

**THOMAS R. BRAIDWOOD, Q.C.,
HEARING AND STUDY COMMISSION**

**SUBMISSIONS OF THE GOVERNMENT OF CANADA
IN RESPONSE TO THE CONSTITUTIONAL ARGUMENT OF
THE ATTORNEY GENERAL OF BRITISH COLUMBIA**

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OVERVIEW

1. In its closing submissions dated September 29, 2009 (at paras. 9-21 and 200) the Government of Canada ("Canada") made reference to the well established principle of constitutional law that a provincial commission of inquiry cannot investigate core subject matters that fall within federal spheres of jurisdiction. Canada also submitted that it flows logically from this principle that a provincial commission of inquiry should not make institutional findings of misconduct against the federal government or any of its constituent entities, including the Canada Border Services Agency ("CBSA") and the Royal Canadian Mounted Police ("RCMP").
2. The Attorney General of British Columbia ("AGBC") takes issue with Canada's submissions and argues that a province has the constitutional authority to task a commission of inquiry to investigate federal institutions, so long as: (1) the purpose of the inquiry is "maintaining confidence in the administration of justice in the province"; and (2) the inquiry does not "impair the vital core of any federal interest in the management and operation of the federal institutions." In addition, the AGBC argues that recent Supreme Court of Canada ("SCC") jurisprudence has modified the constitutional principles identified by Canada in its submissions. It appears that the AGBC concludes that in the case of the Thomas R. Braidwood, Q.C., Hearing and Study Commission (the "Inquiry"), both of these conditions are satisfied and therefore there is no constitutional impediment for the Inquiry to investigate and make institutional findings of misconduct against the Government of Canada, the CBSA and/or the RCMP.
3. With respect, Canada disagrees with the AGBC's conclusion. The SCC has not repudiated its clear jurisprudential pronouncements on the extent to which a provincial commission of inquiry can investigate the administration and management of the Canadian government and has not authorized provincial commissions to make findings of misconduct against federal institutions.

SUBMISSIONS

4. A review of the AGBC's submissions reveals that there is significant common ground between his position and that of Canada. Both governments agree that a province may direct inquiries into actions of federal public servants that take place in British Columbia, pursuant to s. 92(14) of the *Constitution Act, 1867* (i.e., the provincial power in respect of administration of justice within a province).
5. The governments also agree that this power is not unlimited. In the words of the AGBC, such a provincial inquiry cannot "'impair' the 'vital core' of any federal interest in the management and operation of the federal institutions".¹
6. Accordingly, it appears that the governments are in fundamental agreement that individual findings of misconduct can be made by a provincial commission of inquiry in respect of actions by federal public servants in British Columbia, so long as they do not relate to the administration and management of federal institutions.²
7. Where the governments part company, however, is on the question of whether a provincial commission of inquiry can make institutional findings of misconduct in respect of the Government of Canada or any its constituent entities. Canada submits that the answer to this question is no.
8. This proposition flows logically from the well established principle that it is beyond the constitutional authority of a provincial government to inquire into the administration and management of a federal institution, a principle most

¹ AGBC Submissions, para. 3

² Canada acknowledges that there could theoretically be a disagreement between it and the AGBC over which specific actions by individual public servants in a particular case would constitute "administration and management" of a federal institution. However, Canada submits that none of the actions that were in fact the subject of evidence tendered before the Inquiry would fall under this rubric. Since Canada is not aware of any potential individual findings of misconduct by the Inquiry that could be said to relate to the administration and management of either the CBSA or the RCMP, this issue does not arise in this case.

clearly set out by the SCC in *Quebec (A.G.) v. Canada (A.G.)*,³ better known as “*Keable*”. In this case, the Quebec government tasked a provincial commission of inquiry to examine certain incidents involving the police in Quebec, including the RCMP. The SCC in *Keable* decided that a province cannot task a commission to inquire into the administration and management of any federal institution, including the RCMP.

9. The justification for this constitutional principle is evident. Management of federal institutions such as the RCMP is an absolutely indispensable and necessary element of federal jurisdiction.⁴ The practical operation of federal institutions is one of the primary mechanisms through which the federal Crown, sovereign within its sphere of jurisdiction, is given life. As such, the federal Crown must retain exclusive control over their operation and management. Provincial governments cannot impair Canada’s ability to operate its institutions by inquiring into the management of these institutions.
10. This principle is a recognized example of the doctrine of interjurisdictional immunity and it is reciprocal. Just as a provincial commission of inquiry cannot investigate the management of federal institutions, a federal commission of inquiry would not be permitted to investigate the management of provincial institutions either.⁵
11. This principle has been reiterated by the SCC in several cases subsequent to *Keable*, such as *Alberta v. Putnam*,⁶ *O’Hara v. British Columbia*⁷ and *Mackeigan v. Hickman*.⁸ The *Putnam* case is particularly notable because

³ (1978), [1979] 1 S.C.R. 218

⁴ *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 62

⁵ *Ibid*, at para. 35. The SCC did say, however, that: “Its [the doctrine of interjurisdictional immunity] application to federal laws in order to avoid encroachment on provincial legislative authority has often consisted of ‘reading down’ the federal enactment or federal power without too much doctrinal discussion.”

⁶ [1981] 2 S.C.R. 267

⁷ [1987] 2 S.C.R. 591

⁸ [1989] 2 S.C.R. 796

the SCC expressly applied the principle to situations where the RCMP provides provincial police services under contract with a province.

12. The principle and its supporting jurisprudence was discussed at some length by the Commissioner in the Inquiry's June 9, 2009 ruling dismissing the individual RCMP members' applications to quash their notices of misconduct. The following extracts are instructive:

[19] Because the RCMP and its members are regulated by federal legislation, a provincially-appointed commission of inquiry has a limited constitutional capacity to inquire into the Force and the conduct of its members. [discussion of *Keable* follows]...

...

[24] The Supreme Court of Canada applied *Keable* in *Alberta (Attorney General) v. Putnam*, [1981] 2 S.C.R. 267, ruling that the province had no authority over the disciplining of RCMP officers who were policing under a federal-provincial contract. In other words, the province was not entitled to authorize an inquiry, under the provincial *Police Act*, into a citizen's complaint that an RCMP officer had harassed him during a narcotics investigation....

...

[38] I agree with the Applicant that *Putnam, supra*, stands for the proposition that a provincially-appointed commission of inquiry has no constitutional authority to discipline RCMP officers. Those matters are reserved to the federal Parliament,

...

[50] Earlier in this Ruling I summarized the Supreme Court of Canada's decision in *Keable, supra*, in which the Court stated at p. 242:

While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force.

[51] In my view, an allegation of misconduct respecting the Applicant's notices, statements to investigators or evidence given at the Commission are not an intrusion into the management and supervision of the RCMP. In *Keable*, the Court struck down the phrase "and the frequency of their use" where it appeared in the inquiry's terms of reference, because it would have required an inquiry into the methods used by the RCMP, which are essential aspects of its administration. **No such inquiry into the RCMP's management or administration is contemplated in this commission of inquiry. We are embarked on a narrowly-focused inquiry into the events at the Vancouver International Airport on October 13/14, 2007, leading to the death of Mr. Dziekanski. ...**

...

[52] I recognize that the other inquiry that I was appointed to (the “study commission”), excluded the RCMP from my review. The relevant portions of the provincial Order are as follows: ...

...

[53] There was a sound constitutional law reason for excluding the RCMP from the study commission’s work. It called for me to undertake an examination of the rules, policies and procedures of the various law enforcement agencies, and to make recommendations respecting the use of conducted energy weapons by those agencies and those agencies’ training, which inevitably would require amendments to their rules, policies and procedures. Those investigations and recommendations would directly impact the law enforcement agencies’ management and administration, areas into which (according to *Keable*) a provincially-appointed commission of inquiry cannot venture.⁹

13. The Commissioner’s June 9, 2009 ruling was affirmed by the British Columbia Supreme Court six days later when it dismissed petitions for judicial review brought by the individual RCMP members. With respect to the constitutional principle discussed above, Mr. Justice Silverman wrote:

[54] [after referencing para. 50 of the Commissioner’s ruling and quoting from *Keable* at p. 242] ... In other words, [the Commissioner] understands that there are aspects of the RCMP, particularly those of a management or supervisory nature, which are within federal jurisdiction. He goes on to express the view, that in this case the allegations of misconduct are not an intrusion into the management and supervision of the RCMP. ...

...

[58] In my view, the jurisdictional arguments raise pure questions of law and therefore the correct standard of review against which the Commissioner’ ruling must be measured is, in my view, one of correctness. In my view, he was correct, as a matter of law, in the conclusions he came to in the ruling and in the final decision.¹⁰

14. Canada submits that the Commissioner’s understanding of the constitutional limits that apply to the Inquiry is indeed correct. A provincial commission of inquiry cannot venture into an examination of the administration and management of a federal institution. It follows logically that a provincial commission of inquiry cannot make findings of misconduct with respect to a federal institution as to do so would necessarily require an evaluation of the management and administration of that federal institution.

⁹ Commissioner’s Ruling, June 9, 2009 (emphasis added)

¹⁰ *Rundel v. British Columbia – Braidwood Commission*, 2009 BCSC 814 (CanLII)

15. In other words, it would be unprincipled to conclude that a provincial commission of inquiry that is constitutionally forbidden from inquiring into the administration and management of federal institutions can nevertheless evaluate and pass judgment on such institutions by finding that they have committed misconduct.
16. On the other hand, the AGBC argues that the constitutional principles set out by the SCC in *Keable* and *Putnam* have been attenuated by subsequent jurisprudence and that a provincial commission of inquiry is now at liberty to make findings of misconduct against federal institutions provided such findings do not “impair” them. The AGBC relies on *Canadian Western Bank v. Alberta*¹¹ and *Chatterjee v. Ontario (A.G.)*.¹²
17. Canada submits that neither *Canadian Western Bank* nor *Chatterjee* stand for this proposition. *Keable* and *Putnam* are still good law and the constitutional principles set out therein remain applicable.
18. Indeed, while the SCC’s judgment in *Canadian Western Bank* can fairly be said to state that the doctrine of interjurisdictional immunity is one of limited application, the decision also recognizes that the doctrine has a proper part to play in appropriate circumstances, one of which is to protect the federal government’s power to manage federal institutions. Interestingly, both *Keable* and *Putnam* are expressly discussed at paragraph 62 of the *Canadian Western Bank* judgment as examples of how the doctrine has been properly applied in the past. Then, at paragraph 77, Binnie and Lebel JJ. wrote:

[77] .. As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for **situations already covered by precedent.** (emphasis added)

¹¹ [2007] 2 S.C.R. 3

¹² 2009 SCC 19

Accordingly, the situations covered by the precedents in *Keable* and *Putnam* remain subject to the doctrine of interjurisdictional immunity as set out in those decisions.

19. Turning to *Chatterjee* and its potential bearing on the constitutional question in issue, it cannot reasonably be said to stand for anything more than a reaffirmation of the general principles set out in *Canadian Western Bank*. Notably, *Chatterjee* does not contain any discussion of the extent to which provincial governments can investigate the administration and management of federal institutions.
20. Furthermore, the fact that in *Canadian Western Bank* the SCC clarified that the yardstick for determining when the doctrine of interjurisdictional immunity should apply in new situations is “impairing” rather than “affecting” does not diminish the validity of the principles set out in *Keable* and *Putnam* either.¹³ Were a provincial commission of inquiry permitted to investigate and make a finding of misconduct against a federal institution, this would necessarily impair the federal government’s ability to administer and manage that institution as a result of the stigma that invariably would attach from the provincial commission’s finding.
21. In sum, the law as set out by the SCC in *Keable* and *Putnam* has not been changed by *Canadian Western Bank* and *Chatterjee*. A provincial commission of inquiry cannot inquire into the administration or management of a federal institution and cannot make findings of institutional misconduct against a federal institution.
22. It is further worth noting that because the CBSA and the RCMP are not entities with a legal status independent of that of the Government of

¹³ It should also be noted that at paragraph 49 of their reasons for judgment in *Canadian Western Bank*, Binnie and Lebel JJ. were careful to state that the word “impairing” does not equate to “sterilizing” or “paralyzing”.

Canada, a finding of institutional misconduct against either or both of these institutions would in effect be a finding of misconduct against the federal Crown. As a province cannot intrude upon or sanction the federal Crown, this underlines that a provincially-appointed commission of inquiry cannot, as a matter of constitutional law, make a finding of institutional misconduct against Canada.

23. Such a finding of institutional misconduct would go to the “core” of the administration and management of a federal entity and impair it. It would be a finding of “bad management” or “improper or unprofessional behaviour” which, as submitted above, is beyond the constitutional jurisdiction of a provincial commission of inquiry.¹⁴

¹⁴ *Canada v. Commission of Inquiry on the Blood System*, [1997] S.C.R. 440, at para. 40.

CONCLUSION

24. The constitutional principles set out by Canada in its closing submissions dated September 29, 2009 and in these submissions are not controversial. They have been respected throughout the Inquiry's hearings by all participants and were expressly recognized by the Commissioner in his ruling of June 9, 2009. These principles have not prevented the Inquiry from conducting an exhaustive review of CBSA and RCMP evidence in relation to the specific subject the Inquiry has been tasked by the Province to investigate, namely, the events and circumstances relating to the death of Mr. Dziekanski. These principles will not prevent the Commissioner from making the findings and recommendations necessary to fulfill his mandate. Accordingly, there is no justification for the Inquiry to accede to the AGBC's invitation to make constitutionally impermissible findings of misconduct against federal institutions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT VANCOUVER, this 13th day of October, 2009.



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