

July 27, 2015

The Honourable Wm. Scott Hamilton, MLA
Chair

The Honourable Carole James MLA
Deputy Chair

Select Standing Committee on Finance and Government Services

Dear Chair and Deputy Chair,

Re: Submissions Regarding a Referral to the Ombudsperson

We write in response to your July 17, 2015 letter in which you invited our submissions regarding a possible referral to the Ombudsperson. These submissions reflect the unanimous views of the eight undersigned.

We appreciate that the Minister of Health has accepted the need for an independent review of the 2012 firings and their aftermath.

We spent many hours searching for proposals we could make that would result in the Ombudsperson's process being something we could accept.

After consultation with our legal counsel and despite our genuine efforts to find a way to make this option work, it is clear that our needs and those of the public cannot be met through an Ombudsperson's investigation. Indeed, it is a legal impossibility.

The Ombudsperson lacks the jurisdiction to investigate matters of central concern. As well, there is no escaping that confidentiality is a core tenet of his process or that his interviews are conducted outside the public eye. No amount of tinkering with his statutory process can change the fundamental mandate of the Ombudsperson.

Our careful deliberations only clarified the need for a full public inquiry.

The request to this Committee from the Minister of Health is limited to "the events leading up to the decision to terminate the employees, the decision to terminate itself, and the actions taken by government following the terminations". Our concerns are much broader.

The central matter requiring investigation is what motivated the dramatic interference with research and programs which were improving the safety and effectiveness of prescription drugs for British Columbians. This was the direct result of our unexplained terminations.

In addition, more than twenty-five other health employees and contractors were negatively impacted by the Ministry of Health's investigation. Some were fired or forced to retire; others had their contracts or data access suspended, terminated, or

not renewed. Many were intimidated in various ways including being subjected to interviews which Marcia McNeil has said were sometimes “snide” in tone, showed a “closed mind” on the part of investigators, and overall were not conducted in accordance with best practices. Ms. McNeil found that the investigations created a climate of fear that was still “palpable” when she conducted her review in the fall of 2014. One contractor has recently come forward to describe what happened to him; he has said he still feels the traumatic effects three years later.

The now largely suspended, hampered, or cancelled work at the Ministry of Health was of tremendous benefit to the public purse and to public health. The public is entitled to know why it was targeted.

These matters of public concern require an investigation that is publicly transparent, has a broad scope of inquiry, provides meaningful participation rights to all affected, and results in findings that satisfy the public’s right to know whether government actors committed wrongdoing.

No Ombudsperson has the legal authority to provide this. An inquiry constituted under the *Public Inquiry Act* does.

Scope of the Inquiry

The questions to which we, other public servants, and the public deserve answers include the following.

- a. Who authorized the firings and the suspensions/terminations of contracts and data access? Who had knowledge of and oversight over these decisions?
- b. Who was responsible for claims that an RCMP investigation was underway when it was not? How was the decision made not to reveal publicly that the RCMP had closed their file in 2014 and to continue (after that date) to refuse Freedom of Information requests citing s.15 of FOIPPA?
- c. Who designed the processes used to conduct the investigations and who made the decisions resulting in a process that Marcia McNeil’s report described as “flawed from the outset”. What oversight was provided by the Public Service Agency and was it appropriate?
- d. What was the government’s strategy with respect to responding to the resulting litigation and union grievances and who designed and authorized the approaches taken?
- e. Why were all of these actions taken? Who benefited and was this against the public interest? Did the pharmaceutical industry have explicit or implicit influence over government decision-making?
- f. To what extent were the Minister of Health, the Minister of Finance, the Premier and other members of Cabinet directly involved in or aware of the decisions related to the suspensions and terminations of employees and contractors?

- g. What was the involvement of outside companies and agencies?
- h. What was the involvement of other Ministries, the RCMP and senior government staff?
- i. Why did the involved individuals act (or fail to act) as they did?
- j. Who made the decision to withhold Roderick MacIsaac's final words from his family? Why was that decision made? How did the file come to be deleted from his personal laptop?
- k. If the following actions (each of which reduced or cancelled drug safety and effectiveness research) did not serve the public interest, what can be done to reverse them?
 - i. ending direct data access for the Therapeutics Initiative, so that it can no longer conduct rapid-cycle drug evaluations;
 - ii. preventing the use of BC data for most queries sent out by the Canada-wide Drug Safety and Effectiveness Network, limiting the usefulness of BC's participation;
 - iii. stopping the BC Smoking Cessation Program Evaluation;
 - iv. ending research into the safety and effectiveness of atypical antipsychotics and other drugs;
 - v. cancelling programs that improved physician access to evidence for prescribing, including EQIP, (Education for Quality Improvement in Patient Care), and OPUS, (Optimal Prescribing Update and Support).
- l. The conduct of other Ministries and public agencies also needs review. For example, concerns have been raised about the Office of the Coroner while investigating Roderick MacIsaac's death, and about the timing of the release of the OIPC report. Both the Coroner's and OIPC reports were delayed until after the 2013 election. Was there political interference?

The evidence must be followed wherever it leads, including into the Premier's Office and Cabinet. Based on the McNeil Report's redacted and then released appendices, it may be that the Premier's communications advisor disregarded legal advice in the crafting of the September 2012 media release that (inaccurately) claimed the matter had already been referred to the RCMP. Mr. Whitmarsh, the Deputy Minister of Health in 2012, has indicated concern that he would be inappropriately blamed, which suggests that former Ministers of Health must be included in the inquiry.

Government communications with the highest levels at UBC and the University of Victoria about the Alzheimer's Drug Therapy Initiative and the Therapeutics Initiative should be included in the inquiry. The inquiry must understand the origins of these

initiatives and the pharmaceutical industry's role in influencing government decisions related to pharmaceuticals.

Limits on the Ombudsperson's jurisdiction

The above questions are almost entirely outside the Ombudsperson's jurisdiction.

Questions connected to misfeasance in public office, including inquiries into whether influence by pharmaceutical companies implicitly or explicitly influenced government decision making, are matters before the BC Supreme Court in Dr. W. Warburton's lawsuit and therefore cannot be pursued by the Ombudsperson. This would not be the case in an inquiry under the *Public Inquiry Act*, which expressly allows such evidence to be heard in the public interest.

The Ombudsperson cannot interfere with findings of the Privacy Commissioner, the Auditor General or the Coroner and has no jurisdiction over the RCMP.

The Ombudsperson cannot make recommendations with respect to public policy such as whether a particular program was wrongly terminated or should be reinstated.

The Ombudsperson cannot pierce litigation privilege – which would protect the conduct of the Government in our grievance and wrongful dismissal cases from an Ombudsperson investigation.

In other words, while the Ombudsperson could investigate the administrative failures to which we were subjected – including an investigation characterized by Marcia McNeil as having been “conducted with a preconceived theory of misconduct” – he cannot get to the heart of the matter.

It would simply not be appropriate for the Ombudsperson to accept the referral of a matter he lacks legal authority to pursue. Nor is it appropriate to ask him to do so.

The function of an Ombudsperson

An Ombudsperson is an informal problem-solver who helps individuals receive fair treatment from government agencies.

The Ombudsperson investigates issues such as delay or arbitrariness in the provision of government benefits and services to individuals. If an individual is denied income assistance on the basis of an irrelevant lack of paperwork, for example, the Ombudsperson can intervene to ensure that fair and timely benefits are provided.

The Ombudsperson intervenes on behalf of individuals within the administration of government programs. He is not the proper authority for investigating allegations of wrongdoing by government officials or of government in general.

Procedural requirements for a fair and effective inquiry into matters of public concern

An inquiry into matters of such immense public concern must provide a publicly transparent process, guarantee meaningful participation rights for those with a legitimate interest, including payment for legal advice of their choice, and hold officials accountable.

The Office of the Ombudsperson, given its mandate and structure, simply cannot provide this.

(a) A transparent process

Unlike a public inquiry, which involves public hearings, the Ombudsperson's office conducts confidential investigations in which people testify in a private meeting with the Ombudsperson, where neither other parties nor the media can know what is said.

This confidential process is completely appropriate in the usual course of the Ombudsperson's work – ensuring that the complaints of vulnerable individuals are heard and addressed.

It would be wildly inappropriate, on the other hand, to use this process to allow government decision-makers to be shielded from the public eye and to testify behind closed doors.

We and the public have a right to hear what decisions were made and why. It is possible that an inquiry into the matters at issue will require testimony from the Premier and members of her Cabinet. It will certainly require testimony from those who report to them.

It is offensive to democracy to suggest that this testimony should be given in secret.

(b) The right to full and meaningful participation

If the questions of concern to us are referred to the Ombudsperson rather to a public inquiry, we will lose any meaningful participation rights.

Not only would we have no right to question or cross-examine witnesses, we would not even be present during their testimony. No transcripts would be made. We would not have access to all relevant documents.

In a public inquiry, of course, the opposite would be true.

(c) Accountability

We have already been put through a series of flawed investigations and processes which were inadequate to our needs and held no one accountable. We do not need another one.

The Ombudsperson cannot hold anyone accountable. At the conclusion of his investigation he will issue a report with recommendations to the Committee. That report may or may not name individuals.

A public inquiry, on the other hand, can make findings of fault against individuals and publish those findings for the public to see.

Cost

Government has repeatedly cited cost considerations as the main reason a full public inquiry is not in the public interest. As the Ombudsperson has already made clear, however, significant additional funding would be required for his office to investigate this matter.

Also, as we have said in the past, the programs which were cancelled as a result of the terminations were benefiting not only public health but the public purse as well.

Over the past 20 years, the work of the Therapeutics Initiative enabled PharmaCare to improve prescribing safety and save over \$100 million by not covering drugs that were later confirmed in other jurisdictions to have caused harm to patients and massive wastage of expenditures, for example Vioxx.

The annual savings to PharmaCare attributable to advice given before 2012 from the Therapeutics Initiative continues to exceed \$5 million per year.

In addition to these savings, there would very likely have been many millions more in savings from the other cancelled research and prescribing-safety programs.

Cost is not the real issue here.

Time

Government has also cited time as a rationale for referring this matter to the Ombudsperson. However, the scale of this investigation would impose significant startup time and costs on that office, and the Ombudsperson himself pointed to the need not to limit the time for his investigation.

This inquiry must be allowed to take the time needed to do a thorough job. If the pace is forced, the entire purpose will be vitiated.

This inquiry is a potential opportunity for the people of this province to better understand the role of the public service in protecting both public health and the public purse through good pharmaceutical policy. It is worth the investment of as much time as is required in order to avoid mistakes like this in the future.

Conclusion

Nothing can compensate us personally for our ordeal. Nothing can bring back Roderick Maclsaac, whose despair at the loss of his research work and future career led him to take his own life. We sincerely hope that no more public servants or contractors will ever endure what we and so many others did as this cataclysm unfolded.

What we are asking for, however, is an inquiry that looks beyond the harm that we as individuals suffered.

An investigation into the procedural failings surrounding our individual firings would miss the point. We, the public service and the public at large need an investigation that asks what motivated the termination of these successful programs and whether our lives and our careers were merely the sacrifices government was willing to make to achieve other aims.

Any process that cannot meaningfully and fairly pursue the questions outlined above is of no value to us. Another process that provides no answers and no accountability will only cause us further harm.

We reiterate our request that the Legislature order a full public inquiry into this matter.

Signed:

Mr. Ramsay Hamdi
Mr. Robert Hart
Ms. Linda Kayfish (sister of Roderick Maclsaac, deceased)
Dr. Malcolm Maclure
Mr. Ron Mattson
Mr. David Scott
Dr. Rebecca Warburton
Dr. William Warburton