

THE FRANK PAUL INQUIRY

William H. Davies, Q.C., Commissioner

Appointed under the *Public Inquiry Act*, S.B.C. 2007, c. 9

RULING #1

APPLICATIONS FOR PARTICIPANT STATUS

October 17, 2007

Introduction

1. I have been appointed by the Government of British Columbia as Commissioner for a public inquiry in the case of Frank Joseph Paul. This commission of inquiry — and my responsibilities — are governed by the recently enacted *Public Inquiry Act*, S.B.C. 2007, c. 9.
2. One of these duties is to determine who may participate in this public inquiry, and to what extent.
3. This is my ruling on that issue.

Background

4. Mr. Paul, a member of the Mi'kmaq Nation from New Brunswick, was found dead in an alleyway in Vancouver on December 6, 1998. An autopsy concluded that he died from hypothermia due to exposure/alcohol intoxication. Mr. Paul had been in the custody of Vancouver Police in the hours before his death; he was removed from lockup, and left by a police officer in the alleyway.
5. This statement of the facts is necessarily brief and preliminary, because these matters have not been subject to any judicial fact-finding, and this commission of inquiry has yet to commence hearings.
6. On August 10, 2007, the B.C. Ministry of Attorney General announced the Purpose and Terms of Reference for this inquiry. As the Terms of Reference are of central importance to this ruling, I will reproduce them:

WILLIAM H. DAVIES, QC, COMMISSION OF INQUIRY

PURPOSE AND TERMS OF REFERENCE

Purpose:

- (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 British Columbia Ambulance Service, the Vancouver Police Department, the BC Coroners Service, the Office of the Police Complaints 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 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 Complaints 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;

(h) to submit a final report to the Attorney General on or before May 31, 2008.

7. It is intended that this commission of inquiry will have four “phases” of public hearings. The first phase will entail the factual determination of what occurred on December 5-6, 1998, the night Mr. Paul died. The second phase will look at the response of various agencies to Mr. Paul’s death. The third phase will focus on identifying health care and social service programs and facilities. The fourth and final phase will be policy-based, and will consider recommending changes to rules, policies and procedures.

Legislation

8. The governing legislation is the 2007 *Public Inquiry Act, supra*. In s. 11, the Act sets out who may participate in a commission of inquiry such as this. There are two categories of “participants” under s. 11. The first is those persons who are given notice that they may be subject to a finding of misconduct or a report alleging misconduct. As no such notices have been issued to date in this inquiry, this first category is not in play.

9. The second category of participants comprises those who apply to the commission to be accepted as participants. It is this category that we are concerned with here. The key provision is s. 11(4), which reads:

11(4) On receiving an application under subsection (3), a commission may accept the applicant as a participant after considering all of the following:

(a) whether, and to what extent, the person’s interests may be affected by the findings of the commission;

(b) whether the person’s participation would further the conduct of the inquiry;

(c) whether the person’s participation would contribute to the fairness of the inquiry.

10. These are the criteria that have guided my analysis and determination of who should be accepted as participants for this commission of inquiry.

11. The legislation does not specify what rights may be granted to participants, but it is uncontroversial to say that participation would typically include access to documents (according to the commission's procedural rules); a seat at counsel table; and the opportunity to make closing submissions. Depending on the extent of participation authorized, a participant might or might not be permitted to apply to call witnesses or suggest what witnesses should be called; and might or might not be permitted to cross-examine witnesses.

Process for applications

12. Under the *Public Inquiry Act*, s. 11(3), I am permitted to require applicants for participation to apply "in the manner and form" that I indicate.

13. The Government announced the Terms of Reference for this commission of inquiry in August, 2007. In September, advertisements were placed in newspapers, and a press release was issued, calling for interested persons to apply if they wished to participate in the public hearings. Application packages were provided to anyone who requested them from the commission's offices. Those packages described the Terms of Reference, s. 11(4) of the *Public Inquiry Act*, *supra*, and the mechanics of submitting an application. Applicants were asked to describe themselves and their proposed involvement, and to address the criteria in s. 11(4).

14. The commission received a total of 13 applications from these agencies and individuals:

1. British Columbia Ambulance Service;
2. Vancouver Police Department and Vancouver Police Board (both represented by the same counsel);
3. British Columbia Coroners Service;
4. Office of the Police Complaints Commissioner ("OPCC");
5. Criminal Justice Branch of the Ministry of Attorney General;
6. the family of Frank Paul;
7. Aboriginal Legal Services of Toronto;
8. British Columbia Civil Liberties Association;
9. First Nations Leadership Council;
10. United Native Nations
11. Thomas Allen Calder;
12. Julia C. George; and
13. Mark Watamaniuk.

15. In the discussion that follows, I will employ the numbering given above, and will discuss various applicants together where doing so is appropriate.

Analysis

Applicants 1-6

16. In the context of the *Public Inquiry Act, supra*, the considerations for a grant of participant status are expressly given in s. 11(4). To repeat, the three listed factors are: (1) whether the person's interests may be affected; (2) whether their participation would further the conduct of the inquiry; and (3) whether their participation would contribute to the fairness of the inquiry.

17. It is not difficult to reach a conclusion with respect to the first five applicants — the Ambulance Service; Vancouver Police Department and Board; the Coroners Service; the OPCC; and the Criminal Justice Branch. One need only read the Terms of Reference to see that their response to the death of Mr. Paul is to be part of my findings of fact in this matter. Furthermore, I am to examine the rules, policies and procedures of these agencies, and to offer recommendations for change if necessary.

18. These five applicants' interests are all directly affected (the first criterion). Including them in this commission of inquiry will, I believe, contribute to the fairness of the inquiry (the third criterion), as it will permit each of them the opportunity to become involved both in determining what occurred, and in speaking to the policy issues arising. The "fairness" criterion may be put the opposite way as well: it would not contribute to the fairness of this inquiry were one of these bodies excluded from participating. As to the second criterion, having reviewed their submissions in support of participation, I am confident that each of these agencies' participation will further the conduct of this inquiry.

19. The sixth listed applicant is the Paul family. The Paul family is not analogous to the first five agencies, because its conduct is not in issue (as is the case for the agencies). Yet while it does not face the prospect of having its behaviour evaluated, it cannot be denied that the Paul family has a true interest in determining exactly what led to Mr. Paul's death. No doubt this is why the Province included mention of the Paul family in the Terms of Reference. In ss. (a), this commission's statement of purpose is stated thus:

(a) to provide Mr. Paul's family and the public with a complete record of the circumstances relating to Mr. Paul's death [emphasis added].

20. Would the Paul family's participation further the conduct of the inquiry and contribute to the fairness of the inquiry? I conclude that the answer to both questions is yes. The Paul family may play an important role in providing information to the commission, although counsel for the Paul family does not suggest that he has additional direct evidence with respect to the events of December 5-6, 1998. Likewise, Mr. Paul's family may assist this commission by

ensuring that the family's concerns are properly represented through the course of the hearings. It may be that counsel for the Paul family approaches evidentiary and policy issues quite differently from counsel for the five agencies discussed above.

21. As to the extent of the participation of the five agencies and the Paul family, as the Act makes clear (ss. 11-13), I may make orders respecting the manner and extent of a participant's participation. These participants may attend the hearings, receive disclosure of records (according to the commission's procedural rules), and make submissions. I will decide at a later date the extent to which counsel for these participants may call witnesses and/or cross-examine witnesses.

Applicants 7-10

22. I turn next to the applicants listed as numbers 7-10, Aboriginal Legal Services of Toronto; the British Columbia Civil Liberties Association; the First Nations Leadership Council; and United Native Nations.

23. Aboriginal Legal Services of Toronto ("ALST") was established to assist the Aboriginal community in influencing and exercising control over justice-related issues and factors that affect them. ALST has a background in the treatment of First Nations individuals by the justice system, including involvement as an intervener in nine cases before the Supreme Court of Canada. It has been involved in coroner's inquests in Ontario in situations where the deceased had been intoxicated and came into contact with police and ambulance services immediately prior to their death.

24. The British Columbia Civil Liberties Association ("BCCLA") is a non-profit, non-partisan advocacy group founded in 1963, which focuses on protecting the rights of citizens to liberty and freedom. The BCCLA has a background of involvement in the issue of police oversight and accountability, in particular with the provincial *Police Act* (which applies to the Vancouver Police Department).

25. The First Nations Leadership Council is made up of three groups — the British Columbia Assembly of First Nations; the First Nations Summit; and the Union of B.C. Indian Chiefs. The Council was formed in 2005 to represent First Nations in their dealings with the Crown. The Council collectively represents First Nations communities and citizens throughout the province, both on and off reserves. It recently convened a First Nations Justice Forum, which focused on the over-representation of First Nations people in the criminal justice system.

26. United Native Nations ("UNN") indicates that its application would be supported by a coalition of 12 Vancouver-based urban Aboriginal agencies. UNN is an Aboriginal organization that represents the socio-economic and cultural interests of off-reserve Aboriginal people in the province, both rural and

urban. It was established in 1969 and has a membership of approximately 40,500 members. UNN provides referrals and advocacy for individuals seeking health care and social service programs in Vancouver, and as such has familiarity with these services.

27. UNN applied not only for participant status, but also for funding. Nothing in the *Public Inquiry Act* gives me the authority to make an order that a participant receive public funding. There is some authority suggesting that I may nonetheless make a recommendation that such funding be provided: see *Jones v. Canada (R.C.M.P. Complaints Commissioner)* (1998), 162 D.L.R. (4th) 750 (Fed. T.D.) and *Berg v. British Columbia (Police Complaint Commissioner)*, 2006 BCCA 225). Assuming that I do have such a discretion, I decline to exercise it in respect of the UNN's request.

28. There are differences among these four applicants, as to the extent to which their individual interests may be affected. ALST, being a Toronto organization, is in a different position than, for instance, the United Native Nations, which is based in Vancouver's Downtown Eastside. Yet despite differences, in my view all four organizations present as strong applicants. Each has distinctive perspectives and input to bring to the proceedings, and I feel that each of these applicants would further the inquiry's conduct and contribute to its fairness. Each of these applicants has submitted detailed submissions in support of its participation, and is (or will be) represented by counsel; I expect that their involvement will be substantive, relevant, and responsible.

29. As such, I accept these four applicants as participants in the commission of inquiry.

30. I will decide at a later date the extent to which counsel for these participants may call witnesses and/or cross-examine witnesses.

Applicants 11-13

31. The final three applicants are individuals — Thomas Allen Calder; Julia C. George; and Mark Watamaniuk. I will deal with each in turn, applying the criteria set out in s. 11(4) of the *Public Inquiry Act*.

32. Mr. Calder asks to participate in a personal capacity. He does not have any involvement with the facts of this matter, and indicates that he has never met Mr. Paul. Mr. Calder has outlined his background, but in my view it is not relevant to the inquiry that this commission must make. Having reviewed his application, I decline to grant him participant status.

33. Ms. George also applies in her personal capacity, and describes her background working with First Nations in many fields, including "land, law, rights, residential school", and as a liaison between First Nations and government and

law officials. I do not understand her to have any factual involvement with Mr. Paul's case, and have concluded that Ms. George will not be granted participant status, as she is not in the position of a party whose interests may be affected by the commission's findings; and I do not believe that her formal involvement would further the conduct of the inquiry or contribute to its fairness.

34. Ms. George has set out proposed questions for the police officers who were involved with Mr. Paul, along with her views on policy matters. Commission counsel have been made aware of Ms. George's input.

35. Mr. Watamaniuk likewise appears in a personal capacity. Having reviewed his application materials, I cannot conclude (1) that his interests are affected; (2) that his participation would further the conduct of the inquiry, or (3) that it would contribute to the fairness of the inquiry. I decline to grant him participant status.

36. These three individual applicants are, of course, welcome to attend the public hearings, just as any member of the public may (which is to say, subject to the ordinary rules that apply to those in attendance).

Commissioner W. Davies, Q.C.
Frank Paul Inquiry