THE FRANK PAUL INQUIRY
(FINAL PHASE, 2010)

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

SUBMISSIONS OF THE B.C. CIVIL LIBERTIES ASSOCIATION

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Introduction

1. A decision as to whether to prosecute in police-related cases, such as where there has been a serious injury sustained by a civilian in police custody, and particularly where a death has occurred in police custody, is always a decision of great importance. There is a compelling public interest to be served in assuring the public that any charge assessments or prosecutions arising from these cases are fairly and impartially conducted, without any taint of improper conduct or possible conflicts of interest.

2. The final phase of the Frank Paul inquiry has examined the response of the Criminal Justice Branch of the Ministry of Attorney General (the "Branch") to the death of Frank Paul. It will be our submission that in order to maintain public confidence in the criminal justice system, this Commission should recommend a new approach for assessing whether charges should be laid in cases in which the police are involved or implicated. The BCCLA submits that in every police-related incident in which a civilian investigative agency determines that a charge assessment should be conducted, a special prosecutor should be appointed under the *Crown Counsel Act* to make the charge assessment and to conduct any ensuing prosecution.

Facts

3. Mr. Paul was a Mi'kmaq man who was originally from Big Cove, New Brunswick. On December 5, 1998, members of the Vancouver Police Department (the "VPD") arrested Mr. Paul for being severely intoxicated in a public place and sent him to the Vancouver jail to be held until he was sober enough to care for himself. Without reason, the jail sergeant, Sergeant Russell Sanderson, refused to admit Mr. Paul to the jail, where he could have passed the night in safety. He was not taken to the sobering unit of the Detox Centre, where he had stayed just the night before. Instead, a junior police officer, Constable David Instant, left Mr. Paul alone in a back alley in Vancouver's downtown eastside in freezing temperatures. He was soaking wet and was left exposed to the elements. Mr. Paul died sometime during the night from hypothermia.

4. In the first phase of this inquiry, the Commission explored the events leading up to Mr. Paul's death and the response of British Columbia Ambulance Service, the VPD, the Coroners Service, and the office of the Police Complaint Commissioner.

5. On March 12th, 2009, Commissioner Davies issued an interim report which reported on all aspects of the inquiry's mandate, except as it related to the Criminal Justice Branch.[1] The Commissioner concluded that the VPD failed to carry out an adequate investigation into the circumstances of Frank Paul's death. He found that there were "glaring inadequacies" and "systematic flaws" in the VPD's approach to the investigation of police-related deaths, in particular the practice of not interviewing suspect officers and the preparation of the "neutral" reports to Crown Counsel.[2]

6. The Commissioner made findings of fact in respect to each of the officers whose conduct was at issue. He concluded that Sgt. Sanderson "exhibited callous indifference in the exercise of his duties by failing to properly assess Frank Paul before refusing him entry into the Jail, when, by any objective measure, Mr. Paul was grossly intoxicated and incapable of caring for himself."[3] The Commissioner also determined that Cst. Instant had fallen well below the standard of professional care expected of him. The Commissioner determined that Cst. Instant "had a professional and moral duty to Mr. Paul, to provide for his safety, and he failed to fulfil that duty."[4]

7. During the first phase of this inquiry, the Branch did not make any witness available to the Commission, and no evidence of the Branch was heard. The Branch brought an application submitting that the scope of the inquiry's jurisdiction was extremely limited. The Branch submitted that as result of the doctrine of prosecutorial immunity no individual prosecutor and no representative of the Branch involved in the Frank Paul case could be subjected to questioning about his or her exercise of

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[1] The Davies Commission of Inquiry into the Death of Frank Paul, *Alone and cold: Davies Commission – Inquiry into the death of Frank Paul – interim report*, (British Columbia: Province of British Columbia, 2008).
[2] *Ibid.* at p.120.
[3] *Ibid.* at p.92-93.
[4] *Ibid.* at p.95.

discretion in determining whether or not to lay charges against the officers involved in Mr. Paul's death.

8. Commissioner Davies ruled on February 27, 2008 that this inquiry was authorized to inquire into the Branch's exercise of prosecutorial discretion in the Frank Paul case. The Branch sought judicial review of the Commissioner's ruling; the Commissioner's ruling was upheld by the B.C. Supreme Court and the B.C. Court of Appeal. Ultimately, the Supreme Court of Canada announced on April 8, 2010 that it would not hear the appeal sought by the Branch. That decision brought to a conclusion the litigation launched by the Ministry of Attorney General. This Commission reconvened hearings to address the Branch's response on November 3, 2010.

9. In this final phase of the inquiry, the Commission heard testimony from current and former prosecutors. After the VPD forwarded the investigative report of Mr. Paul's death to the Branch, the Branch determined that it would not lay charges against either Sgt. Sanderson or Cst. Instant. The Branch made four other assessments on various occasions as to whether there was sufficient evidence to proceed with the charges against any officers relating to the death of Frank Paul. In all the assessments, the Branch determined that there was insufficient evidence to meet the criminal standard of proof beyond a reasonable doubt.

10. Commission Counsel submitted a detailed and comprehensive chronological summary of the Branch's evidence.[5] The BCCLA adopts the evidentiary submissions of Commission Counsel and will not repeat that evidence here.

11. The Commissioner's authority to inquire into the Branch's response was restrained by the decision of the B.C. Court of Appeal, which placed limits on the inquiry's mandate. Those limits were intended to respect prosecutorial independence; they are set out in the judgment of Mr. Justice Melnick of the B.C. Supreme Court and were expressly adopted by the B.C. Court of Appeal. Mr. Justice Melnick stated:

[5] The Frank Paul Inquiry, Submissions of Commission Counsel, December 14, 2010.

> [69] I also consider it beyond the scope of the Inquiry to require any individual who made a decision not to charge anyone with respect to the death of Mr. Paul to second guess his or her decision or to justify it. The Commissioner is entitled to look at the facts that were before the individuals who made those decisions, get the facts related to the decisions, but not challenge or debate with those individuals the propriety of their decisions. In that way, the Commissioner may open the doors he wishes to open but, at the same time, minimize any transgression into the lawful independence of the CJB.

12. During the final phase of this inquiry, Commissioner Davies issued a ruling which reiterated the limits placed on this inquiry by the B.C. Court of Appeal and offered guidance to counsel on the proper scope and manner of cross examination.[6] The Commissioner directed that Branch witnesses should not be challenged or asked to justify the propriety of their decisions.

13. The final phase of these hearings has raised legitimate questions relating to the Branch's charge assessments in the Frank Paul matter. However, given the legal limits placed on this phase of the inquiry by B.C. Court of Appeal, and the guidance on cross-examination provided by the Commissioner, the BCCLA will not make submissions on whether the Branch's charging decisions were justified. Nonetheless, it is appropriate to make some observations concerning the evidence tendered by the Branch. In a number of situations, prosecutors at the Branch acted in a manner that fell below the standard one would expect for a case of this gravity, and/or failed to follow their own policies and procedures, for example:

- Austin Cullen, who was then Regional Crown Counsel for Vancouver, noted that there were deficiencies in the investigative report that the VPD prepared, but failed to request sufficient additional investigative steps to be taken;

- Gregory Fitch, Q.C., who was then the Branch's Director of Legal Services, acknowledged that he did not conduct the second charge assessment review in a timely manner. He therefore contravened one of his important obligations as Crown Counsel;

[6] William H. Davies, Q.C., Commissioner, Frank Paul Inquiry, Ruling #6, "Ruling on the Proper Scope and Manner of Cross-Examination."

- Mr. Fitch also did not record the reasons for his no charge decision in a comprehensive fashion. Instead, he essentially adopted an internal memorandum prepared by a less senior lawyer at the Branch;

- The Branch's communication with the Paul Family about their charge assessment was inadequate or nonexistent;

- At the time of the final charge assessment, Robert Gillen, who was and continues to be the Assistant Deputy Attorney General, did not seek a legal opinion from an independent lawyer; instead he referred the Frank Paul file to Peter Ewert, a recently retired Branch employee who had already conducted a review of the file previously.

14. It is our submission that the above actions would not have occurred under a different charge assessment model. The remainder of our submissions will focus on our proposed reforms to the current charge assessment model.

Recent B.C. Commissions of Inquiry that Have Addressed Police Reform

The Commissioner's Interim Report

15. Commissioner Davies' interim report thoroughly examined and critiqued the current system of criminal investigations for cases in which civilians die in police custody. The Commissioner determined that the manner in which investigations into deaths that occurred in police custody were conducted was wholly unsatisfactory. This led Commissioner Davies to conclude that it was necessary for the Province to develop a civilian-based criminal investigation model for the investigation of police-related deaths. He wrote:

> Based on my review of the evidence … I am persuaded that the current practice of home police department conducting criminal investigations of police-related deaths is fundamentally flawed, and that nothing short of a wholesale restructuring of such investigations will suffice.[7]

[7] *Alone and cold*, *supra* note 1 at p.18.

16. Commissioner Davies determined that the fundamental failing that lies at the heart of the current practice of police investigating the police is the conflict of interest that inevitably arises when police investigate the police. He observed that there is an inevitable conflict of interest that comes from an unconscious bias in favour of fellow officers that lowers the standard of investigation. This kind of bias could include a tendency to see things from the point of view of the officers involved, to accept the statements of other officers uncritically, or to overlook inconsistencies in the evidence. Divided loyalties arise when duties to fellow officers conflict with carrying out a proper, thorough investigation. The type of bias that Commissioner Davies identified is difficult to eliminate because it is a part of being human; we want to trust our friends and colleagues and we tend to see things from the perspective of our own experiences.

17. The keystone of Commissioner Davies' proposals for policing reform was the recommendation that the Province create a civilian investigative agency to investigate police-related deaths. Commissioner Davies recommended that the agency be called the Independent Investigation Office (the "IIO"), and directed that the IIO should be a totally independent and impartial civilian body established to conduct investigations of deaths that occur in police custody. The most critical feature of Commissioner Davies' recommended organization would be its arm's length relationship with the police. Commissioner Davies recommended that the Ministry of Attorney General oversee the new agency, putting the IIO under a different arm of government than the police itself. The director would be appointed by the government, and not have previously worked for the police. The IIO's director and investigators would have the status of peace officers and the IIO would be the lead investigative agency. The home police department would have no investigative responsibility or authority. We wholeheartedly endorse all of the above recommendations.

The Braidwood Study and Hearing Commission (the "Braidwood Inquiry")

18. Since Commissioner Davies' interim report was released, there have been more calls for change to the system of criminal investigations of police-related deaths. In May

2010, the Braidwood Inquiry endorsed and expanded upon Commissioner Davies' recommendations for the IIO.[8] Whereas Commissioner Davies recommended that the mandate of the IIO be limited to deaths that occur in police custody, Commissioner Braidwood recommended that every serious injury and death that is police related, as well as other serious matters, where for example, an RCMP officer has allegedly contravened a provision of the *Criminal Code*, should be independently investigated by a civilian investigative agency.

19. Commissioner Braidwood explained that one of the primary rationales for expanding upon Commissioner Davies' report was that fact that after the report was released, the RCMP announced a broad change in its policy concerning the independent investigation of policed-related incidents.[9] In February 2010, RCMP Commissioner William Elliott announced that RCMP policy would require that in cases where there were deaths or serious injuries that occurred in police custody, or other criminal matters involving police officers that were of a serious or sensitive nature, the RCMP would refer the investigations to a provincial or federal investigative regime. Where no such regime existed, the RCMP would request that an external law enforcement agency conduct the criminal investigation.[10] Commissioner Braidwood reasoned that it would be logical to recommend that the IIO's mandate be at least as extensive as the categories of offenses that the RCMP wishes to refer to it.[11]

20. Commissioner Braidwood further recommended that a special prosecutor be appointed for every police-related incident assigned to the IIO in accordance with the *Crown Counsel Act*.[12] He recommended that the special prosecutor should make the

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[8] Braidwood Commission on the Death of Robert Dziekanski*, Why? The Robert Dziekanski Tragedy—Braidwood Commission on the Death of Robert Dziekanski*, (British Columbia: Province of British Columbia, 2010).The Braidwood Inquiry was convened to report upon the facts and circumstances of the death of Robert Dziekanski, a Polish immigrant who was apprehended in October 2007 by four RCMP at Vancouver International Airport and died shortly after being tasered five times by one of the officers.
[9] *Ibid*. at p. 412.
[10] *Ibid*. at p. 413.
[11] *Ibid*. at p. 416.
[12] *Ibid*. at p. 422.

charge assessment decisions and, if charges are approved, assume conduct of the prosecution.

21. Commissioner Braidwood based his recommendation for reform of the current charge assessment model on his concern that there is a conflict of interest when prosecutors determine whether to lay charges against police officers. He wrote:

> "....I return again to the pivotal concerns about conflict of interest, public distrust, and an undermining of public confidence in the police and in our justice system. [...] It would in my view be inappropriate for lawyers within that branch [the Criminal Justice Branch] to make charge assessment decisions in police-related incidents. In such sensitive matters, it only takes a perception of conflict of interest to undermine public confidence.[13]

22. Commissioner Braidwood's recommendations are recent and were informed by changes to the political landscaped that occurred after Commissioner Davies released his interim report; namely the fact that within a year of the release of the interim report, all of B.C's municipal police forces and the RCMP committed to supporting a civilian-based investigative body.[14] Commissioner Braidwood's proposals for expanding the mandate of the IIO and his recommendation for reform of the current charge assessment and prosecution model are sound, and in our submission ought to be given special consideration and even deference.

British Columbia's Commitment to the Implementation of the Braidwood Recommendations

23. Shortly after the Braidwood Commission report was released, B.C. Solicitor General Mike De Jong announced that the Province would end the practice of police investigating themselves by establishing a new civilian investigation body. In a news release issued on June 18, 2010 the Ministry of Public Safety and Solicitor General announced that within 12 months, the Province would create "a new civilian-led unit to investigate all independent municipal police- and RCMP-related deaths and serious

[13] *Ibid*. at p. 421.
[14] *Ibid*. at p. 413.

incidents across B.C."[15] According to the release, the IIO will "have a mandate to conduct criminal investigations into police-related incidents involving death or serious harm, with discretion to do other investigations." At this time, we do not know what the precise mandate of the IIO will be.

24. The Province unequivocally accepted most of Commissioner Braidwood's recommendations and stated that it would ensure that prosecutorial independence was a fundamental component of investigations referred to the IIO. However, it is not yet clear whether the Province has accepted the recommendation that special prosecutor be appointed for every police-related incident assigned to the IIO. It therefore seems likely that Commissioner Davies' recommendations on the role of prosecutors will be highly relevant to the work of the Province as it drafts the legislation that will enable the IIO.

The Systemic Problem of Conflicts of Interest as it Relates to Police and Prosecutors

25. The evidence tendered to this Commission raises serious concerns over the degree to which Crown prosecutors may have relied upon a deficient police investigation. The VPD investigation was woefully flawed. Major investigative errors were committed, such as not segregating police witnesses at the scene of the death, failing to collect important forensic evidence, and neglecting to interview several key witnesses. No witness officers were interviewed. Inconsistencies between the physical evidence and the officers' statements were not identified or pursued. Most troubling of all, the Commission heard evidence that VPD investigations of deaths that occur in police custody are habitually conducted in a fundamentally different manner than deaths that are not related to police conduct. These profound investigative failings are what led the Commissioner to determine that the practice of police investigating police-related

[15] Ministry of Public Safety and Solicitor General, Press Release, June 18, 2010, available at http://www2.news.gov.bc.ca/news_releases_2009-2013/2010PSSG0040-000730.html

deaths was “fundamentally flawed” and that “no amount of tinkering with the current practice” could remove the systemic barriers to accountability.[16]

26. There is legitimate public apprehension that the deficiencies of the police investigation and the inadequacy of the “neutral” investigative report submitted to Crown counsel may have negatively affected the Branch’s ability to make apporpriate charging decisions. This Commission discovered that the early errors, oversights, and omissions in the police investigation cascaded through every subsequent level of institutional investigation, polluting the professional standards investigation, the Coroners Service investigation, and the response of the Police Complaint Commissioner. These repeated failures led to a collapse of the system designed to provide accountability and public confidence. In light of these cascading failures, it seems reasonable to question whether the response of the Branch was similarly tainted. Indeed, Mr. Cullen, who conducted the first charge assessment, testified that the inadequacies of the VPD investigative report made the charge assessment more difficult.

27. There is concern that these inadequacies may be a persistent, recurrent feature of the criminal justice system in British Columbia in cases in which police investigate themselves and prosecutors are called upon to investigate and lay charges in matters that involve police officers. Although this Commission was offered a rare opportunity to glimpse inside the workings of the Branch, the limitations that the courts placed on its ability to examine the Branch’s response make it impossible to determine if an independent investigative report would have led to a different series of charge approval decisions.

28. We expect that the Province will remain committed to its promise to create an IIO. However, independent, reliable and accurate investigative reports to Crown counsel — the type we expect the IIO will be capable of producing — will not dispel the risk of potential bias and the public perception that there are inherent conflicts of interest

[16] *Alone and cold*, *supra* note 1 at p.218.

where prosecutors are called upon to investigate and lay charges in matters that involve police officers.

29. It is our submission that Commissioner Davies' findings with respect to the inevitable conflict of interest that comes from divided loyalties within the municipal police forces applies with equal force to the conflicts of interest that arise between prosecutors and police when prosecutors are called upon to determine whether charges should be laid against police officers and to prosecute those charges. In his interim report, the Commissioner identified that personal and collegial interests influence a home police department's criminal investigations, even when the police investigators conducting the investigation are honest, hardworking, and committed to impartiality.

30. During the policy sessions that accompanied the final phase of these hearings, Commission Counsel remarked that there is a vast body of literature concerning wrongful convictions that explores the effect unconscious influences have on prosecutors' conduct and decision making. Indeed, it is well-recognized that we all possess subconscious or implicit biases — beliefs, attitudes, and expectations that are based on our ideas about the groups to which we each belong. These biases shape how we perceive, make decisions about, and interact with others; however, most of us are completely unaware that we possess such biases, or that they have a strong effect on our subconscious. Implicit bias seldom rises to the level of awareness in individuals, but the effects of unconscious biases can lead to discernable practices of discrimination.

31. There is a valid concern that Crown prosecutors will have biases in favour of police officers due to the generally collegial and cooperative relationship between prosecutors and police officers. Commissioner Davies, noting that the *Crown Counsel Policy Manual* explicitly states that there are policy concerns about conflicts of interest when a police officer is alleged to have committed a criminal offense, explored the nature of that conflict of interest in his interim report. He wrote:

> Although the policy does not elaborate on the nature of the conflict of interest, I am satisfied that it arises out of the close working relationship that exists between prosecutors and police officers in a particular community. It is inevitable that a camaraderie will develop over time, even though both have professional duties to act independently in their own spheres of activity.[17]

32. Similarly, David Layton identified the potential for conflict of interest when prosecutors are called upon to review the appropriateness of charges against police officers and prosecute those charges. Mr. Layton was commissioned to provide this Commission with a report on the policy issues arising from the final phase of the Commission. He stated that "the potential for serious conflict can hardly be in doubt"[18] and explained the source of the conflict:

> "...Two separate but potentially overlapping aspects of prosecutorial conflict can arise in police-related matters, namely: (a) conflict flowing from a personal working relationship between the assigned Crown counsel and the suspect officer; and (b) conflict flowing from the institutional working relationship between Crown counsel's office and the police service with which the officer is employed.[19]

33. Mr. Layton identified that conflict could arise where a prosecutor had a pre-existing relationship with an officer. He also identified the potential for conflict where a prosecutor may consciously or unconsciously be influenced by the idea that she may be required to work with the suspect officer or her colleagues in the future. During the policy sessions of this inquiry, the Branch made four prosecutors available to make presentations and field questions concerning Branch charge assessment and prosecution policies. The Branch prosecutors attempted to dispel the notion that there is excessive collegiality between prosecutors and police, explaining that Crown prosecutors and police have frequent disagreements and differences of opinion at all stages of the prosecutorial process—from the conduct of an investigation, to whether charges should be laid, to the outcome of a sentencing hearing.[20] However, these

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[17] *Alone and cold*, *supra* note 1 at p.215.
[18] David Layton, "Memo: Policy Issues Arising at the Criminal Justice Branch Phase of Inquiry into the Death of Frank Paul (November 8, 2010)" at para. 25.
[19] *Ibid.* at p.62.
[20] See e.g. HearingTranscript, November 23, 2010, p. 102-106.

submissions, far from dispelling the notion that there is a potential for conflict, underscored the routine nature of the contact between prosecutors and police, illustrating the robustness of those institutional working relationships.

34. The perception that conflicts of interest may arise when prosecutors are called upon to prosecute police officers was accepted in the Reid Inquiry. The Reid Inquiry was a 1990 British Columbia public inquiry that inquired into the decision of a prosecutor not to prosecute a political figure.[21] The Commissioner noted in that inquiry the potential for conflicts of interest where prosecutors have a close relationship with the individuals whose conduct is under review. He specifically recommended that a special prosecutor be appointed in all cases involving the decision whether or not to lay charges against a police officer:

> Recommendation #9
> 1) That a special prosecutor be appointed in all cases where there is a significant potential for real or perceived improper influence in the administration of criminal justice because of the proximity of the suspect, to the investigation, charge approval or prosecution processes. Such cases would include those involving cabinet ministers, senior public officials and police officers.

35. Current Branch policy largely ensures that prosecutors will not be called upon to lay charges against police officers with whom they have current, immediate working relationships. But it is inevitable that prosecutors will nonetheless, by the very nature of their jobs, have extensive and far-reaching contacts with police officers more generally. After all, they rely on police officers as witnesses, as investigators, and can be assumed to have a tendency to view the evidence of police officers favourably.

36. Even in the absence of actual bias or favouritism, there is a genuine public concern that systemic barriers to police accountability may exist in the criminal justice system. There is concern that police will not be held accountable for abuses of the law

[21] Stephen D. Owen, Inquiry Commissioner, *Discretion to Prosecute Inquiry: Commissioner's Report, Volume I – Report and Recommendations* (Victoria: Province of British Columbia, 1990)

where prosecutors are called upon to investigate and lay charges in matters that involve police officers.

37. Public trust in systems of policing is critical for ensuring effective policing. Therefore, a high value must be placed on public confidence in the integrity and impartiality of the administration of criminal justice. In cases involving deaths and serious injuries that are associated with police conduct, there is a particularly pressing social need to assure the public that if abuse occurs, that abuse will be remedied, and if misconduct exists it will be punished. The public must be assured that where a death or serious injury occurs in police custody, the criminal justice system will maintain the highest commitment to serving the public with fairness and integrity.

BCCLA Recommendations for Change

38. The BCCLA respectfully submits that this Commission should recommend a broad, new approach for assessing whether charges should be laid in cases in which the police are involved or implicated. In short, the BCCLA submits that in every police-related incident in which the IIO determines that a charge assessment should be conducted, a special prosecutor should be appointed under the *Crown Counsel Act* to make the charge assessment and to conduct any ensuing prosecution. As previously noted, Commissioner Braidwood has recommended that every serious injury and death that is police related, as well as other serious matters should be independently investigated by the IIO. It is not known at this time if the Province will accept this recommendation, but if it does our position is that special prosecutors ideally should be appointed in all these cases.

39. In addition, it is our submissions that in any case where the IIO is *uncertain* as to whether charges should be laid, that is, in borderline cases, a special prosecutor should be appointed under the *Crown Counsel Act* to make the charge assessment and to conduct any ensuing prosecution.

40. Although we refer here to “special prosecutors,” we do not intend to limit our recommendation to the list of special prosecutors as it currently exists—that list currently consists of approximately three dozen senior lawyers in private practice, vetted by the law society, regional Crown counsel and the Ministry of the Attorney-General. It is conceivable that the Province may develop an alternate list of similarly qualified members of the private bar who could be called upon to assess charges and conduct prosecutions in IIO cases. The critical feature of the special prosecutor system which must be duplicated is the arms length relationship the appointed prosecutor has with the Branch, and the ability of the prosecutor to conduct charge assessments and prosecutions without political or institutional influence of any sort.

41. The benefit of this approached was canvassed and endorsed by Mr. Layton in his memorandum, where he identified the potential for conflict of interest when prosecutors are called upon to review the appropriateness of charges against police officers. The BCCLA agrees with Mr. Layton’s observations that the police-Crown relationship creates an unacceptable risk that (1) Crown will show favouritism toward suspect police officers and (2) that even in the absence of actual bias or favouritism, the public will perceive that there is favouritism, thereby undermining the public’s confidence in the justice system.

42. Mr. Layton explained in some detail why the appointment of special prosecutors was his preferred approach, and the BCCLA is in agreement with the reasons he outlined as the basis for this conclusion. He stated at para. 235 of his report:

> I come to this conclusion for numerous reasons including:
>
> a. Using outside counsel completely answers what I view to be valid concerns about the potential for conflict arising out of the close working relationship between police and the CJB.
>
> b. The policy of always using outside counsel is easy to apply.

c. The legal profession and public are already familiar with the practice if appointing ad hoc counsel and special prosecutors to counter perceptions of conflict.

d. It is unlikely that the number of IIO cases requiring substantial prosecutorial assistance will be so high as to unduly strain the capacity of the private bar to provide the sort of experienced and competent counsel needed to handle police-related matters.

e. The risk that outside counsel may suffer from a conflict of interest can be alleviated by proper screening procedures.

f. The CJB is a highly professional prosecution service with a strong and well-deserved reputation for independence, integrity and competence. The public's confidence in the CJB will not be harmed by using outside counsel in the modest number of IIO cases that require charge screening and prosecution.

g. It makes sense to err on the side of promoting public confidence in the administration of justice by completely removing any apprehension that conflict may improperly affect Crown counsel's handling of police-related matters, absent any reason to believe that using outside counsel in IIO cases would cause disproportionate harm to other aspects of the justice system.

43. There are two other compelling advantages to appointing special prosecutors in all IIO cases. First, special prosecutor's reports can be expected to be thorough, detailed and comprehensive due to the fact that the special prosecutor will be reporting directly to the Assistant Deputy Attorney General, a high level government official. Reports and reviews are less likely to be comprehensive when they are perfunctory reviews performed by senior level Branch members who are not expected to provide thorough briefings to their superiors within the Branch. Second, an additional benefit of having counsel from the private bar conduct charge assessments is that such opinions will not be subject to claims of Crown privilege and any privilege that attached to the opinions could be readily waived if the Ministry of Attorney General determined it would be in the public interest to do so.

44. In their submissions, the Branch stated that they would consider, but did not commit themselves, to amending their policy for appointing special prosecutors. For

example, the Branch stated they would consider amending the policy to expressly identify the reasons why a conflict may arise in police-related matters or to state that a special prosecutor may be appointed when necessary when the allegation is against a police officer.[22] In addition, the CJB indicated that it would consider a policy that would require that in cases that involve police in-custody deaths the charge assessment would be reviewed by a second member of the CJB before the final decision is made.[23]

45. In our submission, these amendments fall far short of what is required to assure the public that police-related incidents will be reviewed thoroughly and impartially. These types of minor modifications to existing policy will not dispel the public's perception that an inherent conflict of interest exists when Branch prosecutors are called upon to assess charges and prosecute cases against police officers.

46. In his recently released report on the special prosecutors system, Stephen Owen rejected the recommendation that a special prosecutor be appointed in every police-related incident in which the IIO determines that a charge assessment should be conducted.[24] One of his reasons for rejecting this approach is that he surmised that using special prosecutors in all IIO matters would overburden the special prosecutor system. The Commission has received conflicting evidence about the projected number of cases that will emanate from the IIO that will require charge assessments. At this point in time, it is impossible for us to predict with certainty what the projected number of cases will be because the Province has not yet drafted the legislation that will set out the jurisdiction of the IIO. Commissioner Braidwood recommended that the IIO be mandated to investigate a wide range of police-related incident, not only those in which a person dies or suffers serious harm. We do not know if this recommendation will be enshrined in the legislation or if the mandate of the IIO will be limited to investigations of police-related incidents that result in death or serious injury.

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[22] HearingTranscript (Policy Proceedings), November 23, 2010, p.111:15-25; p.112:1-7.
[23] HearingTranscript (Policy Proceedings), November 23, 2010, p.113:1-7.
[24] Stephen Owen, *Special Prosecutor Review*, July 8, 2010.

47. If the number of cases would be such that the Commissioner is concerned that the special prosecutor system would be overwhelmed, the BCCLA makes two alternative submissions. First, we would recommend that special prosecutors only be appointed to assess charges and prosecute cases that involve death or serious injury. The death or serious injury of a person in the custody of police always arouses public concern, and if that the death or serious injury resulted from violence inflicted by police, that concern is profound. These are the categories of cases where it is most critical to assure the public that the criminal justice system will maintain the highest commitment to serving the public with fairness and integrity. Our second alternative argument is the recommendation that special prosecutors should be appointed to conduct the charge assessment in all IIO cases and if the special prosecutor determines that charges are appropriate, the matter should then be prosecuted in the normal course by a prosecutor from the CJB. However, policy should dictate that the responsible prosecutor should be from a different region than the suspect officer(s). Our first alternative recommendation is our preferred approach.

48. In our view, the decision whether or not to lay charges need not be assigned to the IIO Director. This model is used in Ontario, where the director of the independent investigative agency, the Special Investigation Unit, is empowered to determine whether or not to lay charges. This is not the preferable model for British Columbia. As Mr. Layton pointed out in his memo, a prosecutorial pre-charge approval system has been in place in British Columbia for many years, and was endorsed by the Reid Inquiry. So long as the charge approval decision is made by a special prosecutor, it is unnecessary to further remove the charge approval decision.

Conclusion

49. Mr. Paul died tragically and needlessly—in the wake of his death there has been a vigorous call for reform of the criminal justice system. There are important governmental objectives to be served by ensuring that any prosecutions that arise from police-related cases are fairly and impartially conducted, without any taint of improper

conduct or possible conflicts of interest. If the criminal justice system is to enjoy the confidence of the public, bold changes are needed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"Michael Tammen"

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