

1 Vancouver, B.C.

2 November 8, 2010

3 THE REGISTRAR: Order. The hearing is now resumed, Mr.

4 Commissioner.

5 THE COMMISSIONER: Thank you. Mr. Cowper.

6 MR. COWPER: Yes, Mr. Commissioner. We have in the stand

7 by your leave Mr. Robert Gillen, who's the next

8 witness --

9 THE COMMISSIONER: Mr. Gillen.

10 A Sir.

11 MR. COWPER: -- to be called.

12 THE REGISTRAR: Would you like to take the oath using the

13 Bible?

14 A Yes.

15 ROBERT WENDELL GEORGE GILLEN, Sworn:

16 THE REGISTRAR: State your name, full name, please.

17 A Robert Wendell George Gillen.

18 THE REGISTRAR: Thank you very much. You may be seated.

19 MR. COWPER: Mr. Commissioner, if I may at the outset mark

20 Mr. Gillen's will say statement, and I'll hand to

21 Mr. Registrar an original and a copy.

22 THE COMMISSIONER: Thank you. What number will that be,

23 Mr. Registrar?

24 THE REGISTRAR: CJB number 11, sir.

25 THE COMMISSIONER: Exhibit number 11.

1 (EXHIBIT CJB 11: Will Say Statement of Robert
2 Gillen)

3 MR. COWPER: Mr. Gillen -- are you ready, Mr. Commissioner?

4 THE COMMISSIONER: Yes. Thank you.

5 EXAMINATION BY MR. COWPER:

6 Q Mr. Gillen, you were called to the bar of British
7 Columbia in 1974?

8 A Correct.

9 Q And you were Regional Crown Counsel for Vancouver
10 for almost 13 years, and you were appointed
11 Queen's Counsel in 2000; is that right?

12 A Vancouver Island.

13 Q Okay.

14 A Yes.

15 Q What years was that?

16 A 1988 to 2001.

17 Q And you spent your career as Crown counsel?

18 A I spent five and a half years in advance of that
19 as a defence counsel.

20 Q Okay. On the Island?

21 A No, on the mainland.

22 Q Okay. Now, since 2001 you've been the Assistant
23 Deputy Attorney General?

24 A Correct.

25 Q And that's your position today?

1 A Correct.

2 Q Could you outline to the Commissioner in general
3 the role and duties of the Assistant Deputy
4 Attorney General?

5 A Under the *Crown Counsel Act* I'm required to
6 administer the Criminal Justice Branch for the
7 Ministry of the Attorney General. That requires
8 overseeing essentially all criminal prosecutions
9 within British Columbia and administering the
10 branch in terms of its fiscal and human resource
11 issues. I'm responsible for the hiring of Crown
12 counsel for the purposes of those prosecutions.
13 The duties are set out in the act.

14 Q Actually, if you move that -- don't touch the
15 button.

16 A Okay.

17 THE COMMISSIONER: We've been told not to touch the button,
18 Mr. Gillen.

19 A I touched the button. I'm sorry. I won't do
20 that again.

21 MR. COWPER:

22 Q That's better. You can actually move it closer
23 to you and then you don't have to lean.

24 A Okay.

25 Q Go ahead.

1 A Yes. I -- as I said, I am responsible for the
2 obligations imposed on me by the *Crown Counsel*
3 *Act*, which is essentially overseeing prosecutions
4 within the Criminal Justice Branch for the
5 Province of British Columbia that involves
6 essentially criminal prosecutions, the
7 administration of the branch as well.

8 Q In the organizational hierarchy you are the most
9 senior administrative official for the Criminal
10 Justice Branch?

11 A That's correct.

12 Q And under the *Crown Counsel Act* you operate
13 independently of the Deputy Attorney General; is
14 that right?

15 A That's correct, with the exception that they can
16 direct me, both the Minister and the Deputy, they
17 can direct me on various aspects of either case
18 specific prosecutions, on policy, and in relation
19 to matters of administration. If it's in
20 relation to matters of case specific
21 prosecutions, those matters and directions must
22 be gazetted in the B.C. Gazette. If it's in
23 relation to policies, it's my option that they be
24 gazetted in the gazette, but they must be in
25 writing. And if it's in relation to the

1 administration, I can require the direction to be
2 put in writing, and I can have it gazetted at my
3 option.

4 Q And those provisions with respect to gazetting
5 and notice and the powers that you have under the
6 act in general are intended to preserve the
7 independence of the Criminal Justice Branch --

8 A Yes.

9 Q -- from the other parts of the ministry; is that
10 right?

11 A That's correct, and it also allows for the public
12 to see if there is that -- if there is an
13 interaction between the Deputy or myself that
14 it's a transparent one.

15 Q Now, could you speak in general terms about the
16 role of reviews within the operations of the
17 branch, that is, the review of a charge approval
18 decision that's either under way or has already
19 been committed?

20 A The prosecution have an obligation to conduct
21 charge approvals within the branch. The police
22 or other agencies provide investigative
23 documents, and we review them for the
24 appropriateness of that. In certain cases
25 there's a hierarchy that is employed. In police

1 cases, as an example, where a decision is made by
2 a Regional Crown or a recommendation is made by a
3 Regional Crown it would be forwarded to somebody
4 in headquarters during the course of this period
5 of time for the purposes of a final decision.
6 The culture within the branch is such that there
7 is an ongoing policy review in relation to charge
8 approvals. When the decision is taken to do a
9 charge approval, when the assessment is made,
10 it's not a final step. It's a step, and after
11 that step is made there is at all stages during
12 the course of the trial, and even after, an
13 ongoing review to determine whether or not the
14 case still meets the charging standards, which
15 are substantial likelihood of conviction and, if
16 so, is it still in the public interest to
17 proceed. A most extreme example of that would be
18 in the case of Ivan Henry recently where the two
19 senior Crown counsel basically determined that
20 two different offenders seemed to have had the
21 same MO for an offence and raised that issue
22 within the branch. The branch then took a lead
23 by appointing a special prosecutor to review
24 that, and ultimately the case led to an acquittal
25 in the Court of Appeal of Mr. Henry. So that

1 ongoing kind of process doesn't stop at even
2 conviction.

3 Q Now, with respect to a particular case, whose
4 responsibility is it in the day-to-day sense to
5 identify the need for a reconsideration of the
6 charge approval when something has already been
7 the subject matter of a charge approval and it's
8 been decided to prosecute the matter?

9 A It depends how it comes up. It may be that
10 there's a decision, for instance, to prosecute a
11 case on a lesser offence, and a police officer
12 may raise the review internally with an
13 administrative Crown. The administrative Crown
14 within British Columbia oversee the offices and
15 generally speaking are in charge of the charge
16 approval, particularly in the smaller offices.
17 In larger offices like Vancouver you actually
18 have a section of prosecutors that do
19 specifically charge approval. So the review that
20 comes after that depends on the circumstances
21 that lead somebody to question why the decision
22 is undertaken. Defence counsel may bring to us,
23 for instance, a set of circumstances that we're
24 unaware of which may change the decision making
25 in terms of that specific case. It happens all

1 the time when we're going into court in
2 Provincial Court. Either the police officer
3 comes with some new evidence at the last minute
4 which may lead us to believe that we no longer
5 have a substantial likelihood of conviction. The
6 defence may lead some evidence or provide us with
7 some evidence or provide us with the theory of
8 the defence that we would view as being enough of
9 an impediment that we would not proceed with the
10 case any longer. So it's done at almost every
11 stage of the process.

12 Q Now, I take it that the charge approval standard
13 with respect to those reconsiderations remains
14 the same: substantial likelihood of conviction
15 and the public interest part of the test?

16 A Yes.

17 Q Am I right also in thinking there isn't a
18 separate policy governing those reconsiderations
19 or reviews?

20 A No.

21 Q Now, in relation to this particular matter, how
22 would you characterize the degree of attention
23 that the branch provided to the Frank Paul matter
24 over time?

25 A The branch, when it initially examined the

1 matter, came to a charge approval decision in
2 compliance with the policy that was then in
3 place. When the matter was raised by the Police
4 Complaints Commissioner to the branch again in
5 2000, the branch again undertook a review, and in
6 2004, when the Police Complaints Commissioner
7 approached the Attorney General, the branch again
8 undertook a review of those matters. It's
9 unusual that over that period of time you would
10 have so many reviews, but it's perfectly in
11 keeping with what the branch's approach is to
12 charge approval, that is to say, it's an ongoing
13 issue.

14 Q Okay. Now, this matter came to your attention on
15 several occasions we know from the file, and you
16 have a recollection of some of those occasions,
17 correct?

18 A Correct.

19 Q Not all of them, I take it?

20 A Correct.

21 Q Let's start with the most general question, which
22 is when does something come to your attention
23 when it relates to a specific charge approval or
24 a specific case?

25 A It's very, very difficult to say in a general

1 sense. When somebody has concerns that an issue
2 is going to be of a very high profile, they may
3 bring it to my attention. If the issue is one of
4 resourcing, for instance, we don't have enough
5 bodies to look after this, they may engage me in
6 a discussion about how we can address that. So
7 to say how a case comes to my desk specifically,
8 there's a myriad of ways. Generally speaking,
9 most of the about 80,000 cases that are dealt
10 with by the system never reach my desk, couldn't
11 reach my desk. It's just too vast a volume. But
12 it's usually the higher profile kind of cases or
13 the more difficult decisions.

14 Q Okay. And why does something get referred to
15 you? You said it's difficult to know when they
16 would come, but what are the various reasons why
17 your opinion or your attention would be directed
18 to a particular prosecution other than the
19 profile?

20 A Sometimes it's -- the decisions are one where
21 there seems to be no right answer and people
22 would want to engage me in terms of that final
23 decision. I guess the view is that I am the head
24 of the branch and as such would be the final call
25 in making a decision. Mostly it's not an

1 isolated decision. It's done in a collaborative
2 sense. You get a number of different people
3 having input and then a decision's taken from
4 that. But it would be generally high profile. I
5 deal with any case that requires a direct
6 indictment, any case that deals with a warrant
7 expiry date, offenders who -- those are
8 individuals who served their full sentence and we
9 are requiring some sort of an 8-10 application to
10 monitor them beyond the expiration of that
11 sentence. So those kinds of cases would come to
12 me. Dangerous offender applications would come
13 to me as a matter of course. And also very, very
14 difficult charging decisions might come to me.

15 Q And do you depend upon the officials below you in
16 the organizational hierarchy of the branch to
17 identify those cases which have sufficient
18 challenge associated with them that you should
19 make the final call?

20 A Yes. I would rarely reach down into the
21 organization and pull a file.

22 Q Okay. So what do you look for -- let's deal
23 with -- I am going to get to the Paul matter in a
24 moment, but in general in your position what do
25 you look for when you're looking at a charge

1 approval that is before you on the basis that
2 your approval or your disapproval is being sought
3 with respect to a charge approval decision?

4 A Charge approval standard. I mean, does it -- is
5 there a substantial likelihood based on the
6 evidence available, is that available to us, and
7 if so, is it in the public interest to proceed,
8 because you may be able to prove a case, but the
9 massive expense that goes into establishing it
10 for the purposes of a conditional discharge may
11 not make it in the public interest to proceed.

12 Q And what procedure do you go through when you're
13 reviewing a charge approval decision to satisfy
14 yourself as to how you would either agree or
15 disagree with the decisions reached to that
16 point?

17 A Generally speaking there's a synopsis that I
18 would get, and it would be the synopsis that I
19 would rely on, a legal opinion, perhaps a high-
20 level summary of what the facts are, that kind of
21 thing. It would be unusual that I would get into
22 a case at a level that would require me to
23 examine all the statements and exhibits. My
24 review would be a much higher level review than
25 that. Simply put, if I were to review in the

1 same level of detail each one of the files that
2 came to me, there's not enough hours in the day
3 to do that.

4 Q And in your will say statement you characterize
5 this as a reasonableness check --

6 A Yes.

7 Q -- for the most part. What factors or elements
8 do you look for in the decisions you're reviewing
9 to see whether or not they're reasonable other
10 than the charge approval standard?

11 A The -- whether or not there seems to be a full
12 accounting of what the facts as they've set them
13 out are. If, for instance, a statement was not
14 included in that review, I would not know that.
15 The people that are sending the materials up to
16 me are senior prosecutors. They are, generally
17 speaking, the Regional Crown or Deputy Regional
18 Crown. They're among the best in the branch in
19 terms of the best and the brightest, and I would
20 be relying on them basically to provide that kind
21 of a summary. I would look at the law as it
22 relates to and as set out in the memo to
23 determine whether or not the law seems to be
24 driving them in the direction the decision is.
25 So it's that kind of a review. I don't know if

1 that's helpful.

2 Q That is helpful. So let's move above you because
3 I take it from time to time you've briefed the
4 Deputy Attorney General on specific cases?

5 A On high-profile cases I may do a briefing note to
6 the Deputy. Sometimes I do it to the Deputy and
7 to the Attorney General. Other times it might be
8 by way of a phone call just giving them a heads
9 up that something is breaking and that they
10 should be alive to it and that the Deputy may
11 want to brief the Attorney so that when the
12 cameras are on the Attorney he has some knowledge
13 about what the case is.

14 Q In respect of the substance of the decision, is
15 yours the last input in terms of a charge
16 approval decision itself?

17 A The Attorney General can direct me in writing to
18 appeal a case. I could decide, for instance, and
19 Minister Oppal on several occasions, I believe,
20 required us to appeal sentencing decisions, and
21 we complied with that. Those directions would be
22 in writing. But -- so there -- they -- the
23 Deputy, as I recall, in all my years, which is
24 about nine and a half, has never directed me.
25 None of the Deputies have ever directed me. The

1 Minister, Oppal I think, did on a number of
2 occasions, Bountiful I think three times.

3 Q My point was less -- how does the Minister or the
4 Deputy receive information that might cause him
5 to consider to direct a different approach in a
6 particular prosecution as you decide on a
7 case-by-case basis whether to brief them? Is it
8 either on -- at the instance of your report or
9 some public attention to the case that would
10 permit them to consider that?

11 A It's both. It may be that someone brings a case
12 to their attention where I didn't think that it
13 would be something that would be significant
14 enough for them to be interested in, and they may
15 engage themselves in that way. It's possible
16 that it would be something on the basis that I
17 would be saying our position on sentence is going
18 to be X or we're going to be charging somebody
19 with Y, and they would be entitled to say, "No, I
20 don't think they should be charged with Y. It
21 should be X." So they have that power, but it
22 would be a transparent one, and it would be
23 gazetted.

24 Q Okay. Now, let's move on to the branch's
25 response to Frank Paul's death. I take it that

1 you have no recollection of any briefing in 2001
2 relating to Mr. Fitch's review of the charge
3 approval decision on the Frank Paul case?

4 A No. I note that on August the 17th, 2001, Mr.
5 Fitch indicates that he briefed me, and I
6 completely accept that he did. In fact, I would
7 be surprised if we hadn't chatted about the case
8 after my appointment on March the 23rd of '01.
9 So he had that file during that period of time,
10 and I suspect that we would have spoken to it on
11 and off during the course of that period of time.
12 If he says that he sat down and formally briefed
13 me, I accept that. We may have been briefed by
14 going down an elevator and having a conversation
15 as well. I don't know.

16 Q There's no record of your thoughts at the time?

17 A No. I would have been satisfied with the
18 briefing and the decision. Mr. Fitch is probably
19 one of the brightest, if not the brightest,
20 lawyer within the branch currently. We have
21 several, and he's an exception. I would
22 undoubtedly accept his views on it. I'd be very
23 surprised I would have come to a different
24 conclusion.

25 Q Now, let me just stay with procedure for a

1 moment. I take it you make many decisions a day?

2 A Yes.

3 Q What are the policies as to which decisions you
4 have to record in writing or which decisions are
5 simply made verbally? Is there any policy which,
6 with respect to charge approval decisions,
7 requires that your call be recorded formally and
8 the basis for it?

9 A No. If I were going to intervene and change a
10 proposed decision, I anticipate that there would
11 be paperwork attached to that because I would be
12 undercutting a decision made within the branch,
13 and I would probably want to document that. If I
14 simply am blessing a decision that's been taken
15 because I think it's the right decision, that
16 would be of no moment, no.

17 Q Can you give the Commissioner some sense of how
18 frequent you participate in the final stage of a
19 charge approval decision in the course of a given
20 year? Is that hundreds of times?

21 A I would have things run by me hundreds of times.

22 Q In a year or --

23 A Oh. Some days it feels that way, but not
24 uncommon at all.

25 Q Now let's move forward, if you can. If you could

1 look to the blue binder that's on your right, and
2 if you could go to tab 16. Do you have any
3 recollection of this e-mail exchange
4 independently of the e-mail?

5 A I don't.

6 Q And having read it, what's your -- how do you now
7 recall you handled this request?

8 THE COMMISSIONER: Mr. Registrar.

9 MR. COWPER: Just wait a second.

10 A I will.

11 THE COMMISSIONER: The number again?

12 A 16, Mr. Commissioner.

13 THE COMMISSIONER: Thank you.

14 A I am told that on February the 10th Mr. Ryneveld
15 lodged with the Attorney a request for an inquiry
16 and some materials, and he also requested, as I
17 understand it, for the Crown to review the charge
18 approval decision in the Paul matter. Mr.
19 Ryneveld is an individual that I have a
20 tremendous amount of respect for. He was my
21 Deputy Regional Crown Counsel when I was the
22 Regional Crown Counsel for probably about 10
23 years in Victoria. I found that his decision
24 making was very much similar to mine. We usually
25 landed on public interest thoughts in the same

1 area. We thought very much alike. So I had a
2 lot of respect for his ability, and when I
3 learned -- and I don't know whether or not Mr.
4 Ryneveld may have mentioned something to me in
5 the street, because I see him in Victoria from
6 time to time on the street, or whether the Deputy
7 Minister mentioned to me that there was a receipt
8 of some materials by the Attorney General. I
9 don't know. But I did learn that there was a
10 package that had been transmitted to the Attorney
11 General's office, and so I sought from the Deputy
12 Attorney General that he retrieve those
13 materials, bring them to me, and that I would
14 have a Crown look at the matter again pursuant to
15 Ryneveld's request. And so that's what that
16 e-mail's basically seeking out, is the assistance
17 of the Deputy to retrieve the materials so that
18 we can get that material to a Crown, have another
19 look at it.

20 Q Do you recall anything of any of your discussions
21 or whether you had discussions on the matter with
22 the Deputy at the time?

23 A I don't recall that. It may well be that I had.

24 Q Okay. Now, we know that a further review was
25 conducted. Do you recall asking Mr. Hicks to

1 look at the matter?

2 A I got -- there is documentation to show that that
3 was the case, yes.

4 Q Okay. Do you have any independent memory of
5 asking him to do that?

6 A No.

7 Q Do you recall the outcome of that review?

8 A Yes.

9 Q Okay. Let's go to the green binder. And if you
10 go to tab 9. Now, do you recall receiving this?
11 This is addressed to you.

12 A I don't independently recall receiving it, but
13 undoubtedly I did.

14 Q Okay. And do you recall your reaction to the
15 advice that was contained in the letter?

16 A I don't recall any reaction to it, no. I mean,
17 it would have been a decision -- the decision was
18 a thorough review conducted by Mr. Hicks, and it
19 seemed to have been quite thorough.

20 Q I am going to come back to this in a moment, but
21 do you recall knowing at the time that Mr. Hicks
22 had actually signed a letter explaining the
23 original charge approval decision or was involved
24 in the original charge approval decision
25 respecting Frank Paul's death? Would you have

1 known that in 2004?

2 A That he had been involved in it?

3 Q Previously.

4 A I would have been -- I would have probably been
5 aware of it prior to sending materials to Ewert.
6 I may have been aware of it before then if I had
7 reviewed the file in advance of that, and I may
8 well have, but I couldn't tell you in terms of my
9 independent recollection at this stage?

10 Q Would his previous involvement be a disqualifying
11 factor in respect of asking him to do a further
12 review for the branch, and if not, why not?

13 A No. The -- as I indicated, the branch has a
14 culture of continuous examination of the charge
15 approval standard. If new evidence comes in, we
16 review it whether it's likely to lead to charges
17 or whether it's likely to lead to a cessation of
18 charges. The new material is simply something
19 that the Crown would take into effect in terms of
20 reviewing whether the prosecution should commence
21 or continue. And as I indicated, in even the
22 Paul case, where we discover that years after, we
23 do act on it. And frequently you will find that
24 outside the Provincial Court doors when a defence
25 counsel comes in and they have some new piece of

1 evidence that would have changed our mind but we
2 didn't have that information available to us
3 through the police investigation, we will
4 incorporate that into the thought process as to
5 whether or not the prosecution's still viable.
6 That's what we do. So sending it back to Hicks,
7 who already has some information about it, isn't
8 sending it back to somebody who's going to simply
9 say no. You're sending it back to somebody to
10 say based on what you have does this change your
11 mind. In some cases it does.

12 Q And to members of the public who see there to be
13 a very small number of people involved in the
14 consideration, reconsideration and further
15 consideration of the charge approval
16 considerations arising out of Frank Paul's death,
17 how do you reassure them that the culture within
18 the branch is as you've just described it?

19 A We have policies that guide us in that regard.
20 Crown are trained in terms of charge approval.
21 We, I think, have a culture of fairness within
22 the branch. The unusual part about the Paul case
23 is Austin Cullen's kind of twin involvement
24 initially when he was the Regional Crown, when
25 Mr. Paul initially died and he did the charge

1 approval in Vancouver, and between the time of
2 his initial review and submitting it to
3 headquarters for that process he became the
4 Assistant Deputy Attorney General, and so when
5 Peter Ewert as the director did the review and
6 reported back to Austin Cullen he was reporting
7 up, in actual fact, to the Assistant Deputy
8 Attorney General. So that made it somewhat
9 unusual, but beyond that there's no -- from my
10 perspective there's no question that we as a
11 branch have a very vibrant, ongoing examination
12 as to the viability of prosecutions, whether to
13 commence them or whether to stop them.

14 Q Now, in relation to the events of 2004, did you
15 understand that the Office of the Police
16 Complaint Commissioner was both as to fresh
17 evidence as well as to criticisms or suggestions
18 made respecting correctness of the original
19 decision?

20 A I'm not sure that I'm alive to the criticisms of
21 the initial decision. I'm alive to the fact that
22 there was a provision for new evidence, and I
23 know that Greg Fitch had some dealings with Dana
24 Urban. I'm not privy to those discussions, but I
25 know there was some unease in that regard from

1 Greg.

2 Q Just let me stay on the issue of policy because
3 it seems to me there may be a difference in
4 respect of a review that's been conducted to
5 update the charge approval decision to cope with
6 new evidence in that the person originally
7 dealing with the charge approval on a given state
8 of facts might well be open to being persuaded
9 that was incorrect when new facts come forward.
10 Does the same situation exist when a significant
11 amount of the sting, if I may put it this way, in
12 the public criticism may relate to the
13 correctness of the original decision?

14 A No. I can say without any question that the
15 branch receives criticism regularly for decisions
16 that it makes. Decisions are made in very
17 difficult cases where a large number of the
18 public will be very vocal.

19 THE COMMISSIONER: I wonder if you can stay closer to the
20 mic --

21 A I'm sorry.

22 THE COMMISSIONER: -- Mr. Gillen, so the people at the back
23 can hear.

24 A I'm sorry. The branch not infrequently receives
25 criticism. You only have to open up the

1 Vancouver Sun or Province to read that we've made
2 a decision which is a difficult decision and that
3 decision is being viewed as being wrong by a
4 large portion of the people. There's nothing
5 that you can do to change that perspective. It's
6 an issue of communications. We try to explain
7 the decisions as best we can through a media
8 spokesperson. There are people that will have
9 their agenda, and there are people that will
10 criticize on the basis of that. The public are
11 free to think what they want. We do the best we
12 can on the basis of a principled approach and the
13 policies that we have in place to ensure that
14 that happens. No, the mere fact that the
15 criticism itself is received would not cause us
16 not to do the right thing.

17 Q And in respect of your selection of counsel, I
18 take it that counsel's previous involvement in
19 the decision, whether the decision is under
20 criticism or whether it's simply a question of
21 whether the fresh evidence changes it, in either
22 case you would not consider someone who had
23 previously been involved in the file and made
24 decisions on the file as disqualified from taking
25 another look at it on behalf of the branch?

1 A No. If there was a culture other than the one
2 that exists, that is to say, that we're prepared
3 to review our decisions at any time, if that
4 culture didn't exist, then, yeah, you'd want to
5 probably send it out to somebody independent. In
6 this case it actually makes more sense to send it
7 to somebody who's fully familiar with the file to
8 see whether or not the new evidence really
9 changes in any way that past material, and it
10 could, it really could. It's simply a question
11 of whether it did.

12 Q From the senior person responsible for the
13 branch, from your perspective is there a
14 disadvantage to sending out to external counsel
15 to have a review or a check against the decisions
16 made by the branch? Is there a downside to that
17 process?

18 A There's a very significant downside, and one of
19 it's financial. There's been a suggestion out of
20 another commission that all police files be
21 prosecuted by special prosecutors. Stephen Owen
22 has disagreed with that. But the cost of doing
23 that would be enormous. My budget is not
24 increasing, and that wouldn't be viable.

25 Q So other than financial, are there any other

1 branch considerations that militate against
2 sending files out when criticism has been
3 received by the branch?

4 A No, I don't think that there would be any other
5 rationale. We have among the best criminal
6 lawyers in British Columbia within the branch,
7 from my perspective, so sending it out to others
8 isn't necessarily going to get you a better
9 answer. We have a very good cadre of special
10 prosecutors as well, of course.

11 Q So let's go forward with the Paul matter because
12 we know from the record that after you received
13 Mr. Hicks' letter of April 20th, which we just
14 looked at, that you sought an additional opinion
15 from Peter Ewert?

16 A Yes.

17 Q Why did you do that?

18 A Peter Ewert had been the Director of Legal
19 Services who had previously reviewed the matter,
20 and in my view Mike being the Regional Crown in
21 the area where it arose ought to look at it, and
22 having done so he made his recommendation. I
23 forwarded -- after reviewing the materials I
24 forwarded a package to Peter to see whether or
25 not his views were different, and, in essence, in

1 the conclusion they were not.

2 Q Now I'd like to look at -- from your perspective
3 was he acting as an ad hoc counsel, as a --

4 A Yes.

5 Q -- special counsel?

6 Ad hoc?

7 A Ad hoc.

8 Q Let's look at the terms of engagement, if you
9 wouldn't mind, and you'll find those in the blue
10 binder under tab 20. Now, I take it that by this
11 time Peter Ewert has retired from the branch?

12 A He'd retired before I actually had become
13 Assistant Deputy Attorney General, so probably,
14 I'm guessing, around 1999, somewhere in that
15 area.

16 Q Okay. And as best you can recall, you would have
17 been aware of his previous involvement in the
18 Paul matter?

19 A I would have as a result of reviewing the
20 materials, yeah.

21 Q And in your letter you say at the end of the
22 first paragraph:

23 If the decision is to prosecute, I ask that
24 you assume conduct of this prosecution
25 personally.

1 Do you see that?

2 A Yes.

3 Q What's the purpose of that?

4 A The issue -- and I'm going on my best
5 recollection. I believe that if I would have
6 sent that off to Peter without telling Peter that
7 he had to assume the prosecution that Peter would
8 simply make a decision potentially to proceed and
9 then send the file back to the branch to
10 prosecute. In my view, with the senior people of
11 the branch having made the decision that the
12 prosecution wasn't viable, that would simply
13 create an issue, and so Peter's charge approval
14 had to play into the fact that he would make the
15 decision and he would also prosecute. So the
16 file was not coming back to the branch within the
17 branch to be prosecuted. It would be prosecuted
18 by Peter as an ad hoc.

19 Q And let me ask you in more general terms is it a
20 commonplace term of reference for ad hoc counsel
21 that when they're being asked to make a charge
22 approval decision that they're advised that they
23 would prosecute the matter if they approved it
24 for prosecution?

25 A Yes, I would expect that.

1 Q That's a normal term?

2 A I don't think it would be unusual.

3 Q Okay. So in this case your point, as I
4 understand your evidence, let me recap it, is if
5 he decided to prosecute it and he was not
6 prosecuting it, then it would go back to the
7 branch, and in some ways that would raise an
8 issue because there had been a uniform decision
9 at that point not to prosecute?

10 A Correct.

11 Q Okay. What about engaging him to make a charge
12 approval decision only but with the understanding
13 that you would employ a special prosecutor, an ad
14 hoc prosecutor to prosecute it if he approved the
15 charges?

16 A Then I would simply send to it to the special
17 prosecutor to do exactly the same thing. Why the
18 two-step process?

19 Q Okay. Was he -- I want to raise this question.
20 Was he still in the business of prosecuting cases
21 after his retirement?

22 A Yes, he did -- well, I don't know if he did
23 prosecutions. He continued the practice of law.

24 Q So in your view was he an appropriate prosecutor
25 if charges had been approved for culpable

1 homicide in the Frank Paul case?

2 A I would have thought so.

3 Q Now, let's go back to the green binder, and if
4 you look at tab 10, please, and this is his
5 letter to you of June 2nd, 2004, that's Mr.
6 Ewert's letter?

7 A Right.

8 Q And I take it you reviewed this when it returned
9 to you?

10 A Yes.

11 Q Okay. What was your view of Mr. Ewert's opinion?

12 A Well, his conclusions on the core issues were
13 consistent with those of everyone who had looked
14 at the file before. So essentially he had
15 decided based on the file review that he
16 conducted that the charge ought not to go
17 forward. The opinion was not as free of fault as
18 it might have otherwise been. He has on some
19 occasions referred to Constable Instant, as an
20 example, as Constable English. So there are
21 errors within the opinion itself.

22 Q Did you agree with his opinion in general terms?

23 A With the conclusion and the core of his review,
24 yes.

25 Q So let me just take a half step back so that I

1 can understand. By this time obviously the
2 Office of the Police Complaint Commissioner had
3 made a report, you'd had another internal review
4 by a very senior member of your branch, and you
5 had then sent it out to Mr. Ewert for another
6 review, and I'm trying to determine or I'll ask
7 you squarely was that because you'd felt that the
8 file needed another review or just that the
9 public needed the assurance of another review?

10 A It's difficult for me to kind of put myself back
11 at that stage. Ewert had looked at it before,
12 and I did have a lot of respect for Peter's
13 opinion. I had known him since I joined the
14 branch management in 1988. He had been a
15 significant mentor to me. He had a lot of trial
16 experience. He had spent 13 years in the north
17 as a Regional Crown. So I felt that that would
18 be a fairly sensible thing to do. I suppose had
19 I not sent it to Peter I might be sitting here
20 answering the question, "So Ewert had looked at
21 it. Why didn't you send it back to him?" From
22 my perspective sending it back to him was like a
23 second check, if you will.

24 Q Now, let's talk about your consideration of the
25 case. At some point, and we'll get to it, you

1 issued or the branch issued a media advisory. At
2 what point did you review these opinions to
3 determine your own view of the correctness of the
4 charge approval decisions?

5 A I would have reviewed the opinions before
6 probably sending them to Peter Ewert, as I
7 recall.

8 Q Okay.

9 A Then I would have incorporated his when it came
10 back.

11 Q Now, can you speak to your own view as a senior
12 -- as the senior Crown prosecutor in the province
13 with respect to the factors that were relevant to
14 consideration of a charge approval decision in
15 the Paul matter?

16 A Can you be more specific?

17 Q What were your views as to the elements the
18 likelihood of conviction and public interest in
19 the Paul matter?

20 A Well, I thought that of all the opinions that I
21 had Mike Hicks' second one, his second review
22 probably captured, as best as any of them, the
23 rationale for why there was not a substantial
24 likelihood of conviction, and as result of that
25 the second prong of the examination of public

1 interest simply doesn't come into play. So from
2 my perspective I think Mike Hicks as the Regional
3 Crown, as he then was, was correct in coming to
4 that assessment.

5 Q And how did you review this particular call? Did
6 you think it was a difficult case or not?

7 A I think it's a very tragic and difficult case.
8 You've got a person who's a vulnerable person who
9 dies as a result of being released from police
10 custody. You have a report that indicates he was
11 probably suffering from hypothermia, which wasn't
12 picked up by the police, while under severe
13 intoxication. It was a case where I think that
14 the care that was taken in terms of assessing it
15 was that care that was required in a case like
16 this, and I think it was a difficult case. You
17 don't have many cases like this. This is an
18 unusual case.

19 Q Now, if you could go to the blue binder, tab 22.
20 Now, this is the media statement?

21 A Yes.

22 Q And I take it it went out with your approval?

23 A Yes.

24 Q And if you see the -- it deals with a bit of a
25 chronology, but the last sentence of the media

1 statement says:

2 Gillen has reviewed all of the charge
3 assessments and is in agreement with the
4 unanimous conclusion that the available
5 evidence is insufficient to proceed with
6 criminal charges in this case.

7 A Yes.

8 Q Firstly, why was your own personal view of a
9 charge assessment process included in the media
10 statement?

11 A I'm guessing that the rationale at that time was
12 that there was a significant public interest in
13 the branch's review of it and that I was
14 essentially signalling, although unnecessary by
15 policy, I was signalling that I was supportive of
16 the views that the branch had expressed in terms
17 of the non-charge approval.

18 Q From the branch's perspective was this media
19 statement an attempt, and I don't mean this in
20 any particular way, but to put to rest the public
21 concern over the correctness of the charge
22 approval decisions?

23 A No. I'm not that naive to think that sending out
24 a media statement's going to quell the public if
25 they're not happy with a decision. Somewhere in

1 and around that time, and I cannot tell you
2 whether it was before or after, but it may have
3 been before, I was in Estimates, and Jenny Kwan,
4 who was the Opposition critic at the time,
5 criticized a decision that I had given or
6 published that said there is no substantial
7 likelihood of conviction in relation to a
8 specific case. I don't remember which one. But
9 she said, "That doesn't tell me anything." And
10 in the past we had been doing basically that,
11 saying we've reviewed the matter and we've come
12 to the conclusion that there isn't a substantial
13 likelihood of conviction. As a result of that,
14 since then, and I think you'll see it in many of
15 the branch media releases, we don't give barebone
16 statements. Indeed, when special prosecutors are
17 required to report out now, I require them not
18 only to provide an opinion to me with respect to
19 what their decision is, but I require them to
20 provide me with a short media statement that can
21 be as long as I think Len Doust did one that may
22 have been about 14 pages, but a media statement
23 which sets out the rationale for the
24 non-decision, and this is very much in keeping
25 with the Owen Inquiry recommendation that where

1 you have a high-profile case and there's a
2 no-charge decision that there's an obligation to
3 explain why you've made that no-charge decision.
4 And so this statement is fairly fulsome in terms
5 of why we've done it. It doesn't mean that I
6 expect people will agree with it.

7 Q Now, a couple of matters and then I want to deal
8 with some institutional relationships, but,
9 firstly, in your dealings with this matter and in
10 your review of the file did Mr. Paul's ethnic
11 origin as a First Nation person have anything to
12 do with the decisions made by the branch?

13 A No.

14 Q Did his life circumstances as a person who was
15 homeless in your view have a relevant impact on
16 the question of the substantial likelihood of
17 conviction?

18 A I'm not sure I follow that. The fact that he was
19 a vulnerable person would be of significant
20 concern to the branch in terms of the charge
21 approval process. In terms of whether or not it
22 would cause us not to charge, that's not the case
23 at all.

24 Q Now, with respect to the branch's process and the
25 police investigative process I'd like to ask a

1 few general questions.

2 A Yes.

3 Q From your perspective as senior person in the
4 branch, what's your -- summarize for the
5 Commissioner your view of the relationship
6 between the branch's work and the investigative
7 function of the police?

8 A Well, the position the branch has always taken is
9 that the police are independent of our
10 prosecution service and the prosecution service
11 is independent of the police. We assist in terms
12 of providing legal advice to the police. We do
13 not direct the investigations. It's our view
14 that we cannot do so. We have no authority to do
15 so. We have no right to do so. It would not be
16 proper. So the police have to conduct the
17 investigation, and you'll see in the various
18 pieces of correspondence between Austin Cullen
19 and Mike Hicks that they seek additional
20 information from the police, but it's the
21 police's obligation to investigate, and if they
22 decide, for instance, that they're not going to
23 follow up a request that we have, then our option
24 is if the evidence is short on that vein we would
25 not approve charges based on their inability to

1 or unwillingness to investigate. Generally
2 speaking, I think the relationship between the
3 Crown and the police is a collaborative one in
4 terms of they usually respond to our requests,
5 but not always. And that's a relatively healthy
6 thing. In terms of, I think, the engagement, we
7 have in various areas meetings with the police on
8 a regular basis to make sure that we're being as
9 effective together as we can. We have a Crown
10 Police Liaison Committee meeting that assists us
11 in dealing with issues such as the McNeil reports
12 and things like that where we need to be able to
13 receive reports on police misconduct, and they
14 need to be able to set up systems that allow us
15 to be able to provide that for the purposes of
16 disclosure, those kinds of things. So we have an
17 ongoing relationship with the police in terms of
18 that.

19 Q What limitations are there on the ability of
20 Crown to determine whether an investigation is
21 complete and adequate?

22 A We have absolutely no ability to say that a
23 police investigation is complete or inadequate.
24 If on the face of the file they have not included
25 a witness statement, then you can go and chase

1 that witness statement, but I would not know
2 whether or not the officer who conducted the
3 investigation conducted it in accordance with
4 police standards. We'd have no way of being able
5 to determine that. It's simply not our job to
6 conduct the civilian oversight of police, to
7 develop standards, etcetera.

8 Q Would that be a role that you think would have
9 disadvantages for the branch?

10 A If there were standards for the police?

11 Q That you were discharging.

12 A Yeah, I think that in cases where we would be
13 engaging with setting standards for the police, I
14 think that would be something that would be
15 outside of the scope of the expertise of the
16 branch. I can tell you that what we need in
17 terms of the evidence for a prosecution is X. I
18 can't tell you whether or not going out and
19 driving a police car around the block is the best
20 way to get that. I don't know what their
21 standards of conduct are in relation to a
22 specific investigation. So I think we'd be
23 ill-suited to play that role.

24 MR. COWPER: Those are my questions, Mr. Commissioner.

25 THE COMMISSIONER: Thank you. Mr. Kelliher.

1 MR. KELLIHER: Mr. Commissioner, I see the time. Would
2 this be a convenient time for the break?

3 THE COMMISSIONER: It's a little early for the break.

4 MR. KELLIHER: All right.

5 THE COMMISSIONER: But I'll ask you to start.

6 EXAMINATION BY MR. KELLIHER:

7 Q Sir, so this file came to your attention for the
8 last review by virtue of the Police Complaint
9 Commissioner having forwarded a brief to the
10 Attorney General's office; is that correct?

11 A Well, it actually came to my attention before
12 then. Mr. Fitch had access to that file and was
13 reviewing the file on March the 23rd of '01 when
14 I became the Assistant Deputy Attorney General,
15 so I would have been advised of the file sometime
16 thereafter, and he actually briefed me on August
17 the 17th of 2001, so that would have been
18 probably the very latest that I would have known
19 about it.

20 Q All right. And when was it that the Police
21 Complaints Commissioner returned the file to the
22 Attorney General's office for consideration?

23 A The date that I have is February the 10th of
24 2004.

25 Q All right. Now, I'm thinking the last time this

1 matter was reviewed it was reviewed by Mr. Hicks
2 and then by Mr. Ewert. How did it come into your
3 possession prior to those reviews taking place?

4 A The note that I have is that on February the
5 19th, 2004, I send an e-mail to Allan Seckel, who
6 is the Deputy Attorney General, requesting that
7 the materials which the Attorney has be forwarded
8 to our office for the purposes of assigning a
9 lawyer to look at it.

10 Q All right. And did he do that?

11 A I'm assuming he did.

12 Q Did a direction accompany that?

13 A There was no direction.

14 Q No direction whatsoever?

15 A None.

16 Q All right. Now, you received the file, and you
17 understood at that time that Mr. Ryneveld had,
18 among other things, suggested that the file be
19 reviewed once again to reconsider whether or not
20 charges should be approved, correct?

21 A Correct.

22 Q All right. Now, this was -- in your mind at that
23 time how many reviews had taken place?

24 A There was the first one at charge approval, which
25 Austin Cullen had done. There was the second

1 one, which Matt Adie had requested be done and
2 which was being done by Mr. Fitch in 2001. And
3 then there was the 2004 review, which was
4 conducted at Mr. Ryneveld's request.

5 Q And so that would have been a total of --

6 A Three.

7 Q -- three reviews prior to the Hicks and Ewert
8 review?

9 A Yes.

10 Q So there were a total of five?

11 A Yes.

12 Q Now, I understand that there was originally the
13 Cullen review?

14 A Yes.

15 Q Then the Ewert review --

16 A Yes.

17 Q -- correct?

18 A I mean --

19 Q Right, Ewert?

20 A That can be viewed as one or two, if you wish.

21 Either way. In theory Austin was not really
22 doing a review. He was doing a recommendation

23 which then Peter would provide an opinion on.

24 The Regional Crown made recommendations to the

25 Director of Legal Services. The Director of

1 Legal Services under the policy that was in place
2 at the time would make the decision. So if you
3 want to say that Mike's review and recommendation
4 is a review, you can say that, or you can say
5 that Peter Ewert's decision based on the
6 recommendation of Mike -- or of Austin Cullen is
7 one review.

8 Q All right. So the document that we have here of
9 Austin Cullen's opinion --

10 A Yes.

11 Q -- is not a review; is that correct?

12 A It's a recommendation.

13 Q So you didn't regard it as a review?

14 A It's an opinion.

15 Q Did you regard it as a charging review in this
16 case?

17 A No, I viewed it as a -- a recommendation, and it
18 was a legal opinion. So it's an opinion that I
19 would look at independently of that full review.

20 Q Well, would it surprise you if Mr. Cullen
21 regarded it as a review, a charging decision
22 review?

23 A I'm sure that he may view it any way he wishes.
24 Under the policy he made a recommendation. That
25 recommendation was forwarded to Peter Ewert.

1 Peter Ewert called, as I recall, an opinion on
2 one area for -- from Roger Cutler. Roger Cutler
3 gave him that information. He then made his
4 decision and advised Austin Cullen, who then
5 became the -- who had become the Assistant Deputy
6 in the interim, and he copied Mike Hicks.

7 Q All right. So you understood that it was Peter
8 Ewert that made the decision, not Austin Cullen?

9 A Correct.

10 Q All right. So we have Mr. Cullen who produces an
11 opinion that he titles a review, Mr. Ewert that
12 does the same thing, Mr. Cutler who does a legal
13 opinion and then an analysis of the facts of the
14 case, recommends no charges. Was that an
15 opinion?

16 A It's an opinion, yes.

17 Q Was it a review?

18 A No. The review would be conducted -- well, the
19 review would result in a decision which would
20 have been taken by Peter Ewert on that occasion.

21 Q Okay. And then we had Fitch, correct?

22 A Correct.

23 Q And what exactly -- what opinion or review did
24 Fitch provide you with?

25 A Hicks would have provided --

1 Q Fitch.

2 A Fitch. Sorry. Fitch would have provided me with
3 a briefing on August the 17th as to his decision.
4 As I recall, he met with, according to the
5 documentation, Mike Hicks, and they discussed it
6 to see whether or not there was commonality of
7 decision. The two came to the same conclusion,
8 and they did, that there should be no charge, and
9 that was the decision, and it was Fitch's
10 decision.

11 Q Fitch discussed it with Hicks?

12 A Yes.

13 Q Or Van Oosten?

14 A No, he got an opinion from Van Oosten, then
15 talked to Mike Hicks, I think on August the 10th,
16 and they decided, I'm told by the timeline here,
17 that there would be a no-charge decision. If
18 there was a disagreement between the Regional
19 Crown and the Director of Legal Services, then it
20 would come to my desk for final.

21 Q All right. There was uniformity here
22 throughout --

23 A Yes.

24 Q -- correct?

25 A Yes.

1 Q And you took that as a positive? You took that
2 in the positive sense, not a negative one, I
3 gather?

4 A I don't take it as a positive or a negative.
5 It's just simply a decision.

6 Q It wasn't a factor to you that they were all the
7 same? That didn't reinforce your conviction of
8 their accuracy?

9 A Oh, no, it certainly does that, yes.

10 Q All right. Now, did you have a look at Van
11 Oosten's opinion?

12 A Yes.

13 Q And that was a review, a charge approval review,
14 correct?

15 A That's an opinion.

16 Q All right.

17 A It's an opinion to support Fitch's review and
18 decision.

19 Q All right. Fitch never did put pen to paper to
20 prepare a review, correct?

21 A I think that's correct.

22 Q Now, I understand that the policy manual requires
23 that that be done.

24 A I'm not sure.

25 THE COMMISSIONER: Perhaps we could take the break now --

1 MR. KELLIHER: Yes.

2 THE COMMISSIONER: -- and allow the witness to check his
3 notes.

4 A I have found the area that's of interest.

5 THE COMMISSIONER: We'll take the break and then you can
6 inform us of that after.

7 A Thank you.

8 THE REGISTRAR: The hearing is adjourned. Order.

9 (PROCEEDINGS ADJOURNED AT 11:05 A.M.)

10 (PROCEEDINGS RECONVENED AT 11:22 A.M.)

11 THE REGISTRAR: Order. The hearing is now resumed, Mr.
12 Commissioner.

13 THE COMMISSIONER: Thank you.

14 MR. KELLIHER:

15 Q Sir, can I ask you to turn to tab 2 of Exhibit 4,
16 please.

17 A Okay.

18 Q And this was the Crown Counsel Policy Manual in
19 place at the time of the review of Mr. Paul's
20 death; is that correct?

21 A I'm just looking for it now. Tab 2?

22 Q Yes. Do you have tab 2?

23 A Yes.

24 MR. WARD: Sorry, which letter?

25 MR. KELLIHER: Tab 2.

1 MR. WARD: A?

2 MR. KELLIHER: A, right.

3 Q You can see at page 4 of 4 --

4 THE COMMISSIONER: I'm sorry.

5 A B2. I believe it's the binder, Mr. Commissioner.

6 MR. KELLIHER: Tab 4, A, 2.

7 A Tab 4, A, 2.

8 THE COMMISSIONER: Thank you.

9 MR. KELLIHER: It's A2 in mine.

10 A Tab 4?

11 MR. COWPER: It's Exhibit 4.

12 MR. KELLIHER:

13 Q Exhibit 4, this binder, cerlox binder.

14 A Okay. Thank you.

15 Q Tab A.

16 A Yes.

17 Q Tab 2.

18 A Yes.

19 Q Crown Counsel Policy Manual, date May 7th, 1997.

20 A Yes.

21 Q Page 4 of 4.

22 A Yes.

23 Q

24 In all cases, in applying the charge

25 standard Crown Counsel's important

1 obligations are to:

2 1. make the decision in a timely manner...

3 Now, we're talking about Mr. Fitch's review?

4 A Yes.

5 Q Were you of the view that he complied with that
6 first provision?

7 A Timely? I don't know what transpired between the
8 time that he received Joyce DeWitt-Van Oosten's
9 opinion in February and when he acted on it in
10 August, but if nothing developed or was done
11 during that course of time, it certainly would be
12 excessive.

13 Q It would be excessive. And the passage of time
14 augurs against a pro-charge approval decision,
15 correct?

16 A It rarely helps it.

17 Q The answer's yes? The answer's yes?

18 A Well, it can. I mean, it just depends on whether
19 or not you uncover further evidence which is of
20 assistance after, but usually not.

21 Q Do you agree that it did work against a pro-
22 charge approval in this case?

23 A I don't know that it did.

24 Q You don't know that those that reviewed it
25 following Fitch regarded the passage of time as a

1 significant factor in not approving the charge?

2 A No.

3 Q All right. How about number 2, "record the
4 reasons for the decision"?

5 A Yes.

6 Q Did Mr. Fitch comply in that regard?

7 A I don't have the paperwork before me that would
8 allow me to say yea or nay. I don't know.

9 Q Well, did he provide you with any kind of written
10 reasons, any written record for his decision?

11 A No, he didn't provide it to me.

12 Q Did he provide it to anybody else?

13 A I don't know.

14 Q Have you ever seen one?

15 A I haven't seen anything other than what I've got
16 in the file and his timelines.

17 Q Well, do you agree with me then that he didn't
18 comply with that requirement?

19 A I rely on what he said. If he did, he did. If
20 he didn't, he didn't. I don't know. I haven't
21 seen anything that allows me to say that he did,
22 but I don't know whether or not he did.

23 Q You relied on his review?

24 A Yes.

25 Q And he gave you nothing in writing?

1 A I was orally briefed.

2 Q Okay. Now, you received the file from the
3 Attorney General's office. You invited Mr. Hicks
4 to provide an opinion?

5 A Yes.

6 Q And he did so?

7 A Yes.

8 Q Why did you then -- by your count we are now at
9 four complete reviews. Why did you then send it
10 out to Mr. Ewert?

11 A I sent it out to Mr. Ewert because I respected
12 his opinion. In the past we'd worked together,
13 and he had previously reviewed the matter.

14 Q All right. But weren't you satisfied with the
15 four previous senior reviews that had been done?

16 A I didn't disagree with them.

17 Q Then why did you feel the necessity to send it
18 out for a fifth?

19 A Well, I suspect that had I not sent it out for a
20 fifth I'd be answering the question, "Why didn't
21 you send it out for a fifth?" I wanted Mr. Ewert
22 to look at it because he'd previously passed upon
23 it. In my view he was a person who would be able
24 to determine whether or not that changed his
25 mind. If it did, then he was authorized to

1 prosecute.

2 Q Was there anything about the previous four senior
3 reviews that you didn't feel comfortable with?

4 A No.

5 Q And so you sent it to Mr. Ewert just out of
6 abundance of caution; is that correct? Is that a
7 fair thing to say?

8 A Probably.

9 Q Now, you sent it to Mr. Ewert as an ad hoc
10 prosecutor; is that right?

11 A Correct.

12 Q You identified him in the -- at least you
13 endorsed a news release that identified him as a
14 senior criminal lawyer in private practice,
15 correct?

16 A Correct.

17 Q Were you trying to suggest in that press release
18 that Mr. Ewert was outside the Criminal Justice
19 Branch?

20 A No, I don't think so. I was saying that he was a
21 senior practitioner. He was. He has argued
22 cases in the Supreme Court of Canada and the
23 Court of Appeal. He's done serious prosecutions
24 before, murder cases. I respected his opinion.
25 I worked with him for -- from 1988 until when he

1 retired. I saw him do tremendous work. We
2 co-developed a civil disobedience policy. I
3 worked fairly closely with him over the years.

4 Q All right. But in the press release you're
5 suggesting, you're saying he's a senior criminal
6 lawyer in private practice, correct?

7 A Yes.

8 Q And are you saying that you did not mean to
9 suggest that he was outside the Criminal Justice
10 Branch?

11 A He was outside the Criminal Justice Branch. He
12 wasn't working with us.

13 Q Okay. And so you meant to suggest by that
14 expression that he was an outsider, that he was
15 outside the Criminal Justice Branch, correct?

16 A He was not employed by the Criminal Justice
17 Branch and had not been employed by the Criminal
18 Justice Branch at that stage for probably four or
19 five years.

20 Q Right. Then you agree with me?

21 MR. PECK: Well, I object in this form, Mr. Commissioner.

22 THE COMMISSIONER: Yes.

23 MR. PECK: My learned friend has not put the precise
24 language of the release, and so it tends to be
25 somewhat misleading. If you look at the press

1 release and the language that my friend is

2 quoting from or drawing from --

3 THE COMMISSIONER: Mr. Peck, where is the release again?

4 MR. PECK: It's in binder number 2, tab 22.

5 THE COMMISSIONER: Yes.

6 MR. PECK: The second page at the bottom. Bottom

7 paragraph.

8 THE COMMISSIONER: Yes.

9 MR. PECK: So it clearly identifies Ewert as having been
10 formerly a director and now in private practice.

11 THE COMMISSIONER: Yes. Go ahead with your question.

12 MR. KELLIHER:

13 Q Thank you. So the question again is, Mr. Gillen,
14 did you intend to suggest that Mr. Ewert was
15 outside the Criminal Justice Branch, that this
16 was an opinion not from within the branch but
17 from without the branch?

18 A I think that the sentence speaks for itself.

19 ...a former Director of Legal Services for
20 the branch who had conducted one of the
21 earlier charge assessments and who is now a
22 senior criminal lawyer in private practice.

23 That's what I meant to say.

24 Q All right. Did you mean to suggest that he was
25 an independent set of eyes from outside the

1 Criminal Justice Branch?

2 A It says that he had earlier reviewed the matter,
3 so, I mean, if that's what you mean by
4 independent --

5 THE COMMISSIONER: I think he's answering it as fairly as
6 he can.

7 MR. KELLIHER:

8 Q All right. All right. Sir, given that there had
9 been at least four reviews by Criminal Justice
10 Branch lawyers, all with a uniform opinion, did
11 you --

12 THE COMMISSIONER: Well, with the same opinion.

13 MR. KELLIHER: Yes, with the same opinion.

14 Q -- did you think of referring this final review
15 outside the Criminal Justice Branch?

16 A No. I think that if there had been a division of
17 decisions between the various individuals within
18 the branch I probably would have gone outside to
19 an independent.

20 Q So the uniformity of the decisions was
21 determinative in your mind?

22 A I didn't see the need to go to an outside
23 independent prosecutor for that purpose.

24 Q Because of the absence of any division of
25 thought?

1 A Yes.

2 Q You at the time that you made that decision to
3 send it out to Ewert were aware that both Dirk
4 Ryneveld and Dana Urban were urging the Crown to
5 review its decision not to charge, correct?

6 A Correct.

7 Q Mr. Ryneveld was a former Deputy Regional Crown,
8 a 30-year prosecutor well familiar with your
9 charging standard, correct?

10 A Correct.

11 Q And the same thing is true of Mr. Urban, correct?

12 A No.

13 Q All right. He wasn't a Deputy Regional Crown?

14 A No, I didn't respect his opinion in the same vein
15 that I did Mr. Ryneveld's.

16 Q All right. But, nonetheless, he was a senior
17 prosecutor who was well familiar with your
18 charging standard, correct?

19 A Mr. Urban and I in terms of his -- some of his
20 decisions were not ad idem, I think safe to say.

21 Q But he was familiar with your charging standard?

22 A I suspect he probably was.

23 Q And if you look at Exhibit 4, tab A, tab 1, the
24 final page, you'll see that listed as the
25 designates for charge approval in exceptional

1 cases are both Dirk Ryneveld and Dana Urban,
2 correct? You'll see Region Four Dana Urban,
3 Region One Dirk Ryneveld?

4 THE COMMISSIONER: Where are you now, please?

5 MR. KELLIHER: Exhibit 4, tab A at the final page. Page 5.

6 A Tab A?

7 MR. KELLIHER:

8 Q Page 5. Do you see that, charge approval
9 designates for exceptional cases?

10 A Yes.

11 Q You see Dirk Ryneveld in Region One?

12 A Yes.

13 Q And Dana Urban in Region Four?

14 A Yes.

15 Q So you may have disagreed with Mr. Urban, but you
16 can't dispute that he was qualified in this
17 sphere?

18 A In Region Four. When he was transferred down to
19 Region One, where he was at this time, he was not
20 a Deputy Regional.

21 Q I didn't ask you if he was a Deputy Regional. I
22 asked you if he was qualified in the area of
23 applying the charge approval standard.

24 A He was a Deputy Regional.

25 Q Dana Urban?

1 A In Region Four.

2 Q Yes. And I'm asking you --

3 A Yes.

4 Q -- at the time you were aware that both Mr.
5 Ryneveld and Mr. Urban were taking a different
6 view on the application of the charge approval
7 standard, I'm asking you if Mr. Urban in your
8 mind was qualified to apply that standard?

9 A I -- you're suggesting that Mr. Ryneveld and Mr.
10 Urban were taking different positions. I'm not
11 aware of that.

12 Q I didn't say that.

13 A That's what I understood you to say.

14 THE COMMISSIONER: No, he didn't.

15 A I'm sorry.

16 THE COMMISSIONER: Repeat your question.

17 MR. KELLIHER:

18 Q Did you think at the time that you sent this file
19 to Ewert for the last time --

20 A Yes.

21 Q -- that Dana Urban was qualified to apply the
22 charge approval standards?

23 A I suppose all Crown counsel are -- can apply the
24 charge approval standards. It's a question of
25 the judgment that's applied with it. I just have

1 difficulties in that with Dana.

2 THE COMMISSIONER: Some are better than others; that's what
3 you're saying.

4 MR. KELLIHER:

5 Q Mm-hmm. So there wasn't unanimity, was there?

6 A I think there was.

7 Q Mr. Ryneveld and Mr. Urban took different views,
8 correct?

9 A I don't know that.

10 Q All right. They were urging you to review?

11 A Yes.

12 Q You don't know if Mr. Urban took a different
13 view?

14 A I'm sorry, I understood that you were saying Mr.
15 Urban and Mr. Ryneveld had taken different views.
16 What you're saying is they took a different view
17 than the others within the branch at the time.
18 Yes, that's correct.

19 Q All right. So the fact that the four reviews
20 within the branch were congruent was compelling
21 to you, and as a result of that you saw no reason
22 to go outside the branch because of the
23 uniformity, the absence of a division of opinion,
24 you said, correct?

25 A The rationale for going -- for reviewing the

1 decision by Michael Hicks, as I recall, is
2 because Mr. Ryneveld said that he thought that
3 the Criminal Justice Branch should review it. On
4 the basis of the strength of that concern that
5 was the foundation for the review.

6 Q Mm-hmm.

7 A And so then Mr. Hicks passed his opinion, and it
8 was at that point in time I engaged as well Peter
9 Ewert.

10 Q Yes, we've heard the chronology, but I understand
11 that the reason you stayed in house was because
12 of the uniformity of the decisions.

13 A Yes.

14 Q There was no division --

15 A Yes.

16 Q -- correct?

17 A Yes.

18 Q And there was no division in house, but there was
19 division outside the branch, wasn't there?

20 A Yes.

21 Q Now, did that cause you to think for a moment
22 that it may be because it's within the branch
23 that the uniformity exists and that if somebody
24 from outside the branch were to have a look at it
25 the opinion might be quite different?

1 A Michael Hicks' review examined the "new evidence"
2 that was being offered by Mr. Ryneveld's Office
3 of Police Complaints Commission. He set out in
4 his opinion the fullness of what those additional
5 issues were. In doing so he formed the opinion
6 that that didn't change his mind as to the no-
7 charge decision, and when I looked at what the
8 new evidence was, I wasn't surprised that it
9 didn't change his mind.

10 MR. KELLIHER: Mr. Commissioner, this answer is wholly
11 unresponsive to the question.

12 THE COMMISSIONER: I'm not so sure it is. In what way, Mr.
13 Kelliher? What is it that you fail to --

14 MR. KELLIHER: I asked him --

15 THE COMMISSIONER: Yes.

16 MR. KELLIHER: I asked him if the consistency within the
17 branch was a determining factor in remaining
18 within the branch. If there had been a division,
19 he'd have gone out. I point out to him that
20 there wasn't uniformity overall, that there were
21 divisions. There was Mr. Urban and Mr. Ryneveld
22 urging him to review it once again. And that --
23 bearing in mind there was a division, at least on
24 the part of two competent senior prosecutors
25 outside --

1 THE COMMISSIONER: But they were outside the branch.

2 MR. KELLIHER: They're outside the branch.

3 THE COMMISSIONER: He's saying, "I decided to leave it
4 within the branch because there was uniformity
5 within the branch, and I didn't think that
6 signalled that I should go outside then
7 necessarily."

8 MR. KELLIHER: And I'm --

9 THE COMMISSIONER: You're quite right in the question in
10 pointing out the fact that there were two others
11 from outside, one of whom he respected, that had
12 a different view.

13 MR. KELLIHER:

14 Q Right. So the question is this. Wouldn't that
15 set off the alarm bells that maybe there was a
16 dynamic within the branch that was a factor in
17 the uniformity of those decisions?

18 A The bell that it set off was the fact that Mr.
19 Ryneveld, whom I respect, raised concerns about
20 the branch having a review of it based on new
21 information. On the basis of that we acted on
22 it, and I brought it back for a review. The
23 review conducted showed what new evidence there
24 was and the impact of that new evidence on the
25 charge approval process. It didn't change

1 Michael Hicks' view, and on the basis of reading
2 his opinion I wasn't surprised to see that he
3 didn't change his mind because the new evidence
4 was not all that compelling.

5 Q Why didn't you send it outside the branch?

6 A I could well have done so.

7 Q Why didn't you?

8 MR. PECK: We're dealing with -- with respect, he did send
9 it outside the branch. It went to Ewert. It
10 didn't go to a special prosecutor. That may be
11 the distinction.

12 THE COMMISSIONER: Thank you, Mr. Peck. He did cover that,
13 and we did debate -- or not debate, but we did
14 review your use of the term "outside", and I
15 think he's answered that. He simply said that in
16 his mind Ewert was no longer employed by the
17 branch but he still respected and had a high
18 regard for his opinion, and he wanted him to have
19 a second look at Hicks' --

20 MR. KELLIHER: But he wasn't outside -- that he was outside
21 the branch.

22 THE COMMISSIONER: Well, he was outside in his mind because
23 he was no longer employed with the branch.

24 MR. KELLIHER: Right.

25 Q Sir, could you have a look at your will say,

1 which is Exhibit 11, page 4, second paragraph,
2 second sentence. This is talking about Ewert.

3 This was a matter of having him update his
4 old opinion. I did not think we needed to
5 hire any outside prosecutor in this case.

6 Are you with me there?

7 A I'm looking for it. Page?

8 Q 4. Second paragraph, second sentence. Are these
9 your words, "This was a matter of having him
10 update his old opinion"? Not review, update. "I
11 did not think we needed to hire an outside
12 prosecutor in this case," correct? Did you write
13 that?

14 A That's written, yes.

15 Q Right. So you weren't regarding Ewert as an
16 outside prosecutor, right?

17 A Well, I expected him to use -- I suppose there's
18 an issue there.

19 Q Right.

20 A From my perspective Peter was outside the branch.
21 Peter had looked at the case before. Peter was
22 going to review the case again. He had new
23 information. He's updating the old opinion, I
24 guess, on the basis of the new information. He
25 may change that.

1 Q Right.

2 MR. COWPER: There is --

3 MR. KELLIHER: Well, your honour -- or Mr. Commissioner, I
4 object to the helping hand that's being brought
5 out here periodically and interrupting this
6 cross-examination.

7 MR. PECK: What my learned friend has done is take him to
8 his earlier will say, which was corrected and
9 distributed. The corrected one is at tab --
10 Exhibit 11.

11 MR. KELLIHER: What?

12 THE COMMISSIONER: Exhibit 11? This is what I have marked
13 as Exhibit 11. The wording I have is the wording
14 which you gave in your question.

15 MR. KELLIHER: Mr. Commissioner, I wonder if we could leave
16 my friend's assistance to re-examination.

17 THE COMMISSIONER: Well, all right. We'll do that unless
18 he raises it on another issue.

19 MR. KELLIHER:

20 Q All right. Sir, you knew that Mr. Ewert retired
21 in 2000?

22 A 1999, 2000, somewhere in that area, yes.

23 Q Well, he says 2000.

24 A I accept that.

25 Q And that he did some ad hoc work for Crown,

1 including this, but that's all he did?

2 A Could well be.

3 Q Do you understand that? Did you understand that?

4 A Did I know what he was doing? No.

5 Q Right. You didn't know that all he was doing
6 was, after he retired, was ad hoc work for the
7 Crown?

8 A I don't even know what ad hoc work he did for the
9 Crown.

10 Q All right. But you know he did some ad hoc work
11 for the Crown?

12 A You're telling me he did. I accept that.

13 Q You don't know that?

14 A I don't recall any cases. I certainly don't
15 recall giving him any cases.

16 Q Were you aware that he had done any work of any
17 sort other than ad hoc work for your office?

18 A My understanding was that he had a private
19 practice and he was doing some work. I don't
20 know what kind of work it was.

21 Q Right. So when you say in the media release he's
22 a senior criminal lawyer, you mean a senior
23 criminal prosecutor, right?

24 A I don't know if he was doing any defence work
25 whatsoever. I don't know.

1 Q Otherwise you would have corrected that media
2 release and said a senior criminal prosecutor,
3 correct?

4 THE COMMISSIONER: Well, I think he's answered your
5 question. He said he doesn't know what he was
6 doing. He knows that he was still practising. I
7 think that's fair. Is that right?

8 A That's correct.

9 THE COMMISSIONER: And he was indeed a senior criminal
10 lawyer.

11 MR. KELLIHER: Right, who did prosecution work alone from
12 his office.

13 THE COMMISSIONER: Well, we don't --

14 MR. KELLIHER: Yet we don't know that. I'm asking if he
15 knew that at the time because --

16 THE COMMISSIONER: And you have, and he said he doesn't
17 know.

18 MR. KELLIHER: Right. All right.

19 Q So you decided then not to send it outside, you
20 didn't need an outside lawyer, you were going to
21 keep it within?

22 THE COMMISSIONER: We've gone over and over this question
23 of outside. It's a question of interpretation, I
24 think, Mr. Kelliher, and I think we should move
25 on.

1 MR. KELLIHER: All right.

2 Q And your view was that it wasn't necessary at
3 this point, even for the fifth senior review, to
4 have an ad hoc counsel who had not been connected
5 with the Criminal Justice Branch review this
6 decision?

7 A The purpose of sending it back to Ewert was that
8 he had previously reviewed the file.

9 Q All right. Now, if I can take you to his review,
10 that was the last one you looked at before the
11 press release; is that correct?

12 A Yes.

13 Q And you agreed essentially with that opinion?

14 A Yes.

15 Q And you were reviewing this opinion for
16 reasonableness's sake, from a reasonableness
17 perspective; is that right?

18 A Correct.

19 Q And essentially that means that you were -- if
20 you look at the manual today, whether there was
21 -- on reviewing his analysis, whether there was a
22 substantial likelihood of conviction or, in other
23 words, there is a strong, solid case of substance
24 to present to the Court, right?

25 A Correct.

1 Q And I'll take you in detail, sir, shortly into
2 this report to see if that meets that standard of
3 reasonableness, but I'm asking you this now.
4 When you consider whether this case offered to a
5 court a strong, solid case of substance, a
6 prosecutor faced with this set of facts and
7 considering a charge of failing to provide
8 necessities of life -- we know that the police
9 officers were under such a duty, correct?

10 A Yes.

11 Q We know that shortly before Mr. Paul was removed
12 from the police station the final time -- this is
13 all evidence that could easily be led by the
14 Crown in support of this strong, solid case of
15 substance. We have Turner and Peterson picking
16 up Frank Paul. Well, let's back up. We can
17 prove more. We have Mr. Paul on the video being
18 released from custody 5:30, six o'clock, correct?

19 A Yes.

20 Q No problem proving that. No problem proving that
21 he'd spent the previous five hours in custody,
22 correct?

23 A Correct.

24 Q That on his release from custody he's seen
25 putting his socks and shoes and jacket on, eating

1 chips, having a cup of coffee, conversing with
2 people, getting up and walking, although --
3 albeit not athletically, walking out of the jail
4 bay area, correct?

5 A I think he stayed there for about a half an hour
6 or so, as I recall, something like that.

7 Q And eventually he gets up and walks out, right?

8 A Yes.

9 Q It would be very easy to demonstrate, if it were
10 necessary, that a police officer gave him a
11 toonie on the way out the door? It would be very
12 easy to demonstrate that there was rice wine
13 available in a variety of outlets immediately
14 outside of the jail itself, correct?

15 A I don't know that.

16 Q You don't know that. Okay. Well, we'll come
17 back to that. Do you think that there might have
18 been an evidentiary problem on that point?

19 A I don't know that.

20 Q All right. We know that a couple hours later
21 Turner and Peterson pick him up spread over a
22 vegetable rack a block and a half or so from the
23 police station, that he was asleep or passed out,
24 that he smelled of rice wine, that he couldn't
25 stand, that he could mumble his name. Two

1 experienced police officers concluded that he was
2 intoxicated and couldn't care for himself. They
3 picked him up along with another officer and
4 placed him in the back of the van, correct?

5 A Yes.

6 Q No problem in proving any of that?

7 A I don't think so.

8 Q No. He's -- he is taken to the jail, and he is
9 dragged out of the paddy wagon into the jail.

10 Seems motionless, soaking wet. Up the elevator.

11 Another police officer looks at him, says

12 something, and then he's dragged back out,

13 correct? No problem proving that, correct?

14 A Yes.

15 Q No problem proving that he was incapable of
16 caring for himself when he was taken from that
17 jail, correct?

18 A That wasn't the conclusion, obviously, of
19 Sergeant Sanderson.

20 Q No, stay with me, sir. Just as a prosecutor --

21 A Yes.

22 Q -- what can you prove? There would be no
23 difficulty in proving that Frank Paul was
24 incapable of caring for himself when he was taken
25 from the jail, right?

1 A Well, the question is when he was released, as I
2 understand it.

3 Q No, no, when he was taken from the jail, sir --

4 A Yes.

5 Q -- there would be no difficulty in proving that
6 he was incapable of caring for himself?

7 A Well, that's not the conclusion that came from
8 Sergeant Sanderson, which was the evidence that
9 we relied on.

10 Q I'm not asking you what Sergeant Sanderson
11 thought. I'm saying as a prosecutor weighing the
12 evidence in trying to determine if there is a
13 strong, solid case of substance I'm asking you if
14 you can prove these specific points. Now, when
15 Paul was taken from the jail would there have
16 been any difficulty in proving to a court, a
17 judge or a jury, that he was incapable of caring
18 for himself when he was taken from the jail?

19 A Well, if you want me to ignore Sanderson's
20 evidence, I can't.

21 MR. CROSSIN: Excuse me.

22 MR. KELLIHER: That's what I'm asking.

23 THE COMMISSIONER: Mr. Kelliher, we're now getting into a
24 debate to justify or attempting to have him
25 justify the decision he came to --

1 MR. KELLIHER: No.

2 THE COMMISSIONER: -- and I am not going to permit that.

3 MR. KELLIHER: Mr. Commissioner, can I ask that the witness
4 be stood down and if I might be able to make a
5 submission on this issue?

6 THE COMMISSIONER: Yes. Will you step down, Mr. Gillen.

7 A Certainly, sir.

8 (WITNESS STOOD DOWN)

9 MR. KELLIHER: Mr. Commissioner, this, in my submission, is
10 the heart of why we are here. The restrictions
11 imposed by the Court of Appeal have nothing to do
12 with what I'm doing. This man did not make a
13 charging decision. He's the head of the Criminal
14 Justice Branch. All he did was look at what had
15 happened from the purpose -- perspective of
16 reasonableness.

17 THE COMMISSIONER: Mr. Kelliher, he was in charge, and he
18 made the ultimate decision about the charging.
19 That's my understanding. It came to him in the
20 final analysis, and he approved the decision that
21 had been made. So he is involved with the
22 charging decision. That's my view, and that's
23 why I'm saying that you're asking him now to go
24 back, re-examine all of the facts, and there's
25 nothing wrong with asking him about what he

1 considered or didn't consider. That's quite
2 permissible. But to put to him to justify the
3 decision that he came to, in my view under the
4 terms of guidance I have from the Court of Appeal
5 I can't permit that.

6 MR. KELLIHER: If I could just -- of course I accept your
7 ruling, Mr. Commissioner.

8 THE COMMISSIONER: Yes.

9 MR. KELLIHER: But I'm not debating or asking him to
10 justify anything. I'm just asking him if I put
11 the evidence to him that any reasonable lawyer
12 would consider there is no question, in my
13 submission, that any reasonable lawyer would
14 conclude on the basis of the evidence that could
15 be easily proven in this case that there would be
16 a strong, solid case of substance to put before a
17 court, that is, a substantial likelihood of
18 conviction. What Mr. Gillen is saying is this:
19 "Yes, there is. Of course there is. Anybody
20 who's in second-year law school can see that
21 there is. But, but we don't want to ignore what
22 Mr. Sanderson has to say." That's what he's
23 going to say. That is to say, Sanderson might be
24 able to introduce evidence that would raise a
25 reasonable doubt. Like what? "I thought he was

1 considered it, second-guessing you. I'm asking
2 you in the pieces of evidence that I identified
3 to you whether they are components of a strong,
4 solid, substantive case, the evidence which can
5 be led easily before a judge or jury, okay, that
6 Frank Paul was incapable of caring for himself
7 when he was taken from the jail?

8 A The assessment of the various legal reviews done
9 by others, including Hicks, conclude on the basis
10 of all the evidence --

11 MR. KELLIHER: Mr. Commissioner, he's not answering the
12 question. It's a simple question.

13 THE COMMISSIONER: Let him proceed, and we'll find out.

14 A -- on the basis of all of the evidence that was
15 there that there wasn't sufficient evidence to
16 lay a charge. The evidence has to include a
17 consideration of what the Crown had in
18 Sanderson's evidence. Sanderson could be
19 absolutely wrong, but what we had before him was
20 his view that Mr. Paul's normal post-release
21 condition was the same as what he saw on that
22 occasion. It would be no different. He viewed
23 the fact, as did, as I recall, a correctional
24 officer, Firlotte. They both concluded that he
25 was not intoxicated. The blood alcohol reading

1 shows that they were wrong, but if that's their
2 conclusion, then the strong view that there's an
3 assessment of risk that bodily harm or the life
4 of Mr. Paul is going to be threatened by his
5 release isn't present. You can't prove that
6 element, with the greatest of respect.

7 MR. KELLIHER:

8 Q We'll get to that, sir. Could you prove as a
9 prosecutor that Mr. Paul was incapable of caring
10 for himself when he left the jail?

11 A Well, again, if I'm going to assess that in
12 conjunction with Sanderson's evidence, that's
13 kind of where we're at. I can ignore Sanderson's
14 evidence or I can't. I mean --

15 Q Sir, I'm asking you to ignore it for the moment.
16 Okay. These are stand-alone propositions that
17 I'm putting to you.

18 A Well, the problem with this --

19 Q Just pieces of evidence.

20 A But the problem with that is, is that's not the
21 approach that can be taken in charge approval.

22 THE COMMISSIONER: He's considering all of the points that
23 you've raised, Mr. Kelliher, and he's just saying
24 that he didn't feel that at that particular time
25 that they could, in effect, prove the charge on

1 the basis of all of the evidence that they
2 considered. He didn't think there was a
3 substantial likelihood of a conviction. That's
4 what he's telling you.

5 MR. KELLIHER: Right. And I just want to know if the
6 ingredients of evidence that I'm putting before
7 him could be proven or not because he may be dead
8 right. When I'm finished asking him these
9 various things, it may be obvious to everyone
10 that this charge couldn't possibly have been
11 proven.

12 Q So can I ask you, sir, just on a stand-alone
13 basis -- leave the police officers out of this
14 for a moment, please. We can get to them and
15 then you can explain how all that I'm doing is
16 totally ridiculous. Could you prove that Frank
17 Paul was incapable of caring for himself when he
18 left the jail?

19 A And you want to do that in the absence of
20 Sanderson's evidence, and I'm not prepared to do
21 that.

22 Q I'm asking you the question.

23 A And I'm telling you the answer.

24 THE COMMISSIONER: Well, I think I have his answer. Thank
25 you, Mr. Kelliher.

1 MR. KELLIHER:

2 Q The answer is yes, correct?

3 THE COMMISSIONER: No, he's saying he has to consider all
4 of the evidence, and he did at that point in
5 time, and he couldn't take one phase of the
6 evidence before him to make his decision or base
7 the decision to charge on that basis alone.

8 MR. KELLIHER: Right. I'm not asking anything to do with
9 his basis for his decision to charge. All I want
10 to know is are these ingredients -- do they make
11 up a strong, substantial case. Now, I'm asking
12 him to leave Sanderson aside for a moment.

13 Q Just answer the simple question. Could you prove
14 that?

15 A Mr. Commissioner --

16 Q Not what Sanderson thought, what he believed, but
17 what you could prove.

18 A The cases when you're doing charge approval don't
19 break down into little boxes like that. You look
20 at the various elements, and Sanderson's evidence
21 is part of that process. So to go and say I can
22 prove this piece and I can prove this piece but I
23 can't prove this piece, with the greatest of
24 respect, isn't the approach that you take on a
25 charge approval.

1 THE COMMISSIONER: Mr. Kelliher, I think I've got his
2 answer. Please move on.

3 MR. KELLIHER:

4 Q All right. So I am going to take that as a yes
5 because --

6 A Take it any way you want.

7 Q -- we know from Dr. Ferris, his opinion, Frank
8 Paul was totally incapable of caring for himself,
9 that he was suffering from --

10 MR. CROSSIN: I'm sorry --

11 MR. COWPER: My friend may take whatever he wants. He
12 can't tell a witness he's going to take an answer
13 to be something other than the witness's answer.

14 THE COMMISSIONER: No, I understand.

15 MR. COWPER: And I think my friend, who's obviously
16 passionate on this issue, but the boundary
17 between arguing with the witness, forgetting all
18 the restrictions from the Court of Appeal, I
19 think my friend -- and we are in a commission,
20 but I think a lot of what we've had in the last
21 30 minutes has just been flat-out argument.

22 MR. KELLIHER: Well, there's a difference --

23 THE COMMISSIONER: Mr. Crossin, you have a point you want
24 to raise?

25 MR. CROSSIN: I wanted to, if I may, just raise the same

1 point I raised last day. I -- this is really an
2 argument, in my submission --

3 THE COMMISSIONER: It is.

4 MR. CROSSIN: -- as to whether it was a reasonable or an
5 unreasonable decision, and really that's all it
6 is, in my respectful submission.

7 MR. KELLIHER: Isn't that why we're here, Mr. Commissioner?

8 THE COMMISSIONER: I will hear you in argument, and you'll
9 have an opportunity to make that argument to me.

10 MR. KELLIHER: All right.

11 THE COMMISSIONER: Please move on to something else. I
12 have the response from the witness.

13 MR. KELLIHER:

14 Q So do I understand, sir, that it's Sanderson's
15 evidence that undermines an otherwise strong,
16 solid case of substance to present; is that
17 right?

18 A No, there's Firlotte as well, and there's, I
19 think, another officer that suggests that
20 Sanderson is a well-meaning individual, etcetera,
21 etcetera, providing character evidence, if you
22 will, for him so as to make him a person unlikely
23 to be acting in the fashion that one would expect
24 in the circumstances. So there's a series of
25 those.

1 Q Okay. Let's identify that series.

2 THE COMMISSIONER: If we're going to go back and rehash the
3 same thing again, Mr. Kelliher, I don't want to
4 do that.

5 MR. KELLIHER: Mr. Commissioner --

6 THE COMMISSIONER: He's given you an answer. He's told you
7 that he has to take -- in his mind he had to take
8 into account all the evidence. He isn't able to
9 departmentalize various things, which you're
10 asking him to do, and to make rulings or to make
11 a finding with respect to one section of all of
12 the evidence that he had, so please move on to
13 something else.

14 MR. KELLIHER: Yes.

15 THE COMMISSIONER: Don't argue the point.

16 MR. KELLIHER: Mr. Commissioner, I certainly don't mean to
17 be difficult, but I understand this gentleman to
18 say, "Look, I can't answer your questions, for
19 instance, could I prove Frank Paul was incapable
20 of caring for himself when he left the jail,
21 because I have to consider Mr. Sanderson's frame
22 of mind," and now I'm saying, "Okay, I'd like to
23 ask you about Officer Sanderson's frame of mind,
24 how that's an impediment, how that undermines the
25 strength of the Crown's case." He said there's

1 three things that undermine the Crown's case
2 here: what Sanderson has to say, what Firlotte
3 has to say, and Firlotte's good opinion of
4 Sanderson. Those are the three elements of
5 evidence which he says undermine the strength of
6 the Crown's case and rob this whole scene of the
7 ability to reach the point of substantial
8 likelihood of conviction. Now, all I want to do
9 is to examine this witness on the points that
10 he's raised that undermine the Crown's strength
11 of position. The first is -- the first is --

12 THE COMMISSIONER: You can ask him what he takes from
13 Sanderson, what he takes from Firlotte.

14 MR. KELLIHER: All right. I'll do that.

15 Q Do you take this from Sanderson: Paul's
16 condition did not appear any different to his
17 usual state of post-jail stay sobriety? Did you
18 see that, that that's what Sanderson said?

19 A I did.

20 Q And do you accept that?

21 A It's part of what I have to consider, yes.

22 Q Right. And when he says that and then you see
23 his post-jail stay sobriety at about 5:30 or six
24 o'clock when he's walking out the door and
25 Sanderson says he looked the same at 5:30 or 6:00

1 as he did at 8:00, and you look at the video and
2 then you hear what Sanderson says, what do you
3 think? Is that --

4 MR. CROSSIN: Excuse me, I object.

5 MR. KELLIHER: Ah.

6 MR. CROSSIN: Excuse me, Mr. Kelliher?

7 THE COMMISSIONER: Mr. Crossin.

8 MR. CROSSIN: This is arguing the reasonableness or
9 unreasonableness, the correctness or
10 incorrectness of the decision.

11 THE COMMISSIONER: Well, he was about to get to that, and I
12 would have stopped him at that point, Mr.
13 Crossin.

14 MR. CROSSIN: That's all it is.

15 MR. KELLIHER:

16 Q Sir, did you ever make a charging decision in
17 this case?

18 A No, I wouldn't call it a charging decision. I
19 reviewed the decisions that were made, and I
20 determined that they were reasonable.

21 MR. KELLIHER: Right. Mr. Commissioner, he made no
22 charging decision. I can't possibly infringe the
23 ruling of the Court of Appeal.

24 THE COMMISSIONER: I am not going to allow you to continue
25 with that, Mr. Kelliher. It's an argument. And

1 I think he's tried his best to answer you, and
2 I've got the response. When you have an
3 opportunity to argue, I'll be pleased to hear
4 you, and that will come up.

5 MR. KELLIHER: All right.

6 Q So, sir, you reviewed Ewert's opinion, and you
7 thought it was reasonable, correct?

8 A I thought the core of it was, yes.

9 Q Could you turn, please, to that opinion at --

10 A I have it.

11 Q -- Exhibit 1, tab 10?

12 So by the time you reviewed Ewert's opinion
13 you'd also seen Hicks', right?

14 A Correct.

15 Q Did it occur to you that it would be significant
16 in any degree that neither reviewer touched on
17 the existence of a nurse at the jail?

18 A No, it did not.

19 Q Why?

20 A I'm not sure that -- I'm not sure.

21 Q Is that a relevant consideration in a charging
22 review process?

23 A It could be. This is Renville, as I recall.

24 Q Do you think so in this case, the existence of a
25 nurse standing over Mr. Paul when he's being

1 ordered to be released into the elements?

2 A Was that?

3 Q Is that a relevant factor?

4 A Was that Renville?

5 Q I don't know if it was Renville.

6 A Renville.

7 Q Can you answer the question? Is it a relevant

8 factor?

9 A Sure. Witness.

10 Q And neither Hicks nor Ewert make any mention of

11 it. Did you notice that?

12 A I didn't notice it.

13 Q Were you aware that there was a nurse present

14 when Paul was released?

15 A My recollection is that Renville was identified

16 by Hicks. That's the one that I'm aware of. I

17 think -- although I don't know if she was a

18 nurse. She may have been a custodian.

19 Q I think she was a custodian.

20 A Yeah. I'm not alive to the nurse.

21 Q Never heard of it?

22 A I'm not aware of it.

23 Q Were you ever aware of it?

24 A I don't know if I was aware of it or not.

25 Q Would you agree with me it's a relevant factor?

1 A If that person saw anything, yes.

2 Q If the person was present and wasn't asked to
3 assess Mr. Paul, would that be relevant in a
4 consideration of any criminal offence?

5 A It could be.

6 Q Could be. Sir, if I can take you, please, to
7 page 2 at the top of the page.

8 A Yes.

9 Q Paragraph -- you can read along with me there.
10 It's a long one. Perhaps I'll read the entire
11 thing. Beginning at page 1:

12 While a number of those conclusions,
13 including the suggestion that the clothing
14 arrangement of the deceased was consistent
15 with his being dragged into the alley --

16 THE COMMISSIONER: I'm sorry, Mr. Kelliher, where are you
17 reading from?

18 MR. KELLIHER: I'm at page 1 of Ewert's opinion.

19 THE COMMISSIONER: Thank you.

20 MR. KELLIHER: The last paragraph referring to Dr. Ferris's
21 report.

22 THE COMMISSIONER: Yes.

23 MR. KELLIHER: Second sentence.

24 While a number of those conclusions,
25 including the suggestion that the clothing

1 arrangement of the deceased was consistent
2 with his being dragged into the alley, his
3 opinion that the deceased could not have
4 removed the clothing even though it is known
5 that people suffering from hypothermia may
6 have the illusion that they are hot and thus
7 remove their clothing while they are
8 actually freezing to death, and the further
9 conclusion that the accused was basically
10 drunk at the time of his release are
11 conclusions that are likely to be correct.

12 Did you accept that?

13 A If you take from the issue that he was suggesting
14 that the conclusion that Mr. Paul was being
15 dragged and Mr. Paul was essentially drunk, yes,
16 that's what he says there.

17 Q And you accept that?

18 A I accept that's what he says, yes.

19 Q No, but did you accept what he said as being
20 accurate?

21 A Well --

22 THE COMMISSIONER: Well, that's his view, Mr. Kelliher.

23 MR. KELLIHER: His view is that he accepts that he said it
24 or his view is that he accepted what he said?

25 A Dr. Ferris is opining that there was a dragging

1 into the alley and that the clothes are in
2 disarray as a result of that. I frankly don't
3 think you need expert evidence nor do I think it
4 probably would be within the confines of his
5 expertise to give that evidence. I would think
6 that's common knowledge. That's one of the
7 possible explanations, yes.

8 MR. KELLIHER:

9 Q All right. And he says that's likely correct?

10 A That's correct.

11 Q All right.

12 I must, however, address the issue whether
13 they can be proved beyond a reasonable
14 doubt.

15 Did you accept that?

16 A I accept that's what he said, yes.

17 Q But did you accept that that was an accurate
18 statement of the law?

19 A Well, the onus on the Crown at the end of the day
20 is that. Substantial likelihood of conviction is
21 the test the Crown applied, but at the end of the
22 day can he prove that case beyond a reasonable
23 doubt is what he's looking at.

24 Q All right. And he talks then about the history
25 of the file, and then at page 3 he begins to

1 identify relevant facts.

2 I outline in brief the facts that are
3 relevant in this very tragic death.

4 None of the first three are controversial. Page
5 4, top. Why did you take Frank Paul's criminal
6 record to be a relevant fact in a charge approval
7 review?

8 A I didn't.

9 Q Okay. And the next paragraph. You accepted what
10 Mr. Ewert said, that Mr. Paul was homeless?

11 A I accepted that he appeared to be homeless. I
12 don't know where Mr. Ewert got the information
13 that he was situated near a liquor store. I
14 thought it was a playground at Maple and
15 Broadway, but he did a review, and there may have
16 been evidence in the file that indicated that. I
17 don't know. That was the first that I saw of
18 that.

19 Q All right. And at paragraph 10 you'll see on his
20 first intake Mr. Paul was provided with dry
21 clothing?

22 A And I don't recall that from any of the other
23 material as well.

24 Q Did you watch the video?

25 A I did see the video, and I don't recall whether

1 or not there was dry clothing provided at all.

2 Q You don't recall seeing the police officers put
3 dry clothing on Mr. Paul?

4 A No.

5 Q All right. You have seen the video, though,
6 have you?

7 A I did. It was some time ago.

8 Q All right. But you saw the video that that
9 didn't happen on his -- on the fatal exit? There
10 was no dry clothing put on?

11 A I didn't see any dry clothing put on him at all
12 that I can recall.

13 Q And you were aware from the file, presumably,
14 that the nurse had seen Mr. Paul on his first
15 visit several times?

16 A I don't recall the nurse.

17 Q All right. And paragraph 11 identifies Turner
18 and Peterson picking up Paul. Were you aware --
19 it doesn't seem to be included here, but were you
20 aware that they detected the odour of rice wine
21 on Mr. Paul?

22 A I believe so.

23 Q And did you think that was some evidence of his
24 drinking during the two hours of his release?

25 A Not necessarily. He was in custody five hours

1 before then and for extreme intoxication, so it
2 may well have been from then. I'm not able to
3 say.

4 Q Let's go to paragraph 14. Mr. Ewert says:

5 Sergeant Sanderson in the presence of others
6 concluded that Mr. Paul could not be
7 intoxicated and that rather he was
8 debilitated.

9 All right.

10 The Sergeant concluded that Mr. Paul could
11 communicate that he lived at West Broadway
12 and Maple and that his condition was no
13 different than his usual state of post-gaol
14 stay sobriety. Sergeant Sanderson
15 apparently instructed Constable Instant to
16 return him home, presumably expecting that
17 he would be returned to the address provided
18 by the now deceased and that he would have a
19 place to stay there with his buddies and
20 associates.

21 Did you see that?

22 A I saw that, yes.

23 Q And did you think that that was an accurate
24 statement?

25 A No. I saw -- I've seen that in none of the other

1 materials whatsoever. It may be that Mr. Ewert
2 had something that the others didn't see or
3 didn't view important, but I haven't seen that in
4 any of the other opinions, and I viewed it to be
5 probably erroneous.

6 Q But when Ewert is saying in the final review
7 Sanderson thought that he was taking Paul to a
8 place where he could be cared for by his buddies,
9 that puts the whole thing in a different
10 complexion. That's not just leaving him out to
11 his fate, is it?

12 A I'm not sure if he viewed him as being homeless.

13 Q Pardon?

14 A I say I'm not sure that that's the case, that he
15 viewed him as being homeless.

16 Q Can you explain what that means?

17 A Well, I don't know whether or not Ewert took the
18 position that he had a home to go to or not, but
19 it looked like he was saying that he was homeless
20 and at the same time he was finding him a place
21 where others were and maybe other homeless people
22 were. I don't know that.

23 Q No, what he's saying, sir, at least as I
24 understand it --

25 A Yeah.

1 Q -- is that this is what Sanderson thought.

2 A Oh.

3 Q See, Sergeant Sanderson apparently instructed
4 Instant to return him home, presumably expecting
5 he would be returned to the address provided by
6 the deceased and have a place to stay with his
7 buddies and associates.

8 A Yeah. All I know is that Sanderson appeared to
9 have communicated with the accused on the basis
10 of the information that I have that he learned
11 that he apparently lived in the area of Broadway
12 and Maple and that on the basis of that sent him
13 in that direction, and I think he may have used
14 the word "home" in his statement. I don't know
15 if Sanderson took the position that there was a
16 home as in a playground, near a liquor store, had
17 an actual home. If a person is homeless you
18 wouldn't think that he was going to a dwelling,
19 so --

20 Q But in terms of criminal culpability, Ewert is
21 identifying that Sanderson thought he was sending
22 him to a place where he could be cared for by his
23 buddies. That is a significant matter, isn't it?

24 A Could be, yes.

25 Q Well, did you say to Mr. Ewert, "What is the

1 evidentiary basis that you have for saying that,
2 Mr. Ewert, because this changes everything"?

3 A I'm not sure it changes everything, but certainly
4 I did not say that to Mr. Ewert.

5 Q Well, did it strike you as an important point?

6 A No, there was a number of errors in the report
7 that led me to believe that the report itself had
8 limited value. I looked at the issue of whether
9 or not in terms of the core material there were
10 some differences of opinion from the others. In
11 this report you will find that Ewert refers to
12 Constable English as being Constable English on
13 two occasions. He also refers to a report that
14 was prepared by Michael Hicks in the first
15 review. He says that at the same time the file
16 was examined -- this is at page 2, "History of
17 the file" -- he says that Hicks also examined it,
18 and my reading of it is that Hicks received a
19 copy of a report, but I'm unaware that Mike Hicks
20 had actually conducted a review the first time
21 around when Ewert was conducting that review. So
22 there's a number of errors in the report that
23 were prepared by Ewert, including some of the
24 gratuitous observations that he makes with
25 respect to people losing heat and things like

1 that without, to my knowledge, any expert
2 opinions. And there may be in the file, but I
3 saw none, and they weren't referred to by any of
4 the others. That caused me to give more limited
5 weight to Peter's views, and I had a tremendous
6 amount of respect for this individual, and the
7 report is not all that I would have hoped for, so
8 --

9 Q So are you saying that you concluded that Ewert
10 was wrong in assuming that Sanderson was
11 sending -- Sanderson believed he was sending Mr.
12 Paul to the comfort of his buddies?

13 A I saw no material anywhere else in any of the
14 other reviews that indicated buddies were
15 involved.

16 Q But if that was Ewert's opinion, if that was his
17 belief, wouldn't it taint his entire legal
18 analysis?

19 A I'm not sure it did.

20 Q How could it not help but do so?

21 A Well, it may well have. I mean, I just don't
22 think it did. I don't think --

23 Q And so are you saying that Mr. Ewert's report was
24 flawed?

25 A Yes.

1 Q And that you paid very little attention to it?

2 A I gave less attention to it than I would have to
3 the others which I did not find flawed. His core
4 review, his core examination of the likelihood of
5 conviction in terms of the elements of the
6 offence matched or mirrored very much what the
7 others said, so from that perspective I didn't
8 view his conclusions as being different, but he
9 did include considerations that I didn't find any
10 support for in terms of the evidence on any of
11 the other reports.

12 Q What did you do when you read the statement there
13 that he was being -- suggesting that he was being
14 taken to a place to be cared, what did you do to
15 get to the bottom of that statement to find out
16 if, in fact, that were true?

17 A It was my understanding from the other reports
18 that that wasn't correct.

19 Q So did you say to Ewert, "Hey, where did you get
20 this from"?

21 A No.

22 Q No?

23 A No.

24 Q You just concluded that he hadn't paid any
25 attention to the file?

1 A I concluded that I had no knowledge of where he
2 could get that information from, and had that
3 information been in the file, I anticipated that
4 the others would have also echoed it in some
5 fashion.

6 Q So you concluded he just sort of made it up?

7 A He may have misconstrued some of the evidence
8 that was given. He may have concluded that
9 Angel, who was arrested with him on the second
10 occasion on the 5th, was one of those kinds of
11 peoples. I don't know.

12 Q Okay. Paragraph 20.

13 At the time that Mr. Paul was removed from
14 the police station he clearly was unable to
15 care for himself in a proper way and he was
16 dressed in wet clothes, although he appeared
17 to have several layers of clothing on him
18 including apparently two jackets and several
19 shirts.

20 You saw and accepted that statement?

21 A Mm-hmm.

22 Q Yes?

23 A Yes.

24 Q All right. How about 23?

25 The decision by Sergeant Sanderson to

1 release Mr. Paul had nothing to do with an
2 absence of facilities to hold Mr. Paul but
3 was based solely on his judgment that while
4 obviously debilitated Mr. Paul could not be
5 drunk since he had just been released from
6 the police drunk tank some two and a half
7 hours previously and that his condition was
8 similar to that on other occasions when he
9 had been released.

10 You saw that?

11 A Yes.

12 Q And so you concluded, you accepted that Mr. Paul
13 was obviously debilitated and that Sanderson
14 recognized that?

15 THE COMMISSIONER: Are you saying that was -- I think what
16 Mr. Ewert in his report -- the way I read that is
17 that he's saying this is what Sanderson said.

18 MR. KELLIHER: Yes, that's what I -- and Sanderson believed
19 that.

20 THE COMMISSIONER: Apparently.

21 MR. KELLIHER: Yeah. That's what I'm asking.

22 Q And you accepted that?

23 A Mm-hmm.

24 Q All right.

25 The Crown is unable to prove if Mr. Paul had

1 anything to drink between the time of his
2 first release to the time of his second
3 arrest on December the 5th.

4 Did you see that?

5 A I see it.

6 Q Did you agree with that?

7 A Mr. Hicks in his review came to the same
8 conclusion, that it was unlikely that there was
9 time for him to have consumed alcohol between the
10 time that he left and the time that he was
11 returned.

12 Q But I didn't ask you. Did you hear me say what
13 did Mr. Hicks say on this subject? Is that the
14 question you thought I asked you?

15 A I'm telling you that this conclusion is one that
16 is not by itself, yes.

17 Q All right. And that's your answer to the
18 question could the -- would the Crown be able to
19 prove that he had had something to drink from the
20 time of his first release until the time of his
21 arrest? Could the Crown prove that in your mind?

22 A That he had something to drink?

23 Q Yes.

24 A No.

25 Q You couldn't do a reverse extrapolation on the

1 basis of his blood alcohol content? No?

2 A I don't know that given the time that he had at
3 liberty from the time that he left at about 6:30
4 to the time that he's arrested about 8:00, 8:15,
5 something like that, that he would have had time
6 to get himself into an advanced state of
7 intoxication after having sobered up for a period
8 of five or six hours. That's the issue.

9 Q Sir, this is not a big point. It turns into an
10 argument because the witness won't answer the
11 question. I'm asking you could the Crown have
12 proven that he consumed alcohol in that two-hour
13 framework between six and eight o'clock?

14 A And I don't believe we could.

15 Q You don't think that a reverse extrapolation by a
16 blood alcohol expert could locate consumption of
17 alcohol between 6:00 and 8:00?

18 A What was his reading at 6:00? What was his
19 reading at 8:00? I know that he wound up at
20 the -- in the autopsy at a .29 reading. I didn't
21 see in the evidence anywhere else another reading
22 to which you would work with or against, so I
23 don't know whether or not the two nine reading is
24 as a result of going down from his release and to
25 that point so that he would have been at a higher

1 reading when he was released or whether or not
2 after having been released at a lower reading he
3 would have consumed alcohol to take him to the
4 2.9 (sic), which was where he was at at the
5 autopsy.

6 Q It was a descending curve. You saw the autopsy
7 report that said his blood alcohol level would
8 have been much higher at the time of death?

9 A I saw that.

10 Q Right. It was a descending curve.

11 A I don't know how they achieved that reading. I
12 have no idea.

13 Q So you think that it's a realistic prospect that
14 when Mr. Frank was dragged -- Mr. Paul was
15 dragged out into that alley that someone came
16 along and offered him something to drink; is that
17 correct?

18 A I don't know that.

19 Q I see.

20 THE COMMISSIONER: Mr. Kelliher, it's time for the noon
21 adjournment. You will have some more questions
22 when we come back after lunch?

23 MR. KELLIHER: Yes, I will. Thank you.

24 THE COMMISSIONER: Have you any idea -- we have a witness
25 scheduled for this afternoon, and I think

1 probably -- Mr. Cowper?

2 MR. COWPER: And I also have availability difficulties.

3 Mr. Nathanson was going to take the witness this
4 afternoon. Can we just have a moment to talk
5 about scheduling?

6 THE COMMISSIONER: Yes.

7 MR. COWPER: Well, there are two difficulties. One of them
8 is that Mr. Kelliher believes he'll be an hour,
9 and Mr. Ward says he'll be an hour, which is the
10 rest of the day.

11 THE COMMISSIONER: Oh.

12 MR. COWPER: I had not -- you know, we circulated the
13 schedule, which had this witness finished at
14 12:30, and I think what we'll need to do is to
15 just take a break and address that question,
16 whether we release the witness this afternoon or
17 whether we ask you for directions in respect of
18 allocating the remaining time. I think we'll
19 need to take a caucus and consider that.

20 THE COMMISSIONER: All right. We'll -- let's take a break
21 for a few moments then and then we'll reconvene.

22 THE REGISTRAR: Order. All rise.

23 (PROCEEDINGS ADJOURNED AT 12:34 P.M.)

24 (PROCEEDINGS RECONVENED AT 12:43 P.M.)

25 THE REGISTRAR: Order. The hearing is now resumed, Mr.

1 Commissioner.

2 THE COMMISSIONER: I am concerned with the manner in which
3 the cross-examination is proceeding, and for that
4 reason I have decided that, Mr. Gillen, I am
5 going to release you, sir. I'm sorry to have to
6 say that we'll likely have to bring you back
7 again later in the week when time will permit,
8 but I propose to proceed with the witness that's
9 scheduled this afternoon. For the benefit of
10 counsel, in cross-examination of this witness and
11 witnesses to follow I propose to give a ruling
12 tomorrow morning which hopefully will be of some
13 direction to counsel as we proceed through this
14 hearing with respect to cross-examination. So as
15 far as scheduling is concerned, Mr. Cowper, I
16 know that this will perhaps cause some concerns
17 with your scheduling, but I'd like to proceed
18 with the witness who is scheduled for this
19 afternoon because of unavailability later on, and
20 then we'll proceed from there with the witnesses
21 scheduled for tomorrow, and we'll continue with
22 them, but prior to that I want to say something
23 about the manner of cross-examination which I am
24 going to ask counsel to follow with witnesses to
25 come.

1 MR. COWPER: Okay. I think then we'll have Mr. Gillen off
2 the stand for the meanwhile, and then Ms.
3 DeWitt-Van Oosten will be on at 2:00.

4 THE COMMISSIONER: Yes.

5 MR. COWPER: I'm in your hands. We have the two, Mr.
6 Cullen --

7 THE COMMISSIONER: Yes.

8 MR. COWPER: -- and Mr. Hicks tomorrow. I'm going to talk
9 to counsel about this. We were hoping to finish
10 their evidence each in a half day, and I'll
11 review that with counsel, but at this point do
12 you want to start early tomorrow morning if
13 you're going to have some remarks so that we have
14 the original scheduled time for them? Should we
15 start at 9:30 perhaps?

16 THE COMMISSIONER: We could start at 9:30, if that would be
17 helpful, and I think tentatively we'll just -- if
18 it's all right with you, Mr. Gillen, would you be
19 available on Wednesday if we need to reconvene
20 then? Fine. Thank you. We'll convene then
21 tomorrow morning at 9:30 instead of ten o'clock,
22 but we'll adjourn now until 2:00.

23 THE REGISTRAR: Order.

24 (WITNESS STOOD DOWN)

25 (PROCEEDINGS ADJOURNED AT 12:45 P.M.)

1 (PROCEEDINGS RECONVENED AT 2:00 P.M.)

2 THE REGISTRAR: Order. The hearing is now resumed, Mr.
3 Commissioner.

4 THE COMMISSIONER: Mr. Nathanson.

5 MR. NATHANSON: Thank you, Mr. Commissioner. Mr.
6 Commissioner, Ms. Van Oosten, DeWitt-Van Oosten
7 is here, but before we begin I'd like to address
8 you just on a scheduling matter.

9 THE COMMISSIONER: All right.

10 MR. NATHANSON: In view of what happened this morning I've
11 spoken to my friends. I understand that Mr. Ward
12 will cross-examine first and then Mr. Kelliher
13 second. Mr. Ward's time estimate I understand is
14 an hour, and Mr. Kelliher's time estimate will
15 depend a bit on Mr. Ward but may be up to an hour
16 as well. Your -- you, sir, will recall that
17 there was a schedule that was circulated by
18 commission counsel some week to 10 days ago --

19 THE COMMISSIONER: Yes.

20 MR. NATHANSON: -- that contained time allocations for the
21 witnesses, and for Ms. DeWitt-Van Oosten, as with
22 other witnesses, the time estimate allocated for
23 cross-examination in total was an hour and a
24 half, and so I'm quite concerned that we not
25 get --

1 THE COMMISSIONER: An hour and half in total?

2 MR. NATHANSON: No, for cross-examination in total. And so

3 I'm quite concerned that we not get ourselves
4 into a situation like we did with Mr. Gillen
5 where the time estimates are exceeded and the
6 witness is asked to come back another day,
7 particularly because we've arranged our hearing
8 time --

9 THE COMMISSIONER: I hope not. You did explain to me at
10 the beginning that counsel were canvassed with
11 respect to -- firstly they were informed some
12 time ago the witnesses that would be called and
13 asked for their estimate on cross-examination. I
14 find it surprising that we've taken the length of
15 time that we have, but I intend to deal with the
16 line of questioning that I'll permit tomorrow
17 morning.

18 MR. NATHANSON: I simply bring it to the Commissioner's
19 attention and hope that my friends will be able
20 to allocate the time as between themselves to
21 keep to the time that we've scheduled for Ms.
22 DeWitt-Van Oosten so she will not be asked to
23 come again another day.

24 THE COMMISSIONER: Very good. Thank you, Mr. Nathanson.
25 I'm sure counsel will take your words into

1 consideration.

2 MR. NATHANSON: Could Ms. DeWitt-Van Oosten be sworn or
3 affirmed?

4 THE COMMISSIONER: Yes, go ahead.

5 THE REGISTRAR: Would you like to take the oath using the
6 Bible?

7 A Yes.

8 JOYCE DEWITT-VAN OOSTEN, Sworn:

9 THE REGISTRAR: State your full name, please.

10 A Mennie Joyce DeWitt-Van Oosten.

11 THE COMMISSIONER: I'm sorry, I didn't hear your first
12 name.

13 A It's Mennie. I go by Joyce.

14 THE COMMISSIONER: Joyce. Thank you.

15 MR. NATHANSON: Mr. Commissioner, just before I begin, I
16 have a signed copy of Ms. DeWitt-Van Oosten's
17 will say statement and two unsigned copies. I'd
18 ask that the first be marked, the signed copy be
19 marked as the next exhibit, and that you, sir,
20 and the witness have the will say in front of you
21 as I go through my direct examination.

22 THE COMMISSIONER: Thank you. Marked as the next exhibit.
23 Number?

24 THE REGISTRAR: CJB number 12, sir.

25 (EXHIBIT CJB 12: Will Say Statement of Joyce

1 DeWitt-Van Oosten)

2 THE COMMISSIONER: Please go ahead.

3 MR. NATHANSON: Thank you, sir.

4 EXAMINATION BY MR. NATHANSON:

5 Q Ms. DeWitt-Van Oosten, you were called to the bar
6 in British Columbia in 1993?

7 A That's correct.

8 Q And in 1994 you joined the Crown office in
9 Vernon?

10 A Yes.

11 Q And you were a full-time trial prosecutor there
12 for approximately seven years?

13 A Yes.

14 Q Until January or February of 2001?

15 A Yes.

16 Q During your time in the Vernon Crown office you
17 served as administrative Crown?

18 A Yes, I did for a number of those years. I'm not
19 exactly sure, but I think from about 1996 through
20 to 2001.

21 Q What sort of work did you do as a prosecutor at
22 the Vernon Crown office?

23 A Well, I was a full-time trial prosecutor, so I
24 prosecuted cases at both the Provincial Court and
25 the Supreme Court level ranging from provincial

1 regulatory offences up to offences involving
2 serious violence, including homicide files. I
3 also towards the end of my time there began doing
4 indictable appeals that would arise out of
5 prosecutions in the Okanagan. I did summary
6 conviction appeals, and as an administrative
7 Crown counsel I managed issues in the office,
8 including things such as trial rotations for the
9 other prosecutors there, and I did a significant
10 amount of charge assessment.

11 Q Thank you. Toward the end of January or early
12 February of 2001 I understand you joined the
13 Criminal Justice Branch in Victoria?

14 A Yes. I transferred to headquarters and joined
15 the Legal Services team, and at that time Greg
16 Fitch was the director of that team.

17 THE COMMISSIONER: What year was that, please?

18 A It was in 2001. I believe it was at the end of
19 January or the very start of February.

20 THE COMMISSIONER: Thank you.

21 MR. NATHANSON:

22 Q In 2002 you joined the Criminal Appeals and
23 Special Prosecutions group; is that right?

24 A Yes. I stayed at Criminal Justice Branch
25 headquarters until about mid-2002. Greg Fitch

1 had left his position as director. During that
2 time I was on the Legal Services team and also
3 doing appellate work, and in 2002 I took over a
4 position in the appellate office in Victoria and
5 began at that point doing exclusively indictable
6 appeals.

7 Q And at a certain point did you become involved in
8 a constitutional litigation project for the
9 Criminal Appeals group?

10 A Yes. In about, to the best of my recollection,
11 about midway 2006 a pilot project was established
12 in the Criminal Appeals and Special Prosecutions
13 office where we developed what we then called a
14 Litigation Support Unit, and our role was to
15 provide litigation support to prosecutors across
16 the province primarily on constitutional issues,
17 sometimes on novel complex legal issues, but for
18 the most part that -- the team, myself and others
19 who were involved, would offer support through
20 co-counselling. We would take conduct of matters
21 for trial prosecutors that involved
22 constitutional issues, whether a challenge to
23 legislation or a complex Charter application, and
24 we would go in and handle that aspect of the
25 trial. At the same time my role was to develop

1 materials for them to use as trial prosecutors to
2 be available for legal advice, and that unit was
3 formalized ultimately in 2008, and I became the
4 deputy director of what is now known as the
5 Prosecution Support Unit.

6 Q And that's the position you currently hold?

7 A Yes. And as part of that I have always and I
8 continue to appear as counsel at all levels of
9 court, Provincial, Supreme, the British Columbia
10 Court of Appeal, and the Supreme Court of Canada.

11 Q Ms. DeWitt-Van Oosten, your will say, which has
12 been marked as Exhibit CJB 12, you've had an
13 opportunity to review that?

14 A Yes.

15 Q And it's accurate?

16 A Yes.

17 Q And you've signed it?

18 A Yes.

19 Q Thank you. Now, Ms. Van Oosten, I understand
20 that in 2001 Mr. Fitch asked you to look at the
21 file in relation to Mr. Paul's death?

22 A That's correct, yes.

23 Q Do you recall when he asked you to do that?

24 A Well, the memorandum that I wrote for him
25 indicates that he made the request of me on

1 February 5th, 2001, so I assume that's the day
2 that he made the request. That would have been
3 probably one of the first assignments that I was
4 given when I arrived at headquarters from the
5 Okanagan.

6 Q What did Mr. Fitch ask you to do?

7 A I don't recall the specifics of the conversation
8 with him, but looking at the memorandum and
9 understanding my role, he would have asked me to
10 review the material that was part of the file, to
11 give him an opinion, an independent assessment on
12 whether I thought there was a substantial
13 likelihood of conviction on criminal charges, and
14 in particular to consider what was being put
15 before the branch as new evidence on that file
16 and to provide him with an opinion or an
17 assessment on whether I thought that evidence
18 would change or should change the branch's
19 original charge assessment decision.

20 Q Do you recall anything else about the
21 instructions Mr. Fitch gave you?

22 A No. I don't recall the specifics of the
23 conversation.

24 Q Do you recall if prior to commencing your review
25 Mr. Fitch expressed any view about whether the

1 original decision was correct?

2 A I don't recall the specifics of the conversation.
3 That would surprise me. My experience in both
4 working with Greg Fitch and, in fact, my
5 experience in the branch as a whole is that we
6 are asked to engage in independent assessments,
7 that we are encouraged to be candid in our views
8 even if our views disagree with an assessment
9 made by one of our colleagues, so my
10 understanding would have been that I was asked to
11 take a look at the file from beginning to end,
12 engage in my own assessment, and come back to him
13 with my opinion and recommendation irrespective
14 of what anyone else may have said about that
15 particular file.

16 Q Did Mr. Fitch tell you or did you know to what
17 use your analysis would be put to?

18 A Well, I -- I understood, and I think it's readily
19 apparent from my memorandum, that I was not the
20 decision maker on the file. My role was to
21 provide him with my opinion after I did an
22 assessment and a recommendation but that
23 ultimately he would be reviewing the file. And
24 you can see from the memorandum that, in fact, I
25 tabbed materials for him to look at, so my

1 expectation was that he would be engaging in his
2 own review of the file and I was there to assist
3 and to provide him with my thoughts and my take
4 on the evidence and its value and where it left
5 us in terms of application of the branch charge
6 assessment standard.

7 Q When did you complete your review of the file
8 materials in your memorandum?

9 A The memorandum is dated February 8th, so I assume
10 that I completed it at that time.

11 Q What conclusions did you reach?

12 A It was my conclusion that there was no
13 substantial likelihood of conviction on the three
14 criminal charges that I had looked at and
15 assessed with respect to the file.

16 Q And did you reach any conclusion about the prior
17 charge assessments that had been done?

18 A I also was of the view that even with what was
19 being put forward as new evidence that there was
20 no substantial likelihood of a conviction and
21 that the branch's original determination of not
22 proceeding with criminal charges was appropriate.

23 Q Following completion of your memo what further
24 involvement did you have in the file?

25 A Well, I would have met with Greg Fitch, and I

1 have a recollection of meeting with him. It was
2 a meeting in his office. I recall Carla Taylor
3 being on the telephone, I believe, with respect
4 to that meeting. I don't have a specific recall
5 of the conversation, the details that were
6 canvassed. I don't know if I met with him
7 another time. After I would have met with him,
8 discussed my memorandum. To the best of my
9 recollection, I had no further involvement in the
10 file. I wasn't privy to any of the further
11 reviews. I wasn't asked for my opinion. I don't
12 think I was spoken to about the file by anyone.
13 I moved on to other work and then by June of 2002
14 was actually doing a whole different line of
15 work.

16 Q Ms. Van Oosten, did -- DeWitt-Van Oosten, I'm
17 sorry, did Mr. Paul being an aboriginal person
18 play any role at all in your assessment?

19 A No.

20 Q Did the fact that the potential accused persons
21 were police officers play any role?

22 A No. When I arrived in Victoria I had only
23 prosecuted in the Okanagan. I actually had no
24 familiarity with the Vancouver Police Department,
25 no familiarity with anyone there. I had never

1 prosecuted any of the files that were brought to
2 the Crown by that department, and none of these
3 names were familiar to me, either the potential
4 accused persons or any of the investigators. I
5 actually didn't even really know the other Crown
6 counsel who had made an assessment of the file.
7 I knew who Mike Hicks was. I knew, of course,
8 who Austin Cullen was, but I didn't have a
9 personal working relationship with either of
10 them. So the only individual that I knew was
11 Greg Fitch, who I was reporting to, and in that
12 sense had had absolutely no prior involvement
13 with the file, the police or, actually, anyone
14 else in relation to that assessment.

15 Q Did anyone attempt to influence your decision
16 either inappropriately or otherwise?

17 A No.

18 Q Was it ever suggested to you that it would be
19 embarrassing if you concluded that the branch's
20 original decision should be changed?

21 A No.

22 Q Did you consider that at all?

23 A No.

24 Q Did you know at the time that Austin Cullen was
25 the ADAG, that is, the Assistant Deputy Attorney

1 General responsible for the branch?

2 A Yes, I did. He was in the same building on the
3 same floor. And he was -- he left the branch not
4 very long after I got there. I don't know
5 exactly when, but it wasn't very long, so I
6 didn't -- I knew who he was. I knew he was the
7 Assistant Deputy Attorney General. I don't
8 recall ever speaking to him about this matter.
9 And so to that extent, you know, his role in the
10 file or any assessment he had made was something
11 that, you know, wasn't a factor for me.

12 Q I'd like to turn and ask you, Ms. DeWitt-Van
13 Oosten, some questions about your experience with
14 charge approval decisions. At the time you
15 completed this assessment for Mr. Fitch you were
16 familiar with the branch's charge approval
17 guidelines?

18 A Yes.

19 Q What previous experience did you have in making
20 charge assessment decisions?

21 A I had been doing charge assessment really from my
22 first involvement with the branch, so starting in
23 January of 1994. I was very junior at that time.
24 I believe I had only been called to the bar about
25 eight months, but the reality was that Vernon was

1 a very busy office, and I started doing charge
2 assessment shortly after my arrival, and I did a
3 lot of it. I would have done charge assessment
4 with respect to individuals who were in custody
5 in the morning. I would have done charge
6 assessment that was brought to the Vernon Crown
7 Counsel office from a variety of RCMP
8 detachments: Vernon, Armstrong, Salmon Arm,
9 Revelstoke, Lumby. I don't know exactly how
10 many. If I had to guesstimate, I would
11 guesstimate in the hundreds ranging really the
12 full range of offences from regulatory offences
13 under the *Motor Vehicle Act* or the *Wildlife Act*,
14 to *Criminal Code* offences, to participating in
15 charge assessment in terms of making
16 recommendations on homicide files. So in
17 comparison probably to my peers at my level of
18 call, by the time I arrived in Victoria, fairly
19 extensive experience.

20 Q Did you have any experience, previous experience
21 in making a charge assessment decision in cases
22 involving serious allegations against a police
23 officer?

24 A The only -- to the best of my recollection, the
25 matter involving Mr. Paul was the first police

1 charge assessment file involving a death that I
2 was involved in. I believe, I might be mistaken,
3 but I believe up to that point I had been
4 involved in one other police charge assessment
5 with respect to a matter that had arisen in the
6 Okanagan. It did not involve a death. And up to
7 that point in time I had had conduct of one
8 prosecution as a trial prosecutor involving a
9 police officer.

10 Q Ms. DeWitt-Van Oosten, were you aware of the
11 police practice of providing a neutral Report to
12 Crown Counsel, that is, a report without a
13 recommendation where there was a potential for
14 criminal charges against police officers?

15 A When I look back to 2001, I don't know if I was
16 aware that it was a practice. I had not up to
17 that point in time been involved in any
18 significant way with police charge assessments,
19 so I don't know if I was aware of that.

20 Q I take it that you noticed the absence of a
21 recommendation in the Report to Crown Counsel in
22 this file?

23 A Yes.

24 Q Did that affect your ability to reach a charge
25 assessment decision in any way on the materials

1 you were given?

2 A No. And I say that for this reason. My
3 experience up to that point in time was generally
4 on all charge assessment that I was engaged in I
5 understood what my role was. My role as a
6 prosecutor was to engage in an independent
7 assessment. So charge assessment would come to
8 me or charge -- or files for charge assessment
9 would come to me in, you know, different forms.
10 Sometimes they would come with a recommendation.
11 Sometimes they would come with an information
12 that had already been sworn. Sometimes they
13 would come without a specific recommendation.
14 Sometimes the recommendation would be with
15 respect to charges that logically weren't
16 connected to the file. So I understood that it
17 was up to me to make an independent assessment of
18 whether there was a substantial likelihood of a
19 conviction, and if so, for what charge, that I
20 saw that was my responsibility, so what the
21 police may have said to me in that regard was --
22 was almost an irrelevant factor in any event. So
23 in this particular situation that would not have
24 been a unique situation for me because I would
25 have started on the understanding it was my

1 responsibility to make that determination in any
2 event.

3 Q Thank you. I'd like to now turn and ask you some
4 questions about the timeliness of your decision
5 and also the steps that you took. So, first, I
6 understand you completed your assessment within
7 approximately four days of receiving the
8 assignment?

9 A Yes.

10 Q And that included a review of the investigative
11 file, correct?

12 A Yes.

13 Q And also the materials that were forwarded by the
14 Office of the Police Complaints Commissioner?

15 A Yes.

16 Q What charges did you consider as part of your
17 memorandum?

18 A Well, it's apparent from my opinion that I took
19 into consideration three different possibilities:
20 manslaughter by way of criminal negligence,
21 criminal negligence causing death, and a failure
22 to provide the necessaries of life. The first
23 two of those charges, manslaughter by criminal
24 negligence and criminal negligence causing death,
25 are really the functional equivalent one of the

1 other. So I would have looked at all three of
2 those. I would have made sure that I understood
3 the legal elements of each of those charges, and
4 then I would have assessed the file within that
5 over-arching framework cognizant of the Crown's
6 burden of proof beyond a reasonable doubt and
7 then looked at the evidence in light of that
8 framework.

9 Q Against whom did you consider charges?

10 A Sergeant Sanderson and Constable Instant.

11 Q And you set out your reasoning and your
12 conclusions in a memorandum that you prepared for
13 Greg Fitch?

14 A Yes.

15 Q That's the memorandum you've referred to of
16 February 8, 2001?

17 A Yes.

18 Q And that's a nine-page memorandum, is it?

19 A Yes.

20 Q Ms. DeWitt-Van Oosten, how was it you were able
21 to complete that so quickly?

22 A Well, as I indicated earlier, given the timing,
23 this file would have been one of the very first
24 things that I was asked to do when I arrived, so
25 I did not have other things on my plate. I at

1 that point in time would have completed all of my
2 court commitments, or at least the bulk of them,
3 from the Okanagan, and it was a bit of a blank
4 slate, so I would have started and worked on it
5 right at the beginning, and there wouldn't have
6 been very much, if anything, to interrupt my time
7 or my review of the file, and I tend to be the
8 kind of person that just works throughout the
9 period of time and do not spend a lot of time
10 doing other things, so --

11 Q Is the length and detail of your memorandum
12 typical of what Crown counsel would usually do in
13 reaching a charge assessment decision?

14 A No. This was, at least in my estimation, a
15 complex file. The charges being contemplated
16 were penal negligence charges based on omission.
17 It's a multifaceted analysis. It requires a lot
18 of thought, a lot of care in terms of going
19 through the various legal elements and trying to
20 put the pieces of the puzzle together. This
21 would not have been ordinarily what I would have
22 seen in a charge assessment file. Because files
23 come in different shapes and sizes from many
24 situations, this degree of research or analysis
25 is not necessary. So in the significant number

1 of charge assessment files that I was personally
2 involved in would I have seen a nine-page
3 memorandum? No.

4 Q Did you have an opportunity to review the work
5 done in the Crown file prior to your involvement?

6 A Prior to my arrival in Victoria --

7 Q I'm sorry.

8 A -- you mean? Sorry.

9 Q When you undertook your analysis --

10 A Yes.

11 Q -- as requested by Mr. Fitch, did you look back
12 at the work that previous Crown had done?

13 A Yes, and I think it's apparent from my written
14 opinion, and I had tabbed some of those for Mr.
15 Fitch, that I had seen the opinion prepared by
16 Mike Hicks and also a memorandum prepared by
17 Roger Cutler. So, yes, that material would have
18 been part of the file, and I would have reviewed
19 that. Also, of course, a letter prepared by Dana
20 Urban.

21 Q Putting aside Mr. Urban's letter, because I think
22 that came later or that came not -- that wasn't
23 from the Crown, how would you characterize the
24 completeness and care exhibited in the original
25 charge assessment decision?

1 A Well, from what I saw at the time certainly up to
2 the point that I became involved in 2001, so
3 there had been an initial review in, I think,
4 1999 or so, then my involvement in 2001, and a
5 subsequent review of which I had no part, what I
6 had seen up to that point in time was a very
7 thorough analysis. A lot of care had been taken
8 in terms of working through the file and making
9 an assessment. This was a file that involved a
10 death, and in my experience as a prosecutor those
11 files attract a good deal of consideration to try
12 to be as thorough and as careful as we can in
13 applying the charge assessment standard, and I
14 didn't see anything personally that suggested to
15 me that anything other than a thorough review had
16 occurred.

17 Q Prior to preparing your memorandum you reviewed
18 Dr. Ferris's opinion?

19 A Yes.

20 Q And you said you reviewed Dana Urban's letter as
21 well?

22 A Yes.

23 Q Did you review the videotape that the Office of
24 the Police Complaints Commissioner provided?

25 A According to my memorandum, I did not view the

1 videotape prior to completing the memorandum. I
2 do not know, I do not have a specific
3 recollection as to whether I viewed the videotape
4 after the memorandum. I had before me the still
5 photographs. I had descriptions from the
6 previous Crown involved in terms of the still
7 photographs. I had the letter of Dana Urban,
8 which described the videotape and commented about
9 it being a compelling depiction of incapacity. I
10 nine years later can close my eyes and I have a
11 visual image of Mr. Paul in the jail. I do not
12 know if that image comes from the still
13 photographs, from the videotape, but it's
14 apparent from my memorandum that I did not view
15 it. I did not consider it necessary for me to
16 see the actual videotape given everything I had
17 before me, including Dana Urban's description,
18 because for the purpose of my analysis I assumed
19 the worst-case scenario, that there was no
20 movement from him while he was in the jail, that
21 his incapacity would have been apparent to the
22 police officers at that time, and the real
23 question for me was not what the videotape
24 showed. That didn't seem to be contentious in
25 terms of his physical condition. The question

1 for me from a legal analysis perspective was what
2 that meant in terms of assessing the mens rea for
3 the offences that were under consideration.

4 Q Thank you. Ms. DeWitt-Van Oosten, I'd like to
5 ask you a few questions about the analysis
6 contained in your memorandum, so if you could
7 turn to Exhibit CJB 1, which is the green binder,
8 tab 7, please. And if you could turn first to
9 page 7 of tab 7. As I understand it, there were
10 two obstacles to concluding that there was a
11 substantial likelihood of conviction on the
12 evidentiary part of the Crown charge approval
13 standard. The first was establishing whether
14 there was a marked departure from the standard of
15 care of a reasonable person in the circumstances
16 of the police officers, which had to be
17 established beyond a reasonable doubt; is that
18 right?

19 A Yes.

20 Q Right. And that's the actus reus of --
21 essentially the common actus reus of the offences
22 you were considering?

23 A I'm sorry, I missed part of that.

24 Q Yes. Is that -- that question of marked
25 departure, is that essentially the actus reus of

1 the offences you were considering?

2 A Yes, and from that then flows mens rea as well.

3 Q Right. Mens rea is in part inferred from the --

4 A Yes.

5 Q -- conduct?

6 A Yes.

7 Q Okay. So could you address, first of all, in
8 summary why it was you concluded that the Crown
9 -- you did not think that the Crown could prove
10 beyond a reasonable doubt there was a marked
11 departure from the required standard of care?

12 A Penal negligence offences are assessed
13 contextually, and what that means is that every
14 case is unique to itself, and the whole of the
15 circumstances will inform the analysis. Pieces
16 of the file cannot be looked at in isolation. So
17 to that extent the -- although the offence itself
18 doesn't require a subjective level of mens rea
19 and it is an objectively assessed offence, the
20 knowledge base or the understanding or the
21 information before the officers becomes relevant.
22 So the question in whether or not it constitutes
23 a marked departure, and for criminal negligence
24 causing death or manslaughter by way of criminal
25 negligence it's not simply a marked departure,

1 it's a marked and substantial departure from what
2 one would expect of a reasonably prudent person
3 in all of the circumstances, so in order to make
4 that assessment their knowledge base or their
5 prior involvement with the individual or their
6 knowledge of his history becomes a relevant
7 consideration, and so the question for me was
8 twofold. In light of their previous dealings
9 with Mr. Paul both on the day in question and
10 prior to, in light of what they appeared to be
11 saying was that they -- they did not think he was
12 intoxicated to the extent that he did -- that
13 they did, were they -- was it objectively
14 foreseeable in those circumstances to see a risk
15 of bodily harm, and even if it was, was their
16 decision to take him and place him in an alley a
17 marked and substantial departure from what one
18 would expect of a reasonably prudent person.
19 That was -- those were the two struggles that I
20 had with respect to the legal analysis. Dr.
21 Ferris's report, if I remember correctly, said
22 that hypothermia would have been manifesting
23 itself already when he was in the jail, but
24 really it's difficult to draw a distinction
25 between that and severe intoxication, and the

1 only way one would know the difference between
2 the two was a testing of the body temperature,
3 really. There was no evidence that that had
4 occurred. They wouldn't have that knowledge
5 base. In addition to that, the evidence was that
6 from their perspective the physical condition
7 manifested by Mr. Paul was a condition that he
8 would also manifest in a sober state. So there
9 were these three layers of perspective on their
10 part, and the question was in light of all of
11 that would it be objectively foreseeable that if
12 he was placed in an alley that bodily harm --
13 there was a risk of bodily harm or a risk of
14 endangerment to his life or safety when, in fact,
15 they had seen him in not dissimilar circumstances
16 on other occasions and he had not sustained
17 bodily harm. That was the struggle that I had
18 recognizing that in proving this kind of an
19 offence one has to take the whole of those
20 circumstances into account, and that includes
21 their perspective of the matter because penal
22 negligence is assessed from the shoes of the
23 persons in that position at the time.

24 Q We've discussed the video. Well, in fact, I
25 think you've addressed this. If you look at page

1 8, please, of your memorandum, under your
2 heading, under the Conclusion you see you refer
3 to the possibility of Sergeant Sanderson and
4 Constable Instant testifying? Do you see that?

5 A Yes.

6 Q Was this a case where the accused's statements or
7 the potential accused's statements disclosed a
8 viable defence that was relevant to your
9 assessment of the charge approval standard?

10 A The -- in my view, their version of events could
11 not be ignored in terms of a factor for
12 consideration, and I say that for this reason.
13 When an accused person provides a version of
14 events, the Crown has to take that into account
15 in assessing the likelihood of a conviction in
16 the event that that version of events is provided
17 at trial, and that's because reasonable doubt can
18 arise from the version of events given by someone
19 who is charged with a criminal offence even if
20 they're not believed in their version of events.
21 So the doctrine of reasonable doubt says a trier
22 of fact listens to the accused's evidence. If --
23 if he or she accepts the accused's evidence, that
24 will result in an acquittal. Even if the accused
25 is disbelieved, it may give rise to a reasonable

1 doubt, and even if not believed and the accused's
2 version of events is completely rejected, then
3 the trier of fact must still look at the Crown's
4 evidence and decide whether or not it gives rise
5 to a reasonable doubt. So you cannot ignore the
6 version of events that comes forward, and in this
7 kind of a case, because penal negligence is
8 assessed in all of the circumstances as they
9 existed at the given time, it was incumbent upon
10 me to see what they had to say, to weigh that in,
11 and to determine where that left us in terms of a
12 substantial likelihood of a conviction in the
13 event those versions were put forward at trial.

14 Q What impact did the criminal standard of proof
15 have in your assessment of whether the evidential
16 part of the charge approval standard was met?

17 A Well, it has a lot of impact. Proof beyond a
18 reasonable doubt is a very high threshold. It's
19 closer to absolute certainty than a balance of
20 probabilities. And one has -- when one engages
21 in a charge assessment, they have to be cognizant
22 of that high threshold. They have to take into
23 account the fact that any accused person is
24 presumed innocent from beginning to end unless a
25 verdict is entered, has to take into account the

1 fact that an accused person is not obliged to
2 give testimony, has no obligation to disprove or
3 prove anything. So, of course, when you engage
4 in a charge assessment process, you inform
5 yourself on all of the legal elements associated
6 with the offence, you recognize that the Crown
7 has a high burden of proof with respect to each
8 and every one of those legal elements, and then
9 based on your experience as a prosecutor and your
10 knowledge of the law you do the best you can in
11 trying to assess the probative value of the
12 material before you and to fit it into that
13 framework and see where it leads you.

14 Q Ms. DeWitt-Van Oosten, if you could refer to page
15 8 of your memorandum, the fourth paragraph, you
16 say:

17 Was the risk of bodily harm to Mr. Paul
18 foreseeable in the circumstances as a whole?
19 Maybe. Maybe not. One simply cannot say
20 for sure,

21 and then you go on. And then you say:

22 The inability to decide whether the risk was
23 foreseeable speaks volumes about the
24 capacity of the Crown to prove --

25 I'm sorry.

1 -- to prove a criminal offence beyond a
2 reasonable doubt.

3 Is the reference to maybe, maybe not and then
4 tied to the criminal standard -- what were you
5 expressing there?

6 A Well, as I indicated, there were three offences
7 that I was looking at. The first two,
8 manslaughter by way of criminal negligence and
9 criminal negligence causing death, to sustain a
10 conviction for either of those offences the Crown
11 has to prove beyond a reasonable doubt that the
12 police officers did something or failed to do
13 something that contributed to the death. They --
14 the Crown has to prove beyond a reasonable doubt
15 that in doing something or failing to do
16 something they showed a wanton and reckless
17 disregard for the life or safety of Mr. Paul.
18 The Crown would have to prove beyond a reasonable
19 doubt that the positive conduct or the omission
20 occurred in the context of a scenario whereby
21 bodily harm was objectively foreseeable. The
22 Crown has to prove that beyond a reasonable
23 doubt. So each of those elements are separate
24 and distinct in terms of the Crown's burden of
25 proof, but the whole of the contextual matrix

1 comes into play, and my concern was in light of
2 all of the information that was available at the
3 time, and certainly which I had in front of me at
4 the time, that there was no substantial
5 likelihood that the Crown could prove beyond a
6 reasonable doubt that bodily harm was objectively
7 foreseeable.

8 Q So you were distinguishing between likelihood and
9 the criminal standard when you were referring to
10 maybe or maybe not?

11 A Yes.

12 Q Ms. DeWitt-Van Oosten, on page 9 of your
13 memorandum, so just over the page, you refer to
14 the opinion that was provided to the Office of
15 the Police Complaints Commissioner?

16 A Yes.

17 Q And that was Mr. Urban's opinion?

18 A Yes.

19 Q If you could refer to Exhibit CJB 2, which is
20 that large blue binder directly in front of you,
21 and if you could turn up tab 9, please. Is this
22 the opinion of Mr. Urban you were referring to?

23 A Yes.

24 Q And if you turn over to the second -- sorry, to
25 the third page, the paragraph beginning, "Based

1 on the above summary," the first full paragraph.

2 Do you have that?

3 A Sorry, on page 2?

4 Q Sorry, page 3. My apologies.

5 A Yes.

6 Q And then midway through that paragraph you'll see
7 Mr. Urban says:

8 I say this because, in my view, there is a
9 significant public interest for the Crown to
10 proceed...

11 Do you see that?

12 A Yes.

13 Q All right. Is this the paragraph that you were
14 referring to in your memorandum?

15 A Yes.

16 Q All right. And why did you feel compelled to
17 address this in your memorandum to Mr. Fitch?

18 A It's apparent from my memorandum that I had
19 flagged Mr. Urban's letter for Mr. Fitch to
20 review. It was a contrary view of the file and
21 certainly from my perspective generally this is
22 my practice. When there's a contrary view, it's
23 important to pay attention to it and to consider
24 it to make sure it's not disregarded. My concern
25 about the opinion provided by Mr. Urban was that

1 it's quite clear -- it was quite clear from the
2 letter that he felt very strongly about there
3 being a sufficient basis for the matter to
4 proceed in terms of criminal charges. I
5 understood that. My concern was that, however,
6 that even in light of how he saw it, which was a
7 very compelling depiction in the cells of
8 incapacity, also coupled with, if I understood it
9 correctly, his reliance on Dr. Ferris's opinion
10 and how Dr. Ferris saw things that may have
11 occurred in the alley or how it unfolded, even
12 with all of that what he said was there's a
13 strong prima facie case and numerous avenues for
14 cross-examination of Sanderson and Constable
15 Instant. My understanding of the branch's charge
16 assessment standard is that a strong prima facie
17 case is not a substantial likelihood of
18 conviction, and, in addition to that, from my
19 estimation one doesn't hope to bolster the
20 Crown's case through cross-examination of the
21 accused given that the accused are not obliged to
22 take the stand. So I wouldn't look to cross-
23 examination as a means by which to strengthen the
24 Crown's evidentiary foundation. So even with his
25 perspective of the file, and I respect that, his

1 ultimate conclusion at the end of the day from
2 my -- my view was not a substantial likelihood of
3 a conviction. At best it was a strong prima
4 facie case.

5 Q One or perhaps two more questions. In your
6 judgment was this charge assessment decision a
7 close call, a difficult decision for you to make?

8 A On whether I thought there was a substantial
9 likelihood of conviction, I was confident in that
10 determination. I was satisfied on my review of
11 what I had before me at the time that there was
12 not. Was this a difficult case? Absolutely.
13 These are very complex issues. It's a multi-
14 faceted analysis. They're always filled with
15 shades of grey. It's not easy to work through
16 this. Was this case a tragic case? Was it sad?
17 Yes. The question before me wasn't whether I
18 condoned the conduct of these officers. It
19 wasn't whether I thought what they did was
20 reasonable. I wasn't being asked whether I
21 thought they were liable from a civil negligence
22 perspective. This was a situation where my --
23 the request made of me was to make a
24 recommendation on whether or not I thought there
25 was a substantial likelihood of criminal

1 culpability. That was what I was asked to do,
2 and my assessment grounded in the evidence before
3 me was that we did not meet that test. Did the
4 file have an impact on me? Yes. Ten years later
5 do I close my eyes and see Mr. Paul? Yes. It
6 was sad. Absolutely. But my role was to engage
7 in a legal analysis, and that -- I did that to
8 the best of my ability and ultimately reached the
9 conclusion that I did.

10 MR. NATHANSON: Mr. Commissioner, those are my questions.

11 THE COMMISSIONER: Thank you. Mr. Ward, are you going to
12 lead off?

13 MR. WARD: Yes. Thank you.

14 EXAMINATION BY MR. WARD:

15 Q Ms. DeWitt-Van Oosten, you say that 10 years on
16 you close your eyes and you can see Mr. Paul; is
17 that right?

18 A Yes.

19 Q And what is it you see when you do that?

20 A As I indicated earlier, I have an image of him in
21 the jail either laying on the floor or the upper
22 part of his body raised, and I see that the floor
23 is wet.

24 Q And that's a still image?

25 A Well, I -- I don't know where that comes from,

1 whether it comes from the still photographs,
2 whether it comes from the descriptions that were
3 provided in the materials that I reviewed,
4 whether it comes from the videotape. I do not
5 know that.

6 Q In the course of your career as a prosecutor
7 you've prosecuted many, many cases, including
8 many homicide cases?

9 A I've prosecuted many cases. I don't know how
10 many -- exactly how many homicide cases I have
11 prosecuted. I never actually counted them.
12 Certainly both as a trial prosecutor, yes, I had
13 responsibility for homicide cases, and as an
14 appellate prosecutor I have had a number of
15 homicide cases as well.

16 Q You must have seen many graphic images of death
17 and injury?

18 A Yes.

19 Q And yet the Frank Paul image appears in your mind
20 when you close your eyes all these years later?

21 A When I'm asked -- when I am asked to reflect upon
22 the file, yes.

23 Q I want to ask you about the Dana Urban opinion
24 next, please. Do you have that document in front
25 of you still?

1 A Is that the blue binder?

2 Q Yes.

3 A Tab 7?

4 Q Yes. No, not tab 7.

5 A Sorry.

6 Q Tab 9, I believe, of the blue binder.

7 A Yes.

8 Q Exhibit 2.

9 A Yes.

10 Q And you look at this in February of 2001 when
11 you're assigned the task, right?

12 A Yes.

13 Q Now, at this point in time you know that Dana
14 Urban is a senior former Crown prosecutor, right?

15 A Yes.

16 Q And he's a Queen's Counsel, a QC?

17 A Yes.

18 Q He had many, many more years of experience
19 prosecuting cases than you had then, correct?

20 A Well, I don't know if I knew how many years
21 experience he had, but certainly when I -- when I
22 began with the Crown in January of 1994 I was
23 aware that Dana was a prosecutor in the Okanagan
24 and considered a senior prosecutor, yes. Sorry,
25 a prosecutor -- he was in the Kootenays, I

1 believe, not the Okanagan.

2 Q So you knew of him?

3 THE COMMISSIONER: Sorry, I didn't hear you.

4 A He was a prosecutor in the Kootenays when I began
5 in the Okanagan, yes.

6 MR. WARD:

7 Q And you deal with his opinion at the end of your
8 letter in the two paragraphs that you referred to
9 a moment ago when my friend Mr. Nathanson was
10 questioning you; is that right?

11 A Yes.

12 Q And is it the gist of those two paragraphs that
13 you are saying that Mr. Urban got the test wrong?

14 A No. In the -- in the memorandum what I was
15 saying was that my view was that the new evidence
16 brought to the branch's attention, which was
17 brought forward through, in part, Mr. Urban's
18 letter, was not sufficient to change the original
19 determination, and in the memorandum I expressed
20 a concern about his articulation of the basis for
21 which he thought there was a substantial
22 likelihood of conviction. When I wrote the
23 memorandum for Mr. Fitch, I was not putting
24 everything in the memorandum that I would have
25 considered. I was not detailing the whole of my

1 thought process with respect to each piece of
2 evidence that I had looked at. I understood that
3 Mr. Fitch would also be reviewing the file, and
4 my role was to offer him my opinion based on my
5 own review, but it wasn't a memorandum that
6 was -- that at least I expected to be, you know,
7 the final word on this particular matter.

8 Q Did you take Mr. Urban's opinion seriously?

9 A Yes. I don't -- I don't remember exactly every
10 thinking process that I engaged in at the time.
11 I have a very limited independent recollection.
12 But certainly I was aware of it, and the fact
13 that I tabbed it for Mr. Fitch's review sends a
14 message to me that I thought it was something he
15 needed to look at in his review of the file.

16 Q Indeed. And the way you put it in your memo was
17 that it was one of the most important portions of
18 the file for him to review?

19 A Yes. I was not ignoring this opinion or
20 disregarding it.

21 Q If you have the opinion still, could you turn to
22 page 3?

23 A This is Mr. Urban's?

24 Q Mr. Urban's, yes. Page 3 of tab 9 of Volume 2.
25 And the thrust of his opinion, it's already been

1 referred to, but I'll read it again. As I
2 understand it, on page 3 about halfway down the
3 first full paragraph Mr. Urban has written:

4 I say this because, in my view, there is a
5 significant public interest for the Crown to
6 proceed and that there is clearly a
7 substantial likelihood of conviction with
8 respect to Sanderson and Instant.

9 Do you see that?

10 A Yes.

11 Q And based on that Mr. Urban articulated the two-
12 pronged test for whether a charge should be
13 approved, correct?

14 A Yes, and immediately follows it with an
15 explanation that from his perspective there is a
16 strong prima facie case and numerous avenues of
17 cross-examination of Sanderson, Instant, and the
18 guard should they elect to testify.

19 Q Yes. And all he's saying in that subsequent
20 sentence is repeating that in his view it's a
21 strong case and that in the event the accused or
22 potential accused took the stand there would be
23 numerous avenues that could be explored; fair?

24 A Well, I don't -- I -- you know, I'm not going to
25 guess as to what Mr. Urban's thought process was

1 with respect to that. From my perspective when I
2 read that, a strong prima facie case and numerous
3 avenues of cross-examination does not meet the
4 branch's charge assessment standard.

5 Q We've seen evidence, and it's in the form of
6 Exhibit number 7 in this proceeding, that another
7 way of stating the substantial likelihood of
8 conviction test is a strong, solid case of
9 substance.

10 A Yes.

11 Q And you agree with that?

12 A That's what the branch policy says, yes.

13 Q Isn't that really what Mr. Urban is saying in his
14 letter? He's saying there's clearly a
15 substantial likelihood of conviction, and then in
16 the next breath there's a strong prima facie
17 case, a strong case.

18 A I'll go back to what I said earlier. I don't
19 know what Mr. Urban was thinking at the time he
20 wrote this. From my perspective, a substantial
21 likelihood of conviction requires more than a
22 strong prima facie case. But Mr. Urban's letter
23 and perspective on the file -- and I fully
24 appreciate that these are issues on which
25 reasonable minds may disagree. I -- I understand

1 and appreciate that people may see a file
2 differently. That's not unusual, particularly
3 when the issues are relatively complex and when
4 one is trying to gauge at the end of the day
5 where -- where a file might land in terms of the
6 charge assessment standard. What I can tell you
7 is that from my perspective, my experience as a
8 prosecutor, my understanding of the charge
9 assessment standard, my knowledge of the law and
10 my own prosecution experience in understanding
11 how trials often unfold is that a strong prima
12 facie case is not sufficient.

13 Q Fair enough. In any event, you would appreciate
14 based on your knowledge of Mr. Urban's experience
15 and stature in the profession that he would
16 appreciate at the time he wrote his letter that
17 neither accused would be obliged to take the
18 stand if they were prosecuted; is that fair?

19 A I assume he would have appreciated that, yes.

20 THE COMMISSIONER: Would this be a convenient time to take
21 a brief break?

22 MR. WARD: Yes. Thank you.

23 THE COMMISSIONER: Thank you, Mr. Ward. We'll take a
24 break.

25 THE REGISTRAR: The court is adjourned. Order.

1 (PROCEEDINGS ADJOURNED AT 3:00 P.M.)

2 (PROCEEDINGS RECONVENED AT 3:15 P.M.)

3 THE REGISTRAR: Order. The hearing is now resumed, Mr.
4 Commissioner.

5 THE COMMISSIONER: Thank you. Mr. Ward, please go ahead.

6 MR. WARD:

7 Q Yes. Thank you. I just have a couple more
8 questions about your consideration of Mr. Urban's
9 letter. The first one is did you consider that
10 he got any of the facts or the applicable law
11 wrong in his opinion letter?

12 A I don't know if at the time I thought that or
13 turned my mind to that. I honestly can't answer
14 that question.

15 THE COMMISSIONER: It was a difference of opinion, Mr.
16 Ward.

17 MR. WARD:

18 Q All right. Thank you. And next if you could
19 please turn to page 3. At the foot of that page,
20 paragraph 3, Mr. Urban in his letter refers to a
21 number of things that he characterizes as
22 information not available and/or considered by
23 the Crown. Do you see that?

24 A Yes.

25 Q Page 3. And then he lists some things. And item

1 number 3 he says this:

2 The actual video of Mr. Paul at relevant
3 times was not made available to the Crown.

4 That was correct, was it?

5 A To the best of my knowledge, yes.

6 Q And then he stated:

7 Upon recently obtaining and viewing this
8 video, our office is of the view that the
9 video is *far more revealing*,

10 with those words in italics,

11 than the still pictures provided.

12 Do you see that?

13 A Yes.

14 Q And he goes on to say, I'm skipping a couple of
15 sentences:

16 This video,

17 turning over the page,

18 will be of invaluable assistance to them,

19 meaning the Crown,

20 so that they may be able to assess for

21 themselves the absolute lack of major and

22 minor motor movements of the deceased and

23 the absolute inability of Mr. Paul to form

24 any rational thought in order to better

25 determine whether or not he had any

1 capability of looking after himself and in
2 order to clearly contradict the statements
3 of Sanderson, Instant, and the guard.

4 Now, that's what Mr. Urban thought, clearly,
5 right?

6 A Yes.

7 Q And given this statement about the importance of
8 the videotape to this former experienced
9 prosecutor's assessment of this file, why didn't
10 you look at it?

11 A I don't remember exactly what I was thinking at
12 the time, but I accepted for the purpose of my
13 analysis, I accepted that the videotape showed no
14 motion, that it showed incapacity, that it showed
15 Mr. Paul being dragged in the detachment. I
16 accepted that. I didn't take any issue with
17 that. The question for me was what that meant in
18 terms of the Crown's ability at the end of the
19 day to prove both the actus reus and the mens rea
20 of these offences.

21 Q All right. Now, you said just now you accepted
22 that it depicted his condition when he was
23 dragged into the detachment, and indeed your
24 written memorandum referred to his condition when
25 being dragged into the detachment, but isn't the

1 more important question of fact what his
2 condition was when he left the detachment in the
3 company of Instant?

4 A I believe I actually said "dragged in the
5 detachment", not "into", but, in any event, if
6 I -- maybe what I'll do is refer to my memorandum
7 just at tab 7.

8 Q I was going to refer you to that anyway.

9 A If you could just --

10 Q Tab 7.

11 A -- show me the portion that you were referencing.

12 Q Volume 1, tab 7 you say -- page 4, second bullet,
13 "Paul" -- 4 of 9.

14 Paul is seen by a custodial guard to be
15 "dragged" into the detachment.

16 So that's coming in?

17 A Yes.

18 Q And then about three bullets down the page right
19 in the middle:

20 Paul was taken back to the police wagon by
21 Constable Instant.

22 Do you see that?

23 A Yes.

24 Q And then another reference is over on page 5
25 under the heading "New evidence", second

1 paragraph. The end of that paragraph -- well,
2 let me read the second to last sentence.

3 At times, he is crawling on his hands and
4 knees to access the elevator.

5 Let me just stop there. You were aware and are
6 aware that at those times it was in the course of
7 his first apprehension by police officers that
8 day, correct?

9 A Yes, that's correct.

10 Q And then you say:

11 Following the second arrest, he is dragged
12 into the detachment, apparently unable to
13 stand.

14 A Yes.

15 Q But nothing about, insofar as I can read it
16 anyway, his condition when he left the
17 detachment.

18 A Well, I was certainly aware of -- I had read the
19 entire file, so that would have included the
20 statements from the various police officers,
21 including the corrections officer, Furlow or
22 Firlotte. I'm not sure exactly how to pronounce
23 his last name. There's no question I was aware
24 that leaving the detachment that both Constable
25 Instant and the corrections officer had to take

1 Mr. Paul into the van, so I was not of any
2 impression that Mr. Paul had left the detachment
3 walking into the transport van. So my
4 understanding of the factual matrix would have
5 been that he was dragged into the detachment and
6 had to be taken out of the detachment by the two
7 individuals as well.

8 Q Well, anyone being released from the detachment
9 -- let me start again. Any person in custody
10 being transferred from the police detachment to a
11 waiting police wagon would be taken by or
12 assisted by peace officers, wouldn't they?

13 A Well, I don't know what the answer is to that.
14 What I can say with respect to this particular
15 matter, to the best of my recollection, I
16 understood full well that on the second arrest
17 during the period of time that Mr. Paul was
18 brought into the detachment and taken out of the
19 detachment and placed in the transportation wagon
20 by Constable Instant and the corrections officer
21 that he was unable to walk or stand and that his
22 physical condition was as it appeared in the
23 still photographs.

24 Q Would you concur that that's not necessarily
25 obvious to the reader of your letter or

1 memorandum?

2 A No, I -- that may well be, but this is what I
3 said earlier. I didn't reference absolutely
4 everything in the memorandum, but I certainly
5 have no recollection of being of any impression
6 other than that. I understood the apparent
7 incapacity. The question for me was coupled with
8 everything else what that meant from a criminal
9 culpability standpoint.

10 Q Okay. This memorandum, and I'm still -- I'm
11 referring to yours at tab 7, Exhibit 1, has a
12 number of handwritten notes in the margins?

13 A Yes.

14 Q Do you know who those notes are and how or in
15 what circumstances they came to be made there?

16 A They're not mine. I understand that this is --
17 my understanding is that the notes may have been
18 made by Carla Taylor in reviewing the memorandum.
19 I don't have personal knowledge of that. I did
20 not see these notations until for the purpose of
21 testifying at the inquiry I was given a copy of
22 this opinion.

23 Q You testified that you had a conversation with
24 Mr. Fitch and Carla Taylor in which she was
25 patched in on the telephone?

1 A That's my recollection, yes.

2 Q And do these notes, which you've now seen, the
3 handwritten notes in the margins, refresh your
4 recollection as to what she was contributing to
5 that conversation?

6 A No, I'm sorry, they don't. I don't know if these
7 notations were made prior to the conversation or
8 post-conversation. I don't have a specific
9 recall of the issues or the items that were
10 discussed during the course of that conversation
11 with Greg. I just remember that Carla Taylor --
12 I thought she was on the telephone, maybe from
13 Vancouver, because she had, I believe, been
14 seconded to Mr. Fitch's team to do some work for
15 him, and he had asked her to take a look at this
16 matter. I don't know to the extent to which she
17 did. I personally don't recall ever having a
18 discussion with her about the file, simply that
19 one conversation. I don't remember the details
20 of it -- or that one meeting -- the details of
21 it, and I don't know when these handwritten notes
22 arose.

23 Q Was it your usual practice after six or seven
24 years as a prosecutor to make notes of important
25 conversations or meetings you had?

1 A It depended on the nature of the meeting. I
2 wouldn't usually -- if I had provided an opinion
3 to somebody or done some work for them on a
4 particular file, I wouldn't -- and went to
5 discuss it with them, I wouldn't necessarily make
6 notes about that. I would certainly make notes
7 of interviews I had with witnesses with respect
8 to my file or communications I had with counsel
9 on any of my files. But would I make notes in
10 this kind of a situation? Not necessarily. And
11 up until this point in time most of the charge
12 assessment I did in my career as a prosecutor I
13 did on my own, so it wouldn't be a consultative
14 process where I was meeting with people to
15 discuss those issues.

16 Q Let me just -- I appreciate what your evidence
17 is, but if I may, if I can ask you just about a
18 few of the notes that appear in this copy of your
19 memorandum. Page 5 of 9 under the heading "New
20 evidence", second paragraph, last sentence, you
21 wrote in your memorandum:

22 Following the second arrest, he is dragged
23 into the detachment, apparently unable to
24 stand.

25 Do you see that?

1 A Yes.

2 Q And apparently Ms. Taylor, who was then Crown
3 counsel as well; is that right?

4 A I believe she was, yes.

5 Q And by the way, do you know what she's doing now
6 or where she is?

7 A I -- my understanding is that she is with the
8 prosecution office in Alberta. I don't know
9 exactly her title or -- I believe she may be in
10 Calgary.

11 Q In Calgary?

12 A Yes.

13 Q And does she still go by Taylor or some other
14 surname?

15 A I don't know that. I'm sorry, I don't maintain
16 contact with her.

17 Q In any event, back to the opinion, second
18 paragraph there on page 5 under the heading "New
19 evidence" it appears that she wrote "if
20 deceased", I guess that is. Is that --

21 A I don't know what that --

22 Q Clearly it's a reference to Mr. Paul?

23 A Yes.

24 Q

25 If he can't stand, how could anyone say he

1 could care for himself?

2 Does that assist you in recalling whether she
3 raised that concern in the telephone conversation
4 you and Mr. Fitch had with her?

5 A No, I'm sorry.

6 Q At the bottom of the page you wrote:

7 Constable Instant, who placed Mr. Paul in
8 the alley, says he assisted Mr. Paul in
9 walking to the place at which he eventually
10 sat against the wall.

11 It appears that she's written in reference to the
12 word walking "dubious". Do you see that?

13 A Yes.

14 Q Did she raise that, to your recollection, in the
15 conversation you and Mr. Fitch had with her?

16 A You know, I wish -- I wish I could detail the
17 conversation with you. I -- honestly, I don't
18 recall the specifics of the discussion.

19 Q You seem to have, if I understood your evidence
20 today correctly, put some considerable emphasis
21 on what Sanderson and Instant said about this --
22 their interaction with Mr. Paul; is that right?

23 A I don't think it's fair to say that I put
24 considerable emphasis on it. I took it into
25 account as a factor in the overall assessment,

1 yes, I did.

2 Q Did you consider it to be significant in any way
3 that the videotape showing Mr. Paul's condition
4 at the relevant times apparently surfaced after
5 they had provided their statements?

6 A I don't have a recollection of knowing that or
7 the history of how that videotape came to be or
8 how it was -- how it surfaced. All I know at the
9 time the assignment was given to me was that it
10 had come now to the Crown for consideration as
11 part of the investigative file.

12 Q All right. Just turning over the page to page 6
13 of 9, and this is the start of a thread of notes
14 that Ms. Taylor has made, and I want to ask you
15 about this in the same way. Under the heading
16 "Crown's initial charge approval decision" it
17 appears that she has written, "Why does it have
18 to be intoxication." And then further down the
19 page next to your sentence, "Moreover, Mr. Paul
20 himself denied he had been drinking," she's
21 written, I think, "so what". And then finally on
22 the next page, page 7, in her second note on the
23 right-hand side she has written, "why is intox so
24 important (am I missing something)?" That's what
25 she's written, it appears?

1 A It appears, yes.

2 Q Did she raise those matters, to your
3 recollection, during your discussion of this file
4 with her?

5 A I don't have a recollection.

6 THE COMMISSIONER: She said three times that she has no
7 recollection.

8 MR. WARD: All right.

9 THE COMMISSIONER: I don't know where we're going, but I
10 don't think we're going to make any further
11 headway.

12 MR. WARD: Thank you.

13 Q She described him at the foot of page 6 in her
14 note as being dragged like a rag doll. That's
15 consistent with your appreciation of the
16 condition he was in?

17 A I understood he was being dragged, yes.

18 Q Like a rag doll?

19 A He was being dragged and was not moving of his
20 own accord.

21 Q And she noted, finally, with respect to her notes
22 on page 8, "would he be dumped wet and" -- looks
23 like "immobile in an alley at 2 degrees Celsius."

24 THE COMMISSIONER: What's your question?

25 MR. WARD:

1 Q You concurred with her appreciation of the
2 circumstances in which he was left in the alley,
3 did you?

4 A I'm not sure.

5 Q Dumped there?

6 A I concurred that he was dumped? You're asking me
7 whether I concurred that he was dumped in the
8 alley?

9 Q Yes, if that's a fair characterization.

10 A I understood that he was taken to the alley, yes,
11 and left there unattended.

12 Q And with respect to the alley itself, did you
13 appreciate it was in an industrial area some
14 miles from his stated place of residence at
15 Broadway and Maple?

16 A I would not have known that, no. I --

17 Q Sorry.

18 A I wasn't familiar with Vancouver, and I -- my
19 understanding was that it was an alley behind the
20 detox centre, but --

21 Q Did you know where that was?

22 A No.

23 Q Now, you referred in your evidence, your
24 testimony this morning about the many charge
25 assessments you've done, and you said probably in

1 the hundreds, right?

2 A I'm guesstimating, yes.

3 Q And some of those were homicide cases?

4 A Yes.

5 Q What would the typical turnaround time be from
6 receiving the Report to Crown Counsel to making
7 the charge approval decision?

8 A On what kind of a file?

9 Q On a homicide file.

10 A Well, on a homicide file generally, at least to
11 the best of my recollection, I would not be doing
12 that by myself. That would be -- I would
13 probably do a preliminary assessment on that and
14 then it would -- there would be consultation and
15 a decision made by either the Deputy Regional
16 Crown Counsel or the Regional Crown Counsel given
17 the nature of the charges. The timeline. It
18 would very much depend on the nature of the file,
19 the length of the investigation, the volume.
20 Some of these files come with a tremendous volume
21 of material arising out of an extremely lengthy
22 police investigation. It would depend sometimes
23 on whether the individual had been arrested and
24 was in custody or whether what was being
25 contemplated was a warrant. So I don't think

1 there is any specific or standard timeline for
2 that.

3 Q Had you in the course of your prosecutorial work
4 appreciated that police investigations of serious
5 incidents typically followed a pattern, in other
6 words, there were certain fundamental things that
7 were usually done? Let me give you two examples.
8 Firstly, witnesses would be identified,
9 separated, and questioned right away before they
10 could speak to anyone thereby tainting their
11 evidence. Was that a typical practice you
12 encountered?

13 A You know, when I think back -- that's a difficult
14 question to answer because each file is so
15 individualized both sometimes in terms of the
16 investigation itself and, you know, the
17 circumstances surrounding the commission of the
18 alleged offence that I don't know if I can answer
19 that with any degree of certainty as to what a
20 standardized investigative methodology would be
21 or pattern, at least from my own experience.

22 Q When you prosecuted cases in the Okanagan and
23 since, you worked closely with police
24 investigators on the files?

25 A Not typically during the pre-charge phase. On

1 occasion certainly files would be sent over from
2 the police, and upon a review of it I would
3 require further investigation to be done or I
4 would have inquiries, and I would send it back.
5 It wasn't very often that I was involved in the
6 pre-trial -- in the pre-charge stage either
7 giving advice or in a consultative role in terms
8 of investigative methodology. Most of my
9 involvement would have been post-file receipt by
10 the prosecution office and making a charge
11 assessment from that point forward.

12 Q And from that point forward you worked closely
13 with the police officers, correct?

14 A Well, I'm not sure what you mean by worked
15 closely with them. In terms of requesting
16 information from them, yes. Making inquiries of
17 them, yes. They would marshal witnesses. But at
18 the end of the day my understanding was, and it
19 still is today, that the police and the
20 prosecution office were independent one from
21 another and that my responsibility was to conduct
22 the prosecution, their responsibility was to
23 conduct the investigation.

24 Q Is it fair to suggest that in the course of
25 prosecuting cases and calling police officers to

1 the stand and reviewing investigations that you
2 understood that when police in the usual case had
3 a suspect in a serious matter they would give
4 that person the Charter warning and then
5 endeavour to immediately get a statement from the
6 suspect?

7 A In files where police would seek to obtain a
8 statement from someone who was detained, then,
9 yes, the individual is Chartered and warned,
10 specifically with respect to the right to
11 counsel, their right to silence, and the police
12 would then conduct a custodial interview. That
13 wasn't in all cases. It depended on the nature
14 of the offence, and in many, at least in my
15 experience, in many cases other than homicide
16 files you wouldn't see that occur because the
17 individual may not be under arrest or for
18 whatever reason the police did not try to take a
19 statement. But generally when there was going to
20 be a custodial interview, yes, there would be a
21 Charter warning, contact with counsel, and then
22 the police would proceed to question the
23 individual.

24 Q Did you appreciate when you looked at the report
25 or the file in the Frank Paul case that that

1 procedure had not occurred with respect to the
2 potential suspects? In other words, the
3 potential suspects in the homicide, Instant and
4 Sanderson, were not given Charter warnings, nor
5 was any attempt made to question them by police
6 investigators?

7 A I don't -- I don't believe I was aware of the
8 history of how the statements came about, or if I
9 was, I don't have a specific recollection about
10 that. My -- for the purpose of my assessment
11 there I looked at their statements with a view to
12 if a criminal prosecution was to proceed what
13 would be the version of events that were put
14 forward by the individuals involved, and so under
15 the charge -- charge assessment process looking
16 at possible defences and then factoring that into
17 my ultimate analysis in the context of everything
18 else that was before me.

19 Q In your will say, Ms. DeWitt-Van Oosten, you
20 said -- I just have a couple more questions, Mr.
21 Commissioner. I'm sorry, I just have to find
22 this. You said that this was the first file in
23 which you had been asked to assess charges
24 against a police officer. I believe you said
25 that. I am just trying to locate that in the

1 will say. Is that right?

2 A Yes. I -- my recollection is at best that I
3 might have on one prior occasion. I have a
4 memory of looking at or being asked for a view
5 with respect to a charge of impaired driving
6 against a police officer, but in terms of a
7 police -- a prosecution, a contemplated
8 prosecution with respect to police officers
9 involving a death, this would have been my first
10 file, yes.

11 Q And I take it from that, too, it would have been
12 the first time you looked at the possibility of a
13 charge against a police officer arising from on-
14 duty conduct; is that right?

15 A Yes, except when I was in the Okanagan I had
16 conduct of a prosecution involving a police
17 officer where the offence occurred while on duty.

18 Q And what was that offence?

19 A Careless use of a firearm.

20 Q And I found the paragraph in your will say. It's
21 at page 5, the second to last paragraph. And you
22 say in the present tense:

23 I am not aware of a practice whereby police
24 provide a "neutral" report to Crown
25 Counsel...

1 Do you see that?

2 A Yes.

3 Q Have you since considering the Frank Paul case
4 had occasion to consider reports to Crown counsel
5 in other police involved cases, specifically
6 death cases?

7 A After this particular matter I remained as part
8 of the Legal Services team until mid-June of
9 2002. I think that's when it was. I did other
10 police charge assessments because that was part
11 of the policy process. So Mr. Fitch and then
12 whoever took over that aspect would have asked me
13 to look at other ones, so I did a number of them.
14 In some of them I recommended charges. In others
15 I did not depending on the evidentiary
16 foundation. To the best of my knowledge, I
17 looked at at least one other police charge
18 assessment involving a death that occurred in
19 custody, and that was around and about the same
20 time as this particular matter.

21 Q Was there a recommendation included in the Report
22 to Crown Counsel as to charges or was it silent?

23 A I don't remember that.

24 Q Do you remember --

25 A I'm sorry.

1 Q Do you remember whether you approved charges in
2 that instance?

3 A Well, again, in my role at headquarters I wasn't
4 the decision maker. I made -- I gave an opinion
5 only, and in that particular situation my
6 recollection is that my opinion was there was no
7 substantial likelihood of a conviction.

8 Q Just a last matter, and that is did you conduct
9 legal research for the purpose of writing your
10 memorandum?

11 A I don't remember exactly what I looked at, but
12 it's apparent from my memorandum that I had
13 informed myself about the constituent elements of
14 each of the offences that were being
15 contemplated. I did certainly look at least at
16 the jurisprudence on failing to provide the
17 necessities of life, and at the time when I
18 reviewed the file there was in the file a
19 memorandum that had been prepared by Roger Cutler
20 that canvassed the relevant law, and, of course,
21 Mr. Urban in his letter also canvassed the law.
22 My practice is generally that I do that. I don't
23 know specifically what I looked at, and in the
24 memorandum itself I didn't lay all of that out,
25 but my practice would have been generally to

1 canvass the case law and to make sure I properly
2 understood the legal framework that would apply
3 to these particular offences.

4 Q So do I understand you to say that as you sit
5 here today and as you looked over your memorandum
6 you don't have a distinct recollection of
7 undertaking significant legal research; is that
8 fair?

9 A Yes. I don't have an independent recollection of
10 that. You can see that at page 2 of my
11 memorandum I refer to the *Curtis* decision from
12 the Ontario Court of Appeal. At page 8 of my
13 memorandum I refer to *Creighton* out of the
14 Supreme Court of Canada, which at that time was
15 the leading authority on criminal negligence. So
16 I clearly conducted legal research. The extent
17 to which I did so and the specific cases that I
18 looked at I do not know.

19 MR. WARD: Thank you very much. Those are my questions.

20 THE COMMISSIONER: Thank you, Mr. Ward. Do you have a few
21 questions?

22 MR. KELLIHER: Yes. Ten minutes, Mr. Commissioner.

23 THE COMMISSIONER: Thank you very much.

24 EXAMINATION BY MR. KELLIHER:

25 Q Ms. DeWitt-Van Oosten, Mr. Fitch invited you to

1 do an opinion on this matter, but it was -- you
2 understood that he was the one doing the charge
3 approval process or charge review decision; is
4 that correct?

5 A I understood that he would be ultimately the
6 person who made a recommendation to the Assistant
7 Deputy Attorney General.

8 Q All right. And so you saw your role as doing a
9 charge approval -- making a charge approval
10 recommendation; is that right?

11 A Yes. A charge assessment recommendation based on
12 my review, yes.

13 Q All right. And you had the benefit of other
14 opinions, you've said?

15 A Yes.

16 Q And which of those opinions did you find most
17 helpful?

18 A Well, I don't know which ones I found most
19 helpful. I clearly had seen, based on my
20 memorandum, the letter from Mike Hicks dated
21 December 21st, 1999, which set out a review of
22 the file. I had Roger Cutler's memorandum, which
23 was, to the best of my recollection, more about
24 the legal framework, and I had the letter from
25 Dana Urban. I do not recall if I had before me

1 other opinions that were produced with respect to
2 the file.

3 Q Were you aware that the Director of Legal
4 Services and the Regional Crown from Vancouver
5 had before you done charge approval reviews of
6 this same file?

7 A I would have -- I would have been aware -- you
8 know, I don't know the answer to that. I don't
9 know exactly what I -- who I was aware of at the
10 time having been involved. I would have had the
11 entire file before me, so if there were letters
12 or opinions that have been produced by Austin
13 Cullen or Peter Ewert, I would have seen them,
14 yes.

15 Q But you have no recollection of having seen those
16 opinions?

17 A I don't recall every piece of information that I
18 looked at in the file. The list that I have
19 included at page 2 of the memorandum was a list I
20 gave to Mr. Fitch as ones that he should look at.
21 My understanding is that the fuller -- that the
22 letter of Michael Hicks from December of 1999 was
23 a full analysis of the file, but I don't remember
24 the details of other pieces of correspondence or
25 other opinions that would have been there.

1 Q All right. Well, having reviewed the whole file
2 then, you would have known that -- that the
3 Director of Legal Services had given an opinion,
4 a no-charge opinion, the Vancouver Regional Crown
5 had given an opinion, a no-charge opinion, and
6 that Mr. Cutler had given a no-charge opinion,
7 all before you, correct?

8 A Yes. If those were in the file, I would have
9 known that, yes.

10 Q All right. Now, then on your first few days in
11 your job you were invited to give an opinion on
12 the same case, correct?

13 A Yes.

14 Q And in order to give a charge opinion you would
15 have had to have given an opinion contrary to at
16 least two of your superiors in the Criminal
17 Justice Branch? I don't know what Mr. Cutler's
18 role, but a more senior position than your own,
19 correct?

20 A Yes. Everybody was more senior than me.

21 Q Right. And so you would have had to in your
22 legal opinion contradict at least three of your
23 immediate superiors on your first case that you
24 were handed in the Criminal Justice Branch,
25 correct?

1 A Yes.

2 Q Did you take that as something of a burden on
3 you?

4 A No.

5 Q All right. I'd like to take you just to a few
6 points in your memorandum. Page 7 of 9, please.
7 This is tab 7 of the small binder. Halfway down
8 under "Whether", the second full sentence:

9 The video depicts conduct consistent with
10 extreme intoxication. That fact has already
11 been acknowledged as obvious by the Crown.

12 So is it fair to say that you accepted as a fact
13 that Frank Paul was extremely intoxicated at the
14 material time?

15 A Well, my understanding of the evidence was that
16 at the time of his death his blood alcohol
17 content was .29, that it would have been higher
18 at the time that the police were interacting with
19 him. I knew that. I accepted that his physical
20 condition as it was manifesting itself in the
21 videotape was consistent with extreme
22 intoxication. Dr. Ferris's opinion was that it
23 was also, I believe, consistent with hypothermia.

24 Q Yes. If we can just do this one step at a time,
25 please, Ms. DeWitt-Van Oosten. So as I read that

1 to you it's acceptable to conclude from what
2 you've written that you accepted when you did
3 write it that Mr. Paul was extremely intoxicated
4 at the material times, correct?

5 A Well, I accepted that his blood alcohol level was
6 higher than .29 and that his physical condition
7 was consistent with someone in a state of extreme
8 intoxication, yes.

9 Q Okay. The answer is yes. Now, do you agree with
10 me that a person in that state is incapable of
11 caring for themselves?

12 A I accepted that at the time the videotape depicts
13 Mr. Paul his incapacity was apparent, and I
14 believe the first two officers who actually
15 called for him to be taken back to the
16 detachment, that was certainly their perspective,
17 that his incapacity was readily apparent to them.

18 Q All right. Let me take you to the second
19 paragraph there then. We know --

20 THE COMMISSIONER: What page is this on?

21 MR. KELLIHER: This is the same page, Mr. Commissioner,
22 page 7.

23 Q We know that he's extremely intoxicated. We know
24 that he can't take care of himself. Here we are
25 at the second paragraph.

1 The difficulty with this case lies not with
2 the appearance of Mr. Paul and the perceived
3 degree of his physical incapacity, but
4 whether the police officers should have
5 known from *all of the information* before
6 them, that the apparent incapacity was due
7 to intoxication, as compared to something
8 else...

9 Now, if we could just stop there. If he is
10 extremely intoxicated, you find as a fact, if he
11 is unable to care for himself, which you have
12 found, what difference does it make whether the
13 police officers view that incapacity as due to
14 alcohol or anything else? The police officers
15 viewed him as being unable to care for himself.
16 What does it matter what the reason is?

17 A It matters in this sense. These offences,
18 manslaughter by criminal negligence or failing to
19 provide the necessaries of life, involve several
20 different legal elements. It's not just a
21 question of whether or not on the facts Mr. Paul
22 was incapable of caring for himself. The
23 question is whether or not based on all of the
24 circumstances and what was known to the officers
25 at the time whether or not the risk of bodily

1 harm was objectively foreseeable and whether or
2 not their decision ultimately amounted to a
3 marked and substantial departure or a marked
4 departure from what would be expected of a
5 reasonable person in similar circumstances. So
6 one can't take one aspect of the file and isolate
7 it and say, well, it's apparent that he did not
8 have the capacity to care for himself. The
9 analysis is not as simplistic as that. The
10 question is whether or not the mens rea for the
11 offence can be established beyond a reasonable
12 doubt, and so it has to be a contextual analysis
13 that takes into account also other information
14 that they had before them, which was, if I
15 understood it from the file as a whole, based on
16 their pre-existing knowledge of him and for
17 Constable Instant how that had been relayed to
18 him, whether or not they would be able to know
19 that what he was engaging in was a result of
20 intoxication such that the risk of bodily harm
21 was objectively foreseeable, and that was the
22 issue that I struggled with from an analytic
23 perspective.

24 Q All right. So if I understand you, the police
25 officers see Mr. Paul in this state. They

1 understand he can't take care of himself. They
2 just don't know why. And they take him and leave
3 him out in the alley. Isn't it incumbent upon
4 them to find out what the problem is? If they're
5 confused whether it's alcohol, they know he's
6 incapacitated. Isn't it incumbent upon them to
7 find out before they leave him outside?

8 A My understanding of -- from the material that was
9 before me is that Sergeant Sanderson based on his
10 pre-existing knowledge of Mr. Paul was of the
11 view that, in fact, he was not intoxicated to the
12 extent that the blood alcohol content of his
13 blood would have suggested, that, in fact, he had
14 on prior occasions been in a similar situation,
15 had gone back to where he was residing, had
16 functioned in that capacity, so the Crown would
17 have to prove beyond a reasonable doubt that even
18 when all of that was taken into consideration the
19 objective for foreseeability was there and that
20 their conduct amounted to wanton and reckless
21 disregard for his safety.

22 Q Let me read this to you for a moment. This is
23 coming from Sanderson's duty report. He says
24 this:

25 Paul's condition did not appear any

1 different to his usual state of post-jail
2 stay sobriety.
3 Now, when you say, well, Sanderson had seen him
4 in similar circumstances before when he left the
5 jail, is there any evidence of that in the file
6 other than what I've read to you, that is to say,
7 what Sanderson was saying was, "He was -- as I
8 witnessed him leaving the jail at eight o'clock
9 it was -- it was just the same as I had witnessed
10 in other post-jail stays -- jail stay
11 situations"? Is that what you understood
12 Sanderson to mean?

13 A I understood his perspective to be that what he
14 saw on the day in question was not inconsistent
15 with what he had seen on prior occasions, yes.

16 Q Meaning seeing Mr. Paul dragged out of the jail
17 and left outside? That's what Sanderson had seen
18 previously?

19 A Meaning that he had seen Mr. Paul in a situation
20 where movement and coordination was extremely
21 limited, yes, and my recollection was that that
22 issue for him played a part in his perspective in
23 terms of his assessment of risk of bodily harm.

24 Q Do you have Exhibit 2 in front of you, please?

25 A Yes.

1 Q Tab 2. It's called a Sudden Death Report. And
2 if you turn to page 0004. Now, this is what I
3 understand is Sanderson's evidence on the issue
4 of seeing Mr. Paul in and out of jails. Just
5 take a second to read it over.

6 A Sorry, which portion would you like me to read
7 over?

8 Q The second paragraph, if you like.

9 A I must have a different document. 0004?

10 Q Yes. It is at tab 2.

11 A Yes.

12 Q It is the eleventh page in, but it's -- the
13 number on the top right is 0004.

14 A Oh.

15 Q The eleventh page in.

16 A My 004 is page 4.

17 Q It says at the bottom left Sanderson, R.

18 MR. PECK: There's two 0004s. One is four pages in, and
19 one is 11 pages in.

20 THE COMMISSIONER: Oh. Thank you.

21 MR. KELLIHER:

22 Q All right. The eleventh page in, what do you
23 have there?

24 A I have a page that is entitled Miscellaneous and
25 Supplementary Report.

1 Q All right. At the bottom it says R. Sanderson,
2 correct?

3 A Yes, it does.

4 Q Second paragraph he's describing Mr. Paul,
5 correct?

6 A Yes.

7 Q He describes Mr. Paul being brought into the
8 jail, that he met the wagon driver in the
9 elevator, and he says there's no way that Paul
10 was intoxicated but he was debilitated to the
11 extent that he was slow moving and passive when
12 sober.

13 Paul was communicative and stated that he
14 lived in the area of West Broadway and
15 Maple. The undersigned could not confirm
16 this fact as Paul was booked in no fixed
17 address.

18 This is the point I want you to consider.

19 Paul's condition did not appear any
20 different to his usual state of post-jail
21 sobriety.

22 Do you see that?

23 A Yes.

24 Q Did you see in the video Mr. Paul leave the jail
25 at approximately 5:30 that day?

1 A I -- my recollection is that I saw him crawling
2 toward -- at one point on his hands and knees
3 towards the desk, and he left the detachment
4 supporting himself, I believe, against the wall.
5 He then sat for, my recollection was about almost
6 close to an hour before he left the area. So
7 clearly what that depicted after being in cells
8 for a number of hours was extremely laborious
9 movement where he needed assistance to support
10 himself, yes.

11 Q Right. You saw him putting his shoes on, his
12 socks on, eating, putting a jacket on, and
13 getting up and walking out of the wagon bay,
14 correct, unassisted?

15 A I don't recall if I personally saw that, but I
16 know that, yes, that was the -- part of the
17 evidence, yes.

18 Q How does that compare -- you see, Sanderson says
19 he looks the same at approximately six o'clock as
20 he did at eight o'clock when he was dragged out.
21 When you -- when you consider the video of Mr.
22 Paul being dragged out, do you accept Sanderson's
23 statement here that it was the same as when he
24 left earlier?

25 A Well, that's not actually his statement, Mr.

1 Kelliher. He doesn't say he was the same as when
2 he left earlier. He says, "...did not appear any
3 different to his usual state of post-jail stay
4 sobriety." My understanding from the evidence
5 was that he had had previous interaction with Mr.
6 Paul on more than one occasion, that -- and
7 contextually the whole of that knowledge base
8 would come into play. So I didn't read this and
9 I don't read it now as him saying it's exactly as
10 when he left today and there is no distinction
11 between the two.

12 Q Well, you're saying that somewhere in the file
13 there is evidence that Sanderson had seen Mr.
14 Paul dragged out of the jail at some earlier time
15 in a condition where he couldn't care for himself
16 and yet Mr. Paul survived; is that correct?

17 A I did not say that, sir. What I said was that he
18 had had pre-existing interaction and knowledge
19 with Mr. Paul over a period of time and that
20 whatever that consisted of on different occasions
21 he took that into account in making his
22 assessment. I don't know if he saw him being
23 dragged on other occasions. What I do know is
24 based on the evidence that was contained in the
25 file at the time that he took into account in his

1 determination or assessment at that time his
2 prior knowledge of Mr. Paul's physical condition
3 and that that prior knowledge included extremely
4 laborious movement, lack of coordination, and the
5 need for assistance even in a state of sobriety.

6 Q Moments before Sanderson ordered Mr. Paul to be
7 deposited at Maple and Broadway he said Paul's
8 condition did not appear any different to his
9 usual state of post -- of post-jail stay
10 sobriety. Now, you had a visual depiction in the
11 file of what Mr. Paul looked like when he was in
12 a post-jail stay situation. He walked out the
13 door. Now, when you look at the video and see
14 him being dragged out, how can you lend -- how
15 can you give any credibility whatsoever to what
16 Sanderson is saying here?

17 MR. PECK: With respect, we're getting into argument, Mr.
18 Commissioner.

19 THE COMMISSIONER: It's true, it is argument, Mr. Kelliher.
20 You're disagreeing with the witness and arguing
21 on her interpretation of the evidence. She came
22 to an opinion or conclusion, and she's told you
23 that. You certainly can make your points at the
24 time of argument.

25 MR. KELLIHER:

1 Q If I can take you to your conclusion. At the
2 third full sentence down you're referring to the
3 two police officers, both, that is, the -- are
4 you with me?

5 A Are you on page 9?

6 Q Page 8 of 9, last paragraph.

7 A Yes.

8 Q Third full sentence.

9 Both would likely say that Mr. Paul's
10 condition, as manifested that day --
11 now, we're talking at the time that he's dragged
12 out of the jail and deposited in the street.

13 Both would likely say that Mr. Paul's
14 condition, as manifested that day, was not
15 unusual and that they had no idea he may
16 have been suffering from hypothermia.

17 Correct?

18 A That's what I say, yes.

19 Q What difference would it make if they didn't know
20 he was suffering from hypothermia if they knew
21 that he was disabled?

22 A Because it goes to whether the Crown could prove
23 beyond a reasonable doubt objective
24 foreseeability of risk, risk of bodily harm.
25 Their knowledge base in terms of his physical

1 condition and the contribution that that physical
2 condition would make to the risk involved was a
3 factor for consideration. So, for example, if
4 someone knew that an individual was suffering
5 from hypothermia at the time they made their
6 decision to take the actions that they did, that
7 might be qualitatively different than a knowledge
8 base with respect to some other physical
9 condition because it goes to the appreciation of
10 the risk.

11 Q All right. So if Sanderson was to say, "Oh, I
12 didn't think he was intoxicated," it's obvious he
13 can't care for himself, it's obvious that he's
14 disabled, and there was a nurse standing right
15 there, and he didn't say, "Could you check this
16 man before I leave him out in the elements," is
17 that a factor that you would weigh in your
18 decision?

19 A I'm sorry, I'm not sure I understand.

20 Q That he didn't -- well, you say they had no way
21 of knowing that he had hypothermia. Couldn't
22 they have asked the nurse that was standing right
23 over Mr. Paul at one time to check him?

24 THE COMMISSIONER: That's, I think, argument again. That's
25 not -- you certainly can ask her about the

1 evidence she had or didn't have, but whether she
2 should have applied her mind to this or to that,
3 that's argument.

4 MR. KELLIHER:

5 Q Did the presence of a nurse at the time Mr. Paul
6 was dragged from the station enter into your
7 analysis?

8 A I don't -- I don't know if I knew that at the end
9 of -- of the second arrest there was a nurse
10 present. I certainly knew based on my review of
11 the file that a nurse had been present during the
12 first part of the interaction during the day.
13 The question for me was given the whole of the
14 circumstances, including their perspective as
15 relayed in their statements, whether the Crown
16 could prove objective foreseeability of the risk
17 of bodily harm and a wanton and reckless
18 disregard for life and safety or a marked
19 departure from what one would reasonably expect.
20 So I took everything I had in front of me to the
21 best that I could, applied it to that analysis,
22 and I reached the conclusion I did.

23 Q All right. Can I take you to page 7 of 9,
24 please, the last paragraph, and this will be the
25 last area of questioning. It begins:

1 The report of Dr. Ferris acknowledges that
2 it is difficult, objectively, to distinguish
3 between intoxication and hypothermia. The
4 symptoms can be very similar and it is only
5 when one checks body temperature that a more
6 decisive assessment can be made. There is
7 no evidence to suggest that at any time
8 during the course of the day, Mr. Paul
9 sought medical attention, complained of
10 problems or indicated he was cold.

11 Now, are you saying that as he was about to be
12 dragged from that elevator in that condition
13 there was an obligation on him to ask the nurse
14 to check him over --

15 A No.

16 Q -- or to say as he's lying there soaking wet
17 having been dragged in out of the elements and on
18 his way back that the officer could not have
19 intuited that he was cold?

20 A No, I'm not saying that Mr. Paul had any
21 obligation to request assistance. This part of
22 the memorandum is again -- it goes to what was
23 all -- what was readily apparent at the time,
24 what was the extent of the knowledge base of the
25 officers at the time, and when you factor into

1 their perspective -- into that analysis their
2 perspective was the decisions that they made,
3 were they made in the context of objective
4 foreseeability of bodily harm and did they in
5 that context constitute a marked departure or a
6 marked and substantial departure. So in the
7 course of that contextual analysis you look at
8 everything that was there and everything that was
9 not there, and you try to get to a point where
10 you can decide where it leaves you in terms of
11 your elements of proof. I am in no way
12 suggesting that an obligation was there on the
13 part of Mr. Paul. But even the decision by an
14 officer to not seek a medical assessment or to
15 not take body temperature or not ask a nurse to
16 take a look at this individual, each one of those
17 decisions in terms of where -- whether they
18 constitute a substantial departure from the norm
19 depends on the context, everything that was known
20 to them at the time because it always has to be
21 looked at from the position of the individual who
22 is in the middle of those circumstances.

23 Q And what they knew, is this correct, of Mr. Paul
24 was that he was a derelict alcoholic whose
25 medical condition was deteriorating rapidly and

1 that he appeared before them totally incapable of
2 caring for himself, and that would have been
3 obvious to anybody who saw him; do you agree with
4 that?

5 A What I understood from the file that they knew is
6 that when they were dealing with him at the time
7 he was unable to stand, he had to be dragged into
8 the detachment, that he was an individual with a
9 substance abuse problem, that they had dealt with
10 him on numerous occasions, and that during the
11 course of some of those occasions, even in a
12 state of sobriety, he would have difficulty,
13 sometimes extreme difficulty, in supporting
14 himself. That's what I understood they knew.

15 Q Okay. So you're saying it's reasonable for them,
16 knowing that he had those difficulties in the
17 past, to conclude that that was nothing more than
18 they were witnessing as they were about to drag
19 him out? It was the same thing; is that correct?

20 A No, Mr. Kelliher. My role was not to ask myself
21 whether what they did was reasonable. My role
22 was not to ask myself whether they did the right
23 thing or whether or not what they did amounted to
24 civil negligence. My -- the question I had to
25 ask myself is whether or not the Crown could

1 prove beyond a reasonable doubt that their
2 conduct in the context of all the circumstances
3 amounted to a marked and substantial departure
4 from what one would expect in those
5 circumstances. That was the question before me.

6 Q So you concluded that when Officer Sanderson
7 looked at Frank Paul that night that he honestly
8 believed that he could leave Mr. Paul out in the
9 rain and there would be no serious harm done? Is
10 that what you accepted?

11 A No. What I concluded was based on the material
12 as a whole there was no substantial likelihood of
13 a conviction for manslaughter by criminal
14 negligence or failing to provide the necessities
15 of life.

16 THE COMMISSIONER: Mr. Kelliher, we've gone quite some time
17 without a break for the reporter.

18 MR. KELLIHER: Yes. Thank you. Those are my questions,
19 Mr. Commissioner.

20 THE COMMISSIONER: Thank you very much, Mr. Kelliher. Are
21 there any further questions from anyone else this
22 afternoon? Thank you. Tomorrow morning we're
23 resuming at 9:30; is that correct?

24 MR. NATHANSON: That's correct, Mr. Commissioner.

25 THE COMMISSIONER: And the witness may be excused now.

1 MR. NATHANSON: Thank you.

2 A Thank you.

3 THE COMMISSIONER: Thank you for coming. You can be
4 excused. We'll adjourn until 9:30 in the
5 morning.

6 (WITNESS ASIDE)

7 THE REGISTRAR: Order.

8 (PROCEEDINGS ADJOURNED AT 4:21 P.M.)

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**I hereby certify the foregoing to
be a true and accurate transcript
of the proceedings transcribed to
the best of my skill and ability.**

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