FRANK PAUL INQUIRY

William H. Davies, Q.C. Commissioner
Appointed under the *Public Inquiry Act,* S.B.C. 2007, c. 9

UNITED NATIVE NATIONS SOCIETY
(PARTICIPANT)

Submissions of United Native Nations Society
on the final phase of the
Frank Paul Inquiry; December 14-15, 2010

COUNSEL TO UNITED NATIVE NATIONS

A. Cameron Ward
Neil Chantler
A. Cameron Ward & Company
Barristers & Solicitors
58 Powell Street,
Vancouver, BC V6A 1E7
Tel: (604) 688-6881
Fax: (604) 688-6871

I. INTRODUCTION

"The die was cast".

1. These words, uttered by former Vancouver Regional Crown Counsel Austin Cullen, Q.C., go a long way toward explaining why the Criminal Justice Branch ("CJB") responded to Frank Paul's death the way it did. Mr. Justice Cullen (as he now is) was explaining that the CJB's response was to some extent preordained by the form of the Report to Crown Counsel ("RTCC") that was delivered to him, an RTCC that was prepared by a Vancouver Police Department ("VPD") investigator in a "neutral" fashion, containing no recommendations as to criminal charges.

2. It is submitted that the die was cast against prosecuting those responsible for Mr. Paul's death by more than merely the flawed RTCC; the die was cast by a culture within the CJB that made the prosecution of a police officer for causing the death of an aboriginal, if not a citizen of any race, most unlikely.

3. The VPD was in an apparent conflict of interest when it investigated Mr. Paul's death and produced a flawed RTCC. The solution recommended by this Commission to avoid the appearance of such conflicts in the future is the creation of the IIO. The principal question for this Commission in this phase is whether the CJB was similarly conflicted and, if so, what should be done about it.

4. This Commission touched on the potential for prosecutorial conflict of interest in its Interim Report, in discussing the different charge assessment procedures for police officers alleged to have committed criminal offences:

> "The *Crown Counsel Policy Manual* explicitly attributes this different policy to concerns about conflict of interest and the need to maintain public confidence in the administration of criminal justice. Although the policy does not elaborate on the nature of the conflict of interest, I am satisfied that it arises out of the close working relationship that exists between prosecutors and police officers in a particular community. It is inevitable that a camaraderie will develop over time, even though both have professional duties to act independently in their own spheres of activity." [p. 215]

5. There can be no doubt that police and prosecutors maintain a close working relationship. According to the *Crown Counsel Policy Manual*:

> "Police and prosecutors are in a symbiotic relationship. Evidence gathered by the police is the lifeblood of a prosecution. If it is anaemic or tainted, no amount of forensic brilliance can save the prosecution. Conversely, an incompetent prosecutor can render the most probing and meticulous police investigation impotent. For the criminal justice system to fully realize its goal of apprehending, convicting and sentencing the guilty (but not the innocent) by means of a process that complies with the Charter of Rights and Freedoms, police and prosecutors must have an effective working relationship." [Ex. 8, p. 5]

6. David Layton comprehensively addressed the issue of potential conflict of interest on the part of Crown Counsel handling police-related death files in a memorandum he was commissioned to write for this Commission. It is respectively submitted that he captured the essence of the problem with the following statement:

> "…a risk of conflict may arise because Crown counsel knows that he or she, or his or her colleagues, will have to work closely with and rely upon the police force, and perhaps also the officer in question, <u>in the future</u>…" [p. 62, emphasis added]

7. The CJB'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.*

8. It is respectfully submitted that Frank Paul's death at the hands of the VPD created an unacceptable risk of the appearance of a conflict of interest on the part of Regional Crown Counsel and the CJB 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.

II. SUMMARY OF THE EVIDENCE

9. Frank Paul died on December 5, 1998. Within a few days, the circumstances of his death and the identities of those who caused it were known to the VPD investigators. The RTCC was delivered to Mr. Cullen some five months later, on May 11, 1999. [Ex. 2, Tabs 2, 3, 4]

10. While the CJB has said that there were five different charge assessment decisions [Ex.], and Commission Counsel has concluded there were four [Ex. 18], we have concluded that there were three such decisions.

11. The first appears to have been made on December 21, 1999, more than a year after Mr. Paul had succumbed, when Acting Regional Crown Counsel Hicks advised the VPD "that the above-noted file has been reviewed and 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." [Ex 1, Tab 6] The second decision appears to have been made by Mr. Fitch on August 13, 2001 [Ex. 2, Tab 14] and the third and final decision appears to have been made on or about June 18, 2004, the date the decision was announced by Geoffrey Gaul, the CJB's Director of Legal Services [Ex. 2, Tab 22]. The circumstances surrounding the CJB's decision-making process is explored below.

A. Documentary evidence:

1) The Crown Policies

12. As indicated above, the *Crown Counsel Policy Manual* has a distinct policy for charge assessments involving allegations against peace officers. Prior to October 1, 1999, s. 7 of the policy stated:

> "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. A copy of this material must also be forwarded to designated Senior Crown Counsel." [Ex. 4, Tab B1]

13. Effective October 1, 1999, the policy stated:

> "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." [Ex. 4, Tab B2]

14. The CJB also had a policy relating to the use of special prosecutors. At all material times, it said:

> "The ADAG 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." [Ex. 4, Tab D1]

2) The First Decision

15. Mr. Cullen was Regional Crown Counsel until November of 1999, when he was replaced in that role by Mr. Hicks, in an acting capacity. The CJB's Assistant Deputy Attorney General ("ADAG") was Ernie Quantz, Q.C.

16. The RTCC was not in the prescribed format. It was not accompanied by a memo setting out the matters contemplated by paragraph 3 of the policy, which included the name of the accused, the alleged offence, the recommendation, etc.

17. After Mr. Cullen received the RTCC, he requested further information from the VPD, noting that "this is a very troubling case from any perspective". [Ex1, Tab 1] The VPD delivered the information requested on or about September 21, 1999. [Ex. 1, Tab 4] On November 9,

1999, Mr. Cullen, still Regional Crown Counsel, wrote to Mr. Ewert, then Director of Legal Services, seeking his "review and opinion". On December 2, 1999, Crown Counsel Roger Cutler delivered a letter to Mr. Ewert reviewing the law relating to s. 215 of the *Criminal Code* (duty to provide necessities). On December 3, 1999, Mr. Ewert wrote a brief letter to Mr. Cullen, then Acting ADAG, with a copy to Mr. Hicks as Acting Regional Crown Counsel, in which he stated "it is my opinion that charges should not proceed against the officers."

18. Mr. Hicks' ten page letter to Insp. Biddlecombe of the VPD on December 21, 1999 advised that "we have determined that charges are not appropriate in this matter" and concluded with the statement that "the sad and unfortunate conditions of Paul's life make the task of distinguishing between circumstances likely to expose him to endangerment, and simply returning him to the context of his daily experience, more difficult than not."

3) The Second Decision

19. A year later, on December 22, 2000, Matt Adie, Deputy Commissioner of the Office of the Police Complaint Commissioner ("OPCC") wrote to Mr. Cullen, by then the ADAG, enclosing the opinion of Dana Urban, Q.C. A copy of the letter, which suggested that the CJB review and reconsider the matter, was sent to Mr. Hicks.

20. Mr. Urban, an experienced former Crown Counsel then employed as OPCC Counsel, had reviewed the videotape showing that Mr. Paul was dragged, motionless and soaking wet, out of the jail, was unequivocal; "in my view, there is a significant public interest for the Crown to proceed and that there is a substantial likelihood of conviction with respect to Sanderson and Instant." [Ex. 2, Tab 9, p. 3]

21. On January 8, 2001, Mr. Fitch noted that "Austin asked that I review this file" [Ex. 2, Tab 10] and on February 5, 2001 he asked Ms. DeWitt-Van Oosten to review the file. Two days later, she wrote a nine page letter to Mr. Fitch which concluded, "I recommend that the original decision of the Crown to not approve charges remain intact." [Ex. 1, Tab 7]

22. Mr. Fitch subsequently consulted with Crown Counsel Carla Taylor and Mr. Hicks before advising the OPCC by letter dated August 13, 2001 that "the original decision not to approve charges in connection with this matter stands."

4) The Third Decision

23. The CJB next dealt with the case on January 20, 2004, when Geoffrey Gaul, the Director of Legal Services, sent an e-mail to twenty-nine senior lawyers in the CJB (including inquiry witnesses Fitch, Gillen and Gillespie) which included the following:

> "BC's police complaint commissioner is recommending that the Attorney General call a public inquiry into the death of a native man in December 1998, when Vancouver police took an intoxicated Frank Paul from a city jail and left him in an alley. Hours later Paul was found dead from hypothermia. Complaint Commissioner Dirk Ryneveld says there are too many unanswered questions about the death. (CBC Radio 1/120 [sic])
>
> Lawyer Steven Kelliher joins Rick Cluff to discuss the recommendation for a public inquiry into Frank Paul's death. Kelliher says the administration of justice misfired in this case; the former police complaints commissioner, the coroner and the Solicitor General 'linked arms in indifference' and didn't do anything about it. (CBC Early Edition 1/20)"

24. The next day, January 21, 2004, Mr. Gaul circulated a similar e-mail reporting that the radio and TV media were quoting the Solicitor General as saying that he had just received Mr. Ryneveld's report. [Ex. 3, Tab 3]

25. On February 19, 2004, Mr. Gillen, the ADAG, sent an e-mail to Allan Seckel, the Deputy Attorney General about Mr. Ryneveld's report. [Ex. 4, Tab 16]

26. On April 2, 2004, Mr. Hicks telephoned VPD Chief Constable Jamie Graham, with whom he was on a first name basis, to tell him that he, Hicks, was reviewing the OPCC material "for the purpose of determining whether or not there was new information that would impact on Crown Counsel no charge decisions made in the past on this matter".

27. On April 20, 2004, Mr. Hicks wrote to Mr. Gillen, saying "I am satisfied that a criminal prosecution could not succeed" and "in all of the circumstances, and based on the information available, the original decision not to proceed with charges, and subsequently confirmed during Mr. Fitch's review, remain [sic] the appropriate conclusion in this case." [Ex. 1, Tab 9]

28. On April 27, 2004, Mr. Gillen asked Mr. Ewert "to review the file for me afresh". [Ex. 2, Tab 20] Mr. Ewert responded with his letter of June 2, 2004, indicating, "I have concluded that there is not a substantial likelihood of a conviction and that a prosecution should not follow against Constable Instant or Sergeant Sanderson." [Ex. 1, Tab 10]. Mr. Gaul issued a Media Release on June 18, 2004 stating the CJB "confirmed there will be no criminal charges resulting from the tragic event." He said that there were "five charge assessments" and that "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." [Ex. 2, Tab 22]

B. Witness Testimony:

1) Greg Fitch, Q.C.

29. Mr. Fitch is the Director of Criminal Appeals and Special Prosecutions with the Criminal Justice Branch ("CJB") in Vancouver. He joined the CJB in 1984 after moving to British Columbia from Ontario, where he had been practising criminal law with the Crown office in that province. In the fall of 1998 he became head of the Appellant Section and in the summer of 2000 he became the Director of Legal Services. In 2001 he accepted his current position.

30. Mr. Fitch recalled that the RTCC in Frank Paul's case did not include any recommended charges. He opined that, as a general rule, it was preferable for the police to include a recommendation as to charges, and that in some circumstances it would be appropriate for a prosecutor to send a file back to the police for further investigation and a recommendation with respect to charges. However, Mr. Fitch did not recall having the impression that the

RTCC was "shoddily prepared" and felt that the RTCC fell within the "acceptable range" of reports [Tr. Nov 3 at p. 94 line 14].

31. Upon his receipt of the file in January, 2001, Mr. Fitch tasked Ms. DeWitt-Van Oosten with preparing a memorandum on the legal issues involved in the charge assessment. Ms. DeWitt-Van Oosten's memorandum was completed and returned to him three days later [Tr. Nov 3 at p. 132 line 21]. It would be seven months before Mr. Fitch would provide this opinion to Mr. Hicks for further review. When faced with these facts, Mr. Fitch agreed he did not deal with this matter in a timely manner [Tr. Nov 3 at p. 136 line 15]. Mr. Fitch further agreed that he did not record his own reasons for the decision in writing, but simply adopted Ms. DeWitt-Van Oosten's memorandum. And while it was normally his practice to notify next of kin, he did not in this case, as there was no contact information for family members in the file [Tr. Nov 3 at p. 137 line 15]. Later in his testimony, Mr. Fitch characterized a failure to inform next of kin to be an "extraordinarily unusual occurrence." [Tr. Nov 4 at p. 13 line 11].

32. Mr. Fitch did not accept the evidence of Constable Instant that he walked Mr. Paul to the laneway where Mr. Paul was left [Tr. Nov 3 at p. 146 line 21]: "The charge assessment proceed on the basis that Mr. Paul was unable to care for himself at that time" [Tr. Nov 3 at p. 147 line 4]. However, it was the context that Mr. Fitch ultimately based his decision upon. He described this context as follows:

    a. …that [Frank Paul] was often in debilitated circumstances, that he was frequently picked up in this state and yet he made his way, he made his way largely without injury or endangerment of life. He made his way on the streets not in the circumstances any one of us would want someone we know to have as their lot in life, but he made his way in those circumstances [Tr. Nov 3 at p. 148 line 22].

33. This factual context, in Mr. Fitch's view, supported the ultimate conclusion that the harm caused to Mr. Paul that night was not reasonably foreseeable from the perspective of the police officers involved: "he was unfortunately often in desperate circumstances and apparently nothing happened to him. We have to establish that it's objectively foreseeable" [Tr. Nov 3 at p. 148 line 22].

34. Mr. Fitch conceded that if Constables Instant and Sanderson had possessed no prior knowledge of Mr. Paul's chronic alcoholic condition, the decision would have been "much different" [Tr. Nov 4 at p. 25 line 6]. To remove the context in which Constables Instant and Sanderson believed themselves to be operating "would simplify the process of assessing objective foreseeability" [Tr. Nov 4 at p. 26 line 15]. Mr. Fitch reasoned that it was the context which made the charge assessment so complex. He denied that assertion that the only complicating factor in this case was the involvement of police officers [Tr. Nov 4 at p. 28 line 19], and he insisted that "the fact that Mr. Paul was an aboriginal person played absolutely no role in the branch's consideration of this file" [Tr. Nov 3 at p. 97 line 6].

35. Mr. Fitch described the relationship between the police and Crown as "symbiotic" [Tr Nov 3 at p. 45 line 11] and "interdependent" [Tr. Nov 4 at p. 79 line 9]. In the normal handling of criminal files, Mr. Fitch admitted the two organizations work closely together, resulting in personal relationships between members [Tr. Nov 4 at p. 80 line 5]. Mr. Fitch was on a first-name basis with then Chief Constable Jamie Graham, and his successor, Deputy Chief Doug LePard [Tr. Nov 4 at p. 80 line 9]. Mr. Fitch and Doug LePard sat together on the executive of an interagency committee of police officers, correctional officers, and Crown Counsel: "[A]s a consequence", Mr. Fitch testified, "Deputy Chief LePard and I did an awful lot of work in the community together" [Tr. Nov 4 at p. 80 line 19]. Mr. Fitch was also the Chair of that committee for the Pacific region, while Doug LePard was the Vice Chair [Tr. Nov 4 at p. 81 line 3].

36. Under cross examination, Mr. Fitch explained the purpose of the Crown policy with respect to charge approval decisions involving 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 [Tr. Nov 4 at p. 98 line 5].

37. Mr. Fitch refused to accept that charge assessments involving police should be handled by an independent organization [Tr. Nov 4 at p. 100 line 16], despite accepting that this was a "serious allegation or potential offense", and one "that had attracted some considerable public attention" [Tr. Nov 4 at p. 102 line 12]. Mr. Fitch was not aware of a single case in B.C. where a police officer involved in a fatality occurring in the line of duty had been prosecuted [Tr. Nov 4 at p. 104 line 10].

2) Robert Gillen, Q.C.

38. Mr. Gillen testified this was "a very tragic and difficult case" [Tr. Nov 8 at p. 34 line 7]. Despite the previous assessments of the Frank Paul file, with which Mr. Gillen purported to concur, Mr. Gillen sent the file to Mr. Ewert for another opinion [Tr. Nov 8 at p. 52 line 11]. Under cross examination he agreed that the decision to stay "in-house" was based on the uniformity of the previous decisions [Tr Nov 8 at p. 61 line 13]. Mr. Gillen was alive to the fact that two senior counsel from outside the branch, Dirk Rynveld and Dana Urban, were urging the Crown to reconsider its decision not to charge, but he did not think their opinions warranted sending a review outside the branch.

39. Mr. Gillen found Mr. Ewert's report of "limited value" [Tr. Nov 8 at p. 96 line 6], finding: "a number of errors in the report…including some of the gratuitous observations that he makes with respect to people losing heat and things like that without, to my knowledge, any expert opinions" [Tr. Nov 8 at p. 96 line 21].

3) Joyce Dewitt-Van Oosten

40. Ms. Dewitt-Van Oosten recalled joining the Legal Services Team at the CJB in Victoria in 2001, "at the end of January or the very start of February" [Tr. Nov 8 at p. 111 line 18]. Within a few days, on February 5, 2001, Mr. Fitch, Director of the Legal Service Team, tasked her with preparing an "independent" charge assessment. She completed a memorandum on February 8, 2001, only three days later, and concluded that, despite new evidence, and in accordance with her superiors' prior decisions, there remained no substantial

likelihood of conviction [Tr. Nov 8 at p. 116 line 9]. She did not review the videotape evidence of Mr. Paul being dragged through the cells, unconscious and soaking wet, before completing her memorandum [Tr. Nov 8 at p. 127 line 25].

41. Ms. Dewitt-Van Oosten found this a "difficult case" with "very complex issues" filled with "shades of grey", adding "it wasn't easy to work through this" [Tr. Nov 8 at p. 140 line 8].

4) Austin Cullen, Q.C.

42. Mr. Cullen was the first to review the Frank Paul file, in his position as Regional Crown Counsel for the Vancouver region in the spring of 1999. His first action was to request additional information from the Vancouver Police, finding the Report to Crown Counsel "very tentative" [Tr. Nov 9 p. 13 line 6]:

> …it wasn't a standard report to Crown counsel in that it didn't have a recommendation 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 [Tr. Nov 9 p. 12 line 8].

43. Mr. Cullen also had significant concerns about the charge assessment:

> …there were a number of things I found troubling. The first and foremost was that a man died whose death could have been prevented – or may have been prevented. One couldn't say for certain, but it may have been prevented. Secondly, I found it of concern that a relatively young and very inexperienced officer was left dealing with a situation in circumstances where he had contact with more experienced officers who simply didn't offer him – any good guidance" [Tr. Nov 9 p. 13 line 12].

44. Despite this, Mr. Cullen ultimately concluded that the evidence raised a reasonable doubt about the central issue, whether there was "objective foresight in all the circumstances of endangerment and a marked departure from the conduct of the reasonable and prudent person" [Tr. Nov 9 p. 20 line 8]. From the outset of the police investigation, the "dye [*sic*] was cast" [Tr. Nov 9 p. 49 line 3].

45. Mr. Cullen did not recall ever having approved charges against a police officer in a case involving death throughout his lengthy career [Tr. Nov 9 p. 37 line 17].

5) Michael Hicks

46. Mr. Hicks was involved with the Frank Paul file in 1999, 2001, and 2004 in his role as Regional Crown Counsel for Vancouver. Mr. Hicks was of the view that the police ought to include a recommendation with respect to charges, even in cases involving fellow officers, "just as they would address files involving any other person in the community" [Tr. Nov 9 p. 124 line 13].

47. Mr. Hicks could not recall ever having approved charges against a police officer in a case involving a death [Tr. Nov 9 p. 122 line 5], during his 22 year career as a prosecutor. He admitted that over that period of time he had "become familiar" with members of the Vancouver Police Department [Tr. Nov 9 p. 153 line 23]. He "recollected the name" of Detective Staunton [Tr. Nov 9 p. 153 line 21] and he was on a "first-name basis" with Chief Constable Jamie Graham [Tr. Nov 9 p. 169 line 5].

48. Mr. Hicks accepted that the investigative approach followed by police in cases involving accusations against fellow police officers was "very different" than that followed in cases involving civilians [Tr. Nov 9 p. 159 line 13]. He accepted that "the best approach" would be "to conduct those interviews before anyone has any opportunity to taint their evidence by going way and talking to others…" [Tr. Nov 9 p. 160 line 5].

III. THE GREATER CONTEXT

49. Although this Inquiry is probing a single fatality, it is submitted that some consideration of the greater context in which the death occurred is desirable and necessary, if only to facilitate designing recommendations that may improve the quality of the administration of criminal justice in the future.

50. One cannot live in British Columbia without being aware of the uneasy relationship between the Aboriginal community and the criminal justice system. As Commissioner Oppal put it:

> "Much has been said about the relationship of aboriginal peoples to the Canadian justice system. It has been said that the values of native people are incompatible with those of the system. There have been numerous studies done in Canada relating to aboriginal policing…Most studies have concluded that the historical relationship between native people and the police has been marked by antagonism and distrust." [p. xxi]

51. Frank Paul's death was not an isolated case. Many, many aboriginals have died as a result of police conduct over the years. Unfortunately, many more such deaths are likely to occur in the future.

52. Just three of the more controversial high-profile cases, all involving the application of force, were those of Fred Quilt, who died of injuries sustained in a traffic stop in 1971, Frank Bell, who was fatally shot in Vancouver in 1992 while holding a Sony Walkman in his hand and Kyle Tait, a young aboriginal shot while riding as a passenger in a stolen vehicle in New Westminster in 2005. These incidents outraged many in the aboriginal community and the fact that the police officers involved were not charged in either of these cases did not enhance the level of trust the community has in the justice system.

53. We have been unable to find a reported case of either an acquittal or conviction of a British Columbia police officer who caused the death of an Aboriginal. In marked contrast to the Frank Bell case, an Ontario police officer was charged and convicted of criminal negligence causing death in the shooting death of Dudley George at Ipperwash Provincial Park in 1995. [*R. v. Deane* (1999), 143 C.C.C. (3d) 84 (Ont. C.A.) appeal dismissed; [2001] 1 S.C.R. 279]

54. The Commission received the evidence, in one form or another, of eight members of the CJB who had at least 140 years of collective experience with the provincial Crown;

Fitch:	16 years
Gillen:	26 years
DeWitt-Van Oosten:	16 years
Cullen:	21 years
Hicks:	22 years
Ewert:	25 years
Cutler:	9 years
McPhail (Taylor):	5 years

55. None of these lawyers had apparently ever either approved charges against or prosecuted a police officer in a homicide case involving a deceased of any race.

56. Coroner's statistics reveal that 267 people died in police incidents in British Columbia between 1992 and 2007. According to a recently published study commissioned by the BCCLA, this means that a resident of this province is statistically much more likely to die at the hands of the police than an Ontario resident.

57. 52 of the 267 deaths occurred in the City of Vancouver. This Commission received some insight into how some of these deaths were handled when it received the testimony of retired detective Staunton in the first phase of the inquiry. Mr. Staunton testified in the first phase of the Inquiry that he handled the investigations of 11 of the Vancouver in-custody deaths and that other colleagues within the VPD handled the balance [Tr. Feb 14, 2008 at pp. 129-130]. He said that "reports to Crown counsel and reports with respect to in-custody deaths are two different things", the latter being prepared in a "neutral" fashion, without recommendations [Tr. Feb 14, 2008 at pp. 129-130]. Mr. Staunton testified that this practice of "neutrality" was known to Mr. Cullen and other senior regional Crown counsel [Tr. Feb 14, 2008 at pp. 129-130]. To his knowledge, none of the 52 in-custody death investigations he or his VPD colleagues had investigated had resulted in charges against police officers [Tr. Feb 14, 2008 at pp. 129-130].

58. We have received Mr. Peck's consent to tender a brief of CJB explanations for its no charge decisions in five other recent police related death cases. All of these were the subject of some public controversy. We were involved as counsel for the families of the deceased in three of the cases (Berg, St. Arnaud and Tait) and in that capacity received letters from the Crown explaining why charges were not approved. In the other two (Boyd and Dziekanski) the CJB published "Clear Statements" on its publicly accessible website.

59. In each of the five cases, the identities of the police officers who caused the deaths were immediately known. The CJB took between 14 and 26 months to render its decisions that charges were not appropriate as very briefly outlined below.

60. On October 22, 2000, a VPD constable applied force to a Jeffrey Berg, young, unarmed man who had no prior record of criminal convictions, in the presence of two other VPD members and two civilians, Mr. Wu and Ms. Fujikawa. In her three-page letter of December 9, 2002 notifying the deceased's sister that a "criminal prosecution is not appropriate", Deputy Regional Crown Counsel Mary Tait said, "based solely upon a review of Mr. Wu's statement and Ms. Fujikawa's statement, it is apparent that Constable 1593 Bruce-Thomas applied excessive force to Mr. Berg when Mr. Berg was lying on the ground." She went on to explain that the other VPD members' versions different and it wasn't clear whether the fatal injury to Mr. Berg's neck was inflicted by a kick or by the butt of a gun.

61. On December 19, 2004, an RCMP officer shot and killed Kevin St. Arnaud, an unarmed break and enter suspect, in Vanderhoof. On February 16, 2006, Mr. Gaul, the Director of Legal Services, wrote us to advise that no charges would be laid. He suggested that the police officer's "serious concerns for his personal safety" justified the shooting such that the Crown could not prove its case beyond a reasonable doubt. After a coroner's inquest was held into the death, the CJB issued a "Clear Statement" on April 27, 2009 advising the public that "there is no evidentiary basis for changing the original decision of the Criminal Justice Branch that there is not a substantial likelihood of obtaining a conviction..."

62. On August 23, 2005, Kyle Tait, a 16 year old Aboriginal, was riding in the front passenger seat of a stolen vehicle being driven by one Ian Campbell. Three other young persons, a boy and two girls, were in the back seat. No weapons were in the vehicle. The vehicle was chased and stopped by New Westminster police. One of the officers fired at the vehicle, killing Tait. On May 4, 2007, Mr. Gaul, Director of Legal Services, wrote us advising that "the available evidence does not support prosecuting Cst. Sweet in relation to the shooting death of Mr. Tait.

63. On August 13, 2007, Paul Boyd was shot eight times and killed by a member of the VPD. The CJB, through its Communications Counsel, Neil MacKenzie, issued a "Clear Statement" on November 9, 2009 advising the public that "there is insufficient evidence to establish that

the officer's use of force was excessive in the circumstances." According to the Clear Statement, the police had retrieved Boyd's weapon, a bicycle chain, after he had been shot four or five times, and Boyd "had fallen to the ground and was on his hands and knees and was crawling toward the officer before the last shot was fired" at Boyd's head. (A coroner's inquest into Mr. Boyd's death commenced December 13, 2010.)

64. On October 14, 2007, Polish immigrant Robert Dziekanski died at the Vancouver International Airport in an incident that was captured on videotape. On December 12, 2008, the CJB released an unattributed "Clear Statement" advising that after review by "three levels of Executive Management within the Criminal Justice Branch", the CJB "will not be approving any charges in relation to this very tragic event. Mr. Dziekanski's death and the use of TASER weapons were the subject of the Braidwood Commission of Inquiry, and that Commission released two reports on the matter. In June of 2010, Richard Peck, Q.C. was appointed as a special prosecutor to reconsider whether criminal charges were appropriate. His report, we understand, is pending.

65. These other controversial police related death cases are offered as examples, not to challenge the merit of the no charge decision in each, but to demonstrate that the process followed in these cases have much in common with the way the CJB responded to Mr. Paul's death. The most striking feature of these cases (aside from the uniformity of the decisions), as alluded to above, is the length of time required by the CJB to decide whether or not to approve charges in homicide cases where the identity of the perpetrator's identity was immediately known. Every lawyer or judge with a passing acquaintance with criminal procedure and practice knows that when identified ordinary civilians cause death, even when asserting they acted in self defence, the CJB does not usually need more than a year to decide whether charges should be laid. For example, Paul Boyd was shot in daylight on a busy street. All the eyewitnesses and the person who fired the fatal shots were immediately identified. If the latter had been a civilian, can it reasonably be asserted that the CJB might require more than two years and two months to decide whether to lay a charge?

66. Some of the effluxion of time is no doubt due to the different investigative procedure followed in police-involved homicides (notably, police suspects are not immediately apprehended and questioned, as civilian suspects would be) but some delay has to be attributable to the CJB. For any system that prides itself on the speedy administration of justice, the passage of years in making charge approval decisions is most unsatisfactory and does not enhance public confidence.

67. Another common feature of these cases is the lack of a consistent decision-making structure. It appears that the decision is sometimes made by lawyers in the Regional Crown office (Paul, Berg), sometimes by the Director of Legal Services (St. Arnaud, Tait) and sometimes the identity of the decision-maker is unclear (Boyd, Dziekanski).

68. A further common feature of most of the cases is the uncritical acceptance of, and reliance upon, exculpatory statements made by the person or persons who caused the deaths. In the Berg case, Ms. Tait wrote;

> "it is possible, based on Constable Bruce-Thomas' duty report, and Constable Silver's duty report, that the fatal injury was caused during a violent struggle between Constable Silver and Constable Bruce-Thomas, and Mr. Berg, when, according to Constable Bruce-Thomas and Constable Silver, they were trying to overcome Mr. Berg's resistance to arrest."

69. In the St. Arnaud case, Mr. Gaul indicated that after Mr. St. Arnaud obeyed the police officer's command to stop and raised his hands in the air, he then advanced with one hand in his pocket. According to Mr. Gaul, "at this point, Cst. Sheremetta had serious concerns for his personal safety" that apparently justified his decision to open fire.

70. In the Tait case, Mr. Gaul wrote that "the evidence supports the position that Cst. Sweet had reasonable grounds to believe it was necessary to fire his sidearm at the driver of the Campbell vehicle in order to protect himself and his fellow officer."

71. In the Boyd case, while Mr. MacKenzie wrote that "the evidence of some witnesses could lead to an inference that the officer who shot Mr. Boyd acted excessively by firing too many shots, by firing at him while he was on the ground, or by firing at him at all", the CJB rested

its decision on the VPD members' statements that they believed that Mr. Boyd posed a threat to one or more of the eight VPD members on the scene.

IV. SUBMISSIONS

72. Mr. Urban, a Queen's Counsel with approximately 25 years of prosecution experience, felt strongly that criminal charges should be laid against Sanderson and Instant. He said that the police had a legal duty to care for Mr. Paul, that he was incapacitated by something (intoxication, hypothermia or "some other condition") and "the simple fact is that for whatever the reason, he was soaking wet and for really no legitimate reason, he was dumped in an unpopulated alley, in a strange area, in rainy 2 to 3 degree Celsius temperatures".

73. These factual assertions are unassailable. They are consistent with this Commission's findings of fact in the first phase. According to the best evidence, the videotape, Mr. Paul was clearly incapable of voluntary movement when he was dragged out of the jail. He was soaking wet, leaving a wet trail behind him. He was deposited in an alley in an industrial area of Vancouver on a weekend night, when few people were around. His stated place of residence was miles away, at the corner of Maple and Broadway. It was raining and the temperature was just above freezing.

74. It would be callous, cruel and unlawful to treat a disabled dog the way Mr. Paul was handled. It is submitted that Sanderson and Instant's actions toward another human being were criminal, in every sense of the word. They got away with, if not manslaughter, then another criminal offence.

75. One other lawyer who reviewed the file, Ms. Taylor, seemed to share Mr. Urban's view of the facts. She was quite junior, presumably knowledgeable in the law but perhaps not yet inculcated in Crown Counsel culture. She seems to have reviewed the damning videotape and her marginal notes are revealing.

76. Based on her notes, she seemed to be of the view that the video evidence showed that Mr. Paul's condition had deteriorated markedly after his earlier release, to the point where he was completely incapable of caring for himself and had to be "dragged like a rag doll", leaving a visible trail behind him from his wet clothing. She seemed to be of the view (correctly) that the reason for Mr. Paul's incapacity was irrelevant, wondered where the evidence was that he was refused admission to detoxification and questioned if he would be "dumped, wet and incapacitated in an alley at 2 degrees C" to sober up, given that he was usually kept in cells to sober up.

77. How is it that two Queen's Counsel, Mr. Urban and Mr. Ryneveld, each with decades of prior prosecutorial experience, could have an opinion on charge approval that was diametrically opposed to that of the experienced lawyers within the CJB? One explanation is that this was an issue on which reasonable people could differ. Another, more plausible explanation is that Messrs. Urban and Ryneveld were independent, unencumbered by any existing relationship with the CJB or VPD, whereas the CJB lawyers viewed the case through a lens that was clouded by their ongoing relationship with the province's largest metropolitan police force.

A. Misapplication of Crown Policies

78. It is submitted that the CJB failed to ensure that its own policies were adhered to in the Frank Paul case. First, there is no doubt that the RTCC, in any of its iterations over the years did not conform to the prescribed format. The basic information required, the name(s) of the accused, the alleged offence(s) and, most importantly, the investigator's recommendation with respect to the case, was not set out in any cogent manner.

79. Second, is not at all clear that the no charge decisions were reached in accordance with policy. Prior to October 1, 1999, Regional Crown Counsel had an express obligation to forward the RTCC "directly" to the ADAG "for review and decision", with a copy to "designated Senior Crown Counsel." It is submitted that the policy required Mr. Cullen to send the RTCC to the ADAG (then Ernie Quantz, Q.C.) for his review and decision

immediately upon receiving it on May 11, 1999, or perhaps at the very latest, on September 21, 1999, the date Mr. Cullen received the responses he had requested from the VPD. This was not done.

80. Mr. Quantz was the ADAG until he was appointed to the Provincial Court on November 24, 1999. [OIC 1590, Vol. 26, No. 28] Mr. Cullen then succeeded him as Acting ADAG. [Tr. p. 39. lines 22-23] Between December 5, 1998 and November 24, 1999, a period of almost a full year, Mr. Quantz had the sole authority pursuant to the *Crown Counsel Policy Manual* to make the charging decision in the case.

81. We cannot know whether Mr. Quantz might have handled this case differently than Mr. Cullen did, had the RTCC been referred to him for review and decision. However it is apparent from the public record that Mr. Quantz had previously appointed a special independent prosecutor to determine whether charges were appropriate in a controversial case arising out of an alleged assault at the Vancouver Jail. [CJB News Release nos. 93:27 and 93:46]

82. Acting Regional Crown Counsel Hicks advised the VPD that "we have determined that charges are not appropriate in this matter" on December 21, 1999, while Mr. Cullen was the Acting ADAG. Whether he made the first decision not to lay charges, or whether Mr. Cullen did, or whether it was a joint decision made by both, the decision-making process did not comply with the policy. Furthermore, and more importantly, the decision-making process suffered from the very problem that the policy was presumably designed to avoid; the decision not to charge VPD members was made by Vancouver Crown counsel who had a long and close working relationship with the VPD, creating the potential for a perception of favouritism.

83. The second decision was made by Mr. Fitch on August 13, 2001, while he was either Director of Legal Services or Director of Criminal of Appeals and Special Prosecutions (the record is unclear). If he held the former office, he was the correct decision maker.

84. The third decision was apparently made by Mr. Gillen, the ADAG, although policy dictated that the responsibility was that of the Director of Legal Services, Mr. Gaul. We sought to have Mr. Gaul testify before the Commission but were advised that he was merely the CJB's media spokesperson. If this was the case, then again, policy was not followed.

85. Finally, while the ADAG admittedly had some discretion, it is submitted that this was a case in which Crown policy compelled the appointment of a special prosecutor, at least after public controversy arose over the handling of the file.

86. As indicated above, the policy stated that "in practice, most special prosecutors are appointed in cases involving ... senior police officers, or persons in close proximity to them." The term "senior police officer" is undefined, but arguably both Sgt. Sanderson, with his 18 years of VPD experience and Cst. Instant, would be at least "persons in close proximity", as subordinates, of senior VPD police officers.

87. It is submitted that this case was more suited to the appointment of a special prosecutor than the jailhouse assault that Mr. Quantz had dealt with in 1993, especially when the original no charge decision came under review, and it has not been satisfactorily explained by any CJB witness why that step was not taken here.

V. SUGGESTED RECOMMENDATIONS

A. In the event that the IIO recommends charges against a police officer in a case of death or serious injury, an independent special prosecutor shall be appointed to conduct the charge approval process and subsequent prosecution

B. All CJB professional staff should receive appropriate cultural awareness and sensitivity training with respect to the relationship between First Nations and the criminal justice system

C. The CJB should strive to maintain a reasonable level of First Nations representation within the ranks of its professional staff

D. The CJB should appoint an independent special prosecutor to review this file with a view to ascertaining whether criminal charges are appropriate

E. The Attorney General of British Columbia should convene a study commission of inquiry to review the CJB's handling of all 267 police-involved deaths in the 1992-2007 period

VI. CONCLUSION

88. It is submitted that the sad case of Frank Paul demonstrates the difficulty those charged with the onerous responsibility of administering criminal justice seem to have when faced with the prospect of charging police officers with a crime arising from death of a citizen. It would seem that in British Columbia, police officers are effectively immune from prosecution in homicide cases, the most serious of all offences against the person. No other class of citizen would ever enjoy the benefit of such immunity.

89. If the criminal justice system is to enjoy the respect and confidence of the public, fundamental reform is needed to address the way the system responds to police-related deaths.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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A. Cameron Ward