

## **THE FRANK PAUL INQUIRY**

**William H. Davies, Q.C., Commissioner**

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

### **RULING #6**

#### **RULING ON THE PROPER SCOPE AND MANNER OF CROSS-EXAMINATION**

##### **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.
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.