

## FRANK PAUL INQUIRY

### RULING 5

#### APPLICATION TO CALL FURTHER WITNESSES

William H. Davies, Q.C., Commissioner

May 13, 2008

#### A. NATURE OF THE APPLICATION

1. This application is brought by the United Native Nations Society (Applicant), one of the participants in this Inquiry, for an order that three additional witnesses be called during the evidentiary hearings – Sgt. Boyd, Insp. Rothwell (both of the Vancouver Police Department (VPD)), and a representative of the VPD information technology (IT) section.

#### B. LEGAL FRAMEWORK

2. This hearing and study Commission of Inquiry is governed by the *Public Inquiry Act*, S.B.C. 2007, c. 9. Section 21(1) of the Act authorizes a hearing inquiry to hold oral hearings and to receive evidence under oath or affirmation, and s. 22(1) authorizes a hearing inquiry to serve a summons requiring a person to attend a hearing and give evidence, and to produce information in that person's possession or control.

3. Section 9(1) grants the authority to make directives respecting practice and procedure. Pursuant to that power, this Inquiry published a *Practice and Procedure Directive for Evidentiary Hearings* (see <http://www.frankpaulinquiry.ca/rules-of-procedure.php>). Rule 21 states:

The following rules apply to witnesses:

- a. Commission Counsel shall decide who shall be called as a witness at the evidentiary hearings,
- b. Subject to Rule 22, Commission Counsel shall call and examine witnesses on behalf of the Commission, and may adduce evidence by way of both leading and non-leading questions,
- c. each witness called shall, before testifying, be sworn or affirm,
- d. each witness who testifies may during his or her testimony be represented by counsel or, with the approval of the Commissioner, by an agent,
- e. the Commissioner may, on application by a participant, permit a participant to cross-examine a witness to the extent of that participant's interest. If the participants are unable to agree on an order of cross-examination, the Commissioner will determine the order,
- f. subject to Rule 22, counsel for a participant is entitled to examine that participant last, regardless of whether or not counsel is also representing another participant,
- g. after Commission Counsel has called all witnesses on behalf of the Commission, a participant may apply to the Commissioner for permission to call a witness and, if permission is granted, subrules (c) to (e) apply to each witness called by a participant.
- h. Commission Counsel has the right to re-examine any witness who has testified.

4. Under this Rule, Commission Counsel decides who will be called as witnesses. However, if Commission Counsel does not call a person who a participant wishes to be called, that participant may apply to the Commissioner for permission to call that person as a witness.

5. It is on this basis that the Applicant applies for permission to call Sgt. Boyd, to recall Insp. Rothwell, and to call a representative of the IT section.

### **C. SUBMISSIONS OF THE PARTIES**

6. On April 29, 2008 counsel for the Applicant filed a written submission in support of its application. On April 30 counsel for the Paul family and the First Nations Leadership Council, by email, expressed support for the Applicant's position respecting Sgt. Boyd.

7. On May 5, 2008 counsel for VPD filed a written submission, taking the view that the application should be dismissed without an oral hearing. On the same date Commission Counsel filed a written submission asking that the application be dismissed.

8. On May 7, 2008 counsel for the Applicant filed written reply submissions. On May 9, 2008 I permitted an oral hearing on the application, at which counsel for the Applicant, counsel for VPD, Commission Counsel and counsel for the First Nations Leadership Council made submissions.

#### **D. SERGEANT BOYD**

9. He was a Sergeant in VPD's Major Crime/Homicide section when Mr. Paul died in December 1998. He retired in 2005, with the rank of Inspector. Although Det. Staunton was the lead investigator in the Frank Paul case, Sgt. Boyd (who was Det. Staunton's superior) did attend the scene and had some involvement in the criminal investigation that followed.

10. Commission Counsel interviewed Sgt. Boyd, determined that he had relevant evidence to give, and arranged for him to testify before the Inquiry on Monday, February 11, 2008. During the preceding weekend, Commission Counsel received word from VPD that Sgt. Boyd had a serious medical condition that precluded him from testifying. This medical condition arose just prior to the date of his intended testimony, and remains today. Commission Counsel has confirmed this medical condition with Sgt. Boyd and with counsel for VPD (Sgt. Boyd's employer), and has a letter from Sgt. Boyd's doctor confirming that he is unwell and unable to attend. Commission Counsel is satisfied that he is not medically fit to testify.

11. Sgt. Boyd has since sworn a 16-paragraph affidavit, in which he recounts his recollection of his involvement in the criminal investigation and his review of Det.

Staunton's 1999 Sudden Death in Custody report. The affidavit has been marked for identification.

12. Counsel are agreed that the application respecting Sgt. Boyd is not to be decided on the basis of the relevance of his evidence, but on his unavailability. In the words of counsel for the Applicant: "If he is available, he should be called. If he is not available, the reason should be put on the record unless there is some compelling reason not to do so" (written submission, para. 6). In his written reply submissions, counsel also submitted that: "this Commission should not receive in evidence a lawyer-prepared Affidavit from Sgt. Boyd that addresses any facts in dispute, unless the evidence can be tested by cross-examination" (para. 11).

13. I agree that this application should be decided on the basis of whether or not Sgt. Boyd is available as a witness at this Inquiry. I am satisfied that Sgt. Boyd has a serious medical condition that renders him medically unfit to testify, and precludes his appearance as a witness. I am prepared to reach that conclusion based on Commission Counsel's assurances of the inquiries he has made, and of his receipt of a letter from Sgt. Boyd's doctor confirming that he is unwell and unable to attend. Out of respect for Sgt. Boyd's privacy, I will not require that the doctor's letter be filed as an exhibit.

14. In Sgt. Boyd's absence, I am satisfied that his affidavit is the best evidence available. I direct that it be entered as an exhibit proper in these proceedings. I appreciate counsel's concern about relying on evidence where the deponent has not been subjected to cross-examination. I will bear those concerns in mind in deciding how much weight to attach to this affidavit evidence.

**E. INSPECTOR ROTHWELL**

15. In his written submission, counsel for the Applicant stated at para. 14:

Insp. Rothwell supervised the Internal Investigation Section at the material time and is the witness in the best position to testify about the VPD's systemic approach to potential member misconduct. When he testified on the issue of next of kin notification, the Applicant's counsel deferred questions concerning the internal investigation into Frank Paul's death on the express understanding that Insp. Rothwell would return as a witness.

16. With respect to counsel's assertion that Insp. Rothwell supervised IIS at the material time, Insp. Rothwell testified (January 31, 2007, pp. 2-3) that he was transferred to IIS in June 2000 (when a Sergeant) as an investigator. By that time the Frank Paul criminal investigation had been completed, Cst. Instant had been disciplined, and Sgt. Sanderson would soon be disciplined. Insp. Rothwell testified that he played no role in any of those matters. He became acting head of IIS in March 2001, and was officially promoted to Insp. in charge of IIS in November 2001, where he remained until September 2003. His only role in the Frank Paul matter related to the next-of-kin notification investigation.

17. Counsel for the Applicant submits there was an express understanding that Insp. Rothwell would return as a witness. In order to address that issue, I have reviewed the relevant portions of the transcript, namely January 31, 2008 (pages 57-61), and February 1, 2008 (pages 61 and 62).

18. On January 31, during Insp. Rothwell's testimony, Commission counsel advised me (p. 57) that he had received the previous day 20 volumes of documents from the office of the Police Complaint Commissioner. Since he had not yet had an opportunity to review the documents, he could not say whether there might be information in them relevant to the examination of Insp. Rothwell. He suggested that we continue to deal with Insp. Rothwell's evidence relating to the next-of-kin notification, "but that if anything else relating to the office of the Police Complaints Commission files which have

just been produced arises that we'll recall Insp. Rothwell for that" (pp. 57-58). Following brief submissions by counsel, we proceeded on that basis.

19. On February 1, counsel for the Applicant sought clarification (p. 61) that Insp. Rothwell had been called at this time to testify respecting the *Police Act* complaint about improper or inadequate notification of next-of-kin, and that Insp. Rothwell was not in attendance at this time to discuss the other *Police Act* complaint about the circumstances in which Mr. Paul died. Counsel noted that the latter was the subject of an internal investigation, that many new documents had come up, and that Insp. Rothwell may be coming back to address the internal investigation of the death. He confirmed that he would not be questioning Insp. Rothwell on that matter, as it would be addressed later.

20. From my review I am not satisfied that there was, to adopt the terminology of counsel for the Applicant, an "express understanding that Insp. Rothwell would return as a witness." There was, at most, a qualified commitment on the part of Commission counsel on January 31 that if, as a result of his review of the 20 volumes of documents that had just been produced by the Police Complaint Commissioner, further questioning of Insp. Rothwell was called for, then he would be re-called. This application is not, as I understand it, anchored in the OPCC's disclosure of 20 volumes of documents, but rather in Insp. Rothwell's role as the officer in charge of IIS. That being so, I am not satisfied that the Applicant can claim reliance on the understanding articulated by Commission counsel on January 31.

21. Putting aside the issue of whether there was an understanding, this application raises, at a more general level, whether Insp. Rothwell should be re-called as a witness. To put it another way, does he have relevant evidence that the Inquiry should hear, in order to complete the evidentiary record? The two matters referred to by counsel for the Applicant are the internal investigation into Mr. Paul's death, and VPD's systemic approach to potential member misconduct.

22. With respect to the internal investigation, I am not satisfied that the Applicant has shown that Insp. Rothwell would have relevant evidence respecting the IIS's investigation into Mr. Paul's death that would justify re-calling him at this stage in the proceedings. In reaching that conclusion, I rely principally on the evidence that Insp. Rothwell was not involved in the criminal investigation or the disciplinary proceedings against Cst. Instant or Sgt. Sanderson, and did not become acting head of IIS until nine months after the IIS report was delivered to the Police Complaint Commissioner.

23. With respect to whether Insp. Rothwell should be re-called to testify about VPD's systemic approach to potential member misconduct, the focus of the Phase 1 and Phase 2 evidentiary hearings is on the events of December 5 and 6, 1998, and on how VPD and the other named public bodies responded to Mr. Paul's death. For the reasons stated, Insp. Rothwell has no relevant evidence respecting VPD's internal investigation into Mr. Paul's death. Having said that, VPD's *current* rules, policies and procedures are germane to Phase 4 of the Inquiry's proceedings, which is the more appropriate forum in which to examine systemic issues.

#### **F. A REPRESENTATIVE OF VPD'S I.T. SECTION**

24. In his written submission, counsel for the Applicant stated his understanding that all VPD emails for a period of time relevant to this inquiry have been purged or expunged and, if that is so, the Inquiry should receive testimony, tested by cross-examination, as to what exactly happened to any emails related to VPD's response to Mr. Paul's death.

25. In his written submission, counsel for VPD stated at para. 9: "Email was rarely used during the period of the initial investigation (1998-2000). It is unlikely that there were any significant emails that did not go into the paper files. For the witnesses whose involvement in the Frank Paul case extended into 2003 and later years (when archiving of VPD e-mailboxes commenced), the VPD uploaded the archived e-mailboxes of each of

those witnesses and searched them for any relevant emails. All emails found were produced.”

26. In his written submission, Associate Commission Counsel stated that he interviewed a computer technician with VPD’s IT section, who advised him that their system did not archive emails prior to 2003. In his view, nothing would be gained by having this Inquiry hear from someone in the VPD IT section on this issue.

27. In his oral argument, counsel for the Applicant submitted that I should not accept, without sworn testimony tested by cross-examination, that VPD got rid of all emails prior to 2003.

28. There appears to be no dispute that VPD did not archive emails until 2003. I am satisfied that Associate Commission Counsel has thoroughly explored this issue, and I accept his conclusion that earlier emails are not available, except those that had been printed out and have been retrieved from paper files. I am satisfied that nothing would be gained by requiring a representative of VPD’s IT section to testify on this issue.

#### **G. CONCLUSION**

29. Accordingly, the applications to call Sgt. Boyd, to re-call Insp. Rothwell and to call a representative of VPD’s IT section are dismissed.



William H. Davies, Q.C.

Commissioner