

04 November 2010

Vancouver, B.C.

(PROCEEDINGS RECOMMENCED AT 10:00 A.M.)

THE REGISTRAR: Order. This hearing is now resumed.

Mr. Commissioner?

MR. PECK: Mr. Commissioner, I'd like to address a matter, if I may. I'm asking Mr. Willms to hand up a copy of the Court of Appeal's judgment for you.

THE COMMISSIONER: Yes.

MR. PECK: Yesterday I rose to object on a point. You have, on the one hand, a skilled and ardent advocate in the presence of Mr. Kelliher; you have a man of integrity and legal knowledge in the presence of Mr. Fitch; but I think that we're coming perilously close to violating what I understand to be the rules and I simply want to draw a line in the sand if I can.

If you look at paragraph 90 at page 30 of the Court of Appeal's judgment.

THE COMMISSIONER: I have it.

MR. PECK: Thank you. The Court of Appeal adopts the observations of Justice Melnick on the review. And I wish to turn your attention, please, to paragraph 69. The Court adopts this: I also consider beyond the scope of the inquiry to

1 require any individual who made a decision not to
2 charge anyone with respect to the death of Mr.
3 Paul to second-guess his or her decision to
4 justify it. The commissioner is entitled to look
5 at the facts that were before the individuals who
6 made those decisions, get the facts who made the
7 decisions, but not challenge or debate with those
8 individuals the propriety of their decision. In
9 that way the commissioner may open the doors he
10 wishes, but, at the same time, minimize any
11 transgression into a lawful independence of the
12 Criminal Justice Branch.

13 So I wanted to put that on the record, I want
14 to draw it to your attention and I will object
15 where I see appropriate and obey your rulings, of
16 course. Thank you.

17 THE COMMISSIONER: Thank you, Mr. Peck.

18 Do you have anything to add to that, Mr.
19 Cowper?

20 MR. COWPER: I don't, I think, at this time. We're in the
21 middle of cross-examination so I think we'll have
22 to take it as it goes.

23 THE COMMISSIONER: All right.

24 MR. COWPER: Your opening remarks gave a road map. I think
25 everybody heard those.

1 THE COMMISSIONER: I tried to --

2 MR. COWPER: In my view, as commission counsel, is the first
3 consideration of what you find useful.

4 MR. PECK: Mr. Commissioner, it is extremely difficult for us
5 to hear Mr. Cowper.

6 MR. COWPER: I'm sorry. Am I on?

7 THE COMMISSIONER: I think you are. I asked the registrar to
8 check again and he told me --

9 MR. COWPER: I think the microphone is on but I may not be, I
10 think probably the problem is. I guess I'll
11 repeat what I've said. I've said you asked me for
12 my comments. Number one, we have a witness under
13 cross and I think we should take it as the
14 questions at this point rather than trying to
15 answer generally.

16 Number two, as commission counsel, my general
17 view is that the first test is what's useful to
18 you. And I also meant to say that you provided a
19 road map to all counsel and to the extent that
20 anybody has a concern that the question is going
21 beyond the road map you provided or beyond the
22 reach of the reasons of the Court, that's a
23 legitimate objection that needs to be considered,
24 but I don't think at this point you can prefigure
25 how that should be applied for the rest of the

1 cross-examination. I think we have to take it as
2 it goes.

3 THE COMMISSIONER: Thank you.

4 Well, Mr. Kelliher, I did mention this
5 yesterday, and I'm sure that you're aware of it,
6 you did mention it, but I do have a caution from
7 the Court of Appeal and I ask you to keep that in
8 mind in the questions that you ask today.

9 **GREGORY JAMES FITCH, Resumed:**

10 **EXAMINATION CONTINUED BY MR. KELLIHER:**

11 Q Thank you, Mr. Commissioner, I will.

12 Mr. Fitch, there is a Victim Services
13 component to the Ministry of the Attorney General;
14 is that correct?

15 A There was a Victim Services component as part of
16 the Ministry of the Attorney General that was
17 eliminated and I can't recall the year in which
18 that programme was eliminated. There is a
19 smaller -- since the elimination, a smaller
20 contingent of Victim Witness Service workers that
21 we call on from time to time. The larger
22 programme was eliminated. I'm just unable to
23 recall the year.

24 Q At the time of your handling of the Frank Paul
25 file, did this component exist then?

1 A I'm going to -- I'm unable to recall, but I, I
2 suspect that it did, Mr. Kelliher.

3 Q And what was its function, its purpose? How many
4 persons would be attached to that component?

5 A Let me start with its function and purpose. There
6 is a Victims of Crime Act, which I believe was in
7 place at the time. And it offers information and
8 services to individuals or family members who have
9 come into contact with the criminal justice
10 system. And one provision, in particular,
11 provides that on request specific types of
12 information should be made available to victims as
13 they are defined in the act, including critical
14 decisions or events in the course of a proceeding
15 that are more than the usual events. Events that
16 will -- are, are definitive in the course of that
17 proceeding. So on, on request of a victim or a
18 family member, that, that information is
19 available.

20 Q All right.

21 A And in terms of the numbers, Mr. Kelliher, I'm
22 not, I'm not confident that I could give you an
23 accurate read at this period of time as to the
24 number of Victim Witness Services workers that
25 were with the Ministry.

1 Q Would you agree that one of the reasons that that
2 service was in existence and that the provision of
3 the Victims of Crime Act existed, as you
4 mentioned, was that victims and the families of
5 victims have a keen, ongoing interest in events of
6 prosecuting wrongdoers, persons who might have
7 caused injury or death to family members?

8 A I would agree.

9 Q And that that's a concern or recognition that
10 exists in the Criminal Justice Branch today, isn't
11 it?

12 A It is.

13 Q Now, sir, you mentioned that when you received the
14 file, there was nothing in the file to identify
15 next of kin; is that right?

16 A I believe I said that I can -- could recall
17 nothing or seeing anything in the file that would
18 identify next of kin.

19 Q Did you have the entire file?

20 A I believe I did.

21 Q Did you have the coroner's file?

22 A I did not have the coroner's file, but I did have
23 the coroner's report from the inquest that was
24 released roughly at the same time, I believe, as
25 Mr. Cullen's opinion.

1 Q Right. Now when you received the file, one of the
2 first things that you did was to call the
3 Vancouver City Police Department and advise them
4 that the matter was now under review, correct?

5 A That's my recollection.

6 Q And very shortly after your review was complete,
7 the Vancouver City Police Department was also
8 advised of the result of your review, correct?

9 A My recollection is I would have informed someone.

10 Q Because the department itself and, more
11 particularly, the officers involved, have a keen
12 interest in what's taking place here and want to
13 know?

14 A Yes.

15 Q They want closure on this outstanding matter,
16 that's reasonable to assume, correct?

17 A Yes.

18 Q Now do you think the same concerns might relate to
19 family of the deceased, Frank Paul?

20 A Absolutely.

21 Q When you first received the file, you contacted
22 the police and did you take any effort to
23 determine the address or contact information of
24 the family of Frank Paul?

25 A I believe I looked through the file and I have no

1 recollection of seeing any family contact
2 information that would alert me to a contact
3 person. Beyond that, I did not make further
4 inquiries.

5 Q Why did you not make further inquiries?

6 A For a couple of reasons, I guess. I, I, I -- as
7 director of legal services, what, what you're
8 doing is reviewing a decision that's made by
9 regional Crown counsel. The management of the
10 file, including contact with the police, follow-up
11 with family, would ordinarily be done by regional
12 Crown counsel.

13 Now I want to note and acknowledge that this
14 is a shared responsibility within our branch. I'm
15 not shifting responsibility to regional Crown
16 counsel where it was within my purview to do
17 something. At the same time, in the usual course,
18 those matters would be attended to in the regional
19 office.

20 Q Right. But nonetheless, the statute does require
21 the reviewer to notify the family?

22 A If a request has been made.

23 Q Right. And if a request has been made, were you
24 aware if the family had ever been contacted about
25 the death of Frank Paul prior to your receiving

1 the file?

2 A I don't recall being aware of the fact that they
3 had been contacted.

4 Q So you had no knowledge if they knew anything
5 about how Frank Paul died or any of the
6 circumstances?

7 A I think that's fair.

8 Q In that case, it would be very difficult for them
9 to make such a request, wouldn't it?

10 A Yes.

11 Q All right. When you got the file, you asked your
12 assistant to find the phone number of Al Boyd, is
13 the note in your file, correct?

14 A Yes.

15 Q You did not pick up the phone and ask the police
16 coroner, police complaints commissioner or anyone
17 else what the telephone number was of a family
18 member, correct?

19 A I did not ask that question, no.

20 Q Was there anything on the file to suggest that Mr.
21 Cullen or Mr. Ewert, who had done earlier reviews,
22 had given any consideration whatsoever about the
23 family's interests in this matter?

24 A I don't recall seeing information to suggest that
25 Mr. Cullen or Mr. Ewert had that information

1 available.

2 Q Did you ever discuss with Mr. Cullen, Mr. Ewert,
3 Mr. Hicks or Mr. Gillen, the advisability or
4 otherwise of letting the family know what was
5 going on here?

6 A I have no recollection of having that
7 conversation.

8 Q Why, sir? I gather that this isn't a common
9 thing, that ordinarily the family of deceased
10 victims of crime are told what's going on, just as
11 you've mentioned, police, as time goes on, have an
12 interest out of fairness in having some certainty.
13 Do you accept that the families of deceased
14 victims of crime have a similar interest in
15 knowing if someone is going to be held accountable
16 for the death of their family member?

17 A Yes, I do accept that.

18 Q All right. Can you explain to me why you or, to
19 your knowledge, no one, who did a review of this
20 file, ever contacted the family of Frank Paul and
21 say, look, this is what's going on, this is what
22 we're doing and this is why we're doing it?

23 A The only explanation I can offer is that the
24 information was not within our possession and
25 it -- I certainly took no additional steps to

1 determine where Mr. Paul's family might be or how
2 they might be contacted.

3 Q Yes. My question, sir -- you've said that before,
4 you had no information and you didn't attempt to
5 collect any information, the question is why?

6 A Again, for my, for my own part as the director of
7 legal services, it was my responsibility to look
8 at its -- at a legal decision that had been made.
9 The transference of the file for communication
10 purposes largely would be then delegated to the
11 region from which the case came. But I want to
12 say again, this is a shared responsibility as
13 between responsible officials within the Criminal
14 Justice Branch and it appears it was not followed
15 up on this case.

16 Q Was Mr. Cullen regional Crown when he did the
17 review?

18 A Yes.

19 Q So it would have been his responsibility in the
20 first instance, correct?

21 A In the first instance that would be the primary
22 responsibility.

23 Q And there was nothing on the file to suggest that
24 he'd done so?

25 A I have not seen anything that would suggest that.

1 Q So you would know from looking at the file that
2 the family hadn't been notified even at the first
3 review?

4 A There was nothing on the file to indicate that
5 that had been done.

6 Q All right. Would you characterize the failure of
7 the branch to do so as unusual?

8 A It's a, a matter that the branch needs to be
9 extraordinarily attentive to. The Victims of
10 Crime Act exists because there are important
11 responsibilities to be discharged. And, and even
12 apart from the existence of that statutory
13 obligation, our branch needs to conduct itself in
14 a way that ensures that people who have been
15 affected by criminal events are kept abreast where
16 they want to be kept abreast.

17 Q Just human --

18 A Of, --

19 Q -- decency as well?

20 A -- of significant developments, yes.

21 Q Human decency as well?

22 A Yes.

23 Q All right. Would you say that the branch's
24 failure to do that in this case was exceptional?

25 A I, I would say that the, the situation where you

1 have no -- in a, in a tragic case like this where
2 you have no next of kin noted on the file is
3 itself unusual. I also think that the branch has
4 an interest in reexamining what occurred on this
5 issue to ensure that our policies and our
6 procedures encompass unusual situations like this
7 moving forward.

8 Q Right. Sir, I asked you, would this be an
9 exceptional occurrence within the branch or is it
10 a common occurrence?

11 A No, failure to, to notify a victim where you're
12 aware of, of the fact of that person wanting
13 information in connection with the file would be
14 an extraordinarily unusual occurrence. The branch
15 is normally very attentive to that. I'm uncertain
16 where there is no next of kin noted on file what
17 steps individual prosecutors of the branch would
18 be taking or whether it would be unusual in that
19 specific context.

20 Q Is there a policy within the Criminal Justice
21 Branch to deal with such a situation?

22 A I -- there's certainly policies that govern the
23 notification of family members and victims
24 reminding Crown counsel of their obligations under
25 the act. They do exist. Whether they encompass

1 this type of situation or provide guidance in
2 circumstances where it's unclear who next of kin
3 are, I'm uncertain.

4 Q All right. Now do you think it would be fair to
5 characterize the Criminal Justice Branch's failure
6 to contact the family as indifferent to the
7 family's concerns?

8 A No. It, it may have been a lapse on our part. It
9 may have been that there was miscommunication
10 between my office and the regional office. It may
11 have been something that was missed in this case
12 because of the unusual fact that no next of kin
13 were noted on the file, but I think it's unfair to
14 characterize the branch's conduct as indifferent.
15 We were not indifferent to the resolution of this
16 file or indifferent to the very serious event that
17 led to, to Mr. Paul's death.

18 Q All right. Now the term context, you used before,
19 was the context of Mr. Paul's life style and
20 circumstances of his death, were they a factor at
21 all in the failure of the branch to contact the
22 family?

23 A No, not at all.

24 Q One would think that a person in those
25 circumstances, with that degree of deterioration

1 of mental and physical function may lose contact
2 with one's family, reasonable to assume?

3 A It's possible.

4 Q Probable?

5 A I think there's a wide variety of situations
6 within families where one individual is
7 debilitated for whatever reason.

8 Q Did you know that he was from New Brunswick?

9 A I -- I'm not certain whether I knew he was from
10 New Brunswick at the time. I may have. I'm not
11 certain if that information that he was a Mi'kmaq
12 from New Brunswick was acquired by me at the time
13 or later. I don't recall, Mr. Kelliher.

14 Q Is there any policy within the Attorney General's
15 office, not within the Attorney General, the
16 Criminal Justice Branch that focuses on any aspect
17 of the culture of First Nations?

18 A There are restorative justice programmes specific
19 to First Nations. There are also directives or
20 practices that are responsive to a body of law
21 that has developed, for example, Gladue, and the
22 importance of sensitivity to context -- to
23 aboriginal context in the sentencing of aboriginal
24 offenders. There's an important body of law about
25 jury selection, for example, and sensitivity to

1 the potential for racial bias. And the, the
2 learnings that come out of those decisions are
3 incorporated in documents that the branch
4 circulates to its members because those are
5 important learnings for our organization. And I
6 would like to think that as a consequence of the
7 development of the jurisprudence and variety of
8 reports that have been issued, that prosecutors,
9 judges, counsel, lawyers are perhaps more
10 sensitive to the cultural -- the unique cultural
11 factors that may be at play at different times in
12 prosecution.

13 Q Did any First Nations prosecutor have a look at
14 this file?

15 A No.

16 Q Do you have any First Nations prosecutors in the
17 Criminal Justice Branch?

18 A I believe we do.

19 Q You believe you do?

20 A Yes.

21 Q How many?

22 A I can't give you that information. I, I wouldn't
23 be able to assign a number to it.

24 Q In what jurisdiction?

25 A In fact, we just lost one.

1 Q In what jurisdiction?

2 A One of the people I had in mind is Jennifer Power,
3 who was just appointed to the Supreme Court, who's
4 Métis.

5 Q All right. Any others that you can bring to mind?

6 A Not offhand, Mr. Kelliher, no.

7 Q So to your knowledge, there are none in the
8 Criminal Justice Branch?

9 A I don't, I don't believe that's true. I believe
10 that we've looked as a, as a management group at
11 that issue in the past and I believe none is not
12 the right answer, at least when we looked at that
13 issue, but I'm unable to say today or to identify
14 today the percentage that -- of prosecutors in the
15 branch who are aboriginal.

16 Q All right. Sir, yesterday you testified as to the
17 regrettable period of time that elapsed from the
18 time you took the file until you reported on your
19 review. You also mentioned the passage of time as
20 rendering an unfairness to those that might be
21 subject to sanctions. When you received the file,
22 were you aware if disciplinary proceedings had
23 taken place for Officers Instant and Sanderson?

24 A I became aware of that information at some point.
25 I cannot say when in terms of my handling of this

1 file that information came within my knowledge.

2 Q Before or after you had completed your review?

3 A I don't recall.

4 Q Can you say whether the issue of disciplinary
5 proceedings came into your consideration in the
6 course of your review?

7 A It did not.

8 Q Wouldn't, sir, the fact that discipline
9 proceedings had taken place and penalties had been
10 administered, would that be a legitimate
11 consideration in determining whether a charge
12 approval should be yes or no?

13 A That factor could conceivably be a consideration
14 under the public interest test, has there been an
15 adequate penalty imposed through an alternative
16 process --

17 Q But it is not --

18 A I'm sorry, --

19 Q Sorry.

20 A -- I just want to continue. We did not get to the
21 public interest prong of the charge approval test
22 in this case. And so the question of whether
23 disciplinary proceedings had taken place or
24 whether they reflected what might be regarded as
25 an adequate penalty or not was not relevant to our

1 assessment of whether there was a substantial
2 likelihood of conviction.

3 Q All right. And that answer would apply to all of
4 the reviews that were done, assuming none of them
5 got beyond the substantial likelihood of
6 conviction phase, correct?

7 A My view is that it would not be a relevant
8 circumstance on the substantial likelihood of
9 conviction prong.

10 Q All right. Now along with the package of
11 material, we've discussed the letter from Urban to
12 Morrison in which, among other things, Mr. Urban
13 is saying to Mr. Morrison, look, let's hold off on
14 the public hearing until Crown has an opportunity
15 to review this information because we don't want
16 to prejudice the prosecution, do you recall the
17 drift of Mr. Urban's sentiments on that point?

18 A I do.

19 Q So you knew when you received the file that the
20 public hearing was being held in abeyance pending
21 your review, correct?

22 A Yes.

23 Q So, sir, you --

24 A Or consideration of the public hearings, but yes.

25 Q Yes, correct. Now you've also discussed the

1 concept of abuse of process. Abuse of process as
2 a potential defence to a charge, if we can call it
3 a defence to the charge. Do you agree that delay,
4 the passage of time is a significant factor in
5 that sort of argument in the context of this
6 matter?

7 A It's a factor, yes.

8 Q So you understood when you got the file that any
9 delay would perhaps prejudice the ultimate
10 decision to hold a public hearing under the Police
11 Act, correct?

12 A Delay would be a factor, yes.

13 Q Right. A factor going against holding a public
14 hearing, correct?

15 A No, I didn't, I didn't see delay as being a factor
16 against holding a public hearing. I saw a delay
17 as a factor against the institution of a criminal
18 proceeding the more time that elapsed.

19 Q Oh, yes. Sorry, I phrased that badly.

20 A I'm sorry, I may have --

21 Q Yes.

22 A -- misunderstood your question.

23 Q Right. Did you consider that the passage of time
24 might pose an obstacle to a public hearing under
25 the Police Act?

1 A No, I don't believe that was within my
2 contemplation at the time.

3 Q You didn't think about it?

4 A No, I don't recall thinking about it.

5 Q Did you think when you received the file that the
6 passage of time might strengthen an abuse of
7 process argument in the hands of the police,
8 should the prosecution proceed?

9 A The issue obviously occurred to me and it's
10 reflected in a note that I made to the file. I
11 believe it was discussed yesterday. So at some
12 point in my review, the prospect of an abuse of
13 process application with time being one factor but
14 also the absence of any new evidence of a material
15 nature that would alter what was otherwise a
16 reasonable charge approval assessment which
17 followed our policies could attract that kind of
18 an application on behalf of the two officers.

19 Q Do you agree with me that you were the author?
20 You were the principal author of that impediment?

21 THE COMMISSIONER: Of what, Mr. Kelliher?

22 MR. KELLIHER:

23 Q Of that impediment. The problem posed by the
24 fluxion of time was caused by you principally?

25 A I was responsible for most of the delay in the

1 file, yes.

2 Q So you were giving as a reason for not proceeding
3 with the prosecution, your own tardiness in
4 handling the file?

5 A No, that's, that's not fair or complete -- it's
6 not fair or completely accurate.

7 Q How so is it unfair and inaccurate?

8 A The, the passage of time would be but one
9 consideration and there are others. The bottom
10 line in this file, at least in my estimation, was
11 that none of the information that had been
12 supplied by the office of the police complaints
13 commissioner when I looked at the file would have
14 a material bearing on the charge approval
15 decision. It didn't change things. It didn't
16 change the analysis. In the absence of evidence
17 that would change that analysis, it would be a
18 very unusual thing for the prosecution service to
19 subsequently approve a charge.

20 Q All right. Sir, if I could shift gears a little
21 bit. To focus on the mental element that we were
22 discussing yesterday of the offences that you were
23 contemplating, as I understand, the physical
24 element, that is to say who did what, was
25 accepted, in your mind, including Mr. Frank Paul

1 being incapable of caring for himself at all
2 material times, those points, if you will, were
3 not in issue, correct?

4 A Correct.

5 Q It was the mental element alone, correct?

6 A Perhaps not correct to say alone. It was the
7 principal obstacle in my mind to charge approval.
8 There was also the question of whether the conduct
9 of each of the officers in the context in which it
10 occurred, it occurred was a marked departure from
11 the standard of care or a marked and substantial
12 departure from the standard of care if you're
13 looking at the offence of criminal negligence.
14 But if we were able to get over that, then the
15 further question, you're right, becomes the mental
16 element and whether there was objective foresight
17 of risk of endangerment of life or serious bodily
18 harm.

19 Q All right. Repeat to me, please, what you took to
20 be the principal mental element hurdle that you
21 had to overcome in order to charge?

22 A Again, objective foresight of a risk of nontrivial
23 bodily harm or objective foresight of a risk of
24 endangerment of life.

25 Q Okay. Objective foresight. Do you agree that

1 placing Mr. Paul in the elements in those
2 conditions -- well, there's no question that it
3 did cause bodily harm and death. You're saying
4 you were not satisfied that a person objectively,
5 that is to say you or I, in the same position
6 would not be able to foresee grievous harm or
7 death?

8 MR. PECK: I object to that question. I think we're getting
9 into a situation where we're now challenging and
10 debating.

11 THE COMMISSIONER: I think you're right. I agree. You'll have
12 to rephrase the question.

13 MR. KELLIHER:

14 Q Is it the knowledge of Instant and Sanderson that
15 makes for this complexity that you referred to?

16 A It's in part their knowledge and it's in part the
17 context in which they were operating, the context
18 in which Mr. Paul lived his life that made the
19 assessment of objective foreseeability of an event
20 coming about difficult to assess.

21 Q All right. So if they would have had no knowledge
22 of that context, the determination of objective
23 foreseeability would be straightforward, correct?

24 A Context is central to the determination of
25 objective foreseeability, yes.

1 Q So if they had no context, that is to say
2 knowledge of Mr. Paul's life style and medical
3 condition and alcoholism, the decision would be
4 straightforward, correct, if there were no
5 context?

6 A It would be a much different decision, yes.

7 Q A much easier one, much more straightforward, not
8 complex?

9 A Potentially it's, it's -- fact patterns take such
10 subtle and nuanced qualities to them that I, I
11 hesitate to respond hypothetically, but I take
12 your point that absent Mr. Paul's context which is
13 that he lived his life on the street, often in
14 this condition and managed to make his way, take
15 that out of the mix and it's a significant
16 difference, yes.

17 Q Right. So do you agree with this proposition that
18 someone wholly ignorant of Mr. Paul's medical
19 deteriorating condition, his increasing
20 vulnerability, someone who is completely ignorant
21 of that would be more likely to be found culpable
22 in these circumstances than two trained police
23 officers with a duty to care for them, is that the
24 reasoning here?

25 A Could I have that question again, sorry?

1 THE COMMISSIONER: I don't quite understand it either.

2 MR. KELLIHER:

3 Q You're saying absent context, that is to say the
4 knowledge of Mr. Paul, the decision is simple,
5 it's straightforward, it's simply an objective
6 consideration of whether someone doing that,
7 laying a person in an alley in those
8 circumstances, would reasonably foresee harm to
9 the individual. It's the context, you say, that
10 poses the complexity and is the heart of the
11 reason why no charges were brought, correct?

12 A I follow, yes.

13 Q So if a person was unaware of that context, to
14 find culpability would be far easier, correct?

15 A It would, it would be -- it would, it would make
16 it more simple. It would simplify the process of
17 assessing objective foreseeability, yes.

18 Q Do you share with me the view of the illogicality
19 of that, that if you take a person who is
20 completely ignorant of the increasing
21 vulnerability of Mr. Paul, they are going to be
22 found culpable more easily than people, trained
23 police officers, who know his history, who believe
24 they understand his medical circumstances, who are
25 trained to deal with people who are intoxicated,

1 their culpability would be harder to find?

2 A Again, I'm not sure I'm following your point.

3 Q You're not?

4 A Can you come at it again for me?

5 Q That if an untrained civilian, layperson, were to
6 come upon Mr. Paul in those conditions and had
7 charge of him for a moment, I can't imagine the
8 circumstances, but then left him in that alley
9 without any knowledge of his background at all,
10 culpability would be more easy to find than if it
11 was a trained police officer that knew his
12 background, correct?

13 A No, I don't --

14 Q No?

15 A -- follow that.

16 Q Well, there's no context. You say context is the
17 problem, right? Take the context away and it
18 becomes a straightforward case, correct?

19 A I don't follow how it would be more likely that a
20 citizen in a casual encounter with Mr. Paul, who
21 knew very little about the situation and didn't
22 have the duty that a police officer did, would be
23 more likely to be found culpable.

24 Q Because there's no context, isn't that what you
25 say is the problem?

1 A But there would also be --

2 Q Sorry, go ahead.

3 A There would also be difficulties in that kind of
4 scenario in assigning to the citizen, who has a
5 casual encounter with Mr. Paul in the street,
6 objective foreseeability of risk.

7 Q Why?

8 A Because they know very little about Mr. Paul's
9 situation.

10 Q Right. Because there is no context, right?

11 A Or very little.

12 Q So regardless the absence of context or the
13 presence of context, it's very complicated,
14 correct?

15 A It's the type of context that makes it so
16 complicated.

17 Q Sir, I suggest to you that the only complexity
18 here is that these are police officers?

19 A That's absolutely untrue.

20 Q Can you go to binder one, please? Tab seven, if
21 you would, please? You recognize this document?

22 A I do.

23 Q Now this is a document produced by Ms. DeWitt-Van
24 Oosten at your request?

25 A That's correct.

1 Q And on which you relied when you were making your
2 decision principally, your charging decision?

3 A That's correct.

4 Q And which you forwarded on to Hicks and Gillen as
5 being the basis of your decision?

6 A I certainly forwarded it to Mr. Hicks. My
7 recollection is that I provided a copy to Mr.
8 Gillen.

9 Q So it's fair to say that you agree with its
10 contents?

11 A Like any legal opinion that's detailed and
12 responding to a complex fact pattern and applying
13 to that fact pattern complex law, there will be
14 aspects of any opinion of that type that
15 reasonable people will disagree --

16 Q Right.

17 A -- about, but the thrust of the opinion and the
18 conclusion that Ms. DeWitt-Van Oosten reached,
19 particularly on the issue of the mental element,
20 was something that I agreed with.

21 Q All right. Was there any factual aspect of this
22 report that you didn't agree with?

23 A I don't recall. I would have to read the report
24 again.

25 Q Oh, I'll take you through it. But you read it and

1 discussed it with Ms. Van Oosten?

2 A Yes.

3 Q Did you tell her that there was anything factually
4 that you disagreed with?

5 A I don't recall telling her that.

6 Q Did you tell her that there was any of the legal
7 reasoning or authorities that she was citing that
8 you didn't agree with?

9 A I don't recall having that conversation.

10 Q All right. Now when you forwarded on to Hicks and
11 discussed it with Gillen, did you say anything to
12 either of those two that there was some aspects of
13 this report that you didn't agree with?

14 A I think that's doubtful.

15 Q Pardon?

16 A I think it's doubtful --

17 Q Right.

18 A -- that I would have focussed on aspects of any of
19 the reports that we had by then that I took issue
20 with. I think what I would have focussed on for
21 the purposes of that briefing is a right to the
22 point, here is the issue and here is my assessment
23 of it.

24 Q All right. Did you ask Ms. Van Oosten to change
25 anything in the report?

1 A Not to my recollection.

2 Q Did you ask her about the foundation of any of her
3 factual statements?

4 A I don't recall doing so.

5 Q All right. But you read the report, the VPD
6 report, before you read Van Oosten's report?

7 A Correct.

8 Q All right. Can I take you through this, please?
9 Do you see the handwritten notes along the side,
10 the borders of this document? Do you have
11 handwritten notes on yours?

12 A I do.

13 Q And whose handwritten notes are those?

14 A I believe that those are the notes of Carla Taylor
15 that reflect discussions we would have had after
16 receipt of Ms. DeWitt-Van Oosten's report. As I
17 mentioned yesterday, I engaged Ms. Taylor to
18 assist and in some ways to play devil's advocate
19 in the assessment that I was obliged to make as to
20 whether the charge approval standard had been met.

21 Q Right. Now that's page two of nine where Ms. Van
22 Oosten deals with the legal principles involved
23 and do you agree with me that she deals with them
24 very briefly, succinctly, and without any apparent
25 confusion or complexity whatsoever?

1 A Just let me take a moment to read it again, Mr.
2 Kelliher.

3 Q Sure. Let me read it into the record, if you
4 would, while you're doing so:

5 Applicable legal principles. If criminal
6 charges were to be contemplated, three
7 possibilities exist: Manslaughter by criminal
8 negligence, criminal negligence causing death, and
9 failing to provide the necessaries of life.

10 For manslaughter, the Crown must prove the
11 marked departure from the standards of a
12 reasonable person in all the circumstances.

13 Did you agree with that?

14 A Yes.

15 Q For criminal negligence causing death, the Crown
16 must prove a wanton and reckless disregard for the
17 life and safety of Mr. Paul.

18 Did you agree with that statement of the mens
19 rea for that charge?

20 A Yes.

21 Q For criminal negligence causing death, the Crown
22 must prove a wanton or reckless disregard for the
23 life and safety of Mr. Paul.

24 Did you agree with that statement?

25 A I believe that that was the statement you just

1 read.

2 THE COMMISSIONER: Yes, you just read that.

3 MR. KELLIHER: Oh, I'm sorry.

4 THE COMMISSIONER: Except you said "and", and you corrected
5 yourself the second time and said "or".

6 MR. KELLIHER:

7 Q All right. I see. Now, sir, did you agree with
8 that simple, straightforward statement?

9 A For the criminal negligence?

10 Q Yes.

11 A Yes, that's descriptive of the language of the
12 provision.

13 Q Right. Taken from the Code in the cases?

14 A Yes.

15 Q With respect to both, foreseeability of death is
16 not required. However, foreseeability of the risk
17 of bodily harm, which is neither trivial nor
18 transitory, is a necessary element of the proof.

19 Correct?

20 A Correct.

21 Q And you agreed with that?

22 A I did.

23 Q Can you read those handwritten notes? Are they
24 legible to you?

25 A I'm, I'm working off a photocopy. The -- on the

1 second paragraph dealing with manslaughter, I see
2 the notation being section 219, wanton and likely
3 reck -- and the words, likely reckless. Section
4 215, marked departure.

5 Q Right. And down to the next paragraph, can you
6 read that? Marked departure that displays wanton
7 recklessness, could that be it?

8 A That could be it, yes.

9 Q And in the next paragraph down, can you read those
10 words?

11 A I'm afraid I can't on the photocopy that I have.

12 THE COMMISSIONER: I can't either.

13 MR. KELLIHER:

14 Q No, nor can I. I'll read the final paragraph: On
15 the third possible charge, failing to provide
16 necessaries of life, the Crown must prove that the
17 police owed a duty to Mr. Paul and they failed to
18 perform that duty in a manner that demonstrates a
19 marked departure from a conduct of a reasonably
20 prudent person and that it was objectively
21 foreseeable that the failure to perform the duty
22 would endanger the life or cause the health of Mr.
23 Paul to be injured permanently.

24 Did you agree with that statement?

25 A I do.

1 Q Now I'd like to go through some of the factual
2 background at page three with you. At the bottom
3 bullet, Ms. Van Oosten reports: He was rearrested
4 at 8:18 for drunk in a public place, was found
5 lying on an empty vegetable stand.

6 Were you aware whether he was conscious or
7 unconscious on the vegetable stand?

8 A I would have to go back and look at the statements
9 of Constables Turner and Peterson, who I believe
10 dealt with him, as to whether he was conscious at
11 that time. I know he had to be carried into the,
12 into the van.

13 Q All right. Noted to be intoxicated by the
14 arresting officer, identified himself as Frank
15 Paul, could not answer any questions, speech
16 slurred, incoherent, smelled of rice wine.

17 Is that something that caught your attention?

18 A I certainly read it. I'm not sure what you mean
19 by caught my attention.

20 Q In respect to whether or not he'd been drinking
21 between the time he left the police station --

22 A Oh, yes.

23 Q -- at about 6:00 and came to the attention of
24 Peterson and Turner at 8:18?

25 A Yes.

1 Q Did that give you to think that perhaps he'd been
2 drinking?

3 A It certainly raised a significant concern, in my
4 mind, that in the two hour period roughly between
5 the first release and when he was rearrested, that
6 there was a, a possibility perhaps, even a
7 distinct one, that he had consumed additional
8 alcohol.

9 Q Right. And just looking at that observation, I
10 suggest that he was unconscious, asleep or passed
11 out on a vegetable stand a couple of blocks away
12 from the police station two hours later, smelling
13 of rice wine would suggest that he was intoxicated
14 by rice wine, correct?

15 A It would suggest that, yes.

16 Q Did you have any discussion with Van Oosten about
17 that possibility?

18 A I don't recall.

19 Q You don't recall. All right. Sir, were you aware
20 at about this time there was what we've heard
21 referred to as a plague of rice wine in the
22 Downtown Eastside?

23 A I don't know whether I was familiar with that at
24 this time or not. I don't recall.

25 Q Did you know that rice wine was readily available

1 around the jail precinct, if you will? Within a
2 block radius of the jail, there were outlets that
3 sold rice wine?

4 A I believe one of the reports that was in my
5 possession at the time referred to that fact, yes.

6 Q All right. And did you know that a bottle went
7 for as little as a dollar and a quarter?

8 A I knew it was a cheap way to acquire alcohol.

9 Q Right. And did you know that Mr. Paul had been
10 given a Toonie by a police officer when he was
11 leaving?

12 A I did.

13 Q Did you think perhaps that he might have gone to
14 the store around the corner and bought a bottle of
15 rice wine and consumed it?

16 A The possibility occurred to me.

17 Q It did occur to you. And I suppose when you read
18 that he smelled of rice wine that possibility
19 became a probability?

20 A I'm not sure if I can recall thinking about it
21 being elevated from a possibility to a probability
22 as a consequence of the smell, but I take your
23 point.

24 Q There was much discussion, I'm sure, among all of
25 the Crown about whether or not he was actually

1 intoxicated because Sanderson was saying he
2 couldn't possibility be intoxicated and that's the
3 reasonable basis that created part of the context,
4 isn't it, Sanderson didn't think he was
5 intoxicated?

6 A In, in my mind, it didn't matter whether he was
7 intoxicated at the time or whether he was disabled
8 by some other cause, whatever it might be. In, in
9 my view, the central fact, and one which animated
10 the thrust of the Crown's consideration of this
11 case, was that Mr. Paul was then unable to care
12 for himself. It's reflected in Mr. Cullen's
13 initial report and it's accepted that he was
14 unable to care for himself at that time by Mr.
15 Ewert in the final review.

16 Q All right. But it is relevant, isn't it,
17 nonetheless you know now or you knew at the time
18 you were doing this review, that he was, in fact,
19 intoxicated, blood alcohol level probably better
20 than four times the legal limit, right? Correct?

21 A Yes, I was aware of it.

22 Q And there's a smell of rice wine when he's picked
23 up?

24 A Right.

25 Q And he spent five hours in a jail cell two hours

1 previous to this, correct, you knew that?

2 A I was aware that he spent a number of hours in a
3 jail cell.

4 Q He didn't consume anything in the jail cell. You
5 understand blood alcohol extrapolation and you
6 would know that he couldn't possibly have been
7 intoxicated, absent drinking, between 6:00 and 8
8 o'clock, correct?

9 A It's a, it's a reasonable conclusion that his
10 state between 6:00 and 8 o'clock deteriorated as a
11 consequence of further alcohol consumption.

12 Q Right. Would you agree with me that it's almost
13 certain?

14 A I think it's the most likely scenario, yes.

15 Q Now it doesn't matter from an analysis point of
16 view, but when you hear a senior jailhouse
17 sergeant say this guy wasn't intoxicated and I
18 couldn't smell any rice wine on him, would that
19 affect that officer's credibility in your mind?

20 A Yes.

21 Q And did it?

22 A Yes.

23 Q You didn't believe Sanderson?

24 A I think Sergeant Sanderson was dealing with a very
25 complex situation where a number of factors were

1 operating. Alcohol intoxication was certainly one
2 of them. Organic debilitation may have been
3 another. I think it was not objectively
4 foreseeable that -- to Sergeant Sanderson that,
5 that Mr. Paul was then also suffering from
6 hypothermia.

7 Q Right. He had a duty of care, Sanderson, at the
8 time?

9 A Yes.

10 Q And it's complicated because Mr. Paul had
11 hypothermia, that seems, to me, to be an
12 aggravating, not a mitigating feature. Bearing in
13 mind his duty of care, oughtn't he -- for
14 instance, would it all be different if there was a
15 nurse there?

16 A I would hope that it would be. My understanding
17 was there were nursing staff available that was
18 indicated to us in the report and that Mr. Paul
19 had been checked on several occasions prior to his
20 first release. The complicating factor here is,
21 of course, that symptoms of hypothermia can bear a
22 close resemblance to the symptoms that one would
23 exhibit as a consequence of having consumed too
24 much alcohol.

25 Q But you didn't believe him when he said to you and

1 through the report that I thought he wasn't
2 intoxicated, so what did you think Sanderson
3 really thought about Mr. Paul's condition?

4 A I'm, I'm not sure that I can project back 10 years
5 and say with confidence to the inquiry what I
6 thought at that time. I suspect that what I
7 thought was that Sergeant Sanderson was dealing
8 with a complex constellation of factors that were
9 contributing to Mr. Paul's behaviour and would
10 have known that one of them was alcohol
11 consumption.

12 Q But there may have been other, as it turned out
13 there were, other medical circumstances that were
14 even more life-threatening than the apparent
15 intoxication, right?

16 A I'm not sure that it's fair to say that those
17 circumstances would have been even more apparent
18 than the intoxication.

19 Q I said even more life-threatening --

20 A Okay.

21 Q -- than the apparent intoxication, correct?

22 A Correct.

23 Q Right. That would seem to me to be elevating the
24 need to take care of this fellow if you think,
25 well, not only is he intoxicated, he's got other

1 serious medical problems. It would seem to me to
2 elevate the necessity to be very careful with this
3 person and not release him out into the elements
4 until you know that he could care for himself.

5 For instance, in your analysis, did Officer
6 Sanderson's failure to say to the nurse, hey, just
7 as you're passing by here, could you have a look
8 at this guy; that's not too much to ask, is it?

9 A It would have been a prudent thing for the police
10 officer to do, yes.

11 Q Do you think it is criminally culpable not to do
12 it and then to issue the order that he did?

13 A Obviously I determined in this case that it was
14 not criminally culpable.

15 Q Why is there no mention of a nurse in your report?

16 A In -- I'm sorry, which report?

17 Q In the Van Oosten report or your notes?

18 A There is mention of a nurse --

19 Q There is?

20 A -- in the police report and the presence of a
21 nurse in the jail unit --

22 Q Yes.

23 A -- at the time.

24 Q No, no, I mean in your opinion or in Cullen's
25 opinion or Ewert's opinion, why is it that on a

1 factual and legal analysis looking to vet criminal
2 culpability, the existence of a nurse and the
3 failure of Sanderson in his befuddled walk through
4 the constellation of symptoms he saw lying in
5 front of him that he didn't call a nurse to have a
6 look before he issued the order, how is that not a
7 factor in weighing criminal negligence?

8 A I suspect it would be a factor and it's a factor,
9 indeed, that Mr. Urban underscored in his report.

10 Q Yes, Mr. Urban did do that, but Cullen didn't do
11 it, Ewert didn't do it, and you didn't do it?

12 A Well, wait a minute. The, the fact that something
13 is not reflected in a written report does not
14 necessarily mean that it is a factor that was not
15 within the contemplation of the individuals who
16 viewed this matter. Obviously these opinions were
17 prepared for internal purposes. And it's an
18 unusual event that we now have public disclosure
19 of them, but I would be very slow to conclude that
20 because every contextual factor, including that
21 one, is not referred to in a report that it
22 necessarily means that that's a circumstance that
23 wasn't in the mind of the, of the decision-maker
24 at the time, --

25 Q Sir --

1 A -- particularly given that the branch was aware
2 that there was nursing staff in the jail, nursing
3 staff who had had some contact with Mr. Paul in
4 his earlier admittance.

5 Q Sir, you and others have a statutory obligation to
6 record the reasons for your decisions, correct?

7 A We have a policy that --

8 Q Policies passed pursuant to statute?

9 A Correct.

10 Q All right. You have a policy obligation. When
11 you said not statute policy, do you mean by that
12 that it's optional to follow it?

13 A No, I was just correcting you.

14 Q Oh, I see.

15 A It is a statutory obligation. It's an obligation
16 that flows pursuant to policy.

17 Q Right. So that's known to Cullen, Ewert and you?

18 A Yes.

19 Q And you do your legal analysis, you identify all
20 relevant facts, you bring to bear all relevant
21 case law, you use your good judgment, right?

22 A Correct.

23 Q Is it unfair to say that the existence of the
24 nurse and Sanderson's failure to utilize her in
25 these circumstances was not a relevant factor to

1 Cullen, Ewert or you?

2 A I believe that that was a relevant factor.

3 Q Why didn't you record it?

4 A It is --

5 Q Why didn't you analyse it?

6 A Well, first of all, you're assuming that we didn't
7 analyse it. The reports that are prepared in
8 complex fact patterns like this cannot possibly
9 address every potential circumstance that
10 influences the application of a judgment. Because
11 something is not in a written document does not
12 necessarily mean that it didn't influence the
13 decision that was made.

14 Q No, it doesn't necessarily but it's very good
15 evidence of it, isn't it?

16 A I wouldn't agree with that.

17 Q Mr. Commissioner, I note the time. Is this a
18 convenient time for the break?

19 THE COMMISSIONER: Yes, we could use one. Just one moment. We
20 will take the morning break then.

21 THE REGISTRAR: This hearing is adjourned. Order.

22 **(PROCEEDINGS ADJOURNED AT 11:05 A.M.)**

23 **(PROCEEDINGS RECOMMENCED AT 11:21 A.M.)**

24 THE REGISTRAR: The hearing is now resumed, Mr. Commissioner.

25 THE COMMISSIONER: Thank you.

1 MR. KELLIHER:

2 Q Mr. Fitch, if I can take you back to where we were
3 in the Houston report. We're now to page four of
4 nine. The second full sentence, through the
5 second full sentence: No evidence to show he had
6 consumed anything between release from cells and
7 second arrest.

8 This, we understand, was probably irrelevant
9 to you because you accepted that he was unable to
10 care for himself, whether it was from alcohol or
11 some other reason, but if this matter were to
12 proceed to a trial, did you consider that as an
13 evidentiary impediment, the note that Ms. Van
14 Oosten made there? That is I'm asking you did you
15 consider that to be resolved with an expert
16 opinion?

17 A No. In fact, I think what Ms. DeWitt-Van Oosten
18 may have been referring to there was the absence
19 of direct evidence that Mr. Paul had consumed
20 something in those -- two hour period, in the
21 sense of a witness observing him doing it as
22 opposed to a circumstantial inference that could
23 be drawn that he, in fact, did so.

24 Q Or expert evidence that could establish it?

25 A Correct, although I don't remember turning my mind

1 to that particular point.

2 Q Right. Okay. Now if I can take you down to the
3 fourth bullet, mid-paragraph, sentence beginning
4 Sanderson says, do you see that?

5 A I do.

6 Q Sanderson says Paul is communicative and able to
7 say where he lives when brought into the
8 detachment the second time.

9 Now was that a consideration of whether or
10 not there was evidence if Mr. Paul was
11 communicative? What I'm thinking of is the video
12 and the audio component on the video.

13 A Sorry, I just found the passage. Can you give me
14 the question again?

15 Q Yes. On the issue of whether or not Mr. Paul was
16 communicative, did you or Ms. Van Oosten discuss
17 the video and the audio component on the video?

18 A I would not have discussed the video, to the best
19 of my recollection, with Ms. DeWitt-Van Oosten. I
20 don't believe that she had viewed it.

21 Q But you had?

22 A I had.

23 Q And what do you say about that?

24 A And the question again is?

25 Q Whether it would support or detract from the

1 proposition that Mr. Paul was communicative?

2 A I have not had the opportunity to view that video
3 in close to 10 years, so I'm, I'm not sure how to
4 answer the question because I don't clearly recall
5 it. What I will say is that whether or not Mr.
6 Paul was able to communicate a few words, Broadway
7 and Maple or say that he hadn't been drinking, it
8 didn't affect my analysis of either the duty or --
9 that the police officers had at that time or my
10 conclusion that he was unable to care for himself
11 in the condition that he was in.

12 Q But it would impact on your view of Sanderson's
13 credibility?

14 A It could possibly, yes.

15 Q That's a factor in an evaluation such as yours?

16 A I'm, I'm not sure that the credibility of a
17 potential Accused or an avenue of
18 cross-examination that might present itself if the
19 Accused were to take the stand would be a factor
20 that I would have foremost in my mind at this
21 point. I would be looking at the Crown's ability
22 to prove on the evidence that it had the essential
23 elements of its own case and less focussed on how
24 the proceeding might develop and what strategic
25 advantages might arise given the way in which the

1 defence was conducted.

2 Q But if you were satisfied that you could
3 successfully attack Sanderson's credibility,
4 wouldn't that impact on your willingness to accept
5 and perhaps a judge is willing to accept his
6 statement that I didn't think he was intoxicated,
7 I thought it was something else?

8 A Well, of course, if he gets into the stand in his
9 own defence but that's something that's within his
10 control. And the Crown in conducting a charge
11 approval assessment can't make guesses as to how a
12 trial might unfold or what opportunities might
13 present themselves to undermine the credibility of
14 Accused should he choose to testify.

15 Q Right. But when you're reviewing the report to
16 Crown counsel and you see Sanderson saying, oh, I
17 didn't think he was intoxicated, doesn't his
18 credibility bear on whether you're prepared to
19 accept that?

20 A It has a fact -- it certainly influences my
21 assessment of Sergeant Sanderson but it's not
22 terribly important at the charge approval stage
23 when I'm focusing on can the Crown -- independent
24 of whether or not the Accused gets into the box,
25 can the Crown say that we have a substantial

1 likelihood of proving this case to the criminal
2 standard.

3 Q And I understood the problem that you were having
4 was the context, part of it was Sanderson's
5 knowledge of Paul in his belief that he wasn't
6 intoxicated, that he was suffering from some other
7 medical circumstance. If you thought that was
8 just rubbish, the problem's kind of resolved,
9 isn't it, --

10 A No, I --

11 Q -- the contextual problem?

12 A Sorry, for interrupting. No, no, I don't think
13 contextual problem is solved or goes away. The
14 context still remains that Sergeant Sanderson was
15 familiar with Mr. Paul, was familiar with the fact
16 that he was often in a debilitated condition, was
17 familiar with the fact that Mr. Paul made his way
18 in the streets of Vancouver for a considerable
19 period of time in that state, and also that
20 Sergeant Sanderson did not know that at the end of
21 the day another officer would release him into a
22 laneway, so that, that becomes all part of the
23 context as well.

24 Q Right. Let's talk about the laneway here and the
25 next sentence takes us there: Sanderson tells

1 transporting Officer Instant to take Paul to the
2 area of his home.

3 Now did you and Ms. Van Oosten discuss what
4 home meant for Mr. Paul?

5 A Not specifically, no, but both of us were aware
6 that Mr. Paul had no fixed address. He lived on
7 the streets. When Ms. DeWitt-Van Oosten is using
8 the word home, I'm inclined to the view that she
9 was contemplating, as was I, his usual -- the, the
10 usual area or where he would frequent, Broadway
11 and, and, and Maple, in the playground area there
12 under the equipment. No one was suggesting that,
13 that he had a home in the regular sense of the
14 word, no.

15 Q Right. Or a bed or friends --

16 A No.

17 Q -- to look after him, nothing like that?

18 A Well, certainly not a bed.

19 Q Right. Broadway and Maple is just a general area
20 of Vancouver in which there's a playground and a
21 liquor store, Safeway, that sort of thing and so
22 you understood Sanderson's order to Instant to be
23 take him up to that general area, right?

24 A To, to that intersection where he was known to
25 frequent, yes.

1 Q You thought Sanderson was saying to Instant take
2 him up to the intersection of Maple and Broadway
3 and set him out on the sidewalk right at that
4 intersection --

5 A No.

6 Q -- or did you think take him in the area, take him
7 to the park or a playground or behind the Safeway
8 or something like that?

9 A I'm not sure I turned my mind to the specificity
10 of the request. It was the general area.

11 Q Right. But that's important, isn't it? Which
12 would be safer, for instance, the alleyway behind
13 the detox centre or the playground up in the
14 neighbourhood of Maple and Broadway in the middle
15 of the night, which is safer?

16 A I'm not sure which would be a safer environment.
17 Maple and Broadway is a busy area. There's lots
18 of pedestrian traffic there. It was Constable
19 Instant's judgment that the laneway was a, a well
20 travelled road, that he would be visible to
21 passersby, that there would be shelter on three
22 sides, that SafeRide frequently passed by there,
23 that was his judgment. Was that reasonable care?
24 I don't think so. That wasn't the issue for the
25 purposes of the charge approval.

1 Q But did you see Instant trying to reduce the
2 potential of harm to Mr. Paul? Did you think that
3 Instant's thinking process was this --

4 MR. CROSSIN: I'd like to --

5 THE COMMISSIONER: Yes, Mr. Crossin?

6 MR. KELLIHER: Oh, sorry.

7 MR. CROSSIN: I have an objection to this line of questioning.
8 I appreciate that this isn't my witness, but my
9 friend is venturing into the conduct of my client.
10 And I just want to, once again, raise what my
11 friend, Mr. Peck, has raised and what Mr. Cowper
12 has raised and, indeed, what, you, sir, raised at
13 the very beginning of this inquiry is that it is
14 beyond the scope of this inquiry to require this
15 witness to justify the decision he made.

16 And in my respectful submission, questions
17 that tend to challenge the decision are not
18 relevant and are not appropriate. Questions that
19 tend to simply invite debate fall under the same
20 category. Questions that are directed at the
21 correctness of the decision, questions that are
22 directed at the reasonableness of the decision,
23 questions that are directed at the sufficiency or
24 otherwise of the legal basis, all fall under the
25 rubric of justification in my respectful view.

1 And in my submission to you, that is all that is
2 happening with this line of questioning.

3 It is my learned friend, Mr. Kelliher, who
4 has an opinion. It's no secret. He's been
5 announcing it since we began this inquiry. And
6 Mr. Fitch who came to a different opinion.

7 And in my respectful view, you can dress up
8 what's going on here, but in pith and substance,
9 it is simply a debate between these two people as
10 to the propriety, the correctness, the
11 reasonableness of the charge approval decision
12 made 12 years ago and so I object to that line of
13 questioning, sir.

14 THE COMMISSIONER: Thank you, Mr. Crossin.

15 MR. PECK: I endorse what Mr. Crossin says, Mr. Commissioner.

16 THE COMMISSIONER: Mr. Peck. I think we will go back again
17 to -- I need to repeat the words from the Court of
18 Appeal again, but what Mr. Crossin says is, in
19 effect, that you're really engaging in this line
20 of questioning in a debate. I was considering
21 that. He came to an opinion on the basis of the
22 information that he had. You're now debating with
23 him about whether he should have considered more
24 or considered it less. And I don't think that
25 that is permissible under the guidelines we have

1 from the Court of Appeal.

2 MR. KELLIHER: All right.

3 THE COMMISSIONER: Proceed, Mr. Kelliher.

4 MR. KELLIHER: Thank you, Mr. Commissioner. If I may be
5 permitted just to this one remark, my opinion is
6 of no moment here whatsoever. My instructions
7 are, and what I am trying to do, though a bit
8 clumsily here, and I accept that I crossed the
9 line perhaps a moment ago, is find out the factual
10 basis upon which the opinion was reached. You
11 see, we'll --

12 THE COMMISSIONER: I think you have covered that. As far as
13 I'm concerned, you have. I think at great length
14 you have drawn my attention to what was before him
15 and you have asked him the questions about the
16 facts that he considered and he's answered them,
17 perhaps not to your satisfaction, but he's given
18 what he considered and what he didn't consider,
19 so --

20 MR. KELLIHER: All right.

21 THE COMMISSIONER: Or what he didn't consider important,
22 surely.

23 MR. KELLIHER: Yes.

24 THE COMMISSIONER: So you could labour on but I don't think
25 we're going to get a different view than I already

1 have.

2 MR. KELLIHER: Thank you for your encouragement, Mr.

3 Commissioner.

4 Q I'll just cover a few more points here. Sir, did
5 you consider any follow-up investigation? And by
6 that, I mean did you think that the report to
7 Crown counsel was deficient in any way that would
8 cause you to request a follow-up?

9 A As I've indicated in my Will Say Statement, I do
10 have an indistinct recollection of a conversation
11 that Ms. DeWitt-Van Oosten and I had to the end of
12 determining whether any follow-up investigation
13 might be done that would have a material bearing
14 on the impediment we saw with the approval of
15 charges. And we must have concluded that although
16 there are always avenues that can be pursued, that
17 the avenues that were hypothetically opened would
18 not have answered the legal issue that we were
19 stumbling on in terms of this charge approval.

20 Q All right. Were you aware that there were three
21 males -- four males in the back of the paddy
22 wagon -- three males in the back of the paddy
23 wagon when Mr. Paul was left in the alley?

24 A I would have been aware of that because they were
25 picked up from the Cobalt Hotel. Mr. Paul was

1 repositioned to another compartment before they
2 were loaded into the paddy wagon.

3 Q All right. Now did you think that any of those
4 three might have made observations of either Mr.
5 Paul's condition or the manner in which he was
6 dealt with in that alley?

7 A I have no recollection of turning my mind to that
8 avenue for further investigation.

9 Q Was that because you didn't think they would have
10 relevant information?

11 MR. CROSSIN: Excuse me. I think this, again, demonstrates
12 this collapse from the facts that -- or the
13 information that Mr. Fitch had before him and
14 information my learned friend has and the findings
15 of fact you made. I do not recall that you made a
16 finding of fact there were three people in that
17 paddy wagon. My recollection is that there was
18 two people, Mr. Angel and the deceased.

19 MR. KELLIHER: Wrong.

20 MR. CROSSIN: Well, that's my recollection.

21 THE COMMISSIONER: I can't say at this point in time. I know
22 that there was more than one but I can't tell you
23 the exact number at the present time. I think
24 that you're certainly permitted to ask the
25 question about were there other people in the back

1 of the car or the back of the wagon and did you
2 consider them as being potentially of some
3 assistance to you. I don't want you to get into a
4 debate about why you did or didn't do it but you
5 can certainly ask those questions.

6 MR. KELLIHER: Thank you.

7 Q Could you answer that question, sir?

8 A Again, my recollection was that Constable Instant,
9 before Mr. Paul was left in the laneway, attended
10 at the Cobalt Hotel and that my recollection was
11 three, three arrestees were loaded into the back
12 of the paddy wagon and that Mr. Paul was
13 repositioned into a different compartment. I do
14 not recall turning my mind to the question of
15 whether it would be a useful avenue for further
16 investigation to attempt to contact those three
17 arrestees to see if they had any recollection
18 about Mr. Paul's state when he was left in the
19 laneway. Had I turned my mind to that question,
20 I'm not sure that it would have helped me in the
21 sense that I proceeded to think about this case on
22 the basis that Mr. Paul was unable to care for
23 himself at that point.

24 Q All right. So it really didn't matter what
25 happened in that alley?

1 A Again, I don't have a current recollection of
2 thinking that. But from the analysis that I was
3 bringing to bear to the issue, it's possible that
4 I came to that conclusion. I simply don't have a
5 current recollection of turning my mind to it.

6 Q Can I ask you to turn to page seven of nine?
7 Heading, whether the new evidence advances the
8 case. Second paragraph: The difficulty with this
9 case lies not with the appearance of Mr. Paul and
10 the perceived degree of his physical incapacity,
11 but whether the police officers should have known
12 from all of the information before them that the
13 apparent incapacity was due to intoxication as
14 compared with something else and, more
15 importantly, that if left unattended, Mr. Paul was
16 at risk of bodily harm.

17 Did you agree with that?

18 A Not all of that paragraph, no. In my mind, again
19 it didn't matter what incapacitated Mr. Paul, Mr.
20 Paul was incapacitated and that gave rise to a
21 duty. What I would like to point out, though, is
22 that in Ms. DeWitt-Van Oosten's opinion, not only
23 in this paragraph but in other portions of the
24 opinion, she's underscoring the most important
25 factor in the charge approval analysis and that is

1 was there objective foreseeability of the risk of
2 bodily harm.

3 Q Right.

4 A That's reflected at page seven in the paragraph
5 that you referred me to. It's also more starkly
6 set out on page six where Ms. DeWitt-Van Oosten
7 comes directly to the problem which she says the
8 problem lies with foreseeability of harm.

9 Q Yes.

10 A And that is the -- at the end of the day the
11 analysis that she concludes with on page eight of
12 her memorandum to me.

13 Q Yes. I'm sure there's much in here that you agree
14 with, but you don't agree with this statement:
15 The difficulty with this case lies not in the
16 appearance of Mr. Paul and the perceived degree of
17 physical incapacity, but whether the police
18 officer should have known, from all of the
19 information before them, that the apparent
20 incapacity was due to intoxication.

21 That seems to be directly at odds with much
22 of what you testified to today?

23 A But continue on: And, more importantly, that if
24 left unattended, Mr. Paul was at risk of bodily
25 harm.

1 Q Yes?

2 A I see Ms. DeWitt-Van Oosten here identifying as
3 the most important feature of the case -- what I
4 regarded as the most important feature of the
5 case, and while I perhaps would not adopt every
6 line in Ms. DeWitt-Van Oosten's opinion or,
7 indeed, every line in the opinions of my other
8 colleagues in the Criminal Justice Branch, I
9 adopted and endorsed her opinion with respect to
10 the mental element.

11 Q Right. But did you tell her, well, I don't agree
12 with that statement?

13 A I have no recollection of telling her that, but I
14 believe that it was the subject of discussion, at
15 least between Ms. Taylor and myself. One of the
16 things that we were focusing on is whether it
17 mattered. And I believe that's Ms. Taylor's
18 annotation in the margin beside the paragraph that
19 you've taken me to, Mr. Kelliher, which I think
20 likely reflects a discourse that was occurring
21 between Ms. Taylor and myself.

22 Q All right. Thank you. Could the Commissioner's
23 interim report be put before this gentleman? Do
24 we have an extra copy of that? Do you? Sir, I'm
25 going to ask you to turn to page five of that

1 report?

2 MS. PASTINE: What page was it?

3 MR. KELLIHER:

4 Q Page five. Third full paragraph, follow along
5 with me: The VPD investigation into the
6 circumstances of Frank Paul's death was
7 methodically flawed. In particular, the
8 unwritten, unpublished, and generally unknown
9 policy of preparing so-called neutral reports into
10 police-related shootings provided an unaccountable
11 environment for the conduct of superficial
12 investigations and inadequate reports to Crown
13 counsel and, hence, had the effect of ensuring
14 that despite police involvement in the death and
15 the assignment of responsibility to the homicide
16 squad, facts were overlooked, suspicions
17 unaddressed, and clarifying evidence left
18 untouched. The various explanations offered by
19 Sergeant Russell Sanderson, responsible for the
20 jail on the evening of December 5, 1998, must be
21 rejected in its entirety. From any perspective,
22 Frank Paul was in need of care that evening. And
23 if the superficial care, the sobering cell,
24 commonly referred to as the drunk tank, was to be
25 kept from him, this experienced officer could not

1 properly conclude that he could be safely
2 discharged to the winter streets of Vancouver. I
3 emphasize that the decision to reject Frank Paul
4 from admission to the jail, despite being sent
5 there by two experienced and capable patrolmen to
6 sober up, was a decision made in a moment and
7 without any responsible level of attention and
8 care.

9 Now particularly with the first paragraph
10 that I read to you, beginning the VPD
11 investigation into the circumstances of Frank
12 Paul's death was methodically flawed and all that
13 follows there, do you accept that's an accurate
14 description, both of the investigation and the
15 report to Crown counsel?

16 MR. PECK: I object to that question, Mr. Commissioner.

17 MR. COWPER: Well, I have a separate problem and so I'll state
18 it as commission counsel, which is I think we made
19 it clear that my understanding of the judgment was
20 that in order to avoid second-guessing, it was
21 important not to directly or indirectly import all
22 of the facts which you heard over 60 something
23 days of hearing or through 60 some witnesses. And
24 I think the danger, and I think there is a very
25 real and present danger here, of taking your

1 conclusions based on the very, very substantial
2 body of evidence which considerable effort was
3 made to gather for you and then presenting it to
4 this witness dealing with what he understood in
5 2001, so --

6 MR. KELLIHER: No, no, I said today, --

7 MR. COWPER: No.

8 MR. KELLIHER: -- I said, do you accept this.

9 MR. COWPER: Well, I don't know if that's a question of fact at
10 all. I don't understand the purpose. I think
11 it's flatly inconsistent with the prohibition
12 against second-guessing. I may be wrong. I'll
13 just state my reaction which is what my friend has
14 sought to do, and, of course, this is your
15 commissioner's report, is to say to a witness
16 who's dealing with facts before you and explaining
17 what he did and the facts on which he was doing
18 and then taking your conclusion with respect to
19 VPD report saying, well, do you agree with that?
20 I don't know how this witness has any basis for
21 agreement or disagreement with your conclusion
22 based on the evidence before the commission.

23 MR. KELLIHER: Mr. Commissioner, before ruling, may I make a
24 submission in the absence of the witness?

25 THE COMMISSIONER: Yes, you may.

1 Thank you, Mr. Fitch.

2 **(WITNESS STOOD DOWN)**

3 MR. KELLIHER: Mr. Commissioner, Mr. Fitch has been put on the
4 stand as a senior member of the Criminal Justice
5 Branch and has spent a good part of his first day
6 on the stand explaining how the Criminal Justice
7 Branch operates its various components and
8 functions. In a sense, he is the lead
9 spokesperson, if you will, so far as we've heard,
10 for the Criminal Justice Branch. It's important
11 to know if this man in his capacity, even today,
12 accepts or rejects the finding of this commission
13 in respect to the completeness of the
14 investigation by the Vancouver City Police
15 Department. This today is part of the Criminal
16 Justice Branch's response to the death of Frank
17 Paul. If he says when I ask him, do you accept
18 this finding today and he says no, that will say
19 volumes about the Criminal Justice Branch, that
20 even in defiance of the evidence and the findings
21 of fact that have been made here, they still
22 adhere to the position that this was an acceptable
23 report to Crown counsel. If that's the evidence,
24 it's important to know it. It will demonstrate
25 how intransigent that organization is.

1 THE COMMISSIONER: Mr. Kelliher, I don't think it's a fair
2 question. I think it gets in the area of debate
3 and I'm not going to allow it. I think it's an
4 unfair question to the witness. You can proceed
5 with the line of questioning with respect to what
6 he did consider or didn't consider, but putting
7 that situation and asking him to reflect back on
8 something which is my decision based upon what I
9 have, I think is an unfair question.

10 MR. KELLIHER: All right. Thank you.

11 THE COMMISSIONER: You can ask the witness to come in.

12 MR. WARD: Maybe, Mr. Commissioner, just before the witness
13 returns, I just wanted to rise now while we have
14 the opportunity and indicate for your assistance
15 and of that of my friends that I planned in my
16 cross-examination of this witness to touch on
17 subject matters similar but in a very different
18 way, in a way in which I believe is not
19 objectionable, but I wanted to signal that so that
20 you were aware now that I wanted to touch on --

21 THE COMMISSIONER: I'll deal with it at the time.

22 MR. WARD: Thank you.

23 **GREGORY JAMES FITCH, Resumed:**

24 THE COMMISSIONER: Thank you, Mr. Fitch.

25 Further questions?

1 MR. KELLIHER: Yes, Mr. Commissioner. I'm going to ask Mr.
2 Fitch not to answer this question, to give anybody
3 a chance to object to it or for you to indicate to
4 me that it's not proper. The question is this,
5 sir, today with the benefit of hindsight, do you
6 think the investigation by the Vancouver City
7 Police Department was flawed into the death of
8 Frank Paul?

9 MR. PECK: I object to that question. It's just in different
10 language.

11 THE COMMISSIONER: Your objection is properly taken.

12 MR. KELLIHER: Mr. Commissioner, those are my questions. Thank
13 you very much.

14 THE COMMISSIONER: Thank you, Mr. Kelliher.
15 Are you ready to proceed now?

16 MR. WARD: Yes.

17 THE COMMISSIONER: Please go ahead.
18 And we're not scheduled to sit tomorrow, are
19 we?

20 MR. COWPER: No.

21 THE COMMISSIONER: No. Any time you're ready, Mr. Ward.

22 **CROSS-EXAMINATION BY MR. WARD:**

23 Q Thank you. I need just a moment to get assembled
24 here, Mr. Commissioner.

25 Now, Mr. Fitch, just at the outset, I want to

1 ask you about the Criminal Justice Branch's
2 website which is, as I understand it, part of the
3 Attorney General ministry's website; is that
4 right?

5 A I believe that's so, yes.

6 Q I'd like to show you two extracts from the
7 website. And, Mr. Registrar, I have -- I guess I
8 step up. The first one, two copies, the original
9 is the coloured vision. I've got some copies
10 here. And the second one, second document, --

11 THE COMMISSIONER: You should give this to the witness.

12 MR. WARD:

13 Q -- also providing two copies. The first document,
14 can you confirm, sir, the coloured pages comprise
15 extracts from the current website of the Criminal
16 Justice Branch of the Ministry of Attorney
17 General?

18 A I would have to look at the current website, Mr.
19 Ward, to confirm that, I have not done so.

20 Q Well, I can advise I took them off yesterday by
21 navigating through the site, but you recognize the
22 logo, British Columbia, The Best Place and Earth
23 and so forth?

24 A I certainly do.

25 Q All right. In this collection of documents, the

1 first one with the coloured pages, the first
2 excerpt is six pages in length. And if I can draw
3 your attention to the first page, under the
4 heading Ministry of Attorney General, B.C.'s
5 Prosecution Service, there's a heading, Trusted,
6 Fair, Impartial; do you see that?

7 A I do.

8 Q And I take it from this that it is a guiding
9 principle, if you will, of the prosecution service
10 that its activities are to be conducted in a
11 manner that is trusted, fair, and impartial?

12 A Correct.

13 Q If you skip on through, sir, you'll see on this
14 page and a few pages following, there are some
15 brief announcements of latest news from the
16 Ministry. And then if you get to page six of six,
17 you'll see that the assistant deputy Attorney
18 General is identified as Robert W. G. Gillen, QC;
19 is that right?

20 A Correct.

21 Q And do you report to him?

22 A I do.

23 Q And under that passage, there's FAQ's, which I
24 understand to mean frequently asked questions; do
25 you see that?

1 A I do.

2 Q And the first one there is how does the charging
3 process work?

4 A Yes.

5 Q If you turn over the page, the next page from the
6 website is a page dealing with that subject and
7 you will see there frequently asked questions.
8 The first bullet, how does the charging process
9 work and then a heading underneath that; do you
10 have that?

11 A I do.

12 Q And I want to draw your attention to the first
13 component of the charge approval standard that
14 we've heard about, and that's in the first bullet
15 under the sentence that reads: There are two
16 components to the Crown counsel charge approval
17 standard.

18 And I'll read it: An evidentiary test that
19 requires a substantial likelihood of conviction.
20 The evidentiary test is met when Crown counsel are
21 satisfied there is a strong, solid case of
22 substance to present to the Court.

23 Do you see that?

24 A I do.

25 Q Is that another satisfactory way of articulating

1 the first branch of the two pronged test?

2 A I think it's an effort on behalf of the branch to
3 make the substantial likelihood of conviction
4 threshold more publicly understandable. This
5 language is also reflected in our policy on charge
6 approval. It's because our policies are available
7 to the public, we will sometimes, when a threshold
8 standard is adopted, attempt to use language that
9 makes it more publicly accessible or
10 understandable, but prosecutors will refer to the
11 standard in, in -- as one as having sort of a
12 legal meaning, a substantial likelihood of
13 conviction.

14 Q I take it from your answer then that in lay terms,
15 one might characterize it as whether there's a
16 strong, solid case of substance to present to a
17 Court?

18 A Yes, I think that's fair. It's our effort to
19 communicate to the public language that, that is
20 descriptive of substantial likelihood of
21 conviction.

22 Q And so it would be fair then to say that the
23 various Crown counsel, yourself included, who
24 reviewed the Frank Paul case, determined that in
25 this situation, there was not a strong, solid case

1 of substance to present to the Court?

2 A We determined that there wasn't a substantial
3 likelihood of conviction, yes.

4 Q Which if you were speaking to a lay audience, you
5 would characterize as not being a strong, solid
6 case of substance to present to a Court?

7 A Or language similar to it, yes.

8 Q All right. If I could ask you, please, to skip
9 ahead a page to the next excerpt, page one of one,
10 entitled Ministry of Attorney General, about
11 B.C.'s prosecution service; do you see that?

12 A I do.

13 Q And I see about four paragraphs down, it indicates
14 there are approximately 460 Crown counsel
15 throughout B.C., that sound about right?

16 A I couldn't -- it sounds about right, yes.

17 Q Right. And that they're divided into various
18 regions as indicated there?

19 A Correct.

20 Q And in respect of something arising during my
21 friend's cross-examination earlier, I understood
22 you to say that you could not advise how many of
23 those Crown counsel might be of First Nations
24 heritage?

25 A No, I'm unable to, to advise you of that.

1 Q You, I expect, are in regular contact with Mr.
2 Gillen?

3 A Yes.

4 Q And he is to be a witness at this proceeding?

5 A I understand so.

6 Q And would you expect that that would be a subject
7 that he might be able to research and be able to
8 advise us on?

9 A If you're asking me to request that those
10 inquiries be made, I'll certainly do so.

11 Q Thank you. If you could turn the page, please, in
12 this bundle to the next one? This appears to be a
13 statement of purpose and principles of the
14 Ministry and, in particular, the prosecution
15 service; is that right?

16 A That's right.

17 Q And it states that there are six fundamental
18 principles and I'll just get you to confirm that
19 the first three are, indeed, fairness,
20 independence, and rule of law?

21 A Correct.

22 Q And you and your employees or the employees of the
23 branch strive to uphold those principles?

24 A Certainly we do.

25 Q If you can skip a couple of pages more, please, to

1 a subheading titled Role of Crown Counsel. This
2 is just a summary of the role of Crown counsel in
3 the criminal justice system, correct?

4 A Yes, it's a public education document.

5 Q Right. And similarly, the last page of this
6 excerpt outlines the role of special prosecutors
7 when they are retained from time to time?

8 A Yes.

9 Q I ask, Mr. Commissioner, that this bundle of
10 documents be marked as the next exhibit.

11 THE COMMISSIONER: Yes. Exhibit number?

12 THE REGISTRAR: CJB number 7.

13 THE COMMISSIONER: CJB number 7. Thank you.

14 (EXHIBIT 7: Bundle of documents, extracts from
15 the current website of the Criminal Justice Branch
16 of the Ministry of Attorney General)

17 MR. WARD:

18 Q Sir, a moment ago I handed you -- I provided the
19 registrar, more accurately, with a second bundle
20 of documents headed Crown counsel policy manual,
21 do you have that?

22 A I don't believe that was provided to me, was it?

23 Q I thought I did.

24 A This here?

25 Q It's a five page package.

1 THE COMMISSIONER: Do you have it?

2 A Yes, I, I -- I'm sorry, I do have this --

3 MR. WARD:

4 Q And it --

5 A -- package. This is, this is -- just to clarify,
6 Mr. Ward, this is not the manual itself. This is
7 a preface that has been taken from the Crown's
8 policy manual.

9 Q Yes. The current Crown counsel policy manual is
10 available online?

11 A Correct.

12 Q And you recognize this five page package to be an
13 excerpt from that document, the Crown counsel
14 policy manual itself?

15 A I believe it is, yes.

16 Q And I can advise you that it's just been recently
17 taken by myself from the website, so I think it's
18 the most current version. On the first page of
19 this document, there's a brief history of the
20 development of the Crown counsel office, and
21 you're familiar with that?

22 A In a general way, yes.

23 Q And I see, just as a matter of interest, at the
24 foot of that first page, it appears that in 2005,
25 there were 413 Crown counsel within the province,

1 so the numbers have swelled somewhat?

2 A Yes, I'm not, I'm not sure whether the 460 figure
3 that you referred me to is the number of full time
4 equivalence or whether that's the number of people
5 who may have part-time work with us, so the
6 discrepancies can be explained through other means
7 in addition to the growth in the prosecution
8 service.

9 Q And I'd like to just skip through this document as
10 well. Next, page three, just get you to confirm
11 that the manual forward -- let me rephrase the
12 question. You described this as a preface to the
13 manual?

14 A Yes, I, I believe that if the binder was printed
15 out, this would be in the front tab.

16 Q So page three of this preface has a heading about
17 a third of the way down entitled Role of Crown
18 Counsel, you see that?

19 A I do.

20 Q And under that, there are a series of judicial
21 statements on that role, correct?

22 A Yes.

23 Q Extracted from various case authorities?

24 A Correct.

25 Q I won't ask you about that, but I would like to

1 ask you about the heading that appears on page
2 four in about the middle, that heading reads
3 Relationship of the Branch With Other Justice
4 Agencies, do you see it?

5 A I do.

6 Q And the first subheading is entitled Police, do
7 you see that?

8 A I do.

9 Q I'm not going to read all of this but the third
10 paragraph at the foot of that page says this:
11 There is no question that cooperation between the
12 police and Crown counsel is absolutely essential
13 to the proper administration of justice.

14 Do you see that?

15 A I do.

16 Q Okay. And then over the page in italics, there's
17 a quote taken from a paper prepared by one John
18 Pearson; you see that?

19 A I do.

20 Q And the first sentence reads: Police and
21 prosecutors are in a symbiotic relationship.

22 And you used that term yourself yesterday, I
23 believe?

24 A I may, I may have. I think I described it as one
25 of mutual independence but a recognition that the

1 two agencies are interdependent in their work as
2 well. I may have used symbiotic, I'm uncertain.

3 Q I thought you did. In any event, would you agree
4 that a definition of symbiotic or symbiosis is a
5 relationship between people or organizations that
6 depend on each other equally?

7 A I think that's a fair definition of the word.

8 Q It's like a partnership; is that fair?

9 A No, I wouldn't necessarily say it's a partnership,
10 in the sense that there is an eradication of lines
11 between separate entities in the partnership, I --
12 if that's what you mean. There -- I think the
13 best I can do in terms of describing the
14 relationship is to refer to Justice Martin's
15 description of it in his report and that is that
16 the two organizations are mutually independent and
17 important constitutional safeguards are protected
18 by that mutual independence. At the same time,
19 the two organizations must work cooperatively, are
20 interdependent. And although they discharge their
21 functions in an independent fashion, they are
22 linked together in the investigation and
23 prosecution of crime, recognizing that the roles
24 are independent.

25 Q All right. With respect to the respective roles

1 of police on the one hand and prosecutors on the
2 other, you say, and I understand you to say, that
3 each of those entities, police on the one hand,
4 prosecutors on the other, is independent?

5 A In their essential responsibilities, yes.

6 Q Do you accept that in their task of apprehending,
7 convicting and sentencing the guilty, they depend
8 on each other?

9 A I would say that they are interdependent
10 organizations, yes.

11 Q I would ask, Mr. Commissioner, that this document
12 to which I've been referring be marked as the next
13 exhibit, the preface to the Crown counsel policy
14 manual. I do note that portions of the manual
15 from various dates are already in evidence. I
16 believe exhibit --

17 THE COMMISSIONER: We will mark this as the next exhibit, CB 8.

18 MR. WARD: Thank you.

19 THE COMMISSIONER: We're marking it as an excerpt, is that
20 correct, from the policy manual?

21 **(EXHIBIT 8:** Excerpt from the preface to the Crown
22 counsel policy manual)

23 MR. WARD:

24 Q Yes. Thank you. Now as a senior member of the
25 Criminal Justice Branch's prosecution service, in

1 the course of your work you have had a good
2 working relationship with members of the Vancouver
3 Police Department, correct?

4 A I would like to think generally that's so, yes.

5 Q In the day-to-day handling of normal criminal
6 investigative files, your office would work
7 closely with the Vancouver Police Department?

8 A Certainly.

9 Q Okay. And you yourself, I expect, are on a first
10 name basis with the former Chief Constable Jamie
11 Graham?

12 A I am.

13 Q And his successor, Deputy Chief Doug LePard?

14 A I am.

15 Q And while your office was reviewing the Frank Paul
16 matter, specifically in around 2003, 2004, you
17 would have been meeting with and speaking with
18 those individuals regularly?

19 A Deputy Chief LePard more so than Chief Constable
20 Graham. We sat on a committee together which was
21 an interagency committee involving police
22 officers, correctional officers, Crown counsel.
23 And as a consequence, Deputy Chief LePard and I
24 did an awful lot of work in the community
25 together.

1 Q You were co-vice chairs in that committee for the
2 Pacific region?

3 A Actually I was the chair and Deputy Chief LePard
4 was the vice chair, as I recall.

5 Q All right. I'm sorry, you and Jamie Graham for a
6 time were co-vice chairs; is that correct?

7 A I don't recall that. I believe I succeeded Chief
8 Constable Graham in that role, although I only
9 recall one meeting that he attended where I was
10 present at.

11 Q Sir, I'm going to show you -- the committee you're
12 referring to is called the national joint
13 committee of senior criminal justice officials?

14 A Correct.

15 Q A Canada-wide organization?

16 A Correct.

17 Q Divided into regions?

18 A Correct.

19 Q Including the Pacific region?

20 A Right.

21 Q I'm going to show you a six-page document which is
22 an excerpt from the first six pages of the 2003,
23 2004 annual report for the Pacific region. Do you
24 have that?

25 A I do.

1 Q And just to put a little more flesh on the bones
2 of this organization, could you turn, please, to
3 page three of the annual report excerpt, do you
4 have that?

5 A I do.

6 Q I'll read what I understand to be the mission
7 statement of this organization. It is the
8 promotion of effective partnerships to improve the
9 administration of criminal justice in Canada.

10 Is that right?

11 A Yes, that's the national mission of the national
12 joint committee.

13 Q And the values are said to be cooperation,
14 understanding and mutual respect?

15 A Yes.

16 Q And the mandate is to establish and maintain
17 efficient and effective mechanisms of
18 communication and consultation between the police,
19 the Correctional Service of Canada, the National
20 Parole Board, the Canadian Association of Crown
21 Counsel, and any other agency which is part of the
22 criminal justice system, right?

23 A Correct.

24 Q I note the words effective partnerships under the
25 mission statement. Isn't it fair or correct to

1 say that the police, the correctional service, and
2 Crown counsel are partners in the administration
3 of justice, criminal justice within the country?

4 A Certainly we're, we're partners but we exercise
5 independent functions. And within our assigned
6 responsibilities, the police are independent in
7 their investigative sphere and the prosecution
8 service is independent in its prosecutorial
9 sphere.

10 Q I'll ask you, sir, to skip ahead in this document
11 another couple of pages to the list of the
12 executive for 2003, 2004, do you have that?

13 A I do.

14 Q If I'm reading this correctly, it suggests that
15 Chief Constable Jamie Graham of the Vancouver
16 Police Department was one regional vice chair
17 during this period of time and you were the other
18 regional vice chair; is that correct?

19 A It appears to be so, although that was for a very,
20 very brief time. As I recall, Chief Constable
21 Graham only attended one transition meeting, moved
22 away from the NJC because of -- his
23 responsibilities could not encompass the work of
24 this committee as well and I stepped up at that
25 point to be regional vice chair to Ms. Maedel. I

1 then became the chair of this committee and
2 subsequently Deputy Chief Constable LePard became
3 my deputy chair or vice chair.

4 THE COMMISSIONER: Mr. Ward, you're taking a great deal of time
5 in setting the stage for the relationship between
6 these two organizations and I think we've got all
7 the background we really need.

8 MR. WARD: Thank you. If I could ask that this document be
9 marked as the next exhibit, please.

10 THE COMMISSIONER: Yes. Exhibit number?

11 THE REGISTRAR: CJB number 9, sir.

12 THE COMMISSIONER: Number 9. Thank you.

13 **(EXHIBIT 9:** Excerpt from the first six pages of
14 the 2003, 2004 annual report for the Pacific
15 region)

16 MR. WARD:

17 Q Now, sir, according to the chronology, your office
18 was reviewing the Frank Paul matter in 2003, 2004,
19 correct?

20 A Just locating the chronology for a second.

21 Q Exhibit 5.

22 A Yes. In the period of 2003 to 2004, the
23 prosecution service had no active role to play by
24 the looks of the chronology. My briefing of the
25 ADAG was in 2001. The next event that engaged the

1 prosecution service was in February of 2004 and
2 that's when Mr. Reiner sent additional information
3 to the Attorney General which in turn prompted the
4 Criminal Justice Branch to revisit again its
5 charge approval opinion and that opinion was
6 conducted by Mr. Hicks, who was regional Crown
7 counsel in the Vancouver region at the time.

8 Q Now in early 2004, the Frank Paul matter was
9 attracting a lot of public attention and was quite
10 controversial; is that fair?

11 A I know that it attracted a great deal of public
12 concern. I, I accept your word that that was
13 active in that respect in, in 2004.

14 Q And just for example, if you have Exhibit 3, the
15 black binder entitled CJB documents, if I could
16 ask you to, please, turn to tab three of that,
17 Exhibit 3, volume three?

18 A I have a larger binder than you appear to have
19 marked CJB documents. I'll just -- just give me a
20 moment, Mr. Ward, to find what you've got.

21 Q Exhibit 3, tab three.

22 A Yes.

23 Q Okay. Just to confirm, these appear to be e-mails
24 that were being -- I'm looking at the first
25 page -- disseminated by Geoffrey Gaul, as he then

1 was, of your ministry to yourself and other senior
2 Crown counsel?

3 A Yes, these would be distributed throughout the
4 organization and, and particularly to the managers
5 that are on the distribution list on a -- on an
6 every morning basis so that we would be aware of
7 the issues that were attracting public attention
8 or concern.

9 Q And you can see, just by leaving through these,
10 that the Frank Paul matter was the subject of
11 several of these e-mails, it was then in the
12 media?

13 A I, I certainly see at least one, yes. Yes.

14 Q Sir, we've seen the policy respecting special
15 prosecutors and that's in volume four, Exhibit 4,
16 tab D?

17 A Just give me a moment again, Mr. Ward, please.
18 Yes, I have it.

19 Q Just before I address this, I want to ask you a
20 question in respect of the evidence that you've
21 just given, in 2003, 2004, specifically early
22 2004, the Frank Paul case had come back to the
23 Criminal Justice Branch for further review?

24 A Correct.

25 Q It was also in the news media and was attracting a

1 high profile?

2 A It would appear so.

3 Q At that time, you and Chief Jamie Graham were
4 co-chairs of the national committee we've referred
5 to?

6 A Correct.

7 Q You and he and then you and his successor, Deputy
8 Chief Doug LePard, were attending numerous
9 meetings together?

10 A Yes.

11 Q All over the country?

12 A Yes.

13 Q The special prosecutor policy statement issued by
14 the branch says at page two of two in the first
15 tab --

16 THE COMMISSIONER: Page two of -- sorry, of exhibit?

17 MR. WARD:

18 Q Tab D1. Under the heading Cases Addressed By
19 Special Prosecutors, it reads: In practice, most
20 special prosecutors are appointed in cases
21 involving cabinet ministers and other senior
22 public or ministry officials, senior police
23 officers or persons in close proximity to them.

24 You see that?

25 A I do.

1 THE COMMISSIONER: I'm sorry, you've lost me.

2 MR. WARD: Sorry. Exhibit 4, the cerlox bound binder.

3 THE COMMISSIONER: I don't have 4. Yes, I've got it now.

4 MR. WARD: Tab D1, page two, halfway down the page.

5 THE COMMISSIONER: All right. Thank you.

6 MR. WARD:

7 Q And what's the rationale for that policy?

8 A The rationale for the special prosecutors policy
9 is that situations may arise where there is a
10 significant potential for real or perceived
11 improper influence in prosecutorial
12 decision-making. And for the most part, what
13 we're talking about here is a public perception
14 that if the file was to stay in-house, the public
15 might perceive that the matter would not be dealt
16 with dispassionately or objectively. The special
17 prosecutor provision is designed to address that
18 public apprehension by permitting the Assistant
19 Deputy Attorney General to appoint in a special
20 case a prosecutor who is selected from a list
21 maintained by the Deputy Attorney General, the
22 Assistant Deputy Attorney General, and the
23 president of the Law Society, in other words,
24 senior, very experienced barristers to conduct
25 prosecutions or appeals on behalf of the Criminal

1 Justice Branch. So it provides a level of
2 distance in terms of public perception. It is
3 designed to maintain public confidence in the
4 administration of justice where again there is
5 significant potential for real or perceived
6 improper influence.

7 Q Why is it, to your understanding, that senior
8 police officers are included in that list?

9 A I believe, in fact, that language came from Mr.
10 Owen's discretion to prosecute inquiry. I, I
11 expect that why that language is included is that
12 there may be a public apprehension that if the
13 commissioner of the RCMP is under investigation
14 for alleged criminal behaviour that there may be
15 something less than an objective judgment brought
16 to bear in the determination of whether the
17 prosecution should lay charges or at least a, a
18 perception that there will be interference,
19 improper interference, and that's why we have a
20 statute now that permits the Assistant Deputy
21 Attorney General to appoint a special prosecutor
22 under that act.

23 Q Well, isn't it really that the public may perceive
24 that in their usual day-to-day work, Crown counsel
25 work in close cooperation, indeed partnership,

1 with police officers and that there may be a
2 perception if a police officer or senior police
3 officer, according to this phrase, is charged or
4 is the subject of potential charges that Crown
5 counsel should have someone independent to assess
6 it?

7 A That perception could arise and there's a number
8 of different ways it can be dealt with. It can be
9 dealt with by the assignment of a prosecutor who
10 is not in the jurisdiction in which the alleged
11 offence is said to have been committed, such that
12 there is no personal connection between the
13 prosecutor, the individual charged or the force
14 that that individual serves or an ad hoc Crown
15 counsel might be selected to prosecute that case
16 or in an exceptional case, a special prosecutor,
17 much would depend on context. And it is very much
18 a discretionary determination as to what the
19 context requires in a given case.

20 Q These words in close proximity, do you know what
21 they mean?

22 A Well, I think they likely contemplate because the
23 words modify all of the offices or people that are
24 contemplated by the policy. For example, a
25 cabinet minister's daughter happens to get herself

1 in a, a bit of trouble, it, it may be because of
2 the proximity of that individual to someone, a
3 cabinet minister, who is perceived to have
4 influence, it may be an appropriate occasion for
5 the ADAG to turn his mind to the question of
6 whether the public confidence in the
7 administration of justice would better be served
8 by a special prosecutor.

9 Q Let me suggest another example, how about a long
10 time loyal sergeant of a police department who's a
11 subordinate to, say, the Deputy Chief, wouldn't
12 that person be in close proximity to a senior
13 police officer?

14 A I'm not sure that that's what the policy
15 contemplates. The policy is -- again, it's, it's
16 addressing situations where there's a potential
17 for real or perceived improper influence and
18 although that can arise in a case where a police
19 officer is the subject of an investigation and may
20 be charged, there are situations where that
21 perception could appropriately be dealt with, as
22 I've indicated, either by the assignment of a
23 prosecutor that has no connection with that force
24 or individual or by an ad hoc Crown counsel. It
25 wouldn't necessarily require the assignment of a

1 special prosecutor and in most cases, in my
2 judgment, wouldn't.

3 Q Well, let me ask you this, and I note the time,
4 wouldn't the Frank Paul matter, given the profile
5 it was acquiring in early 2004 and the suggestion
6 that three members of the Vancouver Police
7 Department were considered to be the subjects of
8 the original investigation, be the type of case
9 that would be tailor-made for the application of
10 your special prosecutors policy?

11 A I would think not and I would think not because I
12 don't see that kind of case as being one where
13 there would be a perceived improper influence
14 perception of that. It certainly is a
15 discretionary call. It would be open to the
16 Assistant Deputy Attorney General in a case like
17 this to consider a range of options, a range of
18 options that would include ad hoc counsel or, if
19 he felt it appropriate, the assignment of a
20 special prosecutor, but I would, I would not say
21 that because a case is high profile or simply
22 because it involves police officers as the targets
23 of an investigation then those two factors
24 necessarily trigger the assignment of a special
25 prosecutor.

1 Q And in saying that -- well, let me back up, sorry.
2 Have you read former Mr. Justice Braidwood's
3 report?

4 A I have not.

5 Q Thank you.

6 A I have, however, read the most recent report of
7 Mr. Owen which examined the special prosecutor
8 process and it did make reference to
9 recommendations made as a consequence of the
10 Braidwood Inquiry, so I'm familiar with the
11 recommendations that have been made in that
12 context.

13 Q And in particular with the Braidwood Commission's
14 recommendation that all cases involving police
15 related incidents where death or serious injury
16 occurs should be handled by special prosecutors?

17 A I read that, including Mr. Owen's observation that
18 he disagreed with it.

19 THE COMMISSIONER: Can we take the break now for lunch?

20 MR. WARD: Yes. Thank you, Mr. Commissioner.

21 THE REGISTRAR: The hearing is now adjourned. Order.

22 **(PROCEEDINGS ADJOURNED AT 12:33 P.M.)**

23 **(PROCEEDINGS RECOMMENCED AT 2:00 P.M.)**

24 THE REGISTRAR: The hearing is now resumed, Mr. Commissioner.

25 THE COMMISSIONER: Thank you. Mr. Ward?

1 MR. WARD:.

2 Q Yes, thank you. Make sure I'm on here. Mr.
3 Fitch, just before we broke for lunch, you
4 mentioned the Owen report and I took you to be
5 referring to the recently released report by
6 Stephen Owen into the review of the special
7 prosecutorial system?

8 A That's correct.

9 Q And I've provided Mr. Registrar with that document
10 and I ask that a copy be shown to you. This is a
11 document entitled Special Prosecutor Review?

12 A Correct.

13 Q And what you were alluding to in your comments
14 about it, I suggest, is the passage is -- one or
15 more passages at page three, if you turn to page
16 three, please, the last full paragraph on the
17 page?

18 A Yes.

19 Q About halfway through that paragraph, I'll just
20 read it to you: The Braidwood Commission on the
21 death of Robert Dziekanski building on the
22 recommendations of the Davies Commission on the
23 death of Frank Paul recommended the creation of a
24 civilian-based, independent investigation office
25 or IIO to investigate all police related incidents

1 throughout the province in which death or serious
2 injury, among other harms, occurs.

3 Justice Braidwood further recommended that in
4 all such cases, a special prosecutor be appointed
5 in accordance with the Crown Counsel Act. And
6 then according to Mr. Owen, with great respect, I
7 disagree with that last aspect; that's what you
8 were referring to?

9 A Correct.

10 Q And if you turn over the page, please, to page
11 four, you'll see that Mr. Owen writes at the top
12 of the page that the B.C. Coroner Service reports
13 an annual average of 16 in custody or
14 police-involved deaths from 1992 to 2007,
15 reference appendix five. And then at the foot of
16 that paragraph, there's a reference to the fact
17 that a special prosecutor has now been appointed
18 to reconsider the original decision by Crown
19 counsel not to charge the four RCMP officers
20 involved in the Dziekanski death and characterizes
21 that as an exceptional case, do you see that?

22 A I do.

23 Q And you know that Mr. Peck, in fact, was appointed
24 to fulfil that role?

25 A I understand that's the case.

1 Q If I could take you to, before leaving this
2 document, appendix five, which is the very last
3 page. I believe this document has come to the
4 attention of this commission before. And, sir,
5 I've added up the figures, I don't know whether
6 you might have, but this table shows that in the
7 City of Vancouver, I'm now in the right-hand
8 column, for the years '92 to 2007, there were 52
9 police involved or custody deaths, does that sound
10 about right?

11 A I haven't done the arithmetic --

12 Q All right.

13 A -- but I accept that's so.

14 Q And the total for the province, according to my
15 addition, is 267, does that sound about right?

16 A I'll accept the figure as correct.

17 Q I know the numbers are quite small but I've used
18 these reading glasses and that's the best I've
19 been able to do. Could I ask, please, that that
20 be marked as the next exhibit?

21 THE COMMISSIONER: Yes, it's been identified. Number?

22 THE REGISTRAR: CJB number 10, sir.

23 THE COMMISSIONER: Number 10.

24 (EXHIBIT 10: Document entitled Special Prosecutor
25 Review)

1 MR. WARD:

2 Q Now, sir, I'd like to move to the area of the
3 handling by Crown counsel of police involved or in
4 custody deaths and start by referencing the
5 policies related to allegations against peace
6 officers. And I think that was in Exhibit 4,
7 sorry. It's Exhibit 4, tab B and there's a series
8 of them there, I believe. Do you have that, sir?

9 A Just give me a second. Yes, I have it now, Mr.
10 Ward.

11 Q Is it correct, and I'm looking now at tab one, the
12 first of the policies relating to allegations
13 against peace officers, is it correct that the
14 Crown counsel policy manual singles out only one
15 occupation, that of a peace officer, for a
16 different charge approval approach than the norm?

17 A Yes, I believe that's so.

18 Q So for everybody who works in some other
19 occupation, there's a process by which Crown
20 counsel approve charges?

21 A Yes.

22 Q And for peace officers, there's a separate,
23 distinct, written policy for how those charges are
24 to be approved; is that right?

25 A Yes, and a different process with the same, same

1 standards applicable in terms of charge approval.

2 Q Why, to your knowledge, are peace officers treated
3 differently than everybody else with respect to
4 the charge approval process?

5 A It's a policy choice that is, again, designed to
6 address public perceptions of how the
7 administration of criminal justice operates. It
8 recognizes that a member of the public might, on
9 the face of things, conclude that because the
10 police and the Crown necessarily have to work
11 cooperatively with one another that there might be
12 some kind of favouritism or different application
13 of charge approval standards. So part of it is to
14 address the apprehension that favouritism might be
15 at play when the Crown turns to consideration of
16 the charges against peace officers, part of it is
17 is to ensure consistency, so that we treat all of
18 these cases the same way. So we do that through a
19 policy that lifts two regional Crown counsel and
20 then to the director of legal services, the
21 decision-making authority with respect to these
22 files, that has the effect of lifting
23 decision-making out of local contexts where
24 otherwise Crown counsel might be making a charge
25 approval decision about a police officer that they

1 know or who works for a force that they regularly
2 deal with. And it so enhances public confidence
3 in the way we do our business if we avoid that
4 apprehension by adopting a process that ensures
5 that, that those perceptions will not be held by a
6 member of the community. A member of the
7 community will have confidence in the way we do
8 things.

9 The second point that I addressed was
10 consistency. And it ensures that a consistent
11 application of the charge approval standard occurs
12 if, if the decision-making authority is, is in one
13 or in several, in several people in the
14 organization but not dispersed as broadly as the
15 application that charge approval standard is
16 otherwise.

17 Q Public perception is a very important concept in
18 the administration of criminal justice, --

19 A I agree.

20 Q -- correct?

21 A I agree.

22 Q And that's due, at least in part, to the maxim
23 that justice must not only be done, it must be
24 perceived to be done, seen to be done?

25 A I agree.

1 Q And a concern about public perception in this area
2 is that, if I may restate what you have just said,
3 the public perceives that police officers and
4 Crown counsel routinely work cooperatively on
5 their day-to-day tasks?

6 A Yes.

7 Q Now Crown counsel at the very high levels, like
8 the office you occupy, also work cooperatively
9 with senior police officers, correct?

10 A Yes.

11 Q Given the importance of public perception,
12 wouldn't any concerns about allegations against
13 peace officers best be addressed by a different
14 regime where the decision-making function was out
15 of Crown counsel's hands altogether?

16 A In my opinion, it would be unnecessary to do that.
17 There are other important interests at play here
18 as well. By taking a large category of cases and
19 saying Crown counsel will not exercise
20 discretionary authority over these categories of
21 cases because there's a public perception, whether
22 informed or not, there's a public perception that
23 those cases might be treated differently, you
24 undermine the integrity of the prosecution
25 service. The public of British Columbia needs to

1 have confidence in a strong and independent
2 prosecution service. It needs to have confidence
3 that cases, except exceptional ones, where there
4 is a real or perceived improper influence in
5 prosecutorial decision-making will be dealt with
6 and are dealt with dispassionately and objectively
7 by Crown counsel. There is a role, however, for
8 both ad hoc counsel and, in the appropriate case,
9 the assignment of a special prosecutor and it's a
10 discretionary call that the Assistant Deputy,
11 Deputy Attorney General is often called upon to
12 make.

13 Q Just on that point, please, could you turn to the
14 next page in the policy manual, page two of tab
15 one? And under item six, subparagraph three, one
16 of the factors to be considered in the charge
17 approval process is whether the offence is of a
18 particularly serious nature or has considerable
19 public profile, do you see that?

20 A I do.

21 Q And then the paragraph goes on to say: Regional
22 Crown counsel may then consider the
23 appropriateness of using local Crown, Crown
24 counsel from outside the local jurisdiction or
25 retaining ad hoc counsel from the private Bar.

1 Do you see that?

2 A I do.

3 Q And this aspect of the policy is carried forward
4 in its subsequent iterations?

5 A I believe that continues to be a feature of all
6 iterations of the policy that would follow this
7 one, yes.

8 Q So the public attention a particular matter
9 receives, in addition to its seriousness, is a
10 factor?

11 A It -- yes, it is a factor.

12 Q And in the case of Frank Paul, both of these
13 factors were present. It was a serious allegation
14 or potential offence, correct?

15 A Agreed.

16 Q And it attracted some considerable public profile?

17 A Agreed.

18 Q These policies contemplate a memo with a
19 prescribed format, do you see that at the top of
20 this page too?

21 A I do.

22 Q And would you agree that a memo in this format was
23 not generated in the Frank Paul case? In other
24 words, no document setting out the names of the
25 potential accused, complainant, date of the

1 alleged offence, et cetera?

2 A I would agree that the memoranda were not set up
3 precisely in the format that the policy
4 recommends. Having, having said that, the
5 information that's required under those fields was
6 identified in the report. And in my experience of
7 looking at several hundred of these in the time
8 that I was the director of legal services, very
9 few of them were, were set up in this format. It
10 just became a matter of regional Crown counsel
11 style in terms of how they wish to present the
12 relevant information.

13 Q All right. You said, if I understood your
14 evidence correctly, that one of the objectives of
15 this policy relating to allegations against police
16 officers was to insure consistency?

17 A One of the objectives, yes.

18 Q Now I'm just restricting this question to the most
19 serious cases involving fatalities, police
20 involved fatalities. All right. The class of
21 case that we've seen from the Owen report seem to
22 be occurring about 16 times a year in the
23 province, on average, the police involved
24 fatalities, all right? I suggest that Crown
25 counsel has achieved consistency because no

1 charges of culpable homicide against police
2 officers have been prosecuted since 1991?

3 THE COMMISSIONER: Is that a question or a statement?

4 MR. WARD:

5 Q It's a question. Let me put it in a different
6 format. Are you aware of any cases where police
7 officers involved in fatalities occurring in the
8 line of duty in the Province of British Columbia
9 have been prosecuted?

10 A I am not aware of such a case.

11 Q In the Frank Paul case, as you testified
12 yesterday, your office was contemplating the
13 appropriateness of three specific Criminal Code
14 offences?

15 A Correct.

16 Q And they were manslaughter, criminal negligence
17 causing death, and failing to provide the
18 necessaries of life?

19 A Correct.

20 Q Those are all culpable homicide offences?

21 A Manslaughter is defined as a culpable homicide,
22 the other two are not.

23 Q All right. And murder, of course, would be a
24 culpable homicide as well?

25 A Correct.

1 Q With respect to those three offences, those
2 various opinions and the authors of them
3 considered the applicable case authority, right?

4 A We certainly endeavoured to do so, yes.

5 Q Mr. Cutler found, as I recall his memorandum, two
6 cases where police officers had been prosecuted in
7 fatality circumstances for failing to provide the
8 necessities of life?

9 A That's my recollection as well.

10 Q We can look them up, but those cases were from
11 outside of B.C., right?

12 A I, I would have to look but I accept your --

13 Q Newfoundland and Ontario?

14 A Thank you.

15 Q No cases were found from British Columbia where a
16 police officer had been prosecuted for any of
17 those three offences in respect of a fatality,
18 correct?

19 A Certainly not a culpable homicide. I didn't
20 specifically search for cases from British
21 Columbia where a police officer was prosecuted for
22 either failure to provide necessities or criminal
23 negligence causing death. Our, our research
24 obviously was directed at the identification of
25 the governing principles.

1 MR. CROSSIN: Well --

2 THE COMMISSIONER: Yes, Mr. Crossin?

3 MR. CROSSIN: I can tell you that I've defended a Vancouver
4 police officer charged with manslaughter, so I
5 think if we're going to debate statistics, we
6 should get perhaps a little more fundamental
7 grounding in the documentation.

8 THE COMMISSIONER: Thank you.

9 MR. WARD:

10 Q Are you aware of any decisions in respect of
11 police officers who are prosecuted for any of
12 those three offences in the Province of British
13 Columbia? And by decisions, I mean acquittals or
14 convictions?

15 A Off the top of my head, Mr. Ward, I can't think of
16 one.

17 Q Given your state of mind at the time you reviewed
18 the appropriateness of laying charges in the Frank
19 Paul matter, I suggest this would have been an
20 unprecedented case?

21 THE COMMISSIONER: Well, he just told me he's not aware of it,
22 Mr. Ward. There may or may not be cases, but he's
23 not aware of them, that's his answer.

24 MR. WARD: All right.

25 THE COMMISSIONER: But if you want to get into that, I think

1 the proper time to do that is in argument and you
2 can present your argument to me.

3 MR. WARD:

4 Q You mentioned yesterday, sir, your outset of your
5 evidence in the context of receiving reports from
6 police investigations without charge
7 recommendations included that you had handled the
8 case of a police shooting in respect of a man who
9 refused to drop his weapon, do you remember that
10 evidence?

11 A I do.

12 Q Was that a fatality?

13 A It was.

14 Q What was the weapon?

15 A I believe it was a handgun and I believe the
16 incident occurred near the Second Narrows Bridge.

17 Q And you did not approve charges?

18 A I did not.

19 Q Do you know whether as at the day Crown counsel
20 first received the Frank Paul report to Crown
21 counsel, whether any of Mr. Hicks, Mr. Cullen, as
22 they then were, Mr. Cutler, Mr. Ewert, Mr. Gillen
23 or Ms. Van Oosten or yourself had approved a
24 charge of culpable homicide in respect of a police
25 officer's actions?

1 A I know that I had not done so. I, I can't speak
2 to whether they did.

3 Q All right. And certainly you hadn't prosecuted
4 such a case?

5 A A culpable homicide case, no.

6 Q To your knowledge, had any of those colleagues of
7 yours prosecuted such a case?

8 A Not to my knowledge, but I wouldn't know.

9 Q You didn't know their work well enough to know
10 whether they'd been involved in such a case?

11 A Well, we're talking about a number of individuals,
12 some of whom have 35 years at the Bar, I, I
13 wouldn't know. I wouldn't be able to say with
14 certainty.

15 THE COMMISSIONER: Here again, Mr. Ward, I'll certainly hear
16 you in argument if you have some statistics that
17 you think I should be aware of, that would be the
18 time to make it known to me, --

19 MR. WARD: Thank you.

20 THE COMMISSIONER: -- instead of asking the witness to guess.

21 MR. WARD:

22 Q Thank you. I'll move to another subject, sir.
23 Earlier during the cross-examination by my friend,
24 Mr. Kelliher, you said, again if I heard your
25 evidence correctly, that normally the CJB was very

1 attentive to the next of kin of a homicide victim;
2 is that right?

3 A Yes.

4 Q There's usually a free flow back and forth of
5 information, right?

6 A Yes. Where it's, where it's requested, yes.

7 Q To your knowledge, is that same practice followed
8 when the deceased's death was caused by the
9 actions of a police officer, in other words, in a
10 police-involved death scenario?

11 A To my knowledge, it would be, yes.

12 Q Sir, we've seen in the material that you received
13 Mr. Urban's letter or report?

14 A Yes.

15 Q Did you know him personally?

16 A Yes.

17 Q And you knew him to be very experienced, --

18 A Yes.

19 Q -- very capable and very principled?

20 A He's a very capable prosecutor, yes, and he's
21 passionate about his work.

22 Q And you were aware from his written letter, as
23 well as discussions with him, that he felt
24 strongly that charges were appropriate in the
25 Frank Paul case?

1 A I was aware of that.

2 Q And at the time he was not employed by Crown
3 counsel?

4 A He was employed by Crown counsel. He had been
5 seconded to the office of the police complaints
6 commissioner for a, a defined period of time. My
7 conversations with Mr. Urban occurred both when he
8 was seconded to the office of the police
9 complaints commissioner and thereafter when he had
10 returned to the Criminal Justice Branch as
11 prosecutor.

12 Q Thank you. Sir, from time to time in your
13 evidence, you've referred to the Frank Paul file
14 as a complex one?

15 A Yes.

16 Q I suggest that looking at it objectively, it was
17 not factually complex, would you agree with that?

18 A Factually, if you're referring to who did what,
19 when, I agree. Factually in terms of the features
20 of what occurred that informed the context in
21 which the officers were operating, I felt that was
22 very complex, so if I could just draw that
23 distinction.

24 Q Well, just looking at, as I say, the main
25 objective factors, you had two or perhaps three

1 people who were involved in dragging a man who was
2 soaking wet, apparently unable to move or care for
3 himself out of a place of shelter and into a
4 vehicle. He was then driven to that location in
5 an industrial part of Vancouver and left there.
6 And a few hours later, his body was found, cause
7 of death was hypothermia. Those are the principal
8 objective factors?

9 A Yes, and I agree that those were clear.

10 Q And not complex compared to, say, I don't know,
11 the Pickton investigation?

12 A Certainly not as complex as that, no.

13 Q Now, sir, I ask that you, please, take a look at
14 Commissioner Davies' report, Alone and Cold and --

15 A May I be supplied with a copy of that?

16 Q I think there's one --

17 THE COMMISSIONER: No, just a moment. I've already dealt with
18 this matter with your friend, Mr. Kelliher. I
19 don't want my report to be a subject of debate
20 here, Mr. Ward. If you ask whether he agrees or
21 disagrees, that will be improper.

22 MR. WARD: I appreciate that, Mr. Commissioner, that's why I
23 signalled my intention earlier in order that it
24 wouldn't come as a surprise now. What I propose
25 to do, subject to your approval, is to ask a

1 question and allow the witness the opportunity to
2 hear if there are any objections. I am
3 approaching --

4 THE COMMISSIONER: If it deals with my report, I'm telling you
5 right now I won't permit the question.

6 MR. WARD: Let me try another approach.

7 THE COMMISSIONER: All right.

8 MR. WARD:

9 Q Please put the report to one side. By the time
10 you worked on the Frank Paul case, you were an
11 experienced prosecutor, correct?

12 A Relatively experienced, yes.

13 Q And you had reviewed many reports to Crown counsel
14 submitted by police investigators in many, many
15 criminal prosecution files?

16 A Yes.

17 Q They invariably contained recommendations with
18 respect to the proposed charges?

19 A Not invariably; most did.

20 Q Most did. Are you able to estimate how many
21 reports to Crown counsel you may have reviewed?

22 A Oh, I would just be guessing, Mr. Ward, I'm sorry.

23 Q When you received the report to Crown counsel that
24 had been prepared by the Vancouver Police
25 investigators in respect of their investigation

1 into the circumstances of Mr. Paul's death, did
2 you perceive any deficiencies in it?

3 A I don't recall now, 10 years later, addressing my
4 mind to specific deficiencies. I don't recall
5 having an impression that this was a shoddily
6 prepared report to Crown counsel. I felt that it
7 contained sufficient information to enable, with
8 the benefit of, of additional information obtained
9 by Mr. Cullen and supplied through the office of
10 Mr. Urban, that it contained sufficient
11 information for us to apply our charge approval
12 standard. I viewed the file, as I said yesterday,
13 as one which involved not so much a question of
14 who did what or what happened here, as you have
15 put it. The basic facts are relatively clear. I,
16 I viewed the case as one which required the
17 application of a legal test against the Crown's
18 charge approval standard and I felt the file was
19 sufficient in order for us to assess whether this
20 was a marked departure from the standard of care
21 and whether the requisite mental element could be
22 proven beyond a reasonable doubt or at least
23 whether there was a substantial likelihood of
24 conviction.

25 Q At the time you first received the Frank Paul

1 file, were you aware, from your previous
2 experience in prosecutorial work, that police
3 investigators usually followed a practise of
4 identifying witnesses to an incident, right away
5 separating them and questioning them right away?

6 A That would be best police practice, yes.

7 Q Were you aware, based on your experience at that
8 time, that police investigators, if a subject of
9 the investigation was known, a suspect in a
10 serious case, a homicide, say, they would
11 apprehend that person, provide a charge warning
12 and then endeavour to obtain a statement?

13 A That would again be consistent with police
14 practice, yes.

15 Q And you had seen that type of investigative
16 practice carried out in the numerous files you had
17 reviewed previously?

18 A Certainly.

19 Q Did you notice whether those practices had been
20 followed in the Frank Paul investigation?

21 A There was statements obtained from Constable
22 Instant, one was an occurrence report and one was
23 an ordered statement. And there was an occurrence
24 report from Sergeant Sanderson. We addressed our
25 minds to the likely admissibility of those

1 statements. Again, I did not regard the case as
2 one where the Crown would have, have difficulty
3 proving that Sergeant Sanderson was in charge of
4 the lockup, that it was he who refused Mr. Paul
5 entry to the lockup, that it was he who ultimately
6 directed Constable Instant to remove Mr. Paul. I
7 did not believe that we would have difficulty
8 establishing through Constable English and through
9 circumstantial inferences that Constable Instant
10 followed Constable English's recommendation and
11 left Mr. Paul in the laneway. I did not foresee
12 problems of proof in that regard, even considering
13 the doubtful admissibility of the police
14 statements.

15 Q So are you saying that you felt you didn't need
16 any of those written statements provided by those
17 three persons for the prosecution?

18 A In terms of proving the basic facts that you have
19 laid out, I, I believe that was what was in my
20 mind, yes.

21 Q Let me ask you to turn to the more routine type of
22 file, the file involving, say, a serious crime,
23 like a homicide, perpetrated by a suspect who is
24 not a police officer, just a person. You've
25 agreed that police investigators, in your

1 experience, typically once they have the suspect,
2 provide the charter warning and then seek to
3 question and obtain statements from them right
4 away, right?

5 A Very often, yes.

6 Q If the statement obtained is inculpatory, that's
7 important to you as a prosecutor?

8 A Certainly.

9 Q I suggest that exculpatory statements like I had
10 nothing to do with this or you got the wrong guy,
11 whatever, are less important to you as a
12 prosecutor?

13 A No, they're both important. Our, our, our
14 responsibilities as prosecutors are to be
15 ministers of justice and determine what the
16 appropriate course of conduct is where we're not
17 guided by a desire to lay criminal charges in all
18 cases. We're desired -- we're guided by a desire
19 to determine whether cases meet our charge
20 approval standard. And if there's exculpatory
21 evidence, it's our responsibility to look at that.

22 Q In the end, the decision comes down to whether
23 there is a sufficient body of evidence, admissible
24 evidence that would result in a substantial
25 likelihood of conviction, acknowledging that there

1 is no obligation on the Accused to take the stand
2 in his own defence?

3 A Correct.

4 MR. WARD: Thank you, sir. Those are my questions.

5 A Thank you, Mr. Ward.

6 THE COMMISSIONER: Thank you, Mr. Ward. Just one moment. Mr.
7 Cowper, have any other counsel indicated they have
8 any questions?

9 MR. COWPER: I don't have notice from anybody else. I know Mr.
10 Tammen indicated that he didn't have any.

11 THE COURT: Mr. Tammen?

12 MR. TAMMEN: Mr. Commissioner, just let me say that we do have
13 questions that largely relate to policy matters.
14 I believe that those can be more expeditiously
15 dealt with either through other witnesses or
16 presenters from the Criminal Justice Branch in
17 this hearing, so I'm not going to have any
18 questions for this witness.

19 THE COMMISSIONER: Thank you.

20 No other questions from any other counsel?

21 May the witness stand down then, Mr. Cowper?

22 MR. COWPER: I have two questions just arising, Mr.

23 Commissioner.

24 THE COMMISSIONER: All right.

25 **EXAMINATION BY MR. COWPER:**

1 Q Mr. Fitch, could you go to tab seven of Exhibit 1?

2 THE COMMISSIONER: Of what exhibit, please, 1?

3 MR. COWPER:

4 Q That's the green binder, Mr. Commissioner.

5 You're going to be, I think, the last person
6 I have to make clear a few things, so I just want
7 to do this. I don't think I asked you --

8 THE COMMISSIONER: Mr. Cowper, I wonder if you could keep your
9 voice up. I had a complaint at lunch-time that
10 people at the back are really unable to hear very
11 well.

12 MR. COWPER: I think it's my natural shyness that's coming out.
13 It's a bit unusual but I'll try to overcome it.

14 Q Mr. Fitch, let's stay with tab seven. Could you
15 just clarify because I don't think I made it clear
16 in your chief, are the handwritten notes that are
17 in notes, are they all those of your assistant or
18 any of the handwritten notes your notes?

19 A The note --

20 Q And your assistant, I think it was --

21 A Ms. Taylor.

22 Q Ms. Taylor, yes.

23 A The notes on page one are obviously in Mr. Hicks's
24 hand at the top of that memorandum.

25 THE COMMISSIONER: It's signed by Mr. Hicks.

1 A Yes, including, I believe, the word file.

2 THE COMMISSIONER: But all of the other notes --

3 MR. COWPER:

4 Q I'll go through them because I think it's somewhat
5 important because I think you have two people. So
6 on page two, --

7 A Yes.

8 Q -- those are notes in Ms. Taylor's handwriting?

9 A I believe so, yes.

10 Q Okay. And if you look at page three on the left
11 hand, --

12 A Yes.

13 Q -- there's notes on the left hand, it said was
14 this known to the police which seems to be under a
15 different --

16 A Yes, those are my, those are my notes.

17 Q And below that after the arrow, are those yours or
18 hers?

19 A I -- they're Ms. Taylor's. They appear to be
20 responsive to an inquiry I made.

21 Q Okay. And while we're on that, just for the
22 purposes of your evidence, the fourth to last
23 bullet says: Nurse witnessed Paul leaving the bay
24 area.

25 Do you know what time in the chronology that

1 reference was to?

2 A That was -- I can't give you a precise time. That
3 was the -- Mr. Paul's first departure --

4 Q Okay.

5 A -- from the lockup. It would have been shortly
6 after 6:00 p.m.

7 Q Now, let's stay on page four of nine, and I should
8 have done this in chief, Mr. Commissioner,
9 frankly, but are those her notes again?

10 A They are, Mr. Cowper.

11 Q Okay. And maybe we can go faster, five, are any
12 of those notes other than notes made by Ms. Taylor
13 in the rest of the document?

14 A The remaining notes in the memorandum appear to me
15 to be in Ms. Taylor's hand.

16 Q Okay. And there's a note at page seven of nine
17 which has a question with an arrow behind it. And
18 it's at the bottom, it says did Sanderson have a
19 duty to have, I think, victim medically assessed,
20 question mark, and then there's an arrow, faced
21 with complete incapacity to take care.

22 Do you see that?

23 A I do.

24 Q Now is that both a question and the observation or
25 whatever it is after the arrow, are those both in

1 her notes?

2 A They are.

3 Q Do you have any evidence or recollection as to
4 whether you discussed that note or whether that
5 reflects any part of your observation or is it her
6 private note?

7 A I can't say whether it's her private note or
8 whether it's a product of a discussion that the
9 two of us were having. It may have been because
10 she's put a Q beside it that it was a question
11 that was raised in the course of our dialogue.
12 I'm, I'm unable to say for certain whether that's
13 so.

14 MR. COWPER: Okay. Those are my only questions.

15 THE COMMISSIONER: Thank you. Mr. Peck?

16 MR. PECK: One question, please, Mr. Commissioner.

17 THE COMMISSIONER: Yes.

18 **EXAMINATION BY MR. PECK:**

19 Q And I have a crux in this way, this file went
20 through a series of reviews over a period of
21 years, Cullen; Ewert with Cutler's input; Hicks;
22 you with Van Oosten and Taylor's input; back to
23 Hicks; Ewert again, and by that time, he was in
24 private practice, he was ad hoc in effect; is that
25 correct?

1 A Correct.

2 Q And then signed off on finally by Gillen, is this
3 unusual?

4 A In my experience, it's very unusual to have this
5 number of prosecutors involved in a charge
6 approval, yes.

7 MR. PECK: Thank you.

8 THE COMMISSIONER: Mr. Cowper, does that end the day then?

9 MR. COWPER: Sorry, Mr. Commissioner, that ends the day and we
10 don't have a hearing scheduled for tomorrow.

11 THE COMMISSIONER: I wonder if you could brief us, please, on
12 what to expect next week.

13 MR. COWPER: Thank you. Perhaps Mr. Fitch can be released from
14 his --

15 THE COMMISSIONER: Yes, certainly. I'm sorry, step down.

16 A Thank you, Mr. Commissioner.

17 THE COMMISSIONER: Thank you.

18 **(WITNESS STOOD DOWN)**

19 MR. COWPER: Subject to any changes that arise from discussions
20 between counsel, Mr. Commissioner, on Monday
21 morning, we'll have Mr. Gillen in chief and in
22 cross-examination, that's Robert Gillen, QC. And
23 we anticipate calling Ms. DeWitt-Van Oosten,
24 although I may want to consider that in light of
25 the evidence, extensive evidence Mr. Fitch gave on

1 that, but I'll advise you if there's any changes
2 to that.

3 THE COMMISSIONER: All right.

4 MR. COWPER: Mr. Cullen is scheduled to testify on Tuesday.

5 And Mr. Hicks, and I'm referring to them in their
6 previous capacities, on Tuesday afternoon. And we
7 anticipate being able to complete those witnesses
8 in the time scheduled and that's the menu for next
9 week.

10 THE COMMISSIONER: Thank you. Counsel have any comments on the
11 schedule? I believe it was circulated. I just
12 want to confirm that it still remains as
13 circulated. In that case then, we'll adjourn for
14 the day, Mr. Cowper, until Monday next.

15 THE REGISTRAR: This proceeding is now adjourned until Monday,
16 10 o'clock. Order.

17 **(PROCEEDINGS ADJOURNED AT 2:44 P.M.)**

18 I hereby certify the foregoing to be a
19 true and accurate transcript of the
20 proceedings transcribed herein to the
21 best of my skill and ability.

22

23 Holly Hall

24 Official Reporter

25 **UNITED REPORTING SERVICE LTD.**

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