

IN THE MATTER OF
THE BRAIDWOOD STUDY AND HEARING COMMISSION
Into the Death of Robert Dziekanski at the
Vancouver International Airport on October 14,2007

**FINAL WRITTEN SUBMISSION OF
Superintendent Wayne Rideout**

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A. Background

1. Robert Dziekanski died at the Vancouver International Airport on October 14, 2007, shortly after he was tasered by a RCMP officer. This incident received significant media coverage in Canada when it originally happened, particularly in British Columbia.

2. Paul Pritchard, a civilian B.C. resident, filmed this incident on his digital video camera. The existence of Mr. Pritchard's video, which he had handed over to the RCMP, became public knowledge within a few days, generating renewed interest in this matter in the latter part of October and early November, when it was reported that the RCMP had declined to return it to him. Mr. Pritchard commenced a civil action to obtain the return of his video and shortly thereafter on November 7, 2007, a DVD of Mr. Pritchard's video footage was returned to Mr. Pritchard's lawyer. Mr. Pritchard then released this video to the media on November 14, 2007 which resulted in extensive media coverage of this video footage. Eventually, the Government of British Columbia announced in February, 2008, that a Public Inquiry into this incident would be conducted. Justice Braidwood was appointed as the sole Commissioner of this Inquiry and his mandate was as follows:

- a) to conduct hearings, in or near the City of Vancouver, into the circumstances of and relating to Mr. Dziekanski's death;
- b) to make a complete report of the events and circumstances of and relating to Mr. Dziekanski's death, not limited to the actual cause of death;
- c) to make recommendations the Commissioner considers necessary and appropriate.

3. Pursuant to this mandate, Justice Braidwood conducted evidentiary hearings in which witnesses provided testimony. While these witnesses were testifying, Justice Braidwood provided some rulings which further clarified the ambit of his mandate to investigate and ultimately report on this matter.

4. On February 25, 2008, he rendered a ruling during the cross-examination of Cst. Gerry Rundel that he would not inquire into the adequacy of the police investigation that was subsequently conducted with respect to this incident by the Integrated Homicide Investigation Team (subsequently referred to as I.H.I.T.) of the RCMP. ¹ Justice Braidwood later confirmed this ruling once again when he provided reasons on June 9, 2009 with respect to an application that was advanced by the four RCMP Officers who dealt with Mr. Dziekanski at the time that he was tasered and subsequently died. This ruling by Justice Braidwood was precipitated by these officers putting forward arguments that the Commissioner would be exceeding his mandate if he found that they had committed misconduct as was apparently alleged in notices that these officers had received from the Commission.

5. In the ruling, Justice Braidwood dismissed the arguments that were advanced by the four officers but in so doing confirmed again that he did not have jurisdiction to review the adequacy of the I.H.I.T Investigation. For instance, Justice Braidwood at one point in his ruling stated the following:

“For these reasons, I do not accept the applicant’s submission that the allegations of misconduct respecting his notes, statements to investigators or evidence given at the Commission relate to the investigation of Mr. Dziekanski’s death, not the death itself. While his notes, statement and testimony occurred after Mr. Dziekanski’s death, and while his written statements were given during the I.H.I.T. investigation, I have no desire to use them as part of an inquiry into the RCMP’s criminal investigation. I have made it clear throughout the proceedings that I do not consider that to be part of my mandate.” ²

6. A further issue arose at the Inquiry as to whether it was part of the Commissioner’s mandate to inquire into whether certain RCMP Officers made errors or committed misconduct concerning information they released to the media concerning the RCMP investigation into this matter or whether they erred or committed misconduct by failing to

¹ See transcript of the proceedings on February 25, 2008 at p.49

² See ruling of Justice Braidwood dated June 9, 2009

provide the media with information that would correct previous information that the RCMP had released to the media that was erroneous.

7. This subject arose initially on April 14, 2009 at which time the Commissioner indicated the following:

“All right. Thank you very much, Ms. Roberts. I have actually, ahead of this time, considered – well, not all of your argument, of course – but whether or not these two persons would be relevant to this hearing.

The difficulty is that at this time – and I emphasize ‘at this time’ -- it is very difficult to separate a number of things that counsel has cross-examined on in terms of the officers themselves. In other words, we have on the one hand the video itself and its promises concerning its return, the court case having to have it returned, and indeed, the impact of that video on what occurred.

We have the officers’ recollection and we have various statements by the officers. I, at this time, find it difficult to separate what I believe – but it’s – so far, I haven’t actually heard it, but what I believe is an undercurrent here as to what the officer said. I think that it deserves being looked at and decide whether or not it’s integral or not.

So I’m certainly not at this stage ruling whether or not it will have an impact on these hearings, but what I am saying is I don’t see how at this time I can make a proper decision that it is not relevant. It appears to me that it is at least *prima facie* relevant. So, Ms. Roberts, I do think we need them. You have certainly, pursuant to your instructions, been very cooperative with us here, and I very much appreciate your statements.”³

8. Consequently, it is submitted at this point the Commissioner does not seem to have made a final decision as to whether it is within his mandate to inquire into and reach conclusions concerning the issue of whether members of the RCMP had erred or committed misconduct when providing or failing to provide information to the media concerning this investigation.

³ Transcript of Proceedings from the Inquiry on April 14, 2009, pp.102-103

9. Subsequently, this issue arose again on April 30, 2009 at which time counsel for the Government of Canada sought a ruling from the Commission as to whether Supt. Wayne Rideout could be questioned on whether the RCMP should have corrected misinformation that had been given to the media. Counsel for the Government of Canada raised four issues at that time seeking clarification whether they were within the Commissioner's jurisdiction and this was the first issue that was raised. After receiving argument concerning these four issues, the Commissioner ruled as follows:

"All right. I agree with Ms. Roberts on points 2, 3 and 4. I cannot see that they would add anything to these proceedings that we do not already have, and whether or not they are within the mandate.

With reference to point 1, I think that as I had indicated before, there has been a certain amount of criticism, certainly in the press and also in this room, concerning the decision, particularly as it relates to correcting misinformation in the media, and accordingly would allow questions revolving around point 1, but not the other three."⁴

10. Finally, this issue arose once again on May 4, 2009 and at that time the Commissioner stated after hearing further argument: "I confirm my ruling on point 1."⁵ referring to the April 30, 2009 ruling. When he provided this latter ruling, the Commissioner went on to deal with other issues and it would appear from his reasons on that date (as well as his reasons from April 30, 2009) he is simply ruling that questioning on these issues can take place. It is submitted though that it is not clear from these rulings whether this questioning was being allowed to fill out the narrative concerning other issues or whether Justice Braidwood, by allowing this questioning, was indicating that it is within his jurisdiction to reach conclusions and potentially find misconduct with respect to issues involving the information that RCMP released to the media concerning this investigation.

⁴ Transcript of Proceedings, April 30, 2009, p.54

⁵ Transcript of Proceedings, May 4, 2009, p.10

11. In the written argument that follows, Supt. Rideout will be taking the position that although the Commissioner ruled that counsel at the Inquiry could question Supt. Rideout about information that the RCMP provided to the media or failed to disclose to the media, no decision has been made as of yet by the Commissioner that any alleged errors that Supt. Rideout made in this regard should be a subject that the Commissioner has jurisdiction to make findings upon in his Final Report. Further, it will also be argued that even if the rulings provided by the Commissioner to date can be construed as indicating he has jurisdiction to determine that Supt. Rideout misconducted himself in this regard, it is submitted this issue of whether the Commission has jurisdiction to deal with these issues should be revisited in final argument.

B. Argument

12. It is clear that the powers of the Commissioner in this Public Inquiry derive from the Provincial Order that established the Inquiry. As indicated earlier, the terms of Reference of this Order directs the Commissioner to make a complete report “of the events and circumstances of and relating to Mr. Dziekanski’s death, not limited to the actual cause of death.” The Commissioner has acknowledged that this mandate does not extend to an Inquiry into the subsequent police investigation of Mr. Dziekanski’s death. If this is so, surely the same could be said for decisions that the RCMP subsequently made as to what information should be released to the media.

13. It is submitted the information or lack of information that the RCMP provided to the media in this matter does not fall within the Commissioner’s mandate to inquire into the “events and circumstances of and relating to Mr. Dziekanski’s death”. Admittedly, the Inquiry is not limited to the “actual cause of death” but when interpreting what “events and

circumstances of and relating to Mr. Dziekanski's death" means, it is submitted that these words do not go so far as to allow the Commissioner to consider administrative or managerial decisions that the RCMP made some time after Mr. Dziekanski's death with respect to what information they were going to release to the media concerning the investigation that they were conducting in this matter. A theme of Supt. Rideout's testimony is that a primary consideration he took into account when deciding what information should be released to the media was his desire to protect the integrity of the police investigation. This apparently was why he, as the supervisor of this investigation, was making these decisions rather than RCMP media relations officers. As a result, this issue as to what information should be released to the media significantly involves or is inter-related to the police investigation that was being conducted in this matter. Consequently, if the police investigation is outside the ambit of this Inquiry, it is submitted that it would also make sense not to delve into administrative or managerial decisions that the RCMP subsequently made as to what information from the police investigation should be provided to the media.

14. It is submitted that the Commissioner's jurisdictional ambit probably was best described by Justice Silverman in his decision concerning the judicial review applications that were advanced by the four RCMP Officers that attended to Mr. Dziekanski at the time that he was tasered and subsequently died. Justice Silverman in his judgment indicated the following:

"The Inquiry in this case does not, in my view, focus on the question of the misconduct of these four witnesses or of their conduct in general. Certainly that is one aspect of what the Commissioner may look at, depending upon his view of the evidence, and may comment upon, depending upon his view of the evidence. But in addition to the evidence relating to the actions of those officers, the evidence and the Commission have been concerned with a number

of other areas, including but not restricted to the role of Customs and Immigration personnel, the availability of translation services at the Vancouver Airport, the involvement of first responders who attended at the time, and not only all of those matters with respect to what happened that night, but with respect to whether or not those areas of concern generally at the airport have procedures that need to be reviewed and considered by the appropriate authorities.”⁶

15. It is submitted that the examples that Justice Silverman provided are very helpful in determining what matters fall within the Commissioner’s mandate to report concerning “the circumstances of and relating to Mr. Dziekanski’s death”. These examples all relate to factors that could have played a part in causing Mr. Dziekanski’s death or how his death could have been avoided. It is submitted that the Legislature had in mind these types of considerations when it instructed the Commissioner that his Inquiry is “not limited to the actual cause of death”.

16. However, it is submitted that it is too far afield, to include within the ambit that the Legislature provided, internal decisions made by the RCMP well after Mr. Dziekanski’s death concerning what information they would release to the media as this investigation developed.

17. Further, there is a significant constitutional issue as to whether a provincial public inquiry can conduct an inquiry dealing with an issue such as this. As the Commissioner noted in the ruling that he provided concerning the previously discussed application that was advanced to him by the four attending police officers:

“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.”⁷

18. In this ruling, the Commissioner recognized that the Supreme Court of Canada in

⁶ *Rundel v. British Columbia*, 2009 B.C.S.C. 814 at para.56

⁷ Confidential Ruling of Commissioner Braidwood, June 9, 2009, para.19

its decision in *Attorney General of Quebec and Keable v. Attorney General of Canada et al* (1978) 1 S.C.R., 218 stated at p.242:

“I thus must hold that an inquiry into criminal acts allegedly committed by members of the RCMP was validly ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this Force. It is operating under the authority of a federal statute, the *Royal Canadian Mounted Police Act* (R.S.C. 1970, c.R-9). It is a branch of the Department of the Solicitor General, (*Department of the Solicitor General Act*, R.S.C. 1970, c.S-12, s.4). Parliament’s authority for the establishment of this Force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the Force enjoy no immunity from the criminal law and the jurisdiction of 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.”

19. Hogg, in this text *Constitutional Law of Canada* (5th ed.) states the following about the *Keable* decision:

“In *Keable*, the incidents under investigation arose out of the security-service activities of the force (described below), but it seems clear that the province’s exclusion from the administration and management of the force was an absolute bar, unrelated to the activities in which the force happened to be engaged.”⁸

20. It should also be noted that the Supreme Court of Canada in its subsequent decision of *Attorney General of Alberta v. Putnam*⁹ reaffirmed this interpretation when it held that the disciplining of RCMP Officers was an exclusive federal matter. In that particular case, the Alberta Law Enforcement Review Board heard a complaint from a citizen who alleged that he was harassed by two RCMP Officers during a narcotics investigation. The RCMP Officers successfully argued before the Supreme Court of

⁸ Hogg, *Constitutional Law of Canada* (5th ed.) p.19-11

⁹ *Attorney General of Alberta v. Putnam* (1981) 2 S.C.R. 267

Canada that the Province of Alberta had no authority to discipline them and was thus not entitled to inquire into this citizen's complaint against them. Furthermore, even though these two police officers were engaged in activities outside the scope of contracted police services, eight of the justices said the decision would have been the same had this complaint arose from actions the two policemen had taken during the course of contracted police services.

21. Hogg, once again in his text, comments upon the combined effect of the *Keable* and *Putnam* decisions:

“The cumulative result of Keable’s immunity for the administration and management of the force and Putnam’s immunity for the discipline of the force is a substantial limitation of provincial power over the RCMP. It is clear that the eight provinces that choose to rent the services of the RCMP have thereby forfeited a good deal of the control that a province could exercise over a provincial police force.”¹⁰

22. It should be mentioned that the Commissioner, in his June 9, 2009, ruling concerning the previously discussed application that was advanced by the four RCMP Officers that attended upon Mr. Dziekanski at the time of his death, discussed the subsequent decision of the Supreme Court of Canada in *Scowby v Glendinning*.¹¹ The Commissioner, when discussing this case in his ruling, appears to rely on the following portion of the dissenting judgment of Laforest J. which was concurred with by Dickson C.J. and Wilson J.:

“Specific conduct of individual officers in breach of the law cannot be viewed as coming within the management and administration of the RCMP and provincial investigations into allegations of such conduct are permissible.”¹²

¹⁰ Hogg, *Constitutional Law of Canada* (5th ed.), p.19-12

¹¹ *Scowby v. Glendinning* (1986) 2 S.C.R. 226

¹² *Scowby v. Glendinning*, *supra*, at para.80

23. One must first of all keep in mind that these comments were made in dissent. However, if it could be construed that these comments further clarify the law as to when provinces can investigate RCMP conduct, it is submitted that this passage would not apply to decisions that Supt. Rideout made with respect to what information should be provided to the media. It is clear that Supt. Rideout's role in this matter is to supervise or manage the I.H.I.T. investigation. This involves him making final decisions as to what information should be provided to the media from October 16, 2007 on. It is submitted that the decisions that he made in this regard were clearly management or administrative decisions that involved RCMP policy, consideration of what impact releases of information would have on the I.H.I.T. investigation as well as the impact that the release of such information would have on the rights of an accused if criminal charges were to be laid in this matter. This type of decision is quite different than the provincial inquiry that the three dissenting justices in *Scowby and Glendinning* appeared to feel was constitutional. Essentially, these three dissenting justices were indicating that a province could conduct an inquiry into the conduct of individual RCMP officers with respect to a specific act so long as this act does not involve management or administrative practices of the RCMP Officer. It is submitted this is not the case with respect to the decisions Supt. Rideout made with respect to media releases as clearly his decisions in this regard would have to be construed as administrative or management decisions that significantly involve RCMP policy.

24. Accordingly, it is submitted that it is quite a different matter from a constitutional point of view for the Commissioner to inquire into the decisions that Supt. Rideout made with respect to what information would be released to the media as compared to the Commissioner inquiring into the conduct of the individual officers who were not acting in a managerial or administrative capacity at the time they dealt with Mr. Dziekanski.

25. In any event, even if the Commissioner decides he has jurisdiction to delve into these decisions that Supt. Rideout made concerning release of information to the media, a finding should be made that Supt. Rideout did not misconduct himself in this regard.

26. First of all, with respect to the issue of whether Supt. Rideout should have

authorized a correction of certain misinformation that had been released to the media before he became involved, one must keep in mind that this involves a very complicated decision which involves consideration of many different factors. In particular, an experienced officer like Supt. Rideout was very aware that before such corrections were made the investigation concerning those issues had to be completed such that the RCMP would be satisfied that any correction that was forwarded to the media was accurate. In this case, we had the rather unique situation that while this investigation was being completed, Mr. Pritchard's video was released to the media. After the video was released, it became even a more difficult situation as to how to deal with the incorrect information that the RCMP media officers had provided in the first couple of days of this investigation. The video to a great extent corrected the initial mis-statements and at that point was it really necessary for the RCMP to get into the specifics of correcting the initial misinformation? Supt. Rideout testified that it was always his intention that the correct information be provided to the public - it was just an issue of timing as to when the RCMP would do this. Critical to this issue of timing, was the fact that Supt. Rideout had a very valid concern that providing the media with further information concerning the evidence that the RCMP had collected in this matter could jeopardize the rights of an accused to have a fair trial if criminal charges were ultimately laid.

27. In this unprecedented and difficult situation, can Supt. Rideout's decision making be faulted? Admittedly, he testified at the Inquiry that in hindsight he would have handled this situation differently by acknowledging publically that incorrect information had initially been provided. After indicating that he should have made this general acknowledgment he maintained that in so doing he should not get into the specifics as to what incorrect information had been provided. However, it should be kept in mind that when Supt. Rideout made this acknowledgment at the Inquiry, he had the advantage of knowing what ultimately resulted from the decisions that he made in this regard. This admission that he made does not mean though that he made the wrong decision at the time. It is submitted that the evidence establishes that Supt. Rideout genuinely felt at the time that he made these decisions that it was best for the criminal justice system that the RCMP not correct the initial misinformation until any potential criminal proceedings had been concluded by

either the Crown deciding that charges should not be laid or if charges were laid then after a verdict had been reached at trial. His thinking was that detailed information concerning this case would come out in any event through the legal process - either at a coroner's inquest or at the conclusion of any criminal proceedings that were instituted. In the interim, he obviously took into account that the initial mis-statements had been corrected in large part by the release of the video. What we have then is a very experienced and dedicated police officer who was trying to make the best decision possible in a difficult and unprecedented situation. Ultimately, it is clear that Supt. Rideout sincerely reached the conclusion that it would be best not to correct the misinformation until a decision was reached with respect to criminal charges. Ultimately, when one looks at all the considerations that he had to take into account at that time, it is submitted the decision that he made in this regard was reasonable and in the best interests of the criminal justice system.

28. With respect to the November 30, 2007 media advisory that Supt. Rideout authorized Cpl. Carr to release, it is submitted that this release did not include misleading, or inaccurate information. Admittedly, this media release could have contained more complete information but the same could be argued for virtually all media releases concerning police investigation. With respect to whether Supt. Rideout misconducted himself in authorizing the release of this November 30, 2007 media advisory, the argument supporting his position is factual and involves a detailed consideration of the evidence that was called at this Inquiry. Counsel for Supt. Rideout at the time of oral argument will refer to the evidence that supports Supt. Rideout's position in this regard.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Edmonton, in the Province of Alberta, this 30th day of September, A.D., 2009.


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