Major Crimes Section) was the lead investigator in the ensuing criminal investigation to determine whether anyone should be charged criminally in relation to Mr. Paul’s death. I reported on this investigation in Part 4 of my

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February 12, 2009 Interim Report. I will not repeat that evidence here, but will summarize my findings (taken from pp. 119–120):

- The department realized very soon after the discovery of Mr. Paul’s body that a criminal investigation was required, which stood in sharp contrast to the evidence of the Forensic Identification Section officer, whose involvement was more a matter of recording the circumstances of a death by hypothermia, than a criminal investigation.
- Many parts of the criminal investigation were inadequately performed, including failing to locate and interview several relevant non-police witnesses; failing to search for relevant video surveillance camera recordings; relying only on written statements from numerous police officers, jail staff and Corrections Branch employees; and failing to insist on interviewing the two key police officers.
- The Report to Crown Counsel did not identify inconsistencies in the evidence, did not offer views on the credibility of various witnesses, did not identify specific *Criminal Code* offences that had been considered, and did not include the officer’s opinion as to whether criminal charges were warranted and, if so, against whom and for what offences.
- Because of the Vancouver Police Department’s organizational environment, this criminal investigation was not conducted in the same manner that the department would investigate any major crime that did not involve police officers.
- The two most glaring inadequacies in the department’s approach to the investigation of police-related deaths were the practice of not interviewing the officers involved and the preparation of neutral Reports to Crown Counsel.

Det. Staunton’s Report to Crown Counsel was approved, and Inspector Biddlecombe forwarded the Report to Crown Counsel on May 11, 1999. Mr. Fitch testified that the five-month time period between Mr. Paul’s death and the delivery of Det. Staunton’s Report to Crown Counsel was not unusual.

The first charge assessment was performed by Mr. Ewert, the Branch’s Director of Legal Services. He decided, on December 3, 1999, that no criminal charges should be approved.

The Branch subsequently undertook three further charge assessments:

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- In December 2000, the Office of the Police Complaint Commissioner sought a reconsideration of the “no charge” decision based on new evidence. The Assistant Deputy Attorney General directed Mr. Fitch to undertake that review. Mr. Fitch made his decision in August 2001 that the “no charge” decision should stand.
- In February 2004, the Police Complaint Commissioner urged the Attorney General to establish a public inquiry into the police investigation of Mr. Paul’s death, and suggested that the file be remitted to the Criminal Justice Branch for further review in light of new evidence. On March 2, 2004, the Assistant Deputy Attorney General directed Mr. Hicks to undertake the review. On April 20, 2004, Mr. Hicks decided that the original “no charge” decision remained the appropriate conclusion.
- On April 27, 2004, the Assistant Deputy Attorney General retained Peter Ewert (now a lawyer in private practice) as ad hoc counsel, to review the entire file “afresh” for charge assessment purposes. On June 2, 2004, Mr. Ewert concluded that the charge approval standard was not met.

On June 18, 2004, the Criminal Justice Branch released a media statement respecting the charge assessments conducted in the Frank Paul case. Mr. Fitch testified that the Branch recognized that there was high public interest and concern about this case, and that it had a responsibility to provide the public with a clear statement of its reasons for not approving charges in this case.

**2. The first charge assessment**

a. Austin Cullen’s recommendation

In May 1999, Mr. Cullen, who was then Regional Crown Counsel for the Vancouver Region, received from the Vancouver Police Department the Report to Crown Counsel in the Frank Paul case. He decided to perform the charge assessment himself, rather than assign it to a Deputy Regional Crown Counsel. His normal practice was to read through the file, conduct any legal research, seek any necessary additional information, and then prepare his report to the Director of Legal Services. Mr. Cullen described the Report to Crown Counsel in this case as “very tentative”:

It wasn’t a standard form Report to Crown Counsel in that it didn’t have recommendations as to charges and it didn’t contain interviews of the various potential witnesses and/or accused, and it made it a little more difficult to assess given that. (November 9, 2010, p. 12)

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With respect to inadequacies in the Report to Crown Counsel, he stated:

It would have been much preferable to have had a full police report with full recommendation of charges with interviews of the various officers. By the time the report that I got came to me, it seemed to me that the die had been cast in that the report had been submitted as it was and that was what the Crown was essentially left to deal with. (November 9, 2010, p. 36)

Mr. Cullen wrote to Insp. Biddlecombe on May 19, 1999 (Exhibit CJB 1, Tab 1), stating that additional avenues of investigation would, if explored, be helpful:

- **Exact temperatures for the hours leading up to the discovery of Mr. Paul’s body.**  
Mr. Cullen testified that this evidence would go to the issue of the objective foreseeability of endangerment.
- **Statements from the workers at the Detox Centre who told Cst. Instant about the possible availability of Haven House for Mr. Paul.**  
This evidence was relevant to whether there was some avenue of finding shelter for Mr. Paul that Cst. Instant did not pursue.
- **Statements from the police officers who Cst. Instant had dealings with at the Cobalt Hotel, including Cst. English.**  
This evidence was relevant to whether Cst. Instant simply neglected to attempt to find Mr. Paul’s place of sanctuary near Broadway and Maple, whether there was an agreement between Sgt. Sanderson and Cst. Instant to simply leave Mr. Paul on the street, and whether Cst. English had suggested to Cst. Instant that he leave Mr. Paul in the alleyway.
- **A “conclusions” portion of the report of the post-mortem examination, if it existed.**  
This was relevant to the cause of Mr. Paul’s death. The last page of the forensic pathologist’s report, which summarized her conclusion on the cause of death, was apparently not included in the original Report to Crown Counsel. In response to Mr. Cullen’s request, the police located the missing page and provided it to him.
- **Cst. Instant’s background and level of experience.**  
Mr. Cullen said that if Cst. Instant had paramedic training, it might assist in gauging the reasonableness of what he asserted he believed and what he did as a consequence of it.

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In late September 1999, the Vancouver Police Department responded to Mr. Cullen with additional information (Exhibit CJB 2, Tab 4).

Mr. Cullen testified that he found this to be a very troubling case for several reasons—a man died when death could have been prevented, a young and inexperienced police officer was left to deal with a situation in circumstances where more experienced officers did not offer him any good guidance, and there was a gulf between the needs of people in Mr. Paul’s situation and the means of dealing with it.

Mr. Cullen said that he considered the criminal offences of failing to provide the necessities of life, manslaughter (either unlawful act manslaughter or manslaughter by criminal negligence), and criminal negligence causing death. The potential accuseds were Cst. Instant, Sgt. Sanderson, and possibly Cst. English. Cst. English was soon excluded from consideration based on his statement.

On November 9, 1999, Mr. Cullen completed his 10-page report to Peter Ewert, Director of Legal Services, in which he concluded: “In my opinion, on all the evidence, the Crown would not succeed in showing an intentional failure to perform a duty on the part of Instant or Sanderson” (Exhibit CJB 1, Tab 2, p. 10). He said that the time required to complete his review was probably a little longer than he would ordinarily take, because of the legal research involved, considering the evidence in light of the law, and coming to grips with the case. He added:

I saw it as one of those cases in which there was some fairly strong objective evidence pointing towards guilt, but there was also a body of what I just described generally as countervailing evidence that raised the issue of whether there was a reasonable doubt as to the central issue, which is whether there was objective foresight in all the circumstances of endangerment and a marked departure from the conduct of a reasonable and prudent person. (November 9, 2010, p. 20)

Mr. Cullen said that he was satisfied that the Crown could prove the nature and extent of Sgt. Sanderson’s and Cst. Instant’s involvement with Mr. Paul, and that the act of leaving him in the alley was a contributing



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factor in his death. However, in his letter to Mr. Ewert (Exhibit CJB 1, Tab 2, p. 9) he had explained the challenge the Crown would face:

On the issue of whether there was a failure to perform the duty without lawful excuse, although it appears the liability is imposed on an objective basis (e.g., the conduct of a reasonable person in the circumstances) the subjective quality of an accused’s belief in a state of facts governing his actions is an element of proof to be considered.

He testified that several court decisions (e.g., *Tutton*, *Creighton*, and *Naglick*) established that a perception of events by an accused, if reasonably held, even if wrong, could countervail the inference that certain actions leading to death had objective foreseeability; and that these actions represented a marked departure from the reasonable and prudent conduct of a person in the position of the accused. Mr. Cullen said that there was evidence that Sgt. Sanderson and Cst. Instant were operating in the belief that Mr. Paul’s condition did not render him intoxicated to the extent that he was incapable of caring for himself. While it was somewhat difficult to credit this state of belief given his physical condition and his blood alcohol level, there was some contrary evidence to support their belief, such as the still photographs, Correctional Officer Firlotte’s evidence, and Mr. Paul’s habitual pattern of living on the streets and sometimes refusing shelter.

Mr. Cullen testified that he was not subjected to any pressure to conclude this matter one way or another. The fact that Mr. Paul was Aboriginal added a dimension to the case, but did not affect the charge approval process. He said that he had approved criminal charges against police officers in the past. He could not recall dealing with a case of death arising out of police involvement, except for one situation where the police forwarded a report to the Crown in which they recommended that charges not be approved.

In cross-examination, Mr. Cullen agreed that in most homicide investigations the police attempt to identify, separate, and question witnesses right away, and when a suspect is apprehended, the police give the suspect the Charter warning and then endeavour to obtain a

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statement from him or her right away. He was aware from his review of the file that the police did not follow this practice in the Frank Paul case. He had no dealings with anyone who was acting as legal counsel for the potential accused persons in this case.

Mr. Cullen said that when his Will Say statement described this case as being troubling, it was not a reference to the possibility that serious homicide-related charges might be laid against police officers. It was troubling because of the nature of the allegations—the fact that someone had died whose death may have been prevented. He said that when he received the Report to Crown Counsel:

It had at least in part the earmarks of a report in which the police were seeking some sort of confirmation that charges need not be laid, and I wanted to in effect establish that that wasn’t the way I viewed it.... And what I wanted to ensure was the police understood that there was potential complicity on the part of both Sanderson and even Constable English, and that played into the fact that I’d asked them to take a statement from Constable English, whom I assumed would be warned before he gave a statement. (November 9, 2010, p. 52)

Mr. Cullen agreed that the January 1, 1991 version of the Branch’s policy respecting allegations against police officers was the applicable version when he commenced his charge assessment. Under paragraph 7 of that version, all allegations that the actions of a peace officer have caused the death of another person “are to be forwarded by Regional Crown Counsel directly to the Assistant Deputy Attorney General, Criminal Justice Branch, in the format set out in #3 above, for review and decision” (Exhibit CJB 4, Tab B1, p. 2). Mr. Cullen said that the policy seems to imply that the Assistant Deputy Attorney General perform the charge assessment in such cases, but that was not what the practice was—it may be that the Assistant Deputy Attorney General had designated the Director of Legal Services to fulfill his role. In any event, a new policy for such cases came into effect on October 1, 1999 (Exhibit CJB 4, Tab B2), and designated the Director of Legal Services as the person responsible for making the charge assessment decision.

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Mr. Cullen said that he had some skepticism about Cst. Instant’s evidence generally, “but skepticism doesn’t convert into proof beyond a reasonable doubt” (November 9, 2010, p. 64). He testified that he considered Cst. Turner’s evidence of Mr. Paul’s condition important, reliable, and credible evidence—that he was intoxicated, his speech was slurred and incoherent, he smelled of rice wine, he was unable to sit up or walk, and he was apparently unable to care for himself. The still photographs showing Mr. Paul in the jail were more favourable to Cst. Turner’s view than to Sgt. Sanderson’s view.

b. Peter Ewert’s charge assessment

Mr. Ewert, the Branch’s Director for Legal Services, received Mr. Cullen’s report and recommendation on or about November 9, 1999. Although Mr. Ewert did not testify at our evidentiary hearings, his Will Say statement prepared with the assistance of Commission Counsel states in part (Exhibit CJB 4, Tab 15, p. 1):

The Frank Paul case was indeed sensitive, and it troubled Mr. Ewert. He recognized that it involved an Aboriginal man and that this sort of case could have a political component. He sensed it could be a significant case. He felt it was a perfect case for a coroner’s inquest. He was not pleased with the actions of the police—some, like allegedly misinforming the family, are shocking—but he also felt sorry for the young officer who he recalled as being quite new to the job.

When asked about the relevance and role of Mr. Paul being Aboriginal, Mr. Ewert said this was relevant and that he looked at it. Frank Paul was a homeless man, but as far as the sensitivities and the political profile of the case, it was significant he was Aboriginal. Mr. Ewert said that he was very concerned about the possibility that Frank Paul was treated differently because he was First Nations. There was never any hint or discussion within Crown, that he knew of, of Mr. Paul being seen as less deserving of respect because of his ethnicity. He never heard any colleagues say anything callous.

Mr. Ewert asked Roger Cutler, a lawyer in the Branch, to research the law on s. 215 of the *Criminal Code*, which makes it a criminal offence to fail,

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without reasonable excuse, to provide necessities of life when under a legal duty to do so. Mr. Cutler’s December 2, 1999, four-page memorandum to Mr. Ewert was filed as an exhibit (Exhibit CJB 1, Tab 3). Mr. Cutler did not testify at our evidentiary hearings, but his Will Say statement (Exhibit CJB 4, Tab 16) states in part:

I do not recall when Ewert first spoke to me regarding the Frank Paul file, although it must have been some time prior to my December 2, 1999 memorandum. The only recollection I have of my involvement in Mr. Paul’s file is based on the memorandum I wrote.

Ewert asked me to research the law on s. 215 of the *Criminal Code*. Section 215 is not a commonly charged section, so I assume Ewert wanted me to give him an update on the law. Based on my review of my December 2, 1999 memorandum, I believe Ewert asked me to confine myself to a review of s. 215.

The memorandum I wrote is not a charge approval determination. I understood it was for the purpose of assisting Ewert in making a charge approval determination.

I do not recall what information or evidence I was given or reviewed. I also do not recall whether Ewert briefed me on the case or whether he gave me the file to review. However, based on my memorandum, I obviously had some evidentiary or factual foundation.

I do not now recall the content of any discussions I had with Ewert about the Paul matter, either before or after my December 2, 1999 memorandum.

I did not have any subsequent involvement with Mr. Paul’s file. I do not recall if I knew that Mr. Paul was an Aboriginal person.

Mr. Ewert’s December 3, 1999, two-page letter to Mr. Cullen (who had by now been appointed as Acting Assistant Deputy Attorney General) offers some insight into Mr. Ewert’s assessment:

Having reviewed the above materials, I have concluded that charges are not appropriate in this matter because there is no substantial likelihood of a conviction were any of the officers involved in the care and handling of the deceased to be charged. It is my opinion that the police clearly owed a duty to the deceased to provide him with the necessities of life considering the fact that they had arrested him in

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the circumstances described in the court brief. However, I am also of the opinion that we are unable to prove beyond a reasonable doubt that the police failed to perform their duty in a manner that constituted and demonstrated a marked departure from the conduct of police officers in similar circumstances, given the unusual background and history of this particular deceased.

Similarly, there is in my opinion a considerable doubt whether, given the conclusions drawn by the police, although perhaps erroneous, there was an objective foreseeability that harm would come to the deceased under these unusual circumstances. (Exhibit CJB 1, Tab 4, p. 1)

Mr. Cullen testified that in his new capacity as Acting Assistant Deputy Attorney General, he would have received his own report, and Mr. Cutler’s and Mr. Ewert’s reports, and would have read them, although it was difficult for him to recall. He said that it would normally be the responsibility of Regional Crown Counsel (i.e., Mr. Hicks) to notify the police and other interested persons of the Branch’s decision. He had no recollection of being involved in that process in this case.

Mr. Hicks testified that on December 21, 1999, in his capacity of Acting Regional Crown Counsel for Vancouver, he wrote a 10-page letter to Insp. Biddlecombe of the Vancouver Police Department, advising him of the charge assessment in the Frank Paul case and the decision that “we have determined that charges are not appropriate in this matter as there is no substantial likelihood of conviction were any of the officers involved in the care and handling of the deceased to be charged” (Exhibit CJB 1, Tab 6, p. 1). He agreed that his letter essentially adopted Mr. Cullen’s November 9, 1999 memorandum. That was Mr. Hicks’s only involvement in the 1999 charge assessment.

**3. The second charge assessment**

a. Referral to Mr. Fitch

In December 2000, the Deputy Police Complaint Commissioner wrote to the Assistant Deputy Attorney General (Austin Cullen), asking for a reconsideration of the Branch’s “no charge” decision in the Frank Paul case, based on two pieces of new evidence—two Vancouver Police

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Department videotapes from the police wagon bay and from the jail, and a report from Dr. Ferris, a forensic pathologist, commissioned by the Office of the Police Complaint Commissioner.

According to Mr. Fitch, who was then the Branch’s Director of Legal Services, Mr. Cullen referred the matter to him, but Mr. Cullen testified that he had no recollection of referring this review to Mr. Fitch, of discussing it with him, or of giving him any instructions.

Mr. Fitch testified that Mr. Cullen directed him to undertake the review and that it was apparent to him that Mr. Cullen had already decided that a review should be done. Mr. Cullen, according to Mr. Fitch, told him that he had found the charge assessment in this case to be very difficult. He wanted Mr. Fitch to look at the new evidence to see if that would change the charge assessment decision, but he also wanted Mr. Fitch to look at the case more globally. Mr. Fitch also understood that he was not to be overly deferential to Mr. Cullen’s previous recommendation.

Mr. Fitch obtained the Branch’s file, obtained the material relating to the two pieces of new evidence, and advised the Vancouver Police Department that the Branch was embarking on a review. He reviewed all that material. He was satisfied that even without reliance on the statements of Sgt. Sanderson and Cst. Instant, the Crown would be able to prove who did what—that Sgt. Sanderson refused Mr. Paul entry into the jail, and that Cst. Instant left Mr. Paul in the alley where he was later found dead. However, in his view the case presented “jurisprudential challenges” for the Crown. He formed a preliminary opinion that no charges should be laid.

On February 5, 2001, Mr. Fitch asked Ms. DeWitt-Van Oosten, to conduct a charge assessment. Mr. Fitch also used a more junior member of the Director of Legal Services team (Ms. Taylor) as a researcher and as a sounding board to flesh out his thinking on the file.

b. Ms. DeWitt-Van Oosten’s opinion

Ms. DeWitt-Van Oosten testified that Mr. Fitch asked her to review the file, and to provide him with an opinion as to whether the new evidence should change the Branch’s original charge assessment decision. She did not recollect, but doubted, that Mr. Fitch would have expressed any view about the correctness of the original decision. She testified that she concluded:

Even with what was being put forward as new evidence ... there was no substantial likelihood of a conviction and ... the Branch’s original determination of not proceeding with criminal charges was appropriate. (November 8, 2010, p. 116)

Ms. DeWitt-Van Oosten said that after she submitted her report to Mr. Fitch on February 8, 2001 (Exhibit CJB 1, Tab 7), they had a meeting, which Ms. Taylor joined by telephone. She did not recall the content of the conversation. She said that the fact that Mr. Paul was Aboriginal, and that the potential accused persons were police officers, did not play a role in her assessment. She did not consider that it might be embarrassing if she concluded that the Branch’s original decision should be changed. She had done hundreds of charge assessments, including making recommendations on homicide cases. She had in the past received Reports to Crown Counsel that did not include the officer’s recommendations respecting charges. She understood that it was up to her to make an independent assessment, so what the police may have said to her was almost an irrelevant factor in any event.

She said that she considered three possible criminal offences: manslaughter by way of criminal negligence, criminal negligence causing death, and failing to provide the necessaries of life. She considered charges against Sgt. Sanderson and Cst. Instant. In her view this was a complex file—the charges being contemplated were penal negligence offences based on omission, which required a multifaceted analysis. She felt that the previous reports constituted a very thorough analysis.

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Ms. DeWitt-Van Oosten said that she did not view the video footage that Dana Urban, O.C., of the Office of the Police Complaint Commissioner, had recently provided to the Branch. She had viewed still photographs of Mr. Paul in the jail, had reviewed descriptions from the previous Crown Counsel involved, and had Mr. Urban’s letter that described the videotape as being a compelling depiction of incapacity. She said:

I did not consider it necessary for me to see the actual videotape given everything I had before me, including Dana Urban’s description, because for the purpose of my analysis I assumed the worst-case scenario, that there was no movement from him while he was in the jail, that his incapacity would have been apparent to the police officers at the time, and the real question for me was not what the videotape showed. That didn’t seem to be contentious in terms of his physical condition. The question for me from a legal analysis perspective was what that meant in terms of assessing the *mens rea* for the offences that were under consideration. (November 8, 2010, pp. 128–129)

She said that one of the obstacles in this case was establishing whether there was a marked departure from the standard of care of a reasonable person in the circumstances of the police officers. Penal negligence offences are assessed contextually, which means that every case is unique and the whole of the circumstances will inform the analysis. Although the offence itself is objectively assessed, the knowledge base or the understanding or the information before the officers becomes relevant, which in this case would include their prior involvement with Mr. Paul and their knowledge of his history. Was it objectively foreseeable in those circumstances to see a risk of bodily harm, and even if it was, was their decision to take him and place him in an alley a marked and substantial departure from what one would expect of a reasonably prudent person?

She acknowledged that the other piece of new evidence (Dr. Ferris’s report) said that hypothermia would have been manifesting itself while Mr. Paul was in the jail, but it is difficult to draw a distinction between that and severe intoxication. The only way to tell which it was would be by testing his body temperature, and there was no evidence that that had occurred. There was also evidence that, from the officers’ perspective, Mr. Paul’s physical condition was a condition that he would also manifest



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when he was in a sober state. In light of all that, would it be objectively foreseeable that if Mr. Paul was placed in an alley that there was a risk of bodily harm or a risk of endangerment to his life or safety when, in fact, they had seen him in similar circumstances on other occasions and he had not sustained bodily harm?

Ms. DeWitt-Van Oosten said that when an accused provides a version of events, the Crown must take that into account in assessing the likelihood of conviction. Consequently, the two officers’ versions of events could not be ignored. Further, that even if an accused is disbelieved or his version of events is completely rejected, it may still give rise to a reasonable doubt. She said that based on all the evidence that was available at the time, there was no substantial likelihood that the Crown could prove beyond a reasonable doubt that bodily harm was objectively foreseeable.

She was referred to Mr. Urban’s opinion to the Police Complaint Commissioner, in which he stated:

In my view, there is a significant public interest for the Crown to proceed and that there is clearly a substantial likelihood of conviction with respect to Sanderson and Instant. There is a strong *prima facie* case and numerous avenues of cross-examination of Sanderson, Instant and the guard should they elect to testify. (Exhibit CJB 2, Tab 9, p. 3)

She said that, because it was a contrary opinion, she felt it was necessary to address his views in her opinion. She summarized her view as follows:

My understanding of the Branch’s charge assessment standard is that a strong *prima facie* case is not a substantial likelihood of conviction, and, in addition to that, from my estimation one doesn’t hope to bolster the Crown’s case through cross-examination of the accused given that the accused are not obliged to take the stand. So I wouldn’t look to cross-examination as a means by which to strengthen the Crown’s evidentiary foundation. (November 8, 2010, p. 139)

In cross-examination, Ms. DeWitt-Van Oosten said that she accepted that Mr. Paul’s physical condition as it was manifesting itself in the videotape was consistent with extreme intoxication, and that in Dr. Ferris’s opinion

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it was also consistent with hypothermia. His incapacity was apparent. She was asked whether, if Mr. Paul was incapable of caring for himself, it matters whether his incapacity was due to intoxication or to some other cause. She responded:

It matters in this sense. These offences, manslaughter by criminal negligence or failing to provide the necessities of life, involve several different legal elements. It’s not just a question of whether or not on the facts Mr. Paul was incapable of caring for himself. The question is whether or not based on all of the circumstances and what was known to the officers at the time whether or not the risk of bodily harm was objectively foreseeable and whether or not their decision ultimately amounted to a marked and substantial departure or a marked departure from what would be expected of a reasonable person in similar circumstances. So one can’t take one aspect of the file and isolate it and say, well, it’s apparent that he did not have the capacity to care for himself. The analysis is not as simplistic as that.  
(November 8, 2010, pp. 177–178)

c. Mr. Fitch’s charge assessment

After Mr. Fitch received Ms. DeWitt-Van Oosten’s report, he undertook his own charge assessment, ultimately concluding that the original “no charge” decision should stand. In her Will Say statement, Ms. MacPhail described her involvement:

I understood that the decision on the review of the charge assessment arising out of Mr. Paul’s death was Mr. Fitch’s decision, but that he wanted my assistance. My impression was that Mr. Fitch wanted me to be a sounding board, to take a critical view of the file, and pick it apart. By “critical” I mean not accepting anything that had already been done. I understood that Mr. Fitch wanted me to get right down to the facts, to a nuts and bolts analysis of the file....

I reviewed the Report to Crown Counsel and everything that was in the file at the time. I believe this included the video tape ... I also looked at some case law....

It is ten years since my work on this file, and my recollection, including my discussions with Mr. Fitch, are a bit vague. I know I had a number of meetings with Mr. Fitch to discuss the file, either in person when he was in his Vancouver office, or by telephone.

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Ms. MacPhail did take a critical second look at the evidence. She made extensive notes which confirmed that she was skeptical of aspects of the statements given by Cst. Instant, Sgt. Sanderson, and Correctional Officer Firlotte, particularly their observations and belief about Mr. Paul’s physical condition on his release that evening. Ms. MacPhail’s notes show that she and Mr. Fitch were not overly credulous of the officers’ claims and explored the inconsistencies in the evidence. At the same time, they recognized that the state of the evidence presented very difficult problems of proof. As Ms. MacPhail explained in her Will Say statement:

It is important to understand my notes and the scepticism they reflect in context. The file contained a body of evidence about Mr. Paul’s physical condition that went both ways. Without being exhaustive, there were the statements of Cst. Turner and Cst. Peterson, who arrested Mr. Paul for H/SIPP<sup>6</sup>; the differences between Mr. Paul’s condition on his release from jail earlier that evening and what I viewed as his “marked deterioration” when he was arrested later by Cst. Turner and Cst. Peterson; and what was depicted on the videotape, all of which suggested that Mr. Paul was unable to care for himself. On the other hand, Mr. Paul still had difficulty standing and walking earlier that evening on his release, despite having been held for five to six hours and being judged sufficiently sober to be released; there was the witness who said he saw a person in the alley (likely Mr. Paul) “up on one elbow”; and there were the statements of Cst. Instant, Sgt. Sanderson and CO Firlotte. All of this was, as I wrote in my notes in relation to CO Firlotte’s statement “tough to reconcile,” and made this a very difficult file from a charge assessment perspective.

Ms. MacPhail’s Will Say statement also discussed her and Mr. Fitch’s consideration of various legal issues, such as the gains that might be obtained from cross-examining the officers if they testified, whether the cause of Mr. Paul’s inability to care for himself mattered, the problems associated with calling Mr. Firlotte as a Crown witness, and their skepticism of Sgt. Sanderson’s and Cst. Instant’s versions of events. Mr. Fitch touched on many of these matters in his testimony.

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<sup>6</sup> H/SIPP means Hold/State of Intoxication in a Public Place and is used to describe the condition of an individual who should be held in a cell.

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Mr. Fitch testified that there was no doubt in his mind that the officers had a duty of care toward Mr. Paul. Prudence dictated that they keep him in custody until he was able to care for himself. They should not have done what they did, and they did not exercise reasonable care. However, in deciding whether to charge criminally, it is not enough for the Crown to show ordinary negligence:

It’s incumbent upon the Crown to prove beyond a reasonable doubt that there was a marked departure from the standard of care that arose in the context in which the accused was operating. A marked departure from standard of care applies to both the manslaughter offence and to failure to provide necessaries. (November 3, 2010, p. 105)

The second challenge in this case was the provability of the mental element—objective foresight of risk, in criminal negligence cases. For example, in a charge of unlawful act manslaughter, the Crown would have to prove objective foreseeability of the risk of non-trivial bodily harm. In a charge of failing to provide the necessaries of life, the Crown would have to prove objective foreseeability of endangerment of life or permanent risk to health. Mr. Fitch said that penal negligence is assessed contextually, adding:

You have to ask yourself: What was the context in which these officers were operating, and given that context and their appreciation of it, was it objectively foreseeable that releasing Mr. Paul in the state he was in would cause non-trivial bodily harm or endanger his life. (November 3, 2010, p. 107)

In the case of Sgt. Sanderson, part of his context was that he knew Mr. Paul was addicted to alcohol and that he lived his life on the street. He authorized Mr. Paul’s release to a busy intersection in the city, not to a laneway. He knew that Mr. Paul had a very sad existence on the streets but that he made his way, that he was often debilitated, and that he seemed to survive despite everything. Mr. Fitch said that ultimately he determined that the Crown would not be able to prove beyond a reasonable doubt that it was objectively foreseeable that Mr. Paul would

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suffer non-trivial bodily harm or that his life would be endangered by the decision to release him.

Cst. Instant’s context was different. This was his first encounter with Mr. Paul, and he was reliant on information he received from others: that he was not suitable for detox; that he should be taken to the jail; that he lived near Broadway and Maple (Sgt. Sanderson); and that he did not live there but lived on the street (Cst. English). Ultimately, Cst. Instant left him in the alleyway that was sheltered on three sides, and in a location where he would be visible to passersby, such as Saferide. Mr. Fitch said that although he was satisfied that there was an absence of reasonable care, there was not a substantial likelihood of conviction because of the problem of establishing objective foreseeability of endangerment of life or risk of serious bodily harm.

Mr. Fitch explained that of the criminal offences considered, the offence of failing to provide the necessities of life was the most attractive. It most closely matched the behaviour of the officers, was consistent with the way similar cases had been charged in the jurisprudence, and the mental element was less than that required in criminal negligence causing death.

Mr. Fitch was asked about the new evidence provided by the Office of the Police Complaint Commissioner. He replied that the police department videos graphically displayed that Mr. Paul was in very bad shape and from all appearances unable to care for himself, but that did not alter his conclusion that there was not a substantial likelihood of conviction.

The report from Dr. Ferris stated that Mr. Paul was suffering from hypothermia when he was removed from the jail, that he was totally incapable of caring for himself when discharged from the jail, that he was not capable of being walked over to the wall in the alley where he was left, that it is unlikely that he was capable of any significant voluntary movement after he was left in the alley, and that the position of his clothing at the time he was found dead was consistent with his body being dragged. Mr. Fitch said that this report did not significantly advance the

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analysis—the Crown would still be unable to prove objective foresight of endangerment to life or significant bodily harm beyond a reasonable doubt.

Mr. Fitch said that it never occurred to him that it might be embarrassing to the Branch if he reached a contrary decision after so many senior people had decided that charges should not be laid. The Branch’s culture is one of tolerance of the expression of dissent. When asked about his concerns regarding abuse of process, Mr. Fitch said that people are entitled to move on from events within a reasonable period of time, to get on with their lives. Absent a material change in circumstances, they have a reasonable expectation that a considered and reasonable decision by the prosecution not to charge will stand:

I was not satisfied that there was a material change in circumstances here.... And it’s particularly problematic where there is an understandable level of public concern about a decision that’s been made by the prosecution service. That’s not unique to this case obviously. It happens quite often. We cannot adopt a different course in response to public pressure. (November 3, 2010, pp. 123–124)

On August 3, 2001, Mr. Fitch informed Mr. Hicks, Regional Crown Counsel for Vancouver, of his view that the original “no charge” decision should stand, and five days later sent him a memorandum that appended Ms. DeWitt-Van Oosten’s opinion. He discussed the case with Mr. Hicks on August 10, and they were agreed that the original “no charge” determination should stand. Mr. Hicks testified that he reviewed Ms. DeWitt-Van Oosten’s written opinion and agreed with Mr. Fitch’s decision, as reflected in his handwritten note at the top of page 1 of the opinion, which reads: “August 10, 2001. Reviewed and discussed with Mr. Fitch. I agree no charge. He will write to Commission advising Branch not altering original decision” (Exhibit CJB 1, Tab 7, p. 1).

On August 13 Mr. Fitch advised the Office of the Police Complaint Commissioner of his decision. On August 17 he briefed Assistant Deputy Attorney General Robert Gillen, offered his assessment of the case and advised him that he and Mr. Hicks were agreed, and therefore he

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(Mr. Gillen) would not need to referee. He said that it would normally be his practice in a case like this to ensure that the next of kin were notified of the decision. He had no recollection of seeing in the file any contact information for family members, but it did not occur to him to take steps to find out who the next of kin were.

Mr. Fitch testified that the only record of his decision in this case was his handwritten note recording his view that the original charge approval decision should stand. He had come to the conclusion that Ms. DeWitt-Van Oosten’s opinion was thorough, correct in law, and reflected an appropriate application of prosecutorial discretion. He adopted it as the opinion that ought to govern the matter. He said that this was a very complex and difficult file, and this review involved more prosecutors than usual. He added:

I felt no improper influence from the Criminal Justice Branch, Mr. Cullen or anyone else. I was free to come to the view of the matter that I thought was appropriate. It took me too long to come to that view of the matter but, like Mr. Cullen, I found the case extraordinarily difficult to resolve, a close call, and vacillated back and forth on occasion as to what the Crown ought to do in this case. But I was satisfied at the end of the day that the appropriate decision in the exercise of our discretion had been made and that no new information that had a material bearing on the original charge approval assessment was now before us which ought to cause us to change course. (November 3, 2010, p. 86)

Mr. Fitch regretted the length of time it took him to complete this review, which he attributed in part to it being an extremely difficult file, and in part to being overwhelmed with the volume of work in the office of the Director of Legal Services. Since that time, a change in the Branch’s charge approval policy has resulted in taking “some of the load away from the Director of Legal Services in part because the files weren’t moving fast enough” (November 3, 2010, p. 126).

Mr. Gillen testified that a delay in completing a review rarely helps a pro-charge approval decision, but he did not know that it had that effect in this case.

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Mr. Fitch testified that he had no previous knowledge of Sgt. Sanderson or Cst. Instant. The names of Det. Staunton and Insp. Biddlecombe were familiar to him, but he could not recall any specific dealings he may have had with them.

Mr. Fitch said that he kept detailed notes of his dealings with Mr. Urban from the Office of the Police Complaint Commissioner, who was urging him to approve charges for the purpose of having a public airing of the matter. Mr. Urban expressed the view that charges should be approved, making reference to a substantial likelihood of conviction and a strong *prima facie* case. Mr. Fitch was troubled by the fact that Mr. Urban was taking it upon himself to conduct a function that is by statute reserved for Crown Counsel.

Mr. Gillen testified that he had no recollection of Mr. Fitch briefing him on his decision in 2001 not to approve charges, although he did not dispute that Mr. Fitch did so. He said that Mr. Fitch is one of the brightest lawyers in the Branch, and he (Mr. Gillen) would have undoubtedly accepted Mr. Fitch’s views on the case. He said that if he were going to intervene and change a decision, he would document that decision because he would be undercutting a decision made within the Branch. Otherwise, he would not make a record of his review.

Mr. Fitch was asked for his opinion respecting the completeness of the Report to Crown Counsel. He responded:

I don’t recall having the impression this was a shoddily prepared report to Crown Counsel prepared by an organization that wasn’t interested in conducting a proper investigation, I wasn’t left with that impression when I read the report. I think there’s a great range in the quality of reports that you see not only on police charge approval files but generally. I wasn’t left with the impression that this fell outside of an acceptable range. (November 3, 2010, p. 94)

In cross-examination, Mr. Fitch agreed that under the *Victims of Crime Act*, the Branch offers information and services to individuals and family members who have come into contact with the criminal justice system.



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The Act also provides that, on request, specific types of information should be made available to victims, including critical decisions or events in the course of a proceeding. He agreed that Mr. Paul’s family would have had at least as much interest in what was going on as the Vancouver Police Department and the officers involved.

He said that after he completed a review, normally it would be the Regional Crown Counsel who would contact the victim’s family, although he acknowledged that he shared that responsibility. He had no recollection whether any of the other prosecutors had Paul family contact information, and had no recollection of discussing with them the advisability of letting the family know what was going on. He said that in a tragic case such as this, it is unusual that the next of kin was not noted on the file. It would be an extraordinarily unusual occurrence for the Branch to fail to notify a victim where the Branch was aware of the fact that the person wanted information, and he added that “the Branch has an interest in re-examining what occurred on this issue to ensure that our policies and our procedures encompass unusual situations like this moving forward” (November 4, 2010, p. 13).

He agreed that the Branch’s failure to contact the family may have been a lapse and there may have been miscommunication between his office and the regional office, but he did not agree that it showed indifference to the family’s concerns. Mr. Paul’s lifestyle and the circumstances of his death were not a factor in the failure of the Branch to contact the family. Mr. Fitch said that he believed there were First Nations prosecutors in the Branch, but none had a look at this file.

Mr. Fitch said that the issue of whether the officers involved in the incident had been the subject of disciplinary proceedings, and had been penalized, was not a relevant consideration in his review of whether there was a substantial likelihood of conviction. That factor could conceivably be a consideration under the public interest test, had the review got that far.

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Mr. Fitch testified that he was aware that the Office of the Police Complaint Commissioner had postponed its public hearing into the events surrounding Mr. Paul’s death so as not to prejudice any prosecution. He agreed that delay in completing the charge assessment could be a factor in an abuse of process argument if a prosecution ensued, but he did not put his mind to whether a delay might also prejudice the holding of a public hearing. He disagreed with the suggestion that he used his own tardiness in handling the Frank Paul file as a reason for not proceeding with a prosecution—in his estimation, none of the information supplied by the Office of the Police Complaint Commissioner would have a material bearing on the charge approval decision.

With respect to the mental element of the offences under consideration, Mr. Fitch said that context is central to the determination of objective foreseeability, adding: “Absent Mr. Paul’s context which is that he lived his life on the street, often in this condition and managed to make his way, take that out of the mix and it’s a significant difference, yes” (November 4, 2010, p. 25). He rejected as absolutely untrue the suggestion that the only complexity to this case was the fact that the two people under investigation were police officers.

Mr. Fitch said that while he thought that Mr. Paul might have consumed alcohol between the time of his release from the jail at 6 p.m. and the time of his re-arrest at 8 p.m., it did not matter whether he was intoxicated at the time or whether he was disabled by some other cause—the central fact was that he was unable to care for himself. He had an indistinct recollection of discussing with Ms. DeWitt-Van Oosten a follow-up investigation, but that would not have answered the legal issue that they were faced with in this case.

Mr. Fitch said that he has a good working relationship with members of the Vancouver Police Department. He is a member of the National Joint Committee of Senior Criminal Justice Officials. He previously served as chair of the Pacific Region subcommittee, and Deputy Chief Constable

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Doug LePard was vice-chair, and they did a lot of community work together.

Mr. Fitch was asked whether the Frank Paul case would not be tailor-made for the application of the special prosecutor policy. He thought not, because he did not think that it was the kind of case where there would be a perception of improper influence. A special prosecutor is not assigned just because it is a high-profile case or because it involves police officers.

Mr. Fitch explained why there is a special policy governing the charge assessment process for police officers:

It’s a policy choice that is, again, designed to address public perceptions of how the administration of criminal justice operates. It recognizes that a member of the public might, on the face of things, conclude that because the police and the Crown necessarily have to work cooperatively with one another that there might be some kind of favouritism or different application of charge approval standards. So part of it is to address the apprehension that favouritism might be at play when the Crown turns to consideration of the charges against peace officers, part of it is to ensure consistency, so that we treat all these cases the same way. (November 4, 2010, p. 98)

He disagreed with the suggestion that in all cases of allegations against police officers, the charge assessment decision should be removed from Crown Counsel. Taking this large category of cases away would undermine the integrity of the prosecution service:

The public of British Columbia needs to have confidence in a strong and independent prosecution service. It needs to have confidence that cases, except exceptional ones, where there is a real or perceived improper influence in prosecutorial decision-making will be dealt with and are dealt with dispassionately and objectively by Crown Counsel. (November 4, 2010, pp. 100–101)

Mr. Fitch said that he was not aware of any cases where police officers involved in fatalities occurring in the line of duty in the province of British Columbia have been prosecuted. He agreed that it was very unusual from his experience to have as many prosecutors involved in a charge assessment as occurred in this case.

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**4. Vancouver Courier article in 2003**

Mr. Hicks testified that in 2003 the *Vancouver Courier* published an article that included the history of the Frank Paul case, which included the statement: “Frank Paul had become a political liability that no one wanted to touch. The Police Commissioner, the Solicitor General, Crown Counsel and the Coroner’s Office all simply wanted the story to go away” (Exhibit CJB 3, Tab 4). Mr. Hicks said that Crown Counsel did not want that matter to simply go away, and wrote a letter to the editor:

My purpose in writing the letter was to make it clear that the Crown had a responsibility to review matters carefully pursuant to the charge approval policy and that we were an independent agency and that a comment such as that raised—had the potential to raise in the eyes of the member of the community or cause a member of the community to be concerned about the integrity of Crown Counsel simply wanting to see something disappear so that it didn’t have to deal with it for any other reason, and I wanted to respond to that because I felt that it required a response. (November 9, 2010, pp. 101–102)

**5. The third charge assessment**

a. Mr. Gillen’s referral

Mr. Gillen testified that he learned in February 2004 that the Police Complaint Commissioner had sent a package to the Attorney General asking that a public inquiry be established into the Frank Paul case, and also suggesting that the matter be remitted to the Criminal Justice Branch for further review based on new evidence. On February 19, 2004, Mr. Gillen sent an email to the Deputy Attorney General requesting that the Attorney General consider remitting the material to him so that he could assign the matter to a lawyer for review. Mr. Gillen testified that he had no recollection of whether or not he discussed the case with the Deputy Attorney General, but it is possible that he did.

Mr. Gillen referred the case to Mr. Hicks, who was at that time Regional Crown Counsel for Vancouver, where the death had occurred. Mr. Gillen could not remember, when testifying, whether he knew in February 2004 that Mr. Hicks had been involved in the original charge assessment in 1999. The fact that Mr. Hicks had some involvement in the original charge

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assessment would not have been a disqualifying factor in referring it to him in 2004. Mr. Gillen said that the Branch has a culture of continuous examination of the charge approval process, so sending it back would be an invitation for Mr. Hicks to decide whether the new information changed his mind.

b. Mr. Hicks’s charge assessment

Mr. Hicks testified that on about March 2, 2004, Mr. Gillen asked him to review the new material provided by the Police Complaint Commissioner, to determine whether it should impact on the previous charge review decisions. The new material consisted of a second statement from Gregory Firlotte and a first statement from Michelle Renville. He contacted Chief Constable Graham of the Vancouver Police Department to obtain the investigative file, and arrangements were made for Sgt. Grywinski to assist him.

Mr. Hicks and Sgt. Grywinski reviewed the jail videotape carefully. They identified three people who had not previously been identified, and interviewed them. Mr. Hicks reviewed that material, the new statements that the Police Complaint Commissioner had provided, and the previous charge assessment materials. On April 20, 2004, he prepared a memorandum to Mr. Gillen in which he concluded (Exhibit CJB 1, Tab 9, p. 3):

I have concluded that although there is some new information identified by the Office of the Police Complaint Commissioner, that information is not sufficient or compelling such that it should alter the earlier decisions made by members of this Branch that no charges be laid.

In reaching this conclusion I bear in mind two basic principles.

The Crown is bound to prove its case beyond a reasonable doubt.

Further, there are a variety of interests at play in respect to the circumstances surrounding Mr. Paul’s death. They include but are not limited to the criminal culpability, if any, of the police personnel named, police procedures in handling people in Mr. Paul’s condition and life style, the availability of services for these individuals, the

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propriety of police practices and policy respecting the arrest of persons found in a state of intoxication, the so-called breach policy, police training, the quality of the police investigation into Mr. Paul’s death.

A criminal prosecution will not answer the variety of questions arising in respect to these other issues. A criminal prosecution must not be undertaken as a means by which these issues can be investigated and addressed.

Mr. Hicks testified that he had no recollection of briefing Mr. Gillen about his conclusion, and did not believe that he was involved in the decision to ask Mr. Ewert to perform a further charge assessment.

In response to a question about his responsibility to communicate the results of charge assessments to the family of the victim, he stated:

My recollection of the practice, certainly at that time, was that the police took primary responsibility for doing that. We reviewed their material and determined whether a charge would be laid. If a charge was not laid, the file went back to the police, and my recollection is that they took primary responsibility to inform interested parties about the outcome. (November 9, 2010, p. 115)

Mr. Hicks was referred to his handwritten notes (Exhibit CJB 3, Tab 23, p. 21), which he said would have been made some time after Mr. Ewert completed his 2004 charge assessment. The notes provide some indication of the steps taken respecting notification to interested parties. He said that the notes included the following:

- “I will call Doug—Done,” which probably meant that he spoke to Doug LePard of the Vancouver Police Department.
- “I will advise family of decision.”
- “Re police: review complete. No charge to be laid. Confidential till all interested parties informed. CJB will issue a statement. Will want to get information re family from VPD.”
- “Geoff to track phone number of Peggy Clement, cousin of Frank Paul at Big Cove in New Brunswick.”
- “Stephen Kelliher” and phone number.

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He also identified another of his handwritten notes that read: “June 17, 2009—Kelliher advised of decision and will advise client tomorrow and on undertaking (or understanding) given not to reveal to anyone else till advise client. Geoff will advise VPD media of pending announcement” (November 9, 2010, p. 119). He testified that “Geoff” referred to Geoff Gaul, the Branch’s media liaison person, and that the note indicated the agreement between himself and Mr. Kelliher that the Branch would not disseminate this information until Mr. Kelliher had contacted his client.

Mr. Hicks said that since joining Crown Counsel in 1983 he had made charge assessments on a regular basis, including charge assessments against police officers, although he could not recall a case in which he had approved a charge when the police had been involved in a death. He testified that the fact that Mr. Paul was Aboriginal or that the potential accused persons were police officers played no role in his charge assessment. He had no recollection of having previously dealt with Sgt. Sanderson or Cst. Instant, although Det. Staunton’s name sounded familiar.

According to Mr. Hicks, Reports to Crown Counsel routinely came with a standard form face page that included a place for a recommendation respecting the appropriate charge and the identities of potential accused persons, filled in by the officer. His recollection was that there was no face page on the report in this case. In his view, officers should include recommendations in all cases, including files involving police officers. However, the absence of a recommendation in this case did not affect his assessment. He testified that there was no pressure, from within or outside the Branch, for his charge assessment to be consistent with the previous charge assessment decisions.

In cross-examination, Mr. Hicks said that Sgt. Sanderson’s statement that Mr. Paul was as sober that night as when he had been released from the jail earlier that day was one piece of information among many, but was not central to his determination. He agreed that the statement in his report, that the Crown was not in a position to prove a wanton and

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reckless disregard for Mr. Paul’s safety, was relevant to some but not all of the offences under consideration, and in that sense it was not a complete statement of what the tests for all offences were. He said that he felt it was relevant in relation to Sgt. Sanderson’s liability that Mr. Paul’s arrests for public intoxication typically occurred along the Broadway corridor, which supported the officer’s contention that Mr. Paul had some connection to that area. Mr. Hicks agreed that Mr. Paul may have been better off if Cst. Instant had followed Sgt. Sanderson’s order. Cst. English’s involvement and Cst. Instant’s change of plans were significant in relation to Sgt. Sanderson’s liability.

Mr. Hicks accepted the Coroners Service statistics attached to the 2010 Special Prosecutor’s report of Stephen Owen, Q.C., which reported there were 48 police-involved deaths in Vancouver between 1992 and 2004, inclusive. He would expect that there would have been police investigations in such cases with Reports to Crown Counsel. He did not prosecute any such cases, nor could he recall whether there were any charge approvals in those cases. He agreed that the investigative procedure in the Frank Paul case was different from routine criminal investigations.

Mr. Hicks testified that it was his recollection that in Vancouver all investigations of in-custody deaths would result in reports being forwarded to Crown Counsel, although in most such cases the report did not include a recommendation regarding charges. He was referred to the “Allegations Against Peace Officers” section of the *Crown Counsel Policy Manual* (Exhibit CJB 4, Tab B2, p. 1), which states in part: “When any investigation into the misconduct of a peace officer is concluded and a Report to Crown Counsel is received containing allegations of the commission of a criminal offence by a peace officer...” He was asked:

Q           And so in this *Crown Counsel Policy Manual* it does contemplate that where the investigating officer has concluded that—that charges are recommended that that would appear in the Report to Crown Counsel, and in some instances



recommendations would appear in the Report to Crown Counsel?

- A As you read this, the reference is to Report to Crown Counsel, which I—when I see that, I’m thinking about the report, the investigative material, plus the recommendation page. (November 9, 2010, p. 180)

**6. The fourth charge assessment**

a. Referral to Mr. Ewert

Mr. Gillen testified that on April 20, 2004, he received Mr. Hicks’s report, in which Mr. Hicks stated that the new information provided by the Police Complaint Commissioner was “not sufficient or compelling such that it should alter the earlier decisions made by members of this Branch that no charges be laid” (Exhibit CJB 2, Tab 9, p. 3). He reviewed this and previous reports, to satisfy himself “that the decisions were within the parameters that would be acceptable” (November 10, 2010, p. 27). He decided that out of an abundance of caution he should refer the case to Mr. Ewert for a further charge assessment. In his April 27, 2004 letter to Mr. Ewert (Exhibit CJB 2, Tab 20), he stated:

As per our discussion, I would ask that you review this file for me afresh as I am advised there is new evidence available which you did not have when you originally reviewed the case. If a decision to not proceed is determined to be appropriate, I will return the file to the Region. If the decision is to prosecute, I ask that you assume conduct of this prosecution personally.

Mr. Gillen testified that he wanted Mr. Ewert to look at it “because he’d previously passed upon it. In my view he was a person who would be able to determine whether or not that changed his mind” (November 8, 2010, p. 52). Mr. Gillen said that the reason he wanted Mr. Ewert to conduct any ensuing prosecution was because it would “create an issue” for a prosecutor within the Branch to do so, given that senior people of the Branch had already made the decision that the prosecution was not viable. He said that he would have probably referred the file to a lawyer outside the Ministry who had no previous involvement in the case if there had been a division of decisions among the Branch’s prosecutors.

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b. Mr. Ewert’s charge assessment

On June 2, 2004, Mr. Ewert wrote a 16-page letter to Mr. Gillen (Exhibit CJB 1, Tab 10), in which he concluded at p. 16 that “there is not a substantial likelihood of a conviction and that a prosecution should not follow against Constable Instant or Sergeant Sanderson.” Mr. Gillen testified that there were factual errors in the report, which caused him to give less weight to it than to the other reports he had reviewed. Nevertheless, Mr. Ewert’s conclusions on the core issues were consistent with those of everyone who had reviewed the file, and he agreed with the conclusion.

**7. Role of the Assistant Deputy Attorney General**

Mr. Gillen testified that he never made a charging decision in this case: “I reviewed the decisions that were made, and I determined that they were reasonable” (November 8, 2010, p. 85).

He said that Mr. Paul’s ethnic origin as a First Nations person had no bearing on the Branch’s decisions in this case. His vulnerability as a homeless person would be of significant concern to the Branch in terms of that charge assessment process, but “in terms of whether or not it would cause us not to charge, that’s not the case at all” (November 8, 2010, p. 37). He added that the public attention and controversy surrounding this case did not play a role in the Branch’s multiple charge assessments. Difficult decisions on difficult files do bring controversy.

Mr. Gillen was asked whether any of the 127 police-related deaths between 2001 and 2007 resulted in the approval of charges of culpable homicide, criminal negligence causing death, or failing to provide the necessities of life against any of the police officers involved. He was unsure whether any such charges were approved but, if there were, there would not have been very many. He had personally prosecuted police officers, but he could not recall ever approving charges against a police officer for any of these specific offences.

Mr. Gillen said that, with respect to the application of the two-fold charge assessment test to the Frank Paul case:

I thought that of all the opinions that I had, Mike Hicks’ second one, his second review probably captured, as best as any of them, the rationale for why there was not a substantial likelihood of conviction, and as a result of that the second prong of the examination of public interest simply doesn’t come into play. So from my perspective I think Mike Hicks as the Regional Crown, as he then was, was correct in coming to that assessment. (November 8, 2010, pp. 33–34)

## **8. Quality of the charge assessments**

Mr. Fitch said that he thought that the quality of the work that the Criminal Justice Branch brought to bear in this case was very high—the opinions that were prepared reflect a very high quality. He believed that the Branch was conscientious in the way in which it conducted itself in this file, and that the work product reflects a collectively considered high standard of quality. Except for the time it took him to complete his review, he testified that the Branch moved on an appropriate and acceptable timeline, given the importance and complexity of the case. He found no evidence to suggest that any improper influence was brought on any member of the Branch. The fact that Mr. Paul was an Aboriginal man played absolutely no role at all in the Branch’s consideration of the matter.

## **9. The Branch’s June 2004 media statement**

On June 18, 2004, the Branch released a media statement about the charge assessments conducted by the Branch and stated that “there will be no criminal charges resulting from the tragic event” (Exhibit CJB 2, Tab 22, p. 1). It concluded with the statement: “Gillen has reviewed all of the charge assessments and is in agreement with the unanimous conclusion that the available evidence is insufficient to proceed with criminal charges in this case” (p. 3).

Mr. Gillen testified that the final paragraph was included because of the significant public interest in the Branch’s review of the case and that he was signalling that he was supportive of the Branch’s views that charges would not be approved. He said that in the Discretion to Prosecute Inquiry in 1990, Mr. Owen said that when there has been a no-charge decision in a high-profile case, there is an obligation on the Branch to explain why that decision was made. Since then the Branch has acted in accordance with that recommendation.

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Mr. Gillen was asked why the Branch included the coroner’s finding that Mr. Paul’s death was an accident, but did not include the Police Complaint Commissioner’s finding that the police investigation was flawed and incomplete. He responded: “I suppose you could have included both. I don’t know. You could have excluded, I suppose, the coroner’s report as well” (November 10, 2010, p. 17).

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## **PART 4—POSITIONS OF THE PARTICIPANTS**

**A. Introduction**

On December 14 and 15, 2010, I heard two days of closing oral submissions from Commission Counsel and from counsel for those participants who chose to participate in this phase of the commission's activities. Most, but not all, of the participants also filed written submissions. In this part, I will summarize those submissions.

**B. Commission Counsel**

In accordance with convention, Mr. Cowper declined to make submissions respecting what findings of fact I should make. However, he did provide a neutral recitation of the facts and chronology (Exhibit CJB 18) and identified the following issues arising from the evidence that I may wish to consider, especially in relation to recommendations for changes to the Criminal Justice Branch's rules, policies, and procedures:

- Should charge assessments in police-related death cases be referred to counsel outside the Criminal Justice Branch?
- With respect to the Branch's reconsideration of charging decisions, should Branch policy:
  - distinguish between reconsiderations based on changed circumstances/fresh evidence, and reconsiderations arising out of a concern that the original decision may have been incorrect?
  - explicitly address whether the law respecting abuse of process imposes restraints on prosecutors changing a charging decision in the absence of changed circumstances/fresh evidence?
- Should Branch policy authorize prosecutors to more actively influence the final completion of an inadequate or incomplete Report to Crown Counsel?
- Do the Branch's administrative policies inappropriately burden the most senior members of the Branch with charge assessment responsibilities?
- Should the Branch place such a high value on individual decision-making in charge assessment situations, rather than collegial decision-making?
- Should Branch policy impose consequences for failure to comply with written policies on matters such as delays in completing charge assessments or failure to document important charge assessment decisions?

**C. The Paul Family, First Nations Summit, Union Of BC Indian Chiefs, and BC Assembly Of First Nations**

Mr. Kelliher, on behalf of these participants, said that the power to approve criminal charges is a frightening power, as it can allow a person to go free, unstigmatized by an accusation of wrongdoing, or it can destroy a life. The other side of the coin is the impact of charge assessment decisions on victims of crime and their families—the expectation in the public that justice will be done. The Criminal Justice Branch is largely autonomous. The twin pillars of independence and impartiality properly support the public’s respect for the administration of justice.

Two of the Branch’s policies bear significantly on this inquiry’s work: the policy requiring two senior Branch members to review files involving allegations against police officers (a precautionary measure not enjoyed by the public at large); and the charge approval standard of substantial likelihood of conviction (or a strong solid case to present to the court). The policy expects prosecutors, in determining whether a case is solid, to ask what material evidence is likely to be admissible, what weight can be attached to admissible evidence, and what defences (viable but not speculative) should be considered.

When the manifestly deficient Report to Crown Counsel in this case went to Mr. Cullen, he recognized it as such, but felt that the die was cast, in the sense that he was stuck with what he had been given, subject to making minor queries. Mr. Kelliher said that the deficiencies handcuffed Mr. Cullen and other prosecutors, but do not exempt them from responsibility; it only makes them complicit in it.

According to Mr. Kelliher, Mr. Cullen had reliable and credible evidence from officers Turner and Peterson that Mr. Paul was drunk and incapable of caring for himself when he was taken to the jail, as well as the autopsy findings of his intoxication and the photographs of Mr. Paul being dragged into and out of the jail. Mr. Cullen testified that he did not give much credit to Sgt. Sanderson’s and Cst. Instant’s statements that they did not think Mr. Paul was intoxicated, but, Mr. Kelliher said, Mr. Cullen subsequently gave reluctant credit to their versions—by ignoring the relevance of the jail nurse being present, by considering the general evidence of Mr. Paul’s life on the street, by concluding that Mr. Paul would turn down shelter and could find some sanctuary on the street, and by believing Cst. Instant’s account that Mr. Paul was able to walk to the wall where he left him.



Mr. Cullen’s recommendation went to Mr. Ewert. Mr. Kelliher said the record shows that Mr. Ewert did not provide an analysis of the facts, but only a brief, incomplete reference to the applicable law, and that his decision seems almost entirely based on Mr. Cutler’s analysis of the law and Mr. Cullen’s overview of the case.

Mr. Fitch’s reconsideration in 2001 triggered by new evidence relied on Ms. DeWitt-Van Oosten’s analysis, but she did not even view the newly available jail videos, nor did Mr. Fitch request that she do so. Mr. Fitch did nothing for the next seven months other than use a junior lawyer as a sounding board, indifferent to the reality that this delay might frustrate a pro-charge decision or the Police Complaint Commissioner’s decision whether to order a public hearing. In addition, Mr. Fitch ignored three requirements of the charge assessment policy: he had no regard to timeliness; he did not put the reasons for his decision into writing; and he did not ensure that the Paul family was notified.

Mr. Hicks’s reconsideration in 2004, triggered by further new evidence, addressed the legal test for criminal negligence (wanton and reckless disregard) but did not consider the lower legal test for failing to provide the necessities of life (marked departure from the conduct of a reasonable person). Mr. Kelliher also questioned the relevance or significance of the five evidentiary points that were the foundation for Mr. Hicks’s conclusion that charges were not warranted.

After Mr. Hicks’s reconsideration, Mr. Gillen referred the file to Mr. Ewert. Mr. Kelliher described Mr. Ewert’s analysis as shocking in its misunderstanding of the facts and his conception of the relevant factors to be taken into consideration, especially Mr. Ewert’s statement that “[t]he Crown is unable to prove that Frank Paul would not have died on the vegetable stand had he not been arrested by the two conscientious officers Turner and Peterson” (December 14, 2010, p. 32).

Mr. Kelliher described the prosecutors’ opinions in this case as “loose, rambling, incomplete, unstructured and almost casual documents in their nature” (December 14, 2010, p. 27).

Mr. Kelliher said that the Branch’s June 2004 media release implied that the investigation into Mr. Paul’s death was complete and, on the basis of thorough and repeated Crown reviews of the file, there was an insufficient basis to bring charges against either officer. It was a misleading effort to give the public the impression that all was well with the administration of justice in relation to Frank Paul.

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Mr. Kelliher concluded by saying that Mr. Paul's life was devalued—when Sgt. Sanderson refused him entry into the jail, when the investigators decided not to pursue a real investigation, and when the prosecutors decided not to charge. None of the prosecutors were prepared to ruin the lives and careers of these police officers. They made mistakes and it cost Frank Paul his life, but the damage was too great. He added:

[I]t's only a matter of degree that separates what happened to Frank Paul from what the governments of Canada have done with aboriginal people in this country from the beginning. That Canada and Canadians are inured, anaesthetized to the suffering of aboriginal people. And that's part of who we are. That's the blind spot. To say it is relevant that Frank Paul was of aboriginal heritage, that he was an Indian, most certainly. And in part did he die as a result of it? Yes, he did. And in my submission we have to have the courage to see that and say it. The devaluation of his life is inextricably tied to his status as an Indian man. (December 14, 2010, p. 37)

### **D. Vancouver Police Department and Vancouver Police Board**

Mr. Hern advised me that after my Interim Report was released in February 2009, several significant changes have been implemented by the Vancouver Police Department and by other municipal police forces.

First, police-related deaths and serious incidents involving municipal police officers are now investigated by either an external police agency or a special provincial constable appointed by the minister under s. 89 of the *Police Act*. Those investigators conduct both the professional standards investigations under that Act and any criminal investigation into the incident.

Second, the Criminal Justice Branch takes the position that it will only review Reports to Crown Counsel in which the police either recommend charges or are uncertain whether there is an evidentiary basis to charge the involved officer.

Third, when the Vancouver Police Department conducts a criminal investigation into a police-related incident, and the investigators conclude that there is not sufficient evidence for charges to be recommended against the officers involved, the department now (since July 2009) submits a report of the investigation to the Office of the Police Complaint Commissioner (OPCC) for review. If the OPCC believes the evidence discloses a reasonable basis to consider that the conduct of the officers or former officers who are the subject of the investigation may constitute a criminal offence, the OPCC submits an

investigation report to the Criminal Justice Branch recommending a charge assessment. The OPCC's involvement is designed to ensure that there is independent oversight of investigations which conclude with a no-charge recommendation.

Fourth, in February 2010, the OPCC procedure described above was expanded to include 13 other municipal police agencies.

Fifth, in June 2010, the provincial government announced that it will create an Independent Investigation Office (IIO), as recommended by me in my Interim Report and by Mr. Braidwood in his May 2010 report. The IIO will:

- be accountable to the Ministry of Attorney General.
- be led by a civilian who has never served as a police officer in Canada.
- have its powers entrenched in legislation.
- have a mandate to conduct criminal investigations into police-related incidents involving death or serious harm, with discretion to do other investigations.

**E. Don Morrison, Former Police Complaint Commissioner**

Ms. Latimer focused on the Criminal Justice Branch's delay between December 2000 (when Mr. Cullen asked Mr. Fitch to reconsider the initial no-charge decision, based on new evidence from the Office of the Police Complaint Commissioner) and August 2001 (when Mr. Fitch decided that the original no-charge decision should stand). In her submission, that delay limited the options that were available to Commissioner Morrison in 2001.

Ms. Latimer said that in September and October 2000, Mr. Morrison decided to seek further information before deciding whether or not to order a public hearing, and observed that in my Interim Report I concluded that the information he had before him made such a decision reasonable. I also concluded that his December 2000 decision to refer the file back to the Criminal Justice Branch was reasonable (based on the information he had in front of him at that time) and that this referral was a reasonable basis on which to postpone any decision about a public hearing.

In referring to Mr. Morrison's testimony during the first phase of this inquiry, Ms. Latimer said that the delay in making a decision about a public hearing was the

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product of his seeking reconsideration from the Branch. The Branch's own delay ended up being a very heavy factor in his thinking that it would be unfair in August 2001 to order a public hearing under the *Police Act*. No one at the Office of the Police Complaint Commissioner expected that the Branch would take as long as it did to make the decision.

She submitted that Mr. Fitch's excessive delay had a significant impact on Commissioner Morrison's assessment and that, but for the Branch's delay, Mr. Morrison may have reached a different conclusion as to the propriety of a public hearing, and "he may not today stand criticized for postponing making public his own decision not to hold a public hearing" (December 15, 2010, p. 39). She submitted that I should find that Commissioner Morrison acted reasonably in deciding not to order a public hearing in this matter.<sup>7</sup>

#### **F. United Native Nations Society**

Mr. Ward said that Mr. Cullen's statement that "the die was cast" goes a long way toward explaining why the Branch responded to Mr. Paul's death the way it did. It was not just a flawed Report to Crown Counsel; the die was cast by a culture within the Branch that made the prosecution of a police officer for causing the death of an Aboriginal, if not a citizen of any race, most unlikely. The Vancouver Police Department was clearly in an apparent conflict of interest when it investigated Mr. Paul's death. The question now is whether the Branch was similarly conflicted when the Branch's lawyers conducted the charge assessment process and, if so, what to do about it. He added:

The [Branch's] lawyers are undoubtedly capable, conscientious and fair-minded people who would not consciously favour the interests of a class of people in the charge assessment process in homicide cases. However, the risk that they might unconsciously give police officers more favourable treatment than ordinary citizens, particularly in difficult cases, or close calls, is too great to condone the *status quo*.... Frank Paul's death at the hands of the Vancouver Police Department created an unacceptable risk of the appearance of a conflict of interest on the part of Regional Crown Counsel and the [Branch] which should be addressed by a recommendation that all police-related death cases be referred to a truly independent prosecutor for charge approval and, if appropriate, prosecution. (Ward, pp. 3-4)

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<sup>7</sup> This issue falls outside the terms of reference of this inquiry and I believe I addressed this concern in my first report and I do not propose to deal further with the matter here.

Mr. Ward said that although this inquiry probes a single fatality, a consideration of the greater context is desirable and necessary. He submitted that one cannot live in British Columbia without being aware of the uneasy relationship between the Aboriginal community and the criminal justice system. In his inquiry into policing in BC, Justice Oppal described this relationship as being marked by antagonism and distrust. Frank Paul's death was not an isolated case, according to Mr. Ward, who referred to the deaths of Fred Quilt (1971), Frank Bell (1992), and Kyle Tait (2005). He said that these incidents outraged many Aboriginals. He found it remarkable that he had been unable to find a reported case of either an acquittal or conviction of a British Columbia police officer who had caused the death of an Aboriginal. This inquiry received the evidence of eight Branch members who had collectively 140 years of experience with the provincial Crown, but apparently none of them had either approved charges against or prosecuted a police officer in a homicide involving a deceased of any race.

BC Coroners Service statistics reveal that between 1992 and 2007, 267 people died in police-related incidents—52 of them in the city of Vancouver. In the earlier phase of this inquiry's hearings, Det. Staunton testified that, to his knowledge, none of these 52 deaths had resulted in charges against police officers. Mr. Ward was also critical of the length of time it takes for the charge assessment process to be completed in police-related death cases, citing examples ranging from 14 to 26 months after the death. This is most unsatisfactory and does not enhance public confidence. He also cited the lack of a consistent decision-making structure, and the uncritical acceptance of, and reliance upon, exculpatory statements made by the person or persons who caused the death.

Mr. Ward said that it would be callous, cruel, and unlawful to treat a disabled dog the way Mr. Paul was handled, and there was ample evidence that he was incapable of voluntary movement when he was dragged out of the jail. He was soaking wet, and deposited in an alley in an industrial area of Vancouver when few people were around, miles away from his stated area of residence, when it was raining and the temperature was just above freezing. He asked how it was that two Queen's Counsel (Messrs. Urban and Ryneveld), each with decades of prior prosecutorial experience, could have a charge assessment opinion so diametrically opposed to those within the Branch. It may be that reasonable people could differ, but a more plausible explanation is that Messrs. Urban and Ryneveld were independent, unencumbered by any existing relationship with the Branch or the Vancouver Police Department, whereas the Branch's lawyers viewed the

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case through a lens that was clouded by their ongoing relationship with the province's largest municipal police force.

Mr. Ward said that when Mr. Cullen began the charge assessment in May 1999, the Branch's *Policy Manual* provided that, in allegations against police officers, Regional Crown Counsel was to forward all materials directly to the Assistant Deputy Attorney General for review and decision. He should have done so in May or, at the very latest, in September after receiving more information from the police.

Mr. Ward acknowledged that the Assistant Deputy Attorney General has some discretion respecting when to appoint a special prosecutor, but one should have been appointed in this case, at least after public controversy arose over the handling of the file.

Mr. Ward recommended that:

- In all police-related death and serious injury cases, an independent special prosecutor should be appointed to conduct the charge assessment process and subsequent prosecution.
- All Criminal Justice Branch professional staff should receive appropriate cultural awareness and sensitivity training with respect to the relationship between First Nations and the criminal justice system.
- The Branch should strive to maintain a reasonable level of First Nations representation within the ranks of its professional staff.
- The Branch should appoint an independent special prosecutor to review the Frank Paul file, with a view to ascertaining whether criminal charges are appropriate.
- The Attorney General of British Columbia should convene a study commission of inquiry to review the Branch's handling of all 267 police-involved deaths in the 1992–2007 period.

#### **G. BC Civil Liberties Association**

Mr. Tammen said that in order to maintain public confidence in the criminal justice system, this inquiry should recommend a new approach for assessing whether charges should be laid in cases in which the police are involved or implicated. In every such case, a special prosecutor should be appointed under the *Crown Counsel Act*, to make the charge assessment and to conduct any ensuing prosecution.

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He identified several situations in which prosecutors in the Frank Paul case acted in a manner that fell below the standard one would expect for a case of this gravity and/or failed to follow the Branch's policies and procedures:

- Mr. Cullen failed to request sufficient additional investigative steps to be taken.
- Mr. Fitch did not conduct the second charge assessment in a timely manner and did not record the reasons for his no-charge decision in a comprehensive manner.
- The Branch's communication with the Paul family was inadequate or non-existent.
- After receiving Mr. Hicks's charge assessment, Mr. Gillen sought an opinion from Mr. Ewert (a recently retired prosecutor who had conducted the first charge assessment), rather than seeking a legal opinion from an independent lawyer.

Mr. Tammen reviewed the findings in my Interim Report that led to my recommending establishment of a civilian-based Independent Investigation Office (IIO), and wholeheartedly endorsed those recommendations. He cited the Braidwood Inquiry's endorsement and expansion of those recommendations, and Mr. Braidwood's recommendation that a special prosecutor be appointed for every police-related incident assigned to the IIO, having concluded that it only takes a perception of conflict of interest to undermine public confidence. Mr. Tammen agreed with Mr. Braidwood's recommendations, which he said ought to be given special consideration and even deference.

Returning to the Frank Paul case, Mr. Tammen said that there is legitimate public apprehension that the deficiencies in the police investigation and the inadequacy of the neutral investigative report submitted to Crown Counsel may have negatively affected the Branch's ability to make appropriate charging decisions. It seems reasonable to question whether the Branch's response was similarly tainted.

Even if the Province establishes the IIO, independent, reliable, and accurate Reports to Crown Counsel will not dispel the risk of potential bias and the public perception that there are inherent conflicts of interest when Branch prosecutors are called upon to make charging decisions in matters that involve police officers. The inevitable conflict of interest that comes from divided loyalties within the municipal police forces applies with equal force to the conflicts of interest that arise between prosecutors within the Branch

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and the police, when Branch prosecutors are called upon to determine whether charges should be laid against police officers.

It is well-recognized that we all possess subconscious or implicit biases—beliefs, attitudes, and expectations that are based on our ideas about the groups to which we each belong. These biases shape how we perceive, make decisions about, and interact with others. Most of us are completely unaware that we possess such biases, or of their strong effect on our subconscious, but their effects can lead to discernible practices of discrimination. There is a valid concern that Crown prosecutors will have biases in favour of police officers due to the generally collegial and cooperative relationship between prosecutors and police officers, and this concern is acknowledged in the Branch’s *Crown Counsel Policy Manual*. In his research paper, Mr. Layton identified the potential for conflict where a prosecutor may consciously or unconsciously be influenced by the idea that he or she may be required to work with the suspect officer or his or her colleagues in the future.

Mr. Tammen said that in every police-related incident in which the IIO determines that a charge assessment should be conducted, a special prosecutor should be appointed, and this procedure should be extended to cases in which the IIO is uncertain whether charges should be laid. He did not intend to limit this recommendation to the restrictive list of “special prosecutors” that currently exists, as the Province may develop an alternative list of similarly qualified members of the private bar. The critical feature is the arm’s length relationship the appointed prosecutor has with the Branch and the ability of the prosecutor to conduct charge assessments and prosecutions without political or institutional influence of any sort. He agreed with Mr. Layton’s reasons for preferring the appointment of special prosecutors in these cases.

Mr. Tammen disagreed with the Branch’s response that it would consider:

- amending the policy to expressly identify the reasons why a conflict may arise in police-related matters, and
- a policy that would require charge assessments in police-related cases to be reviewed by a second Branch member before the final decision is made.

He said that these proposals fall far short of what is required to assure the public that police-related incidents will be reviewed thoroughly and impartially, and that they will not dispel the public’s perception that an inherent conflict of interest exists in such cases.



If there is a valid concern that the number of police-related cases might overwhelm the special prosecutor system, Mr. Tammen made two alternative submissions:

- That special prosecutors be appointed only in cases that involve death or serious injury, as these are the cases that arouse the greatest public concern.
- That special prosecutors conduct charge assessments, but that any resulting prosecutions be conducted by Branch prosecutors from a different region than the suspect officer.

Mr. Tammen also agreed with Mr. Layton that the director of the IIO ought not to conduct charge assessments. In Ontario and most other provinces, it is the police who initially approve charges, whereas in British Columbia that function is reserved for the Criminal Justice Branch.

#### **H. Criminal Justice Branch, Ministry Of Attorney General**

Mr. Peck began by referring to the decision of the BC Court of Appeal arising out of this inquiry's proceedings:

- In para. 43, the Court stated that the role of a commission is not to judge or to fix liability.
- In para. 79, the Court said that it is not the role of a tribunal to determine whether charges will be laid, but rather to review what took place in the aftermath of Mr. Paul's death, with a view to recommending procedures that will improve the exercise of prosecutorial discretion in the future.
- In para. 90, the Court made it clear that the commission is not to second-guess or criticize the decisions made by individual prosecutors, but rather to focus on the process and see what remedial steps can be recommended.

Mr. Peck disagreed with Mr. Ward's submission regarding whether Mr. Cullen should have made a recommendation to Mr. Ewert in late 1999. He said that in November 1999, when Mr. Cullen sent his report to Mr. Ewert, the policy clearly stated that it was the person in Mr. Ewert's position to whom it should go.

When Mr. Cullen asked Mr. Fitch to reconsider the file in January of 2001 (based on new evidence), it should be remembered that, in addition to his policy-based obligations, Mr. Fitch had to handle between 175 and 200 cases that year—it was a crushing job and it was an extraordinarily busy time for him. When Mr. Fitch asked

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Ms. DeWitt-Van Oosten to review the file, the characterization of her as fledgling could not be further from the truth. She had clerked to the Supreme Court of Canada, had risen to the ranks of Administrative Crown Counsel in Vernon, and was considered one of the brightest people in the office. She has been unfairly criticized for not reviewing the jail video. The still photographs had satisfied her of Mr. Paul's incapacity. The video may have added an emotive element, but it is that very emotional response that must be discarded when a prosecutor is dispassionately determining whether to approve charges.

He disputed Mr. Kelliher's assertion that the various prosecutors' opinions were "loose, rambling, incomplete, and unstructured." Ms. DeWitt-Van Oosten's memorandum was a model of legal and factual clarity. It was also not accurate to suggest that Ms. Taylor's notations were evidence that she agreed with Mr. Urban that charges should have been laid. Her Will Say statement refutes that. Mr. Fitch testified that he relied on Ms. Taylor as a sounding board over several months, and even he acknowledged that his review took too long.

Mr. Peck said that Mr. Hicks's reconsideration of the file, including review of the jail video and investigation of three new witnesses, took less than two months. Mr. Gillen's subsequent appointment of Mr. Ewert was a cautionary step.

He then disputed Mr. Kelliher's closing submissions, stating that he had engaged in baseless attacks on the personal and professional integrity of exceptional people of skill and dedication, and it was wrong for him to have done so. He provided me with brief summaries of the eight prosecutors' professional records. All of them have testified or provided statements to this inquiry. Mr. Fitch, who testified for two days and who, according to Mr. Peck, was not treated with dignity by the media, was forthcoming, intelligent, thoughtful, and careful. Mr. Peck also asked me to consider what Ms. Taylor (now MacPhail) said about Mr. Fitch's character in her Will Say statement.

Mr. Peck said that the three criminal offences under consideration in this case were complex and difficult, because of the standard of care issue and the question of foresight of consequences. As Mr. Ewert noted, the issue was not whether the conduct of the officers was correct, appropriate, or moral, but whether there was a substantial likelihood that the Crown could prove the case beyond a reasonable doubt—the highest charge approval standard in Canada.

Mr. Peck said that it was his role neither to defend the prosecutors' decisions nor to approve charges. As members of the legal profession, we recognize differences of opinion, and this was an extremely close call. Some would say that if it is a close call, then it should be left to a judge to decide, but that would be an abdication of prosecutorial responsibility. He referred to the decisions of *Hoem* and *Krieger* about the importance of the independence of the Crown in a just society. He said that every prosecutor who touched this file did so dispassionately, objectively, fairly, and independently.

Mr. Peck disagreed with Mr. Layton's proposal that all police-related death or serious harm cases be assigned to special prosecutors for charge assessment and prosecution, for several reasons:

- The Canadian legal system is founded on the integrity of the actors in the system: lawyers, defence lawyers, Crown, judges. To call into question an entire class of lawyers calls into question the very principles upon which our adversarial system is based. Lawyers and Crown Counsel alike must be able to determine when they are in a conflict, and when they are, they step off the case.
- Contrary to Mr. Layton's assertions, there is not within the Branch an institutional aversion to making decisions that may harm the relationship between the Branch and the police.
- If conflict of interest disqualifies Branch prosecutors, it is simply not logical to disqualify Branch prosecutors in police-related death and serious injury cases but not other types of cases. If some types of cases must be referred out, then logically all types must.
- Referring police-related cases outside the Branch tells British Columbians that Crown Counsel are incapable of remaining independent and unbiased when dealing with police officers. Such a decision would harm the public's perception of the Branch and of the criminal justice system.

Mr. Peck said that the Branch is in favour of retaining the present system, but is open to making changes to its policies that will enhance the exercise of prosecutorial discretion. For example, it might be appropriate that a charging decision in a case arising in one region be conducted by a Branch prosecutor in another region. The Branch is supportive of the majority of Mr. Layton's proposed recommendations on such changes.

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## **PART 5—THE INTEGRITY OF THE BRANCH’S RESPONSE**

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In this part, I examine the integrity of the response of the Criminal Justice Branch to the death of Frank Paul. Where appropriate, I make findings of fact regarding whether the Branch and the individual prosecutors acted with a level of integrity deserving of the public’s confidence.

**A. The Importance of Integrity to Public Confidence in the Prosecutorial System**

When it made its decision affirming this commission’s jurisdiction to inquire into the Criminal Justice Branch’s response to Mr. Paul’s death, the Court of Appeal held that “there is a very real need for public confidence in the prosecutorial system.” To maintain the public’s trust and confidence, and to be deserving of the independence our law affords them, Crown prosecutors must conduct themselves with integrity. By “integrity” I mean that prosecutors must honestly and faithfully strive to fulfill the duties and responsibilities that accompany their unique role as independent, “quasi-judicial” ministers of justice. If prosecutors act with integrity, they, and the Criminal Justice Branch as a whole, will enjoy the confidence of reasonable members of the public, even when fulfilling their duties requires them to make difficult or unpopular decisions.

In an important sense, integrity is one of the most vital questions I have to address. There are undoubtedly cases where the community will not be in a position to fully appreciate the evidence and the law underlying the Crown’s charging decisions. It is particularly in such cases that public confidence in the Branch’s decisions depends on the soundness of the Branch’s policies and processes, and on the integrity of the Branch lawyers who apply them and ultimately make the charge assessment decisions. This was such a case. It involved a vulnerable victim, potential accused persons who occupied a position of trust, and a legally difficult charge assessment.

In my February 27, 2008 ruling, “The Inquiry’s Authority to Inquire into the Response of the Criminal Justice Branch,” I referred to two specific aspects of integrity that arise in this case. First, was any prosecutor subjected to internal or external pressures or influences respecting the charge assessment decision, and if so, what was the source and nature of those pressures or influences? Second, did each prosecutor “fairly, independently, and objectively”<sup>8</sup> examine the available evidence? These questions provide a useful framework for assessing the Branch’s response to Mr. Paul’s death.

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<sup>8</sup> This phrase is from Branch policy CHA 1 (Charge Assessment Guidelines).

**B. Were the Branch Lawyers Subject to Internal or External Pressures?**

According to Branch policy, the decision to initiate a prosecution is one of the most important duties of Crown Counsel. In discharging their charge assessment responsibility, Crown Counsel must fairly, independently, and objectively examine the available evidence in order to determine whether there is a substantial likelihood of conviction and, if so, whether a prosecution is required in the public interest. The independence of this function must be balanced by measures of accountability. Principled charge assessment decisions are assured, the Branch policy says, “when Crown Counsel experienced in assessing evidence exercise discretion in accordance with Branch public policies when reviewing the available evidence and applicable law” (Exhibit CJB 4, Tab A5, p. 2).

The question of whether any of the Branch lawyers were subject to internal or external pressures to decide the charge assessment arising out of Mr. Paul’s death in a particular way can be dealt with briefly. With one exception, which I will refer to, I have concluded that there was no internal or external pressure exerted on the Branch lawyers to reach a particular result in exercising their charge assessment functions in this case.

The Branch lawyers testified that they were not subjected to any improper pressures. I accept their evidence. Leaving aside the serious problems I have identified in the Vancouver Police Department’s investigation of this matter, once the investigative file was sent to the Crown, the Branch lawyers made their charge assessments independently of the police, as they were required to do. Mr. Cullen’s actions in particular exemplify this.

For their part, once they delivered the Report to Crown Counsel, the police did not seek to interfere in, or influence, the charge assessment process. The VPD cooperated with the reviews performed by Mr. Fitch and Mr. Hicks. The communications between the Branch lawyers and the police were appropriate and respected the independence of their respective areas of responsibility.

Nor was there evidence of any political pressure or influence in this case. The evidence showed that in 2004, as a result of comments by the Police Complaint Commissioner, this matter attracted significant public attention and, with that attention, calls for a public inquiry. Mr. Gillen briefed the Attorney General and Deputy Attorney General.



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But there was no suggestion of any attempt by any person in government or in the Branch to improperly influence the course of the charge assessments. The evidence demonstrated only principled decision-making. When new evidence was identified, the Branch exhibited a readiness to re-examine its prior conclusions. In assigning the first review to Mr. Fitch, Mr. Cullen told him he had been “troubled” by the file. He encouraged Mr. Fitch to make a careful assessment of whether charges should be approved, without being deferential to Mr. Cullen’s original decision. Mr. Gillen, as the head of the Branch, did not seek to change or influence the conclusions reached independently by the Branch lawyers.

Section 5 of the *Crown Counsel Act* provides that if the Attorney General or Deputy Attorney General gives the ADAG a direction with respect to the approval of a specific prosecution, the direction must be given to the ADAG in writing and published in the Gazette. There was no direction from the Attorney General or Deputy Attorney General to the ADAG concerning the decision to prosecute in this case. The decisions taken were the decisions of the Branch alone.

The one instance of an attempt to influence the charge assessment involved Mr. Urban’s communications with Mr. Fitch. Mr. Urban was a senior counsel seconded from the Crown to the Office of the Police Complaint Commissioner. Mr. Urban authored an opinion dated December 22, 2000, to the Police Complaint Commissioner (Exhibit 2, Tab 9) in which he opined that the PCC should not decide whether to hold a public hearing until the file had been referred back to the Crown to consider whether criminal charges should be approved based on new evidence. In his letter, Mr. Urban argued that there was a significant public interest for the Crown to proceed with charges and that there was a substantial likelihood of conviction with respect to Sgt. Sanderson and Cst. Instant, which he expressed as “a strong *prima facie* case and numerous avenues of cross-examination of Sanderson, Instant and the guard should they elect to testify.” Mr. Urban also telephoned Mr. Fitch a number of times in 2001 in an effort to obtain updates on Mr. Fitch’s review of the original charge assessment.

In these calls, Mr. Urban urged Mr. Fitch to approve criminal charges for the purpose of having a public airing of the circumstances of Mr. Paul’s death. Mr. Urban even offered to assume conduct of the prosecution himself. These communications occurred both while Mr. Urban was at the OPCC and after he returned to the Crown. Mr. Fitch

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expressed concern about the appropriateness of these communications and documented them in the Crown file.

Mr. Urban did not testify in this phase of the inquiry, and therefore I do not think it fair that I make any findings about his involvement except to say that Mr. Fitch’s response to Mr. Urban’s inquiries demonstrated an appropriate sensitivity to the need to consider all relevant information while at the same time to conclude his review independently, objectively, and free from outside influences.

The Crown’s function in making the charge assessment decision is to do so dispassionately, based on the factors identified in the relevant policy and ignoring extraneous considerations. Mr. Fitch did so. So did the other Branch lawyers involved.

### **C. Did the Branch Lawyers Examine the Evidence in a Fair, Independent, and Objective Manner?**

Integrity is not simply a matter of being free from improper outside influences. Integrity requires that, in reaching their decisions, the Branch lawyers examined the evidence and applied the Branch charge assessment policy to it in a fair, independent, and objective manner. This in turn involves an examination of whether the charge assessments were conducted honestly, conscientiously, and free from any bias or discrimination, either for or against Mr. Paul and the police officers involved.

Most of the participants accepted that the Branch’s actions exhibited integrity. As Mr. Ward put it, while there is a systemic issue that arises from the close working relationship between Crown lawyers and the police, this case did not raise issues of personal integrity: “We do not say that any of the Branch’s witnesses who appeared here were anything other than capable, conscientious, careful lawyers endeavouring to do the right thing.” I agree.

Nevertheless, criticisms were made that challenged, directly or indirectly, the Branch’s integrity, as reflected in how it responded to Mr. Paul’s death. It was argued that the Branch lawyers failed to properly respond to the inadequate Report to Crown Counsel; that the charge assessment opinions were inaccurate and inadequate; and that the Branch’s 2004 media release was misleading. These arguments are summarized in Part 4, “Positions of the Participants.”

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Elsewhere in this report, I address and make recommendations concerning Branch media statements and how Branch lawyers should respond to inadequate or incomplete Reports to Crown Counsel. In summary, while I do not find the Branch’s 2004 media statement misleading, it fell short of what was required in the circumstances. The Report to Crown Counsel delivered in this case was inadequate and incomplete. In my view, the Crown Counsel acted with integrity and in accordance with applicable policies in making the charge assessment decisions based on the available materials.

Criticisms were also made regarding the completeness and accuracy of the charge assessment opinions prepared in this case.

It is clear to me that each prosecutor conducted an independent review of the file and arrived at an independent decision. All of these decisions were documented, though some less formally than others. These opinions were criticized as “loose, rambling, incomplete, unstructured and almost casual documents in their nature.” Having examined them carefully, I do not share that view. It is evident from the opinions that considerable time, effort, and care was taken in their preparation. They exhibit a detailed review of the evidence and an understanding of the issues and the applicable law. The opinions are not perfect, but I am mindful that they were created as internal documents. They were written, as Mr. Cullen explained, for an audience of senior, experienced Crown Counsel who were well familiar with the charge assessment standard and the general legal principles involved. I am also mindful of the fact that it is easy to criticize the form and structure of these documents from a distance, having had ample opportunity to deconstruct them.

Counsel pointed to what were said to be factual inaccuracies in the opinions. One prominent example of a factual inaccuracy involved Mr. Ewert’s reference to Sgt. Sanderson’s belief that Mr. Paul had associates in the area of Maple and Broadway where Mr. Paul said he lived. I am satisfied that this was not inaccurate and was grounded in the evidence. The reference is found in Sgt. Sanderson’s report of February 17, 2000 to Chief Constable Blythe, which was marked as Exhibit 60 in the commission’s prior proceedings. Regarding other inaccuracies, I am satisfied that they were the result of honest mistakes and would not have affected the no-charge conclusions.

It follows that I reject the submission that the charge assessment opinions were “cobbled together rationalizations.” If the Branch lawyers’ opinions were not fair, independent, and objective, and if they were simply rationalizing a no-charge decision, then I would

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have expected the analysis in each to be briefer and much more homogeneous. The opinions demonstrate that the Branch lawyers reached the same ultimate conclusions, but not necessarily for the same reasons. There were points of departure, as one would expect if any group of lawyers were asked to analyze the same problem independently. The evidence I have already referred to, including Mr. Cullen’s instructions to Mr. Fitch and the care taken by Mr. Hicks in identifying and obtaining interviews of additional witnesses, reflect the principled approach taken by the Branch to the charge assessment process in this case.

Though Mr. Fitch’s review was marked by unfortunate delay, which he candidly acknowledged and took responsibility for, I find that the process he embarked on to review the file demonstrated integrity. After forming his initial opinion, he asked Ms. DeWitt-Van Oosten to produce her own opinion. With Ms. DeWitt-Van Oosten’s opinion in hand, Mr. Fitch sought the additional assistance of Ms. MacPhail. In her Will Say statement, Ms. MacPhail stated that it was her understanding that Mr. Fitch wanted her to be “a sounding board, to take a critical view of the file, and pick it apart.” Her handwritten notes, some of which appear on a copy of Ms. DeWitt-Van Oosten’s memorandum, show that Ms. MacPhail did just that. Ms. MacPhail’s notes raise many difficult substantive issues in this case. This process demonstrates a real concern amongst these prosecutors for fairness, independence, and objectivity. If Mr. Fitch lacked integrity or was simply trying to justify the correctness of the original decision, he would not have engaged in this process. He would not have enlisted Ms. DeWitt-Van Oosten to provide a second opinion, unencumbered by his initial view. He would not have instructed Ms. MacPhail to play the role of devil’s advocate. And he would not have vacillated as he did over an extended period of time, wrestling with this difficult decision. While Mr. Fitch was quick to take responsibility for his delay, I find that it was not entirely due to inattention on his part. Mr. Fitch is clearly an accomplished, conscientious counsel who, based on the evidence, was overburdened by the workload that came with his position. The time it took to complete his review also reflected the seriousness with which he treated this difficult charge assessment.

For the purpose of this section of the report, it is sufficient to say that the opinions do not reveal any lack of fairness, independence, or objectivity.

**D. The Difficulty of the Charge Assessments in this Case**

It is important to address one theme that underlies the criticism of the Branch's failure to charge anyone. In various ways it has been suggested that the approval of charges was an obvious, straightforward, and clear matter. From this point of view, the failure to charge is inexplicable, even mystifying, in light of what is described as clear evidence of criminal wrongdoing. In search of a justification for such a view, this theory proceeds to suggest that special consideration was given to the potential accused because they were police officers, while Mr. Paul's life was devalued because he was Aboriginal.

In my view, this criticism—both as to result and motive—is wrong and the product of understandable anger and passion. It is an understandable attitude for those who wanted a public airing of the circumstances of the chronically addicted homeless in Vancouver's Downtown Eastside, or for those wanting to make examples of the police officers involved, in aid of a broader policy agenda. It is not justified by the facts, and in my view, giving it credibility would risk damaging prosecutorial independence in this province. That independence helps guarantee that charge assessments are made objectively, without regard to public passions, partisanship, or extraneous considerations. We are well served in British Columbia by the need to persuade an independent prosecutor that the facts justify a prosecution to a high charging standard. Any direct or indirect change in those protections would in my view diminish the rights of all in our community.

I express no conclusion as to whether charges should have been laid. I reject entirely, however, the submissions made to me that the charging decision was straightforward. I conclude this was a decision on which reasonable people could reach different conclusions.

The suggestion that the results of the charge assessments reflected a devaluation of Mr. Paul's life as an Aboriginal person is especially troubling because it directly challenges the integrity of the charge assessment decisions in this case. But there is no foundation to it. The reasons for the charge assessment decisions were before me. None disclosed biased or inappropriate reasoning. The Branch lawyers who testified said that their decisions were not affected by the fact that Mr. Paul was an Aboriginal person or the fact that the potential accused were police officers. I accept their evidence. The documentary evidence as a whole discloses that the Branch approached the charge

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assessment decisions professionally, conscientiously, and with an appropriate degree of seriousness, given that a death was involved.

### **E. Conclusion on the Integrity of the Branch’s Response**

On consideration of all the evidence, I am satisfied that the charge assessment decisions were fair, independent, and objective, and free of any bias against Mr. Paul or in favour of the police officers.

Having found that the Branch and the individual prosecutors acted with integrity, I do not mean to suggest that the handling of this case was perfect or beyond criticism. Rather, I have found that the members of the Branch honestly and faithfully tried to fulfill their duties as Crown prosecutors. The public can have confidence that the Branch and the prosecutors responded to this difficult case with integrity. To the extent that there were shortcomings in the Branch’s response to the death of Frank Paul—and there were shortcomings—they do not implicate the integrity of the Branch or of the individual lawyers involved.

## **PART 6—CHARGE ASSESSMENTS IN CONFLICT OF INTEREST SITUATIONS**

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**A. Introduction**

The Terms of Reference direct me:

- (c) to examine the rules, policies and procedures of the Criminal Justice Branch respecting its role and response when an individual dies in circumstances similar to the circumstances of Mr. Paul’s death; and
- (d) to recommend changes considered necessary to the rules, policies and procedures referred to in paragraph (c).

My review of the Branch’s response to Mr. Paul’s death identified numerous Branch policies and practices that warrant examination and reconsideration. The issue that has attracted the most interest is the Branch’s policy regarding the conduct of a charge assessment when a police officer is suspected of having committed a criminal offence. Given the importance and complexity of this issue, I am devoting this entire part to a consideration of it. I will discuss the other policy issues in Part 7.

The circumstances of Mr. Paul’s death are part of a larger categorization of “police-related deaths,” as I used that term in my Interim Report. At page 203 I stated:

In this report I use the term “police-related deaths” to include a wide variety of factual circumstances, including (but not limited to) a death in a police department jail cell, a death resulting from an officer’s use of force, a death while detained at the roadside or in a police cruiser, or a death arising from, or soon after, some other form of police interaction with the deceased (such as in the Frank Paul case).

As emerged during the first phase of the commission of inquiry’s proceedings, the Vancouver Police Department had special investigative procedures in police-related death cases. As we learned during this second phase, the Criminal Justice Branch has special policies and procedures in police-related death cases as well—indeed in all cases where allegations are made against police officers.

As I noted in Part 2 of this report, the commission retained Vancouver criminal lawyer David Layton (whose credentials I highlighted in Part 2) to prepare a research paper identifying the legal and ethical issues that may arise during the charge assessment process in police-related cases. Similarly, the Criminal Justice Branch’s written submissions complement statements made during its four-member panel presentation

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regarding the Branch’s charge assessment processes. Because Mr. Layton’s paper and the transcript of the Branch’s presentation were posted on the inquiry’s website, I do not intend to summarize them here, but I may make reference to them as appropriate during this policy discussion.

My initial intent was to limit my examination of the Branch’s rules, policies, and procedures to “police-related death” cases. However, it soon became apparent to me that the Branch’s charge assessment policies and procedures applicable in police-related death cases are only a part of the larger policy surrounding conflicts of interest generally. To put it another way, the Branch has numerous policies respecting how and by whom charge assessments (and prosecutions) should be conducted when a conflict of interest exists; cases where the potential accused is a police officer is only one illustrative example.

For reasons that will, I hope, become clear, I have concluded that my examination must extend to the broader issue of conflicts of interest generally, if only to provide a more meaningful context within which to understand charge assessments in police-related death cases.

### **B. Current Policy and Practice**

#### **1. General charge assessment guidelines**

Before examining charge assessment policies and practices in conflict of interest situations, it would be useful to describe the general scheme for charge assessments in routine cases.

The Criminal Justice Branch’s *Crown Counsel Policy Manual*<sup>9</sup> establishes the general principle that “[g]enerally, local Crown Counsel should handle all prosecution functions, including charge assessment, unless there is a compelling reason not to do so” (Policy Code CON 1).

Another policy, entitled “Charge Assessment Guidelines” (CHA 1), states British Columbia’s charge approval standard (the strictest in Canada):

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<sup>9</sup> The *Crown Counsel Policy Manual* is publicly available at: <http://www.ag.gov.bc.ca/prosecution-service/policy-man/index.htm>

## **PART 6—CHARGE ASSESSMENTS IN CONFLICT OF INTEREST SITUATIONS**

Under the *Crown Counsel Act*, Crown Counsel have the responsibility of making a charge assessment decision which determines whether or not a prosecution will proceed.

In discharging that charge assessment responsibility, Crown Counsel must fairly, independently, and objectively examine the available evidence in order to determine:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether a prosecution is required in the public interest.

That policy also provides that a lower “reasonable prospect of conviction” standard can be applied “in cases of high risk violent or dangerous offenders or where public safety concerns are of paramount consideration.” In such cases, charging decisions must be approved by Regional or Deputy Regional Crown Counsel.

Further, Crown Counsel should, before a charge assessment decision is made, discuss that decision with Regional or Deputy Regional Crown Counsel in two circumstances:

- where the allegation is that a person is responsible for a death, and
- for any serious allegation about which there has been, or is likely to be, significant public concern with respect to the administration of justice.

This policy also imposes important obligations on Crown Counsel to make a charge assessment in a timely manner, to record the reasons for any charge assessment decision that differs from the police recommendation contained in the Report to Crown Counsel, and, where appropriate, to communicate with those affected (including the police) so that they understand the reasons for the charge assessment decision.

If the police disagree with a charge assessment decision, policy CHA 1.1 (Charge Assessment Decision—Police Appeal) provides that the police should first discuss their concerns with the Crown Counsel who made the decision. If not satisfied, the police should discuss the matter with Administrative Crown Counsel.

If the matter is still not resolved, then the Chief Constable, or RCMP officer in charge of a detachment (or more senior RCMP officer) may ask Regional Crown

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Counsel to review the decision, with a further appeal to the Assistant Deputy Attorney General. If the policing authority remains dissatisfied with the Branch's decision, the police may swear an Information. The policy is not clear whether the Branch would, in such cases, intervene to take over the prosecution or enter a stay of proceedings under its Private Prosecutions policy (PRI 1).

The Branch's policy DIS 1.1 (Disclosure of Information to Parties other than the Accused) acknowledges that in some circumstances the Branch has a duty to provide reasons for a decision not to prosecute. It quotes s. 15(4) of the *Freedom of Information and Protection of Privacy Act*, which states:

The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute

- (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim; or
- (b) to any other member of the public, if the fact of the investigation was made public.

The disclosure policy includes several guidelines for Crown Counsel to follow:

- Take care to provide reasons that have a minimal impact on the privacy interests of third parties and that do not breach any legal requirements,
- Make public only summaries or extracts of police reports or other sensitive documents, and
- Do not make public any legal opinions, charge assessment opinions, work product, and other internal or potentially privileged documents.

Finally, the general principle referred to earlier that local Crown Counsel should handle all prosecution functions, including charge assessment, must be read in light of policy ADH 1 (Ad Hoc Counsel), which provides that legal counsel in private practice are retained on an ad hoc basis under various circumstances (in addition to conflict of interest situations, to be discussed below), including:

- To provide Crown Counsel services when no employee Crown Counsel is available.

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- To allow the Branch, in exceptional circumstances, to benefit from the particular expertise, skill, or knowledge of members of the defence bar in specialized areas or sensitive matters.

**2. How the Branch deals with conflict of interest situations**

The Branch has several policies that deal, directly or indirectly, with conflict of interest situations, which I will now summarize.

a. When a specific prosecutor is in a conflict of interest

The Branch's policy STA 1 (Standards of Conduct—Conflict of Interest) offers some guidance on what constitutes a conflict of interest, by adopting Policy Directive 5.4 of the BC Public Service Agency, which states in part:

- 4. A conflict of interest occurs when an employee's private affairs or financial interests are in conflict, or could result in a perception of conflict, with the employee's duties or responsibilities in such a way that:
  - a. the employee's ability to act in the public interest could be impaired; or
  - b. the employee's actions or conduct could undermine or compromise:
    - ❖ the public's confidence in the employee's ability to discharge work responsibilities; or
    - ❖ the trust that the public places in the public service.

Paragraph 6 of the Policy Directive imposes a duty on employees who find themselves in an actual, perceived, or potential conflict of interest to disclose the matter to the designated ministry contact or to their supervisor or manager.

The Branch's own policy provides more specific guidance. Paragraph 1 states:

Where Crown Counsel is assigned to a case involving an accused, victim, or material witness who is a relative, friend, or anyone else in respect of whom there is an objectively reasonable perception of a conflict of interest, Crown Counsel should disqualify themselves from

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participating in that case and, where the matter is before the Court when the conflict becomes apparent, notify the defence and the Court.

Although this policy does not say so explicitly, I interpret it as applying to Crown Counsel conducting charge assessments as well as prosecuting cases. While it clearly disqualifies the specific Crown Counsel who has a conflict of interest, it does not provide any guidance respecting who may assume responsibility for the matter.

b. When everyone in the Branch may be in a conflict of interest

Branch policy CON 1 (Conflict of Interest—Including Prosecutions Against the Crown) states:

In any case where there could be an objectively reasonable perception of a conflict of interest in the Criminal Justice Branch making a charge assessment decision, the matter should be referred to Regional Crown Counsel who may consult with the Assistant Deputy Attorney General in deciding:

- a. whether to obtain an opinion on charge assessment from ad hoc counsel or from Crown Counsel in another province or region; and
- b. whether it would be appropriate for local Crown Counsel to review the aforementioned opinion, conclude a charge assessment decision, and then handle any prosecution which may result.

The commentary accompanying the policy gives some indication of the intended application of this policy:

This policy has application where there could be a perception of a conflict of interest in the Criminal Justice Branch making a charge assessment decision because the potential accused is an agency of government (*R. v. R.*) or there is some connection between the potential accused and the Criminal Justice Branch, and the case falls short of the need for a special prosecutor (see SPE 1).

I understand this policy to be directed at what I would call “institutional conflict” situations.

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Whereas policy STA 1 is premised on a personal relationship between a specific prosecutor and a potential accused, victim, or witness, this policy on the other hand is premised on the relationship of the Branch itself to the potential accused. For example, if a prosecutor within the Criminal Justice Branch (which is within the Ministry of Attorney General) conducts a charge assessment in a case in which another ministry is alleged to have failed to provide the necessities of life to a person under its care, a member of the public acting reasonably might conclude that there is a risk that the prosecutor would allow loyalty to that ministry to influence the prosecutor's charge assessment decision. A similar concern might arise if the potential accused is an employee in a provincial ministry who is alleged to have assaulted a member of the public, such as a social assistance applicant.

While the commentary accompanying the policy offers a helpful example of such an institutional conflict, the policy itself is more broadly cast, capturing any circumstance in which the Branch might be in a conflict of interest. It is worded broadly enough to apply to cases in which the potential accused is a police officer, but gives no indication of the relationship between this policy and policy POL 1 (Police—Allegations Against Peace Officers).

Significantly, the policy gives some procedural guidance, but the exact nature of the policy is difficult to ascertain. If a prosecutor determines that there "could be" an institutional conflict, then the prosecutor must refer the matter to Regional Crown Counsel. Although the policy is ambiguous, I interpret paragraph (a) to mean that if Regional Crown Counsel concludes that a conflict exists, the charge assessment function must be performed outside the region, either by Crown Counsel in another region, by a lawyer in private practice (ad hoc counsel) or by Crown Counsel in another province. It is curious that Crown Counsel in another region is one of the possible options—if the Branch as a whole is in a conflict of interest, referring the case to a Branch prosecutor in another region does not extinguish the conflict.

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Paragraph (b) of the policy is even more problematic. It assumes that the file has been referred out for a charge assessment opinion (which presupposes that Regional Crown Counsel is satisfied that the Branch is in a conflict), but then gives that Regional Crown Counsel the discretion to assign the charge assessment function and any resulting prosecution to a Branch Crown Counsel within that very region.

c. Allegations against police officers

Branch policy POL 1 (Police—Allegations Against Peace Officers) is another example of the Branch addressing instances of institutional conflict of interest. The conflict arises, not because of any personal relationship between an individual Crown Counsel and the police officer who is alleged to have committed an offence, but because of the institutional relationship that exists between the Criminal Justice Branch and the police service of which the alleged offender is a member. The policy states:

In order to ensure that there is no perception of a conflict of interest and to maintain public confidence in the administration of criminal justice, the charge assessment decision on an allegation against a peace officer must be made by either Regional Crown Counsel or the Director, Legal Services.

Regional Crown Counsel should make the charge assessment decision unless concerned that there could be an objectively reasonable perception of a conflict of interest or that the maintenance of public confidence in the administration of justice requires that the decision should be made at Headquarters. In either case, the matter should be referred to the Director, Legal Services for a charge assessment decision, pursuant to the procedure set out below.

Based on this policy and on the accompanying “Procedure” section, I would describe the charge assessment procedure as follows:

When a Report to Crown Counsel alleges that a police officer (whether on duty or not) has committed a criminal offence, the report should be sent to the Administrative Crown Counsel in the location where the offence is alleged to have occurred.



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The Administrative Crown Counsel is then required to forward the report to Regional Crown Counsel who, in normal circumstances, conducts the charge assessment. When Regional Crown Counsel conducts the charge assessment decision he or she must, after making the decision:

- send a report to the Director, Legal Services, and
- communicate the decision to Administrative Crown Counsel, who should notify the police.

There are, however, two circumstances in which Regional Crown Counsel must disqualify himself or herself, in which case the Director of Legal Services conducts the charge assessment:

- if Regional Crown Counsel is concerned that there could be an objectively reasonable perception of a conflict of interest, or
- if Regional Crown Counsel is concerned that the maintenance of public confidence in the administration of justice requires that the decision should be done by the Director of Legal Services.

In either of these circumstances, “the file should be accompanied by a memorandum containing a brief recital of the relevant facts sufficient to carry out an assessment without reference to the police file,” and the memorandum should be in a specified form. However, it is only in the latter circumstance that Regional Crown Counsel should also include a recommendation for the consideration of the Director of Legal Services.

When the Director of Legal Services makes the charge assessment decision, that decision should be communicated to Administrative Crown Counsel, who should notify the police.

When there is any difference between Regional Crown Counsel’s recommendation and the Director’s charge assessment decision, the matter must be referred to the Assistant Deputy Attorney General for decision, following which that decision should be communicated to Administrative Crown Counsel, who should notify the police.

The procedure described above applies to all cases where there is an allegation that a police officer has committed a criminal offence, including

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cases where it is alleged that the actions of a police officer have caused the death of another person. The difference in police-related death cases is that, when Regional Crown Counsel or the Director of Legal Services make the charge assessment decision, the Director must provide a copy of the material to the Assistant Deputy Attorney General.

If, as a result of any of the above procedures, charges are approved, Regional Crown Counsel is responsible for designating who will conduct the prosecution. I interpret the policy as permitting Regional Crown Counsel to designate a Branch prosecutor from within the region to conduct the prosecution, although Regional Crown Counsel is also required to consider the appropriateness of requesting Crown Counsel from another region, or ad hoc counsel, to prosecute the case. In making that decision, Regional Crown Counsel must consider three matters:

- whether the officer is presently, or was formerly, employed in the jurisdiction where the offence occurred and is thus known to local Crown Counsel;
- whether the allegation concerns an offence in the course of duty or duty-related activities, regardless of locality; and
- whether the offence is of a particularly serious nature, or has considerable public profile.

d. Resort to ad hoc counsel in conflict situations

Branch policy ADH 1 states that legal counsel in private practice are retained on an ad hoc basis in various circumstances, including “to make, or advise upon, charge approval decisions and to prosecute cases in respect of which a real or apprehended conflict of interest arises.” This policy, as I understand it, allows but does not require the Branch to assign a charge assessment and/or a prosecution to ad hoc counsel when a conflict of interest arises.

e. Improper influence in prosecutorial decision-making

Branch policy SPE 1 (Special Prosecutors) is an important provision that requires the following brief historical explanation.

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In 1990 a BC cabinet minister resigned in response to public concerns regarding his awarding of a government grant to a society. After an investigation, the RCMP recommended that the former cabinet minister and others be charged with breach of trust under the *Criminal Code*. The Assistant Deputy Attorney General determined that the former cabinet minister should not be charged. The RCMP's appeal of that decision to the Deputy Attorney General was unsuccessful. The Leader of the Opposition and the Opposition Justice Critic publicly challenged that decision, which led to the establishment of a commission of inquiry that was mandated to inquire into the process applied in deciding not to prosecute the former cabinet minister.

The two Opposition MLAs initiated a private prosecution against the former cabinet minister, and the Attorney General refused to intervene or to enter a stay of proceedings. The private prosecution was withdrawn, but the subsequent disclosure by one of the Opposition MLAs of taped telephone conversations between the Attorney General and others led to the resignation of the Attorney General. The decision of whether anyone should be prosecuted for attempting to obstruct justice or for intercepting telephone conversations contrary to the *Criminal Code* was referred by the Deputy Attorney General of BC to the Deputy Attorney General of Alberta. The Deputy Attorney General of Alberta concluded that there was a substantial likelihood of conviction regarding two individuals for disclosure of telephone conversations, but declined to decide whether a prosecution was required in the public interest. The BC Deputy Attorney General then decided that the public interest was best served by declining to prosecute anyone, and by recommending that the terms of reference of that commission of inquiry be broadened to include an examination of the process followed in the decision not to prosecute.

Commissioner Stephen Owen recommended that British Columbia formally adopt a special prosecutor system:

- 9(1) That a special prosecutor be appointed in all cases where there is a significant potential for real or perceived improper influence in the administration of criminal justice because of

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the proximity of the suspect, or someone with a close relationship to the suspect, to the investigation, charge approval or prosecution processes. Such cases would include those involving cabinet ministers, senior public officials and police officers.

That recommendation was implemented in 1991 with enactment of the *Crown Counsel Act*. Section 7 states in part:

- (1) If the ADAG [Assistant Deputy Attorney General] considers it is in the public interest, he or she may appoint a lawyer, who is not employed in the Ministry of Attorney General, as a special prosecutor.
- (2) A special prosecutor must carry out his or her mandate, as set out in writing by the ADAG, and in particular must:
  - (a) examine all relevant information and documents and report to the ADAG with respect to the approval and conduct of any specific prosecution, and
  - (b) carry out any other responsibilities respecting the initiation and conduct of a specific prosecution.

It is noteworthy that the legislation gives the Assistant Deputy Attorney General broad discretion in determining when to appoint a special prosecutor (when he or she “considers it is in the public interest”), rather than restricting the special prosecutor scheme to the types of cases identified by Mr. Owen (“cases where there is a significant potential for real or perceived improper influence in the administration of criminal justice”).

However, the Branch’s subsequent adoption of policy SPE 1 (Special Prosecutors) reverts to Mr. Owen’s terminology:

The Assistant Deputy Attorney General (ADAG) is empowered to appoint a special prosecutor in cases where the ADAG believes there is a significant potential for real or perceived improper influence in prosecutorial decision-making.

Above all other considerations, the ADAG regards the need to maintain public confidence in the administration of criminal justice as

the paramount consideration in deciding whether a case requires the appointment of a special prosecutor.

Any case which Crown Counsel believes warrants consideration of the appointment of a special prosecutor, and any request for the appointment of a special prosecutor received from members of the public or the police, should be referred immediately to Regional Crown Counsel who will discuss the matter with the ADAG.

The commentary accompanying this policy makes it clear that, even though the *Crown Counsel Act* buffers the Criminal Justice Branch from the ministry, the special prosecutor regime is necessary because “cases can arise in which the public may still question the integrity of prosecutorial decision-making.” Most special prosecutors are appointed “in cases involving Cabinet Ministers and other senior public or Ministry officials, senior police officers, or persons in close proximity to them.”

### **C. The Practice in Other Canadian Jurisdictions**

Based on Mr. Layton’s review of prosecutorial policy manuals from other Canadian jurisdictions, and on the Criminal Justice Branch’s panel presentation, it appears that considerable variety exists across the country in charge assessment processes in police-related cases.

#### **Alberta**

The civilian-led Alberta Serious Incident Response Team (ASIRT) conducts all criminal investigations involving serious injury or death resulting from the actions of a police officer. Once the investigation has been completed, the director of ASIRT reviews the results of the investigation to ensure completeness and fairness. A report is then forwarded to the office of the Crown prosecutor, requesting an opinion on charges. The director will, after reviewing that opinion, decide what charges, if any, will result from the investigation. When charges are approved, I understand that the prosecution is (with one exception) conducted by Crown Counsel in another city. Cases involving financial corruption or possession of child pornography are prosecuted by the Special Prosecutions Branch.

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### **Saskatchewan**

I understand that the prosecution's provincial headquarters handles all police-related cases.

### **Manitoba**

The current policy provides that:

Whenever a criminal charge is laid against a person who is directly connected to the justice system, there may be a reasonable perception that the accused could receive some kind of differential treatment if prosecuted by a staff Crown attorney. In all such cases, the prosecution must be conducted by independent counsel.

According to the policy, persons who come within this category include judges, Crown attorneys, police officers, defence counsel, MLAs and their immediate staff and family, and Department of Justice employees who have direct involvement in court processes or prosecutions.

Under recent legislation not yet in force, Manitoba will establish a civilian-led Independent Investigations Office (IIO). If, following an investigation, the IIO director is considering laying an Information against a police officer, the director must first forward the results of the investigation to "independent legal counsel" (which I infer to mean a lawyer in private practice in Manitoba) for advice on whether an Information should be laid. I also infer that it is the IIO director who makes the final charge assessment decision. When charges are approved, the prosecution must be conducted by "an independent prosecutor" retained by the department. The Act specifies that in cases where it is alleged that a police officer caused the death of a person, the independent prosecutor must reside outside Manitoba.

### **Ontario**

The civilian-led Special Investigations Unit (SIU) conducts all criminal investigations of cases where serious injuries or deaths may have resulted from criminal offences committed by police officers. The director of SIU decides whether criminal charges should be laid, although the director follows the practice of first seeking advice from the Justice Prosecutions section of the

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Ministry of Attorney General where it appears that charges might be warranted. When charges are approved, the prosecution is conducted by Justice Prosecutions, which is responsible for prosecuting those working in the justice system who are charged by any authority.

### **Quebec**

I understand that all police-related cases are referred to the prosecution service's provincial headquarters for charge assessment. If charges are approved, the prosecution is conducted by a Crown attorney from another region.

### **New Brunswick**

The Code of Conduct contained within the *Public Prosecution Services Operational Manual* states in part that:

Crown prosecutors will refrain from providing advice in relation to investigation of, or handling of, any case in which there is a conflict of interest or where the public might perceive there to be a conflict of interest—including alleged criminality by a local police officer or other law enforcement officer, by an employee of the Department of Justice, by a close friend or relative of a Crown Prosecutor, by a local member of the Law Society of New Brunswick, or by a former client if the prosecutor was formerly [*sic*] engaged in private practice.

The policy precludes a Crown prosecutor from “providing advice” in police-related cases and is unclear whether it prevents a Crown prosecutor from conducting a charge assessment and/or a prosecution in such cases. I understand that the Specialized Prosecutions office, rather than a Regional Crown office, handles all such police-related cases.

### **Nova Scotia**

The Public Prosecution Service has a general policy regarding conflict of interest. The aim is “to avoid any perception that a person being investigated or prosecuted might receive different treatment because of a relationship he/she has with a particular Crown Attorney or Crown Attorneys’ office.” All such cases must be brought to the attention of the Regional Crown, who is to determine whether the case requires “special handling.” Cases requiring a prosecutor from outside

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the region or from outside the prosecution service are to be referred to the Deputy Director. I understand that in practice all such cases are handled by Crown Attorneys from another region or by the Special Prosecution Section.

### **Newfoundland and Labrador**

I understand that all police-related cases are handled by the Special Prosecutions office.

### **Government of Canada**

I understand that, with respect to matters that are prosecuted federally, the Federal Prosecution Service refers all police-related cases to another region.

Several conclusions can be drawn from this review of other Canadian jurisdictions.

First, the fact that virtually all Canadian jurisdictions have special charge assessment policies and practices for police-related cases is an implicit acknowledgement that special care must be taken to assure the public that police officers suspected of a crime do not receive preferential treatment.

Second, there is no consistent approach respecting how such charge assessments should be conducted, and by whom. In several cases, charging decisions are made by the civilian-led criminal investigation body. Some jurisdictions keep such files within the local Crown office, but may require the most senior prosecutor in the region to make the decision. Others refer the case to another region, to provincial headquarters, or to a specialized unit that may be operationally separate from the prosecution service. At least one jurisdiction requires that all such cases be assigned to lawyers outside the prosecution service.

Third, policies generally do not differentiate among the causes underlying the conflict of interest or give consideration to whether the response to a conflict should differ depending on the nature of the conflict.

In my view, it would be beneficial to go back to first principles, identify the different circumstances in which conflicts of interest can arise, and develop a



comprehensive policy that articulates a principled rationale for proposed responses to different types of conflict of interest.

**D. Discussion**

**1. What conflict of interest means**

At its core, conflict of interest means divided loyalties. For example, the *Professional Conduct Handbook* governing the practice of law in British Columbia states: “As a general rule, a lawyer has a duty to give undivided loyalty to every client” (Chapter 6, Rule 1). A lawyer cannot represent two clients in a lawsuit when the clients have conflicting interests, because the lawyer’s loyalties would be divided—helping one client might prejudice the other.

Although the circumstances facing a prosecutor may be somewhat different, the same principle applies. In conducting a charge assessment, Crown Counsel must act with undivided loyalty to the public interest and, in the words of the Branch’s policy CHA 1 (Charge Assessment Guidelines), “must fairly, independently, and objectively examine the available evidence” in order to determine whether there is a substantial likelihood of conviction. When other interests interfere with that duty of undivided loyalty, a conflict of interest exists.

There are many types of extraneous interests or influences that might undermine a prosecutor’s duty to make a charge assessment in the public interest, including the following:

- a personal interest, such as when a spouse, family member, or friend is the potential accused or is a victim or important witness;
- a financial interest, such as payment or other benefit for deciding the case in a particular way;
- a career interest, such as when the potential accused is a superior in the prosecutor’s ministry or has some direct or indirect influence over the prosecutor’s career advancement; or
- a professional interest, such as when it would be in the interests of the prosecutor or of the Branch to maintain a positive professional relationship with the potential accused or his/her organization.

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Conflicts of interest can be actual or perceived. An actual conflict exists if the prosecutor’s decision-making is actually influenced by the extraneous interest, such as when a prosecutor refuses to approve meritorious criminal charges because the potential accused is a friend to whom a favour is owed. A perceived conflict is more subtle—the prosecutor may have acted properly, but an informed member of the public acting reasonably might conclude that extraneous interests may have influenced the prosecutor’s decision. For example, this fictitious member of the public might think that the prosecutor’s friendship with the potential accused influenced the charge assessment decision, even though it actually did not. In the eyes of the law, and in the minds of the public, neither an actual nor a perceived conflict of interest can be condoned.

### **2. The Branch recognizes that conflicts of interest can exist**

As noted earlier, several of the Branch’s policies and practices implicitly or explicitly acknowledge the reality of conflicts of interest in the charge assessment process. For example:

- Policy POL 1 (Police—Allegations Against Peace Officers) begins with the statement: “In order to ensure that there is no perception of a conflict of interest and to maintain public confidence in the administration of justice ...”
- Policy SPE 1 (Special Prosecutors) begins by stating: “The Assistant Deputy Attorney General is empowered to appoint a special prosecutor in cases where the ADAG believes there is a significant potential for real or perceived improper influence in prosecutorial decision-making.”

To put it simply, conflicts of interest are a fact of life in the charge assessment process; the challenge is what to do about them.

### **3. Examining the broader issue of conflicts of interest**

As I observed at the beginning of this part, special charge assessment policies and practices for police-related cases is only one aspect of the more general concern about conflicts of interest as they are broadly defined. Police-related cases ought not to be dealt with in a vacuum, because sound policy development on that issue requires consideration of the broader picture.

One of the advantages of examining all of the Branch's policies on conflict of interest, as done earlier in this part, is that it reveals that these policies are to some extent disjointed, inconsistent, and contradictory. Rather than being a comprehensive and principled statement of the Branch's response to conflict of interest, these policies suggest that the Branch has responded to discrete problems as they have arisen, without ensuring that there is an overall cohesion to the various policies.

**4. Distinguishing between personal and institutional conflicts of interest**

At least two Canadian jurisdictions (Manitoba and New Brunswick) do not differentiate between the underlying causes for the conflict of interest. In those cases, it does not matter whether the conflict arises because of a specific prosecutor's personal relationship with the potential accused (or with a victim or witness), or arises because of the relationship between the prosecutor's organization and the potential accused's organization. All conflicts are grouped together, which means that a single remedy is developed to respond to all conflicts, however caused. In my view, there is merit in distinguishing between these two categories of conflict of interest.

a. Personal conflicts of interest

When the potential accused is a spouse, family member, or friend (who might be a police officer) of the prosecutor who would normally perform the charge assessment, there is a risk that the understandable desire to protect that person from harm will influence the decision-making process. It might be a blatant refusal to approve charges regardless of the strength of the Crown's case or a more subtle downplaying of the credibility of a key Crown witness. Alternatively, if there is animosity between the prosecutor and the potential accused, the prosecutor might act in an opposite way, approving charges out of spite by applying a lower charge approval standard.

When the prosecutor personally knows the victim of a crime or the family of the victim, there is a risk that sympathy for the victim might influence the prosecutor's charge assessment decision-making, leading to approval of charges which do not meet the substantial likelihood of conviction

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standard. Similar influences might arise where the prosecutor knows an important Crown witness who is fearful of testifying.

Financial interests, blatant or subtle, might also come into play. A prosecutor might decline to approve charges in expectation that helping out the potential accused might lead to lucrative employment down the road. Similarly, a prosecutor who has a personal relationship with a potential accused who is a senior provincial public servant or provincial politician might allow career advancement concerns to colour the charge assessment decision.

Everyone would, I hope, agree that in any of these situations, it would be improper for the prosecutor to conduct the charge assessment. Allowing any such personal interest to interfere with decision-making is obviously wrong (i.e., actual conflict), but acting in any of these situations with even the purest intentions is still wrong, because of the risk that an informed member of the public acting reasonably would conclude that the prosecutor might allow extraneous interests to interfere with charge assessment decision-making.

If it is agreed that these types of personal conflicts of interest are wrong, the question becomes what measures are required in order to extinguish the conflict. The prosecutor with the personal relationship obviously cannot act, but how far away must the charge assessment decision be moved? BC's Criminal Justice Branch policy STA 1 (Standards of Conduct—Conflict of Interest) discussed earlier identifies the problem and makes it clear that the prosecutor is disqualified from participating in the case, but offers no guidance respecting who can act.

The possible options fall along a continuum, from assigning the charge assessment to the prosecutor next door, to Regional Crown Counsel, to a prosecutor in a different region, to a senior prosecutor in the Branch's provincial headquarters, to a lawyer in private practice, or to a prosecutor or private lawyer in another Canadian jurisdiction.

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Assigning the charge assessment to any other prosecutor who does not have the problematic personal relationship with the potential accused, victim or witness severs that connection, but is that enough? I think not, because we must also ensure that the prosecutor who takes over the charge assessment function does not allow any personal relationship with (i.e., loyalty to) the disqualified prosecutor to influence his or her decision.

In deciding how far away the file must be moved, I am guided by the following question: “When would an informed member of the public acting reasonably be satisfied that the charging decision would be made impartially?” Applying that “perceived conflict of interest” standard, I do not think it would be enough to assign the charge assessment to another prosecutor in the disqualified prosecutor’s local office, or even to a prosecutor in another office in that region—there are simply too many ongoing relationships among prosecutors within a region. Neither do I think it appropriate to assign the charge assessment to Regional Crown Counsel; he or she is also too close to the disqualified prosecutor and, even if that were not a problem, it seems unwise to add to Regional Crown Counsel’s already onerous workload when other solutions are available.

The next incremental step away from the disqualified prosecutor would be to assign the charge assessment to a prosecutor in another of the Branch’s five regions. Would that satisfy an informed member of the public acting reasonably that the charge assessment would be conducted impartially? To give an example, if a prosecutor in the Vancouver Provincial Court were assigned responsibility for conducting a charge assessment in a matter in which his or her cousin was alleged to have committed robbery, would an informed member of the public acting reasonably be satisfied that a Branch prosecutor working on Vancouver Island would make the charge assessment impartially?

In my view our fictitious informed member of the public would be satisfied, provided that the specific prosecutor selected had no personal relationship with the disqualified prosecutor.

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There is one additional scenario that needs to be considered. The prosecutor who is assigned in the first instance to conduct a charge assessment may not have a personal conflict, but may realize that another prosecutor in the office has the disqualifying personal conflict of interest described above (for example, that he or she realizes it is the cousin of the other prosecutor who may be charged). In my view, the same perceived conflict of interest arises: If the charge assessment could not have been referred to this prosecutor in response to the disqualification of the first prosecutor, then this prosecutor is equally disqualified from conducting the charge assessment in the first instance. The charge assessment must be assigned to a prosecutor in another region who has no personal relationship with the disqualified prosecutor.

### **RECOMMENDATION 1**

#### **CHARGE ASSESSMENTS IN PERSONAL CONFLICT OF INTEREST SITUATIONS**

**I recommend that the Criminal Justice Branch amend its existing written policies so that they provide substantially as follows:**

- 1. A member of the Branch shall not provide legal advice to an investigating officer, or conduct a charge assessment or prosecution in a matter in which:**
  - a. an accused or potential accused, a victim, or a material witness is a relative or friend of the member, or**
  - b. the member's personal interest (including the member's relationship with an accused or potential accused, a victim, or a material witness) is such that an informed member of the public acting reasonably would conclude that there is a risk that the member might not act with undivided loyalty to the public interest.**

- 2. A member of the Branch who believes that another member of the Branch working in the same Branch region has a disqualifying conflict in a matter shall not provide legal advice to an investigating officer, or conduct a charge assessment or a prosecution in that matter.**
- 3. In any situation described in paragraph 1 or 2, responsibility for providing legal advice to an investigating officer, or conducting a charge assessment or prosecution, shall be assigned to:**
  - a. a member of the Branch working in a different Branch region, or**
  - b. a lawyer in private practice.**
- 4. A member of the Branch or lawyer in private practice shall not accept a referral under paragraph 3 where his or her relationship with the disqualified member is such that an informed member of the public acting reasonably would conclude that there is a risk that the member or lawyer might not act with undivided loyalty to the public interest.**

b. Institutional conflicts of interest

Criminal allegations against police officers is a frequently cited example of an institutional conflict of interest. It does not depend on a personal relationship between the prosecutor and a police officer suspected of a crime—such cases constitute a personal conflict of interest as discussed above. Rather, the institutional conflict arises because of the ongoing professional relationship that exists between the Criminal Justice Branch and the police agency in which the potential accused is employed. The Branch acknowledges the existence of this type of institutional conflict. As noted earlier, policy POL 1 (Police—Allegations Against Police Officers) begins with the words: “In order to ensure that there is no perception of a

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conflict of interest and to maintain public confidence in the administration of justice...”

In his testimony during our recent evidentiary hearings, Mr. Fitch clearly articulated the rationale behind the Branch’s policy:

There is a distinct policy because of the potential, at least for there to be an apprehension of favourable treatment being accorded police officers in the course of a Crown conduct of a charge approval assessment. Relationships between police officers and Crown Counsel develop locally and it is the intent of the policy, again, to enhance public confidence in principled decision-making by Crown Counsel, to lift those cases out of the regular way in which a file would be dealt with, and create a separate process for dealing with files where allegations of criminal conduct are made against police officers. (November 3, 2010, p. 52)

To paraphrase his testimony: Crown prosecutors in a local office work closely together on a daily basis with police officers from that municipality’s RCMP detachment or municipal police department. If an officer from that locale is alleged to have committed an offence, the Branch does not want a local prosecutor to make the charging decision because of the risk of divided loyalties—the prosecutor might allow the charge assessment decision-making process to be influenced by an understandable desire for the Branch to maintain a positive working relationship with that police department or RCMP detachment. The Branch’s policy explicitly adopts what I have referred to as “perceived conflict of interest,” by beginning the policy with the words: “In order to ensure that there is no perception of a conflict of interest and to maintain confidence in the administration of criminal justice...” It is, in my view, an entirely appropriate application of the yardstick I adopted earlier: Would an informed member of the public acting reasonably be concerned that the ongoing institutional relationship between the Branch and the police agency might cause the prosecutor to give preferential treatment to the potential accused?

The Branch’s policy affirms that our fictitious member of the public would be concerned, and properly so. I agree. The question thus becomes, how



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far away from this conflict must we move, for the conflict to be extinguished? In the police-related case situation, the Branch's solution is to disqualify every prosecutor in the local office from conducting the charge assessment, and to refer the decision to Regional Crown Counsel for that region.

If Regional Crown Counsel is concerned that his or her performance of the charge assessment function could lead to "an objectively reasonable perception of a conflict of interest," then the charge assessment must be conducted at provincial headquarters by the Director of Legal Services. Curiously, even though Regional Crown Counsel is disqualified from conducting the charge assessment, he or she is responsible for reviewing the Report to Crown Counsel and preparing a memorandum "containing a brief recital of the relevant facts sufficient to carry out an assessment without reference to the police file."

There are, of course, other institutional relationships that can create conflicts of interest for the Branch. If a Branch prosecutor is required to conduct a charge assessment in a case where another provincial government department or agency (or one of its employees) is the potential accused, there is arguably a risk that inter-agency loyalty or professional collegiality might interfere with impartial decision-making. The commentary accompanying Branch policy CON 1 (Conflict of Interest—Including Prosecutions Against the Crown) alludes to this situation but, as I discussed earlier, the policy's suggested disposition of such cases can only be described as bewildering.

In any event, cases in which a police officer or another government department is the potential accused are examples of institutional conflict of interest. It does not depend on there being a personal relationship between the prosecutor and the potential accused. Rather, it is the nature of the relationship between the Branch and the police agencies or other government departments that creates the risk that a Branch prosecutor may allow loyalty, or allegiance to those entities, to interfere with impartial decision-making.

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A somewhat different form of institutional conflict arises in instances where the potential accused may have the capacity (or at least an informed member of the public acting reasonably might believe that the potential accused has the capacity) to exert improper influence over prosecutorial decision-making. Mr. Owen's 1990 Discretion to Prosecute Inquiry focused on cases where there is "a significant potential for real or perceived improper influence in the administration of justice" when the suspect (or someone close to the suspect) is close to the criminal investigation, charge approval, or prosecution processes. The Branch's resulting policy SPE 1 (Special Prosecutors) acknowledged the perceived conflict of interest that arises in such cases, offering as examples "cases involving Cabinet Ministers and other senior public or Ministry officials, senior police officers, or persons in close proximity to them."

In both the Owen report and the Branch's policy SPE 1, the underlying concern for these categories of potential accused persons is the potential for improper influence in prosecutorial decision-making. Several hypothetical examples come to mind:

- The risk that a cabinet minister accused of an offence might put pressure on the Attorney General to persuade the prosecutor not to approve charges.
- The risk that a senior official in the ministry accused of an offence might let it be known to the prosecutor that his or her career advancement is dependent on a favourable charging decision.
- The risk that a senior police officer accused of an offence might put pressure on a senior Branch official to persuade the prosecutor not to approve charges.

Again, the conflict is not dependent on a personal relationship between the prosecutor and the potential accused. The problem is that these categories of potential accused persons are in a position of power or influence from which they might have the capacity to improperly influence the charge assessment process, or an informed member of the public acting reasonably might believe that they have such power or influence. It is the relationship between the potential accused and the

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Branch that creates the problem, and assigning conduct of the charge assessment to another Branch prosecutor or to a senior official at Branch headquarters does not extinguish the problem. The risk of interference, or at least the public perception that there is an ability to interfere, remains, and the Branch's policy acknowledges that the conflict of interest can only be extinguished by assigning the charge assessment function to a lawyer outside the Branch.

I agree with the policy reflected in the Branch's policy SPE 1 (Special Prosecutors). What remains to be considered is whether there is justification for having a less strict policy in the case of allegations against ordinary police officers (POL 1) and allegations against other government ministries or their employees (CON 1).

With respect to allegations against ordinary police officers, I interpret policy POL 1 to mean that there is a presumption that every line prosecutor in the region is disqualified from conducting a charge assessment. They might in reality be quite capable of acting completely impartially, but an informed member of the public acting reasonably would be concerned that they might give preferential treatment to the police officer. By assigning such charge assessments to Regional Crown Counsel, the policy seems to imply that this more senior prosecutor is not disqualified, in the sense that he or she will in fact act impartially, and an informed member of the public acting reasonably would be satisfied that Regional Crown Counsel would not give preferential treatment to the police officer. According to the policy, even if Regional Crown Counsel disqualifies himself or herself for conflict of interest, no such disqualifying conflict of interest can attach to the Director of Legal Services.

The policy appears to imply that conflict of interest does exist within the region at the line prosecutor level, but not beyond there to Regional Crown Counsel, to other regions, or to the Branch's provincial headquarters. The rationale for that position must be that there is a risk that the desire to maintain a strong positive relationship with the police might influence line prosecutors within each region to give preferential

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treatment to police officers in that region, but that this risk does not extend laterally to other regions or vertically in the Branch's hierarchy.

Since we are concerned here principally with perceived conflict of interest, I would articulate the issue as follows: "Would an informed member of the public acting reasonably be satisfied that a charge assessment in a police-related case was performed impartially, if that charge assessment were done by Regional Crown Counsel, by another region, or by the Branch's provincial headquarters?"

In my respectful opinion, our fictitious member of the public would not be comforted by such a solution. If it is presumed that a prosecutor in Vancouver cannot act impartially in conducting a charge assessment in relation to a Vancouver Police Department officer, how can we expect the public to be satisfied that the risks would be significantly different if it is a prosecutor in Surrey or Nanaimo conducting the same charge assessment? It is not the integrity of the specific prosecutor that is at issue. Rather, it is what informed members of the public acting reasonably might perceive. They see prosecutors, working closely with police officers on a daily basis, conducting charging assessments when police officers are suspected of having committed an offence. The fact that the prosecutor works in a different region from the police officer does not change the equation. Because we are dealing with institutional conflict as opposed to personal conflict, the disqualification is not extinguished until the charge assessment is assigned to a lawyer outside the Branch.

In my view, a similar analysis is appropriate in the case of charge assessments where another provincial government department or agency, or one of their employees, is the potential accused. It is the relationship between the Branch (and everyone in it) and the other entity that creates the problem, and the perceived conflict of interest is extinguished only when conduct of the charge assessment is assigned to a lawyer outside the Branch.

**RECOMMENDATION 2**

**CHARGE ASSESSMENTS IN INSTITUTIONAL CONFLICT OF INTEREST SITUATIONS**

**I recommend that the Criminal Justice Branch amend its existing written policies so that they provide substantially as follows:**

- 1. A member of the Branch shall not provide legal advice to an investigating officer, or conduct a charge assessment or prosecution in relation to an accused or potential accused who is:**
  - a. an officer of a municipal police department or of the RCMP serving in British Columbia, whether or not the offence is alleged to have occurred while the officer was on duty.**
  - b. a British Columbia cabinet minister.**
  - c. a senior British Columbia public or ministry official.**
  - d. any other person, if an informed member of the public acting reasonably would conclude that, because of the relationship between the accused or potential accused and the Branch, there is a risk that a member of the Branch might not act with undivided loyalty to the public interest.**
  
- 2. In any situation described in paragraph 1, the Report to Crown Counsel shall be delivered to the Assistant Deputy Attorney General, who shall refer the request for legal advice, or the charge assessment and any resulting prosecution to one of the following:**
  - a. a special prosecutor appointed under the *Crown Counsel Act*, or**

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- b. a lawyer in private practice in British Columbia or another Canadian jurisdiction, or**
- c. a Crown prosecutor in another Canadian jurisdiction.**

**5. Procedures under the proposed new Independent Investigations Office**

- a. Assistant Deputy Attorney General should appoint counsel

As noted earlier in this report, I recommended in my February 2009 Interim Report that British Columbia establish an Independent Investigations Office (IIO). Under that scheme, an independent, civilian-led investigative office would conduct criminal investigations in all police-related cases. While discussing the IIO in my Interim Report, I considered at page 240 the issue of charge assessments in such cases and stated:

The question of whether the director [of the IIO] should be the one to approve criminal charges—rather than Crown Counsel—is an important one. I understand this to be the practice in Ontario, although I appreciate that in Ontario (as in most provinces), the police determine who is charged criminally—while in BC that determination is left to Crown Counsel. Because I have not had input on this issue from the Criminal Justice Branch, I may reconsider this recommendation if, at the conclusion of the litigation involving the branch, further information persuades me that a different approach is necessary. I reserve the right to consider, for instance, whether the IIO director should approve criminal charges, and also to what extent special prosecutors should be employed in such cases.

Subsequently, my former judicial colleague Mr. Braidwood, conducted a commission of inquiry into the death of Robert Dziekanski at the Vancouver International Airport. In Part 10 of his report, Mr. Braidwood adopted and enhanced my recommendation for a civilian-based criminal investigative body to investigate all police-related incidents occurring throughout the province. With respect to the issue of who should make charge assessment decisions, he stated at pages 421–22:

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Who should make the charge assessment decision? If charges are approved, who should prosecute the police officer? In considering these questions, I return again to the pivotal concerns about conflict of interest, public distrust and an undermining of public confidence in the police and in our justice system. In light of the explicitly stated concerns about perceptions of conflict of interest in the Criminal Justice Branch's policy cited earlier, it would in my view be inappropriate for lawyers within that branch to make charge assessment decisions in police-related incidents. In such sensitive matters, it only takes a perception of conflict of interest to undermine public confidence. I am also uncomfortable with the director of the independent investigatory body making charge assessment decisions. British Columbia has a long and respected tradition of keeping the police investigatory and the quasi-judicial charge assessment roles separate. It would in my view be a regrettable blurring of those roles for the director of the independent investigatory body to make charge assessment decisions.

Based on what I heard during our recent evidentiary hearings, and on my analysis of the Branch's policies and procedures discussed above, I agree with Mr. Braidwood that the director of the IIO should not perform the charge assessment function. In that case, to whom should the director forward the Report to Crown Counsel? When the director recommends that charges be laid: should the report be sent to Regional Crown Counsel in the region where the alleged offence occurred; to the Branch's Victoria headquarters; or directly to a lawyer outside the Branch?

In my view there are compelling legal reasons why the selection and appointment of a prosecutor from outside the Branch should remain within the Ministry of Attorney General. I note, for example, that the definition of "prosecutor" in section 2 of the *Criminal Code* means the Attorney General and includes counsel acting on behalf of the Attorney General. At the same time, I am not comfortable having Regional Crown Counsel make the selection and appointment, given what I have earlier said about disqualifying conflicts of interest. On balance, I have concluded that Reports to Crown Counsel in police-related cases should be sent to the Assistant Deputy Attorney General in charge of the Criminal Justice Branch, for selection and appointment of prosecuting counsel from outside the Branch—in other words, the same process as in other

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institutional conflict of interest situations that are currently dealt with under the Special Prosecutors policy.

At present, the Assistant Deputy Attorney General has the authority to appoint a special prosecutor under the *Crown Counsel Act*, or may appoint an ad hoc counsel under the Branch's own policy. Given the wide range of charges and factual circumstances that will arise, I am content to leave it to the ministry to determine when a special prosecutor or an ad hoc prosecutor should be appointed. My only proviso is that, whoever is appointed to conduct charge assessments and prosecutions in these cases ought to have the same independence that special prosecutors enjoy in their charging decisions and any ensuing prosecutions; and that their decisions are final, subject to the right of the Attorney General or Deputy Attorney General to issue written directions, as currently authorized in the *Crown Counsel Act*.

b. Volume of cases

In May 2010, then-Attorney General Michael de Jong, Q.C., asked Mr. Owen, to review British Columbia's special prosecutor system. In his July 8, 2010 report entitled *Special Prosecutor Review*, Mr. Owen referred to Mr. Braidwood's and my recommendations for establishment of an IIO, and to Mr. Braidwood's more specific recommendation that in every IIO investigation, a special prosecutor be appointed. Mr. Owen disagreed with the latter recommendation, on the basis that it would result in significantly more special prosecutor appointments each year. He stated at page 8:

The special prosecutor system must be, and can only be, an adjunct to the public prosecution system under the Criminal Justice Branch. By definition, it should be limited to very few cases and as a specific precaution in highly sensitive situations. To expand the system beyond a very limited use could damage the professionalism, reputation and effectiveness of the Criminal Justice Branch. The provisions of the *Crown Counsel Act* properly insulate public prosecutors from improper interference in their work. They are highly skilled and dedicated professionals and there is no evidence of anything but excellence in their work. Any expansion of the special



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prosecutor system could potentially expose the criminal justice system to greater improper influence or lower standards because of the distributed nature of private legal practice and the greater difficulty in overseeing quality.

In light of Mr. Owen’s concerns, Commission Counsel obtained annual statistics compiled by the Special Investigations Unit, Ontario’s equivalent to the proposed IIO, which I summarize as follows:

Table 1: Ontario’s Special Investigations Unit Occurrence Chart

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Firearm deaths	5	4	3	1	8	6	7	7	4	7	9
Firearm injuries	9	4	11	8	3	8	10	15	8	9	8
Custody deaths	16	22	15	26	16	22	31	28	26	19	21
Custody injuries	71	78	86	92	57	106	123	127	160	184	171
Other injuries/deaths	2	2	2	0	2	0	0	0	3	3	2
Vehicle deaths	7	11	10	8	8	10	5	10	5	7	6
Vehicle injuries	34	31	26	33	30	29	21	34	33	54	27
Sexual assaults	15	11	10	18	12	14	29	36	37	29	37
<b>TOTAL</b>	<b>159</b>	<b>163</b>	<b>163</b>	<b>186</b>	<b>136</b>	<b>195</b>	<b>226</b>	<b>257</b>	<b>276</b>	<b>312</b>	<b>281</b>
Cases where charges laid	5	3	4	3	3	3	2	6	3	12	10

Based on Statistics Canada data showing that the 2010 population of Ontario (13,210,000) is nearly three times that of British Columbia (4,531,000), it is reasonable to assume that the volume of cases for BC’s proposed new IIO would be approximately one-third of SIU’s volume, or 94 cases per year, based on SIU’s 2010 data. What we do not know from the Ontario data is the percentage of SIU cases that would have resulted in Reports to Crown Counsel, if Ontario had the same Crown charge assessment scheme that is in place in BC. Even if it is assumed that one-third of all IIO files result in Reports to Crown Counsel (likely an unrealistically high percentage), that would amount to approximately 30 Reports to Crown Counsel annually, or 2–3 per month.

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That estimate is consistent with Crown Counsel data provided to this inquiry. Between 2001 and 2005 (the most recent time period that reliable data is available), the Branch received Reports to Crown Counsel in 29 police-related death cases and 107 police-related serious bodily harm cases, for an annual average of 27 cases.

In my view, three cases per month is quite a manageable number for the Branch to refer to lawyers in private practice (to special prosecutors or ad hoc counsel) for charge assessment purposes. The proportion of those cases in which criminal charges will actually be approved will, based on SIU’s experience, be significantly smaller. In the past 11 years, SIU approved charges in 55 cases out of a total of 2,354 cases investigated, for a charge approval rate of 2.3 percent. Applying that rate to the IIO’s anticipated annual caseload of 94 investigations, the number of cases approved for prosecution would be in the range of two or three per year.

Commission Counsel subsequently obtained further detail from the SIU of the number and types of cases in which SIU investigations resulted in the director approving criminal charges. This information is set out in Table 2.

Table 2: SIU Types of Charges Laid

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Firearm deaths											1
Firearm injuries			1					1		1	
Custody deaths	1										
Custody injuries	2	1	2	1	3	1	1	1	2	6	8
Other injuries/deaths											
Vehicle deaths		1								1	
Vehicle injuries	1	1						1		2	
Sexual assaults	1		1	2		2	1	3	1	2	2
<b>TOTAL</b>	<b>5</b>	<b>3</b>	<b>4</b>	<b>3</b>	<b>3</b>	<b>3</b>	<b>2</b>	<b>6</b>	<b>3</b>	<b>12</b>	<b>11</b>

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The Table 2 data shows that in Ontario almost 80 percent of cases in which charges were laid relate to non-death incidents, such as custody injuries or sexual assaults, which would presumably be less complex and less onerous in terms of the time required to conduct charge assessments and to prosecute.

Based on this analysis, I am satisfied that referring all such police-related cases outside the Branch for charge assessment and/or prosecution will be administratively manageable, and will not undermine the integrity of the special prosecutor system. I should add that Mr. Owen's concerns were premised on special prosecutors being appointed in every case that IIO takes on, as Mr. Braidwood had recommended. Upon reflection, it seems to me that the IIO will be able to investigate and resolve the great majority of its cases without needing to appoint a special prosecutor or ad hoc prosecutor. That would significantly reduce the demand for appointment of counsel. Also, I do not think that every case in which the IIO delivers a Report to Crown Counsel will require appointment of a special prosecutor under the *Crown Counsel Act*, as opposed to an ad hoc counsel under the Branch's internal policy.

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**A. Introduction**

In this part, I will make findings of fact respecting the Criminal Justice Branch’s response to the death of Frank Paul; examine some of the Branch’s rules, policies, and procedures that pertain to the Branch’s response; and make recommendations for improvements in them.

For the reasons discussed in Part 2, it has never been my intent to single out for criticism the actions or decisions of any individual members of the Branch. In addition, the BC Court of Appeal’s judgment precludes me from second-guessing any of the charging decisions. For those reasons, in this part my focus will be on the Branch’s response collectively, rather than dwelling on each individual prosecutor’s conduct.

In my view it is important to place on the public record (as I did in Part 3) who did what, and why, so that interested members of the public know what happened and can reach their own conclusions respecting the Branch’s response. It is equally important, however, to carefully examine the Branch’s rules, policies, and procedures, to see what improvements can be made to make the Branch’s charge assessment processes even better.

In my February 27, 2008 Ruling on the Branch’s jurisdictional argument (see Interim Report, Appendix I, p. 347), I set out at paragraph 78 the types of specific information I needed in order to be able to report to the government on the Branch’s response. I will use that listing as a template in the pages that follow.

**B. Inadequate or Incomplete Reports to Crown Counsel**

There was only one Report to Crown Counsel in this case, which the Regional Crown Counsel who initially reviewed the file characterized as “very tentative”—it did not contain interviews of the various potential witnesses and/or accused, and did not include recommendations respecting charges. Although he sought further details on several matters, he testified that “the die was cast”—this was the report that had been submitted, and the Crown was left to deal with it.

I heard considerable evidence from several prosecutors about the importance of respecting the independence of the police in conducting criminal investigations—prosecutors should not dictate to the police how they do their investigations. This

## **PART 7—PROPOSED REFORMS OF BRANCH POLICIES**

Crown-police relationship was described in terms of deference, and the letter requesting further information in the Frank Paul case was consistent with that view: “Before proceeding further to evaluate the feasibility of criminal charges, there are some additional avenues of investigation which would, if explored, be helpful” (Exhibit CJB 1, Tab 1).

In my view the Branch’s current “deferential” policy or practice should be revisited. I wholly agree that within their respective spheres, the police and the Crown must respect each other’s independence, but that does not preclude the Crown from taking a firm position with the investigating officer. The Report to Crown Counsel must be complete, accurate, and detailed. I understand that the practice among prosecutors varies, depending on the circumstances of the case, the types of information needed, and the personalities of those involved. Some will rely on letters, while others may make a phone call or ask the investigating officer to meet with the prosecutor. I expect that in the vast majority of cases, collegial communication between the officer and the prosecutor clarifies the situation and resolves any problems. There may be some circumstances in which the prosecutor may need to seek guidance or assistance from Administrative Crown Counsel in resolving disagreements with the police. It may also be necessary, in difficult cases, for Administrative Crown Counsel to ask Regional Crown Counsel to assist in resolving the matter with the police. For those few cases in which the information sought is still not forthcoming, the Branch’s policy should be clear that responsibility ultimately lies with the police to provide a complete report.

The Branch’s current policy CHA 1 (Charge Assessment Guidelines) enumerates the types of information that are a basic requirement for every Report to Crown Counsel, but the final paragraph is equivocal: “If the RTCC does not comply with these standards it may be returned to the investigator with a request outlining the requirements to be met” (Exhibit CJB 4, Tab A5). In my view, the policy must be clear that a charge assessment decision cannot be made until specified information and/or materials are provided. The policy should also be revised to make it clear that Reports to Crown Counsel must include recommendations respecting who should be charged and for what offence(s). I understand that this is current Branch policy.



**RECOMMENDATION 3**

**INADEQUATE OR INCOMPLETE REPORTS TO CROWN COUNSEL**

**I recommend that page 6 of Crown Counsel policy CHA 1 (Charge Assessment Guidelines) be amended to read substantially as follows:**

**Report to Crown Counsel**

- 1. In order that Crown Counsel can appropriately apply the charge assessment standard, it is essential that a Report to Crown Counsel provide a complete, accurate, and detailed statement of the available evidence.**
- 2. A Report to Crown Counsel shall include the following information:**
  - a. a comprehensive description of the evidence supporting each element of the suggested charge(s),**
  - b. a recommendation respecting who should be charged and for what offence(s),**
  - c. where the evidence of a civilian witness is necessary to prove an essential element of the charge (except for minor offences), a copy of that person's written statement,**
  - d. necessary evidence check sheets,**
  - e. copies of all documents required to prove the charge(s),**
  - f. a detailed summary or written copy of the accused's statement(s), if any, and**
  - g. the accused's criminal record, if any.**
- 3. In a complex case, the material in the Report shall be organized and indexed.**

## **PART 7—PROPOSED REFORMS OF BRANCH POLICIES**

- 4. When a Report to Crown Counsel does not comply with these standards, Crown Counsel shall communicate with the investigator respecting the additional information and/or materials required and may, where appropriate, seek guidance or assistance from Administrative Crown Counsel.**
- 5. When, following the procedures described in paragraph 4, Administrative Crown Counsel is not satisfied that he or she has received the additional information and/or materials required, Administrative Crown Counsel may ask Regional Crown Counsel to assist in resolving the matter with the police.**
- 6. When, following the procedures described in paragraphs 4 and 5, the Branch is not satisfied that it has received the additional information and/or materials required, the Branch shall advise the investigating officer that a charge assessment decision cannot be made.**

### **C. Criminal Offences Considered by the Prosecutors**

Viewed collectively, it is clear that the Branch gave consideration to three criminal offences during the course of the charge assessments: failing to provide the necessaries of life; unlawful act manslaughter or manslaughter by criminal negligence; and criminal negligence causing death. However, it is not clear that all three offences were considered in every individual charge assessment. For example:

- In the first charge assessment, Regional Crown Counsel who prepared a recommendation for the Director of Legal Services testified that he considered all three offences, but in his written report to the Director he discussed only the offence of failing to provide the necessaries of life, as did the Director's charge assessment memorandum.
- In the third charge assessment, the prosecutor's reporting letter stated that the Crown was not in a position to prove a wanton and reckless disregard for Mr. Paul's safety and that Sgt. Sanderson might be found to have been civilly liable in negligence, but his conduct could not be proven to have reached the level of criminal culpability. This suggests that criminal negligence was under

consideration, but there is no reference in the letter to manslaughter or failing to provide the necessities of life.

It may be that every individual charge assessment did include consideration of all three offences, but because of the form in which the charging decisions were recorded, it is difficult to know for sure. There appears to be no requirement that charge assessments be recorded in a standard format; indeed, one charge assessment in this case was no more than a few handwritten notes at the top of a legal memorandum prepared by another prosecutor, while another assessment was a 16-page letter.

Another observation, from my review of the charge assessment documents in this case, is that there was no consistency in identifying the essential elements for each charge under consideration, or in identifying what evidence was relevant to each offence or to essential elements of each offence.

I recognize that Branch prosecutors perform many charge assessments every day across the province, involving a wide range of offences with varying degrees of complexity. With experience, many assessments can be completed without a substantial written record, but in more complex cases (e.g., homicides), it is prudent to prepare detailed charge assessment reports.

In my view it should be left to the Branch to decide the circumstances in which detailed written charge assessment reports should be required. But when they are required, there is considerable merit in ensuring that due consideration was given to important matters such as what offences were considered, the essential elements for each offence, what evidence was relevant to each significant element of each offence, and the reasons for the charging decision.

#### **RECOMMENDATION 4**

##### **WRITTEN CHARGE ASSESSMENT REPORTS**

**I recommend that the Branch develop a policy that:**

- 1. identifies the types of situations in which a prosecutor conducting a charge assessment should be required to complete a detailed written charge assessment report; and**

## **PART 7—PROPOSED REFORMS OF BRANCH POLICIES**

- 2. identifies the categories of information that should be addressed by the prosecutor in a detailed written charge assessment report.**

### **D. Legal Research Undertaken by the Prosecutors**

The prosecutors conducting charge assessments in the Frank Paul case were alive to the legal complexities surrounding the criminal offences under consideration and, in several instances, sought the assistance of other prosecutors in researching specific offences or troubling legal issues. The file includes copies of several detailed legal analyses. Beyond that, it is not within my mandate to second-guess the prosecutors' legal analyses.

### **E. Charging Standard Applied**

The Branch's Policy Manual clearly sets out the charging standard to be applied—substantial likelihood of conviction—and it is clear from the evidentiary record and from the testimony of the prosecutors that they all applied this standard.

Since none of the prosecutors concluded that there was a substantial likelihood of conviction, there was no need for any of them to consider the second prong of the charging standard—whether a prosecution was required in the public interest.

### **F. Communications between Prosecutors and Others**

In at least two of the four charge assessments, prosecutors engaged the services of police officers in gathering additional information or exploring new evidence brought forward by the Office of the Police Complaint Commissioner. In several instances, prosecutors also sought assistance from other Branch prosecutors, such as in conducting legal research, reviewing the file, and debating various difficult factual or legal issues.

I am satisfied that all these communications were appropriate and enhanced the prosecutors' analyses and ultimate charge assessment decisions.

**G. Timeliness of the Charging Decisions**

The prosecutor who conducted the second charge assessment acknowledged in his testimony that his seven-month review took too long, and he expressed regret for that delay. The other assessments were much more prompt:

- In the first charge assessment, the Regional Crown Counsel completed his recommendation to the Director of Legal Services within approximately six weeks of receiving the additional information from the police, and the Director completed his charge assessment within one month.
- The third charge assessment was completed in approximately six weeks, including the time spent interviewing additional witnesses.
- The fourth charge assessment was completed in less than six weeks.

In my view, completing a charge assessment in four to six weeks was reasonable, given the complexities of the case and the prosecutors' other professional obligations. However, this case does raise an important issue of general application: the Branch must ensure that charge assessments are completed promptly.

The Branch provided the inquiry with useful statistical information on this issue, which showed that 76 percent of charge assessments are completed by the seventh working day following submission of the Report to Crown Counsel. Eighty-six percent of assessments are completed within 15 days, and 93 percent of assessments are completed within 30 days.

Clearly, the great majority of charge assessments are completed in a timely manner. There may be valid reasons why many of the other cases take longer than 15 or 30 days, but inevitably there will be some cases that could and should be completed more promptly.

Counsel for one of the participants referred to several other police-related death cases in which the charge assessments were not completed until two years after the death. I am not in a position to comment on those cases, because I do not have detailed information about them. I would observe, however, that it is important to separate the time required to complete the criminal investigation from the time required to complete the charge assessment.

## **PART 7—PROPOSED REFORMS OF BRANCH POLICIES**

Having an administrative system in place to help ensure that charge assessment decisions are completed in a timely fashion is also consistent with the government's obligation under the *Victims of Crime Act* to promote proper recognition of the need of victims for timely investigation and prosecution of offences.

I question whether it would be appropriate for the Branch (let alone me) to fix an arbitrary time period within which charge assessments must be completed. There are far too many variables to take into account. However, I do think that it would be prudent for the Branch to implement, if it does not already use, some form of "tickler" system that sounds an alarm when a specified time period has been exceeded. When the alarm goes off, inquiries can be made to ensure that the charge assessment will be completed within a reasonable period of time.

### **RECOMMENDATION 5**

#### **TIMELINESS OF COMPLETING CHARGE ASSESSMENTS**

**I recommend that the Branch ensure that there is a file management system in place that alerts Administrative Crown Counsel when a pending charge assessment decision has been outstanding for 30 days.**

### **H. The Reconsideration of Charge Assessments**

The Assistant Deputy Attorney General performed several functions in the Frank Paul charge approval process:

- In three instances, he decided who would conduct the charge assessment.
- In several instances, he received the prosecutors' charge assessment reports or was orally briefed on their decisions, but because there was no disagreement between his subordinates, he was not required to make a charge assessment decision himself.
- In the final charge assessment he reviewed the report and agreed with it.

The Assistant Deputy Attorney General testified that he never actually made a charging decision himself in this case—he reviewed the decisions that had been made, and determined that they were reasonable.

There are several systemic issues that arise from my consideration of this case, flowing from the fact that the Branch does not have a discrete policy governing reconsideration of charge assessments based on new evidence or changed circumstances, or based on a concern that the original decision might have been wrong. I will discuss each of those issues in turn.

**1. New evidence or changed circumstances**

It is accepted that when a charge is approved and a prosecution ensues, if new evidence arises or circumstances change that materially affect the charge assessment decision, the prosecutor has a duty to re-evaluate the case. This re-evaluation involves reconsideration of the substantial likelihood of conviction, public interest tests, and, in appropriate cases, termination of the prosecution.

When charges are not approved, there is no policy to guide prosecutors. In my view, the Branch would benefit from having a policy. I would defer to the Branch to decide what the policy should be, as there will be many relevant factors to take into account, and I would invite the Branch to consider the value of having a different prosecutor perform the subsequent charge assessment, thus bringing fresh eyes to the case and precluding the criticism that the original prosecutor might subconsciously seek to defend the earlier decision.

**RECOMMENDATION 6**

**RECONSIDERATION OF A NO-CHARGE DECISION BECAUSE OF CHANGED CIRCUMSTANCES**

**I recommend that the Branch develop a written policy respecting the reconsideration of a no-charge decision based on new evidence and/or changed circumstances that may materially affect the charge assessment decision. The policy should address who will conduct the new charge assessment.**

## PART 7—PROPOSED REFORMS OF BRANCH POLICIES

### 2. Erroneous decisions

The situation is somewhat different when there is a concern that the original charging decision may have been wrong. In that case, several questions arise: what threshold of reliability should be required before the Branch will reopen a charge assessment decision on this basis; should the re-consideration take the form of a new charge assessment (applying the substantial likelihood of conviction standard) or a “review” (applying a reasonableness standard); and, depending on the answer to that question, who should be assigned responsibility?

While I believe that the Branch should develop a policy in this area, I defer to the Branch to determine the content. In the following recommendation, I have restricted its application to the reconsideration of a Branch prosecutor’s no-charge decision. The BC Supreme Court decision in *Blackmore v. British Columbia (Attorney General)* 2009 B.C.S.C. 1299 makes it clear that the decision of a special prosecutor is final and would not be open to reconsideration.<sup>10</sup>

### RECOMMENDATION 7

#### **RECONSIDERATION OF A NO-CHARGE DECISION THAT MAY HAVE BEEN WRONG**

**When there is a concern that an original no-charge decision may have been wrong, I recommend that the Branch develop a written policy respecting the reconsideration of a Branch prosecutor’s no-charge decision. This new policy should address such issues as:**

- 1. the level of certainty that must be met that the original decision was wrong before the charge assessment will be reconsidered;**
- 2. whether the reconsideration should take the form of a new charge assessment (applying the substantial likelihood of conviction standard) or a review (applying a reasonableness standard);**
- 3. who should conduct the reconsideration; and**

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<sup>10</sup> Subject to the unusual instance of a written direction given in accordance with the *Crown Counsel Act*.



4. **the duty to take into account whether it may constitute an abuse of process to approve a charge following an earlier decision not to charge.**

## **I. Notification of the Victim’s Family**

There is no evidence that the Paul family was notified of the Branch’s no-charge decision after the first, second, or third charge assessment. Handwritten notes regarding notification were made after the fourth charge assessment, but it appears that the particular concern arose out of the fact that the Branch was preparing to make a public announcement about the charge assessments.

There was some confusion among the prosecutors who testified regarding who was responsible for notifying the family. One prosecutor thought it was the responsibility of Regional Crown Counsel, while another thought responsibility rested with the police.

The Branch’s policy CHA 1 deals with the issue of notifications in general terms. It states at page 5:

In all cases, in applying the charge assessment standard, the important obligations of Crown Counsel are to

3. ... where appropriate, communicate with those affected, including the police, so that they understand the reasons for the charge assessment decision.

I interpret the phrase “communicate with those affected” as including the victim or, if the victim is deceased, the victim’s family. Although the policy is not explicit, one might infer that it places the onus to notify those affected on the prosecutor who conducted the charge assessment. In my view it would be beneficial for the Branch to develop a more detailed policy respecting notification of those affected by a charging decision (especially a decision not to charge), with special reference to victims or their families.

## **PART 7—PROPOSED REFORMS OF BRANCH POLICIES**

### **RECOMMENDATION 8**

#### **NOTIFICATION OF THE VICTIM OR THE VICTIM’S FAMILY**

**I recommend that the Branch amend its existing written policies respecting notification of those affected by a charging decision to:**

- 1. address specifically the notification of victims or their families;**
- 2. clarify who is responsible for notification; and**
- 3. require written documentation of the notification particulars.**

#### **J. The Branch’s Media Release**

Soon after completion of the fourth charge assessment, the Branch released a three-page media release (Exhibit CJB 2, Tab 22). The release included a very brief summary of the facts, followed by a detailed chronology of the various charge assessments and other relevant proceedings. It concluded with the following:

In all five charge assessments, the conclusion has been the same: there is insufficient evidence to meet the criminal standard of proof beyond a reasonable doubt. Given the available evidence, the Crown is unable to establish that any police officer failed to perform a duty upon them in such a manner that demonstrated a marked departure from the conduct of a reasonably prudent person or that it was objectively foreseeable that the conduct of the officers in failing to provide a more adequate shelter for Mr. Paul endangered his life or was likely to cause permanent damage to his health.

The statement was released in accordance with the Branch’s policy DIS 1.1 (Disclosure of Information to Parties other than the Accused), which acknowledges that in some circumstances the Branch has a duty to provide reasons for a decision not to prosecute. The policy quotes from s. 15(4) of the *Freedom of Information and Protection of Privacy Act*, which imposes a duty to disclose “the reasons for a decision not to prosecute” in two types of situations:

- to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or

- to any other member of the public, if the fact of the investigation was made public.

In my view, the media statement fell short of what was required in the circumstances. It contained a brief and sanitized version of the facts and made no reference to Mr. Paul being refused admission to the jail, being incapable of caring for himself, or being left in an exposed area on a December night, in wet clothes, when the temperature was near freezing.

With respect to the statutory obligation to state the reasons for the decision not to prosecute, it made no reference to what criminal offences had been considered, what was required to prove each offence, what evidence related to each offence and why the evidence fell short.

I contrast this media statement to the much more informative statements released by Ontario's Special Investigations Unit, when a decision is made not to prosecute.<sup>11</sup>

In my view, media statements perform an important public service. I defer to the Branch as to when they should be released, taking into account legitimate privacy concerns. However, when the Branch decides to release a media statement, it should ensure that it is as detailed as possible.

## **RECOMMENDATION 9**

### **THE BRANCH'S PUBLIC STATEMENTS**

**I recommend that the Branch's policy DIS 1.1 be amended to provide that a public statement released by the Branch containing the reasons for a decision not to prosecute include:**

- 1. a summary of material facts that will give a reader a fair understanding of what occurred;**
- 2. the identity of the potential accused, unless there are valid reasons to withhold that information;**

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<sup>11</sup> See, for example, [http://www.siu.on.ca/en/news\\_search.php](http://www.siu.on.ca/en/news_search.php)

## **PART 7—PROPOSED REFORMS OF BRANCH POLICIES**

- 3. the criminal offences that were considered;**
- 4. the reason(s) why the evidence in relation to each offence was insufficient to warrant approval of charges; and**
- 5. the reason(s) for a significant delay in completion of the charge assessment.**

### **K. First Nations Cultural Awareness**

During closing submissions, counsel for one of the participants drew attention to the uneasy relationship that exists between the Aboriginal community and the criminal justice system, which former Justice Oppal had described in his 1994 policing report as a relationship marked by antagonism and distrust. Counsel recommended that the Branch's professional staff should receive appropriate cultural awareness and sensitivity training with respect to that relationship. During our hearings, I was told that the Branch does take these issues seriously, addresses them during staff conferences, and, after the Supreme Court of Canada's decision in *R. v. Gladue*, prepared a booklet on issues to be aware of with respect to First Nations people.

Counsel has raised an important concern. I accept the Branch's assurance that these matters are treated seriously. I encourage the Branch to review its program of cultural awareness and sensitivity, to ensure that it continues as a prominent concern.

I have a similar response to another reform recommended by the same counsel—that the Branch strive to maintain a reasonable level of First Nations representation within the ranks of its professional staff.

### **L. Ancillary Issues**

Several other issues were raised by counsel or arise from my consideration of the evidence, which warrant brief comment:

- Counsel for one participant recommended that the Branch appoint a special prosecutor to review the Frank Paul file with a view to ascertaining whether criminal charges are appropriate. It was appropriate, in my view, for counsel to raise this issue, and now that it is on the public record, the Branch and the

ministry are aware of counsel's concerns. Counsel has not asked that I make a recommendation on this issue, and I do not think that it is within my mandate to do so.

- Counsel for the same participant also recommended that the Attorney General convene a study commission of inquiry to review the Branch's handling of 267 police-related deaths in the 1992–2007 period, arising out of his concern that in none of those cases were charges approved. The implication underlying this submission is that at least a few of those 267 cases may have involved criminal behaviour, and the SIU experience in Ontario could arguably support such a hypothesis. However, I am not satisfied that the evidence before this inquiry justifies my drawing this type of inference. In any event, counsel has not asked that I make a recommendation on this issue, which is now on the public record, and the Branch and the ministry are aware of counsel's concerns.
- With a complement of 460 prosecutors, the Branch is a large organization, significantly larger than most law firms, with clearly defined lines of accountability and managerial responsibilities. I have no doubt that Regional Crown Counsel and senior managers at the provincial headquarters have onerous workloads, and it concerns me that some of the Branch's policies add to these workloads when some tasks, such as charge assessments in instances of new evidence, could be assigned to others within the Branch. I can understand the rationale for requiring those more senior in the organization to conduct reviews when there is a concern that a charging decision was wrong. However, it seems to me that in most other situations charging decisions can be appropriately assigned to line prosecutors within the Branch. I encourage the Branch to review its policies and procedures with an eye to identifying situations in which senior managers can be relieved of responsibilities that could be appropriately assigned to others.
- In British Columbia, Branch prosecutors have historically willingly accepted personal responsibility for making charge assessment decisions. Some believe that it is a "Minister of Justice" responsibility that rests on them individually. While I laud the seriousness with which the charge assessment function is undertaken, I invite the Branch to give consideration to introducing a more collegial decision-making approach, at least in more complex and difficult cases. When important decisions need to be made in a law firm setting, it is common practice for the firm to bring together those most knowledgeable about that area of practice to collegially discuss the facts, the law, and the options, and collectively reach a decision on how to proceed. More brainpower is brought to bear on the issue, more dimensions of the issue are identified and discussed, and the firm as a whole takes responsibility for the final decision. I believe such an approach by the Branch is an alternative worth examining.

**PART 7—PROPOSED REFORMS OF BRANCH POLICIES**

## **ABBREVIATIONS AND ACRONYMS**

<b>ADAG</b>	Assistant Deputy Attorney General
<b>ADH</b>	Ad Hoc Counsel
<b>ASIRT</b>	Alberta Serious Incident Response Team
<b>CHA</b>	Charge Assessment Guideline
<b>CJB</b>	Criminal Justice Branch
<b>CON</b>	Conflict of Interest
<b>Cst.</b>	Constable
<b>Det.</b>	Detective
<b>DIS</b>	Disclosure Information
<b>H/SIPP</b>	Hold/State of Intoxication in a Public Place
<b>IIO</b>	Independent Investigation Office
<b>Insp.</b>	Inspector
<b>OPCC</b>	Office of the Police Complaint Commissioner
<b>Sgt.</b>	Sergeant
<b>SIU</b>	Special Investigations Unit
<b>SPE</b>	Special Prosecutor
<b>VPD</b>	Vancouver Police Department

## **ABBREVIATIONS AND ACRONYMS**



## **APPENDICES**

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## **APPENDICES**

# APPENDIX A

## PURPOSES AND TERMS OF REFERENCE

### The William H. Davies, Q.C. Commission of Inquiry (2010) Order

#### Definitions

1 In this order:

“**Commission**” means the commission of inquiry established by section 2 of this order;

“**Criminal Justice Branch**” means the Criminal Justice Branch of the Ministry of Attorney General;

“**Mr. Paul**” means Mr. Frank Joseph Paul who died in the City of Vancouver on or about December 6, 1998.

#### Establishment of commission

- 2 (1) A hearing and study commission, called the William H. Davies, Q.C. Commission (2010), is established under section 2 of the *Public Inquiry Act* to inquire into and make a report on the response of the Criminal Justice Branch in relation to the death of Mr. Paul.
- (2) William H. Davies, Q.C. is the sole commissioner of the commission established under subsection (1).

#### Purposes of the commission

- 3 The purposes of the commission are as follows:
- (a) to provide Mr. Paul’s family and the public with a record of the response of the Criminal Justice Branch in relation to the death of Mr. Paul;

## **APPENDIX A**

- (b) to recommend changes considered necessary to the rules, policies and procedures referred to in section 4 (c).

### **Terms of reference**

- 4 The terms of reference of the inquiry to be conducted by the commission are as follows:
  - (a) to conduct hearings, in or near the City of Vancouver, respecting the response of the Criminal Justice Branch in relation to the death of Mr. Paul;
  - (b) to make findings of fact regarding the response of the Criminal Justice Branch in relation to the death of Mr. Paul;
  - (c) to examine the rules, policies and procedures of the Criminal Justice Branch respecting its role and response when an individual dies in circumstances similar to the circumstances of Mr. Paul's death;
  - (d) to recommend changes considered necessary to the rules, policies and procedures referred to in paragraph (c);
  - (e) to submit a final report to the Attorney General on or before May 31, 2011.

## APPENDIX B

### PARTICIPANTS AND COUNSEL

<b>Participant</b>	<b>Counsel</b>
Russell Sanderson	Susan Coristine
David Instant	David Crossin, Q.C. Michael Shirreff
Vancouver Police Department Vancouver Police Board	Sean Hern
Paul Family First Nations Summit Union of BC Indian Chiefs BC Assembly of First Nations	Steven Kelliher
Don Morrison	Alison Latimer
Criminal Justice Branch, Ministry of Attorney General	Richard Peck, Q.C. Alex Willms
BC Civil Liberties Association	Michael Tammen Grace Pastine Carmen Cheung
United Native Nations Society	Cameron Ward Neil Chantler

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## **APPENDIX C**

### **EVIDENTIARY HEARING DATES AND WITNESSES**

Commissioner, opening statement November 3, 2010	Submissions by Mr. Kelliher December 14, 2010
Commissioner, opening statement November 3, 2010	Submissions by Mr. Cowper, Q.C. December 14, 2010
Commission Counsel November 3, 2010	Submissions by Mr. Ward December 14, 2010
Gregory Fitch, Q.C. November 3, 2010 November 4, 2010	Submissions by Mr. Hern December 14, 2010
Robert Gillen, Q.C. November 8, 2010	Submissions by Ms. Latimer December 15, 2010
Joyce DeWitt-Van Oosten November 8, 2010	Submissions by Mr. Tammen December 15, 2010
Mr. Justice Austin Cullen November 9, 2010	Submissions by Mr. Peck, Q.C. December 15, 2010
Judge Michael Hicks November 9, 2010	

## APPENDIX C



## **APPENDIX D**

### **COMMISSION PERSONNEL**

#### **Commissioner**

The Honourable William H. Davies, Q.C.

#### **Counsel**

Geoff Cowper, Q.C., Senior Commission Counsel

Andrew Nathanson, Associate Commission Counsel

Keith Hamilton, Q.C., Policy Counsel

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## **APPENDIX D**

# APPENDIX E

## **RULING #6** **PROPER SCOPE AND MANNER OF CROSS-EXAMINATION** **NOVEMBER 9, 2010**

THE FRANK PAUL INQUIRY  
WILLIAM H. DAVIES, Q.C., COMMISSIONER  
APPOINTED UNDER THE *PUBLIC INQUIRY ACT*,  
S.B.C. 2007, C. 9

### **A. Introduction**

1. This ruling is further to my concern about the scope and manner of cross-examination that was exhibited yesterday morning and in our previous two days of evidentiary hearings.
2. When this phase of the Inquiry began, I made some remarks about the limits placed on my authority by the Court of Appeal. To reiterate, those limits are set out in the judgment of Mr. Justice Melnick, which was explicitly adopted by the Court of Appeal. Mr. Justice Melnick said:  
  
[69] I also consider it beyond the scope of the Inquiry to require any individual who made a decision not to charge anyone with respect to the death of Mr. Paul to second guess his or her decision or to justify it. The Commissioner is entitled to look at the facts that were before the individuals who made those decisions, get the facts related to the decisions, but not challenge or debate with those individuals the propriety of their decisions. In that way, the Commissioner may open the doors he wishes to open but, at the same time, minimize any transgression into the lawful independence of the CJB.
3. I propose to offer some further guidance to counsel on the permissible scope of cross-examination to ensure that only relevant and admissible

evidence is adduced, and so that the balance of the evidence may proceed as efficiently as possible. I understand all counsel are endeavouring to respect the Courts' rulings and the restrictions expressed by the Court of Appeal are not free of difficulty for someone framing questions for a witness.

**B. Questions that Require the Witness to Second Guess their Decisions**

4. As my Ruling No. 4 made clear, in examining the Criminal Justice Branch's (the "Branch") response to Mr. Paul's death, it is necessary for me to examine the substance of the charge approval decisions made, subject to the restrictions imposed by the courts. The principal question in relation to each charge approval decision or review is what decision the Branch lawyers made, and on what basis. Questions that seek to explore what facts the witnesses had, what facts they considered and what decisions they made are all appropriate lines of inquiry.
5. Justice Melnick and the Court of Appeal held that it is not appropriate to require a witness to "second guess" his or her decision. Accordingly, questions which ask a witness if they would have made the same decision if they knew of additional facts, or if the facts were different, are not appropriate. It is not only the form of such questions that is objectionable. Any questions which in substance attempt to second guess the decisions are not permissible. Questions that refer to or rely on facts known subsequently, including questions which seek to put findings of the first Commission to the witness, are effectively attempts to second guess the witness and are not permissible. Questions that seek to add to or subtract from facts known to a witness, coupled with a suggestion that the decision could have been different, are inappropriate for the same reason. So are questions, such as some of those put yesterday, that ask witnesses to ignore evidence they considered.
6. By way of example, I have ruled questions in this vein including the following are not proper:

- (a) What additional piece of evidence or change in the context would have made it objectively foreseeable that Mr. Paul would have suffered harm by being left outside as he was?
- (b) Would your decision have been different if the potential suspect had no knowledge of Mr. Paul's life circumstances?

**C. Questions that Seek to Justify, Challenge or Debate the Propriety of the Decisions**

- 7. The other principal restriction that Justice Melnick and the Court of Appeal placed on the evidence is that witnesses cannot be required to justify their decisions. This includes challenging or debating the propriety of the decisions. Each of these terms – “justify”, “challenge” or “debate” – are somewhat general in their character but at their heart they all point at a common restriction: the Commission is not permitted to interfere with the exercise of prosecutorial discretion by requiring that prosecutors justify the correctness or reasonableness of the exercise of their discretion.
- 8. Counsel can ask a witness to identify what factors formed the basis of the witness's decision, and to ask what factors were considered more or less important at the time. But going beyond this to suggest that other matters are more or less important, or relevant or irrelevant, easily descends into argument.
- 9. I must respect the limits the courts have placed on the admissibility of evidence before the Commission. As I have said, they must be respected if prosecutorial independence is to be protected. Counsel should also bear in mind that descending into argument with witnesses in the course of cross-examination is not helpful to me in discharging my terms of reference. What is helpful, and what I expect counsel to do, is to elicit facts from the witnesses which assist in determining what the Branch and its lawyers did in response to Mr. Paul's death, and what recommendations I can usefully make arising out of this case.

## **APPENDIX E**

10. I hope these additional comments are helpful in guiding counsel. There are many areas of inquiry which do not appear to be controversial. I will rule on particular questions as they arise.

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