

Speaking Notes
Braidwood Inquiry Re: TASER
Vancouver, June 25

Good Morning Mr. Commissioner

It is my understanding that I have been invited to speak to you regarding my Role as Police Complaint Commissioner for the Province of British Columbia in relation to my views concerning the use by municipal police officers of Conducted Energy Devices commonly referred to as TASERS.

At the outset, I want to make it clear that I do not hold myself out to be an expert on the TASER. My involvement in the consideration of Taser use by police officers in this province flows directly from my role as Police Complaint Commissioner pursuant to Part 9 of the Police Act.

It may assist you to know that my jurisdiction is with respect to all Municipal Police Departments in the Province of British Columbia. I am an independent officer of the legislature and as such, I report to the Speaker of the Legislature and do not report to any Minister of the Crown. As you are aware, my counterpart, Paul Kennedy has jurisdiction respecting complaints against the RCMP both in BC and elsewhere in Canada.

My submission to you today will essentially focus on two areas. The first is one about which you have heard considerable evidence from various experts; the propriety of the use of the TASER from a safety and efficacy point of view.

The second aspect of my submission, however, may be somewhat more novel but nevertheless significant to your deliberations. It involves the regulatory framework presently in existence in British Columbia and elsewhere in Canada authorizing the use of the TASER. My submission is that it may well turn out that the TASER has been mischaracterized as a prohibited weapon whereas it may actually be defined in law as a prohibited firearm. The consequence of that mis-characterization may prohibit the use of the TASER in circumstances in which it is now being used.

1. In recent months, especially since the highly publicized event involving Mr. Dziekanski at the Vancouver International Airport last year, a number of investigations and inquiries have been announced by various organizations and governments, including this Inquiry.

Given the recent escalation of interest in this matter, perhaps it is beneficial to you Mr. Commissioner, if I provide you with some background respecting my early involvement in commissioning a study into the use of Tasers by the Victoria Police Department.

As early as 2004, reports that subjects had died shortly after the TASER had been applied to them, caused me to wonder whether there was any direct link between the use of the TASER by police and the subsequent death of the subject. My concern was

that if the police had mistakenly been using the TASER in the honest belief that it was a non-lethal weapon, and therefore a safe alternative to lethal application of force, that matter should be investigated.

When Robert Bagnell died on June 23, 2004 shortly after Vancouver Police had deployed the TASER twice while trying to remove him from a locked Hotel bathroom because they believed that the Hotel was on fire, on August 5th 2004 I ordered an external investigation into the matter to be conducted by the Victoria Police Department.

In discussions with Victoria Chief Constable Battershill, he readily agreed to expand his investigation into the death of Mr. Bagnell to include **"a review of the present use of force protocol and to make such interim recommendations as he deems appropriate for the use of the TASER by police officers in BC pending the results of emerging studies presently underway"**.

Victoria had been one of the first police forces in Canada to use the TASER, and was therefore the most experienced force that I had available within my mandate to conduct the study.

Victoria was extremely diligent about conducting this study and Chief Battershill allocated significant resources to it, and produced an interim report on September 29th 2004 entitled "Taser Technology Review and Interim Recommendations". This Report can be found on our website at www.opcc.bc.ca under Reports/Archived Reports/2004.

Those interim recommendations included:

Based on our research to date, this Investigative Team is of the opinion that the TASER should be retained as an Intermediate Weapon for use by police in British Columbia, subject to any recommendations that may emerge from our Final Report. Our analysis of the field usages and the medical literature suggests appropriate use of the TASER presents an acceptable level of risk to subjects being controlled.

At the same time, we believe that more can be done to ensure uniformity of training across the Province, to provide enhanced levels of accountability, and to decrease the risk to those groups most at risk from sudden and unexpected death associated to restraint, whether or not the TASER is used.

RECOMMENDATIONS

Standardized Training:

There appears to be significant inconsistencies throughout the province in the training of police officers in the use of the TASER.

Therefore, we are recommending the creation of a standardized Lesson Plan/Course Training Standard for TASER users in British Columbia. This Course Training Standard would be developed by the Justice Institute of British Columbia in consultation with Use of Force coordinators representing all municipal police agencies and the RCMP. This "core curriculum" would be delivered to all recruits and all in-service TASER users. Agencies would be free to provide training beyond the Course Training Standard, once that initial training had been received.

Mandatory Reporting:

Not all agencies in the province currently require officers to properly report TASER deployment. Some agencies with mandatory reporting policy may not be capturing all usages due to insufficient levels of supervision.

Therefore, we are recommending that after any deployment of a TASER (probes or push-stun application) the user must submit a Use of Force report that captures relevant information and that will allow for statistical analysis of TASER use across the Province. Ideally, this Use of Force report would be delivered via PRIME BC, in a format created by the Justice Institute of British Columbia, in consultation with Use of Force coordinators.

Acquisition of New Taser Technology:

If agencies wish to acquire new TASER technology, we are recommending the X26 TASER due to its enhanced data collection capabilities and lower electrical output.

Although there is no evidence to suggest that the output of the M26 TASER exceeds acceptable levels, the X26 provides a greater margin of safety as documented in the Alfred studies.

Excited Delirium Training:

The phenomena of Excited Delirium still appears to be under recognized in the policing community. Although relatively rare, changes in patterns of drug abuse make it likely officers will encounter victims of Excited Delirium more frequently.

Therefore, we are recommending the creation of a standardized Lesson Plan/Course Training Standard for Excited Delirium by the Justice Institute of British Columbia. This training is to be delivered to all recruits as well as all in-service members, regardless of rank, in the Province.

Restraint Protocols:

Although medical evidence remains inconclusive, there does appear to be a linkage between restraint positions and enhanced risk to arrested subjects.

Until definitive research has been conducted, we are recommending that the use of the maximal restraint position, where handcuffs and ankles are bound behind the back, should be eliminated by police agencies in the Province. A Hobble restraint, a Wrap restraint or other similar devices should be provided to police along with appropriate training. Hobble restraints are inexpensive and training costs should be minimal.

The Final Report was produced on June 14 2005. It too is published on our Website. In my respectful view, this was a very thorough report that made some recommendations which, (in conjunction with the interim recommendations) if implemented, may have prevented some of the problems that subsequently arose.

There will be situations, particularly in areas where back-up officers may be distant or unavailable, where multiple applications are necessary to control violent subjects. **Training protocols, however, should reflect that multiple applications, particularly continuous cycling of the TASER for periods exceeding 15-20 seconds, may increase the risk to the subject and should be avoided where practical.** Conventional use-of-force theory dictates that officers abandon any particular tactic after it has been employed several times without achieving the desired result (i.e.: control of the subject). If multiple TASER applications have not succeeded in gaining control, the officer should reassess and consider another force option or disengagement.

Conversely, recognizing that prolonged struggle heightens the risk to both the officer and the subject, it may be appropriate to use a TASER as soon as it becomes clear that physical control will be necessary and that negotiation is unlikely to succeed. **A single TASER application made before the subject has been exhausted, followed by a restraint technique that does not impair respiration may provide the optimum outcome.**

The Report makes a number of recommendations along with the reasoning behind them, but briefly stated, they are summarized on Pages 34 and 35 of the Report:

- “1. With respect to CED’s, including the TASER, we are recommending, subject to situational factors, that they not be used against subjects who are demonstrating only passive resistance.**
- 2. For subjects who are displaying active resistance, those who are resisting an officer’s efforts to take them into custody without attacking the officer, where an officer believes the use of a CED is appropriate we are recommending that CED’s be used in a push stun mode only.**
- 3. In situations where officers are confronted by active resistance, assaultive resistance, or the threat of grievous bodily harm or death, where an officer believes that the use of a CED is appropriate we are recommending that CED’s be used in either a push stun or probe deployment mode.**

In my view one of the most significant aspects of this Report was the fact that it had been subjected to peer review by a Medical Review Panel; a multidisciplinary group of experts that included a forensic pathologist, an exercise physiologist, a cardiologist, a forensic psychiatrist, the Vice-Chief of Emergency Medicine, a neurologist, a trainer with the Ontario Police College, the District Superintendent for the BC Ambulance Service, the Executive Director of the Canadian Police Research Centre and an Advanced Life Support Paramedic. The Panel met on Oct 27th 2004 to identify relevant issues for further study, not to draw conclusions about the safety of the TASER or other CEDs.

Dr. John Butt, an eminent forensic pathologist, provided a letter to our office on May 17th 2005 wherein he commented on both the interim and final reports. That letter is also on our website as part of the final report.

One of the conclusions he drew from his review of the studies then available was:

“More than one expert in the field of cardiology and electrophysiology has been consulted about the issue of the Taser shock being capable (or potentially so) of producing the fatal arrhythmia of the heart called ventricular fibrillation. **There seems to be general agreement that in but one or two circumstances, most notably persons with pacemakers, the electrophysiology of the normal heart *would not* be affected by discharge of the Taser shock/energy when the weapon is properly used.**

One is aware that it is difficult and most times impossible to assess beforehand those who might be medically at risk. Frequently persons “shocked” with the Taser had been using cocaine, a drug which causes heart arrhythmias. The public is unlikely to be aware of a dilemma; notably that in the *state of excited delirium itself*, not infrequently there are *fatal consequences*.”

It is significant to note that the Medical Review Panel’s purpose was to identify relevant issues for further study. It did not intend to draw conclusions about the safety of the TASER. The interim recommendations were based on the information available to them at the time.

It must also be remembered that in my role as Police Complaint Commissioner for BC, I do not have the power or the jurisdiction to ban, approve or otherwise regulate the use

of weapons in the province. That is the sole jurisdiction of the Solicitor General. Other than commissioning this report, and providing access to it as we have done, we have no jurisdiction to insist upon the implementation of its recommendations by any police force in our Province.

One other important factor that you should be aware of is that in conducting our review of the Bagnell case, we attempted to have the "output" (for lack of a better term) of the TASER used, to be measured by an independent lab, to determine whether the TASER in question actually performed the way that TASER International had advertised it to perform. That question has until very recently not been satisfactorily answered, because there was no known independent laboratory that had the specialized equipment to accurately measure it.

After the Final Report had been provided to us in June 2005, we continued our investigation into the Bagnell matter. We were told in July by Victoria police that the Canadian Police Research Council was working on the development for a testing program because no independent lab could be found. The Tasers in question were retained by Victoria police as exhibits until they could be tested.

At one stage, it was thought that a private lab known as Intertek was able to provide an independent measurement. On the 13th of June 2005 they had provided a report that indicated that the two TASERS measured did not produce a consistent output and that different voltages were measured from each of the TASERS with the same load. A test result accompanying the report indicated that the test results performed by Intertek were not identical as the submitted specifications from the manufacturer.

However, when those results were shared with TASER international, they hired another laboratory to review the Intertek report. That laboratory in Phoenix Arizona, *Exponent*, concluded:

"The discrepancy between the input power and the output power cannot be explained by the laws of physics, and suggests that an error was made in the measurements made by Intertek."

In response to that finding, on February 7, 2006, Intertek provided correspondence addressed to an Arizona based newspaper wherein they explained that the criteria and test regimen used by Intertek differed from that of the manufacturer and that **"the data contained in the subject test report do not reflect actual performance of the taser guns in their intended use. Use of the subject test report to draw conclusions regarding the safe use of taser guns would be inaccurate and misleading."**

So, in essence, we were back to square one. Since then, over the past two years we have been writing both the Victoria Police and the CPRC requesting the status of the testing of TASERS. We finally received word on February 19th of this year that the testing should be able to be performed within a week or two. They have also provided us with the criteria for testing that will be used. Since then, we have received word on June 6th 2008 from the Executive Director of the Canadian Police Research Centre in Ottawa that they had completed their testing but that they were still analyzing the

results. A preliminary view was that the Tasers being tested were within the specifications. They went on to say:

“CPRC is performing tests based on Taser International’s “Open Circuit Voltage Measurement Procedure” and the Taser “Load Voltage and Current Measurement Procedure” for their equipment. The range of open circuit voltages we have reports on is 46800 volts to 55400 volts, average 52 400 volts. This appears to be within the manufacturing tolerances provided by Taser International. When we simulate the human exposure by using a 250 ohm resistor, per TI specification, the measurements are 1250 volts and 3.2 amps on average. The voltage has ranged from 1060 to 1560 and the current from 3 to 3.4.

I met recently with the National Institute of Justice and the Home Office Scientific Development Branch to discuss both Less Lethal equipment evaluation protocols and testing protocols for the Taser X 26 and M26. We agreed to share protocols and work together to develop a standard uniform testing methodology which would provide meaningful results. Our intent is to engage in a three country project, develop the protocols and have them peer reviewed. Each country, or any lab could test against the protocols and provide information to the appropriate authorities or concerned individuals.”

They also provided photos of their test set up and the Taser International specifications.

Conclusion

Having earlier said that I am not in a position to approve, ban or regulate the use of the TASER, I am nevertheless not advocating a moratorium on its use in its entirety at this time based on safety issues alone. Apart from anecdotal accounts of inappropriate use of the TASER in situations where they clearly ought not be used, there is not to my knowledge, (apart from a reported recent jury decision in a civil case in the United States), a body of evidence or legal determination that directly connects TASER use with resultant death *as its sole cause*.

What in my opinion is urgently required, is further study, further independent testing, and training. That was my view in 2004 and still is today. Unfortunately the issues we raised then are still unresolved and truly independent study and testing has not been as actively or as timely pursued as I would have hoped.

Part of the problem is that when the TASER was initially introduced it was regarded as an alternative to lethal force. Police make the argument that the TASER has saved many lives because they have not had to resort to lethal force such as a handgun when they have deployed the TASER. As a matter of fact, in a very recent BC Inquest into a shooting death by an RCMP officer of a suspect, the Coroner’s jury *inter alia* recommended that all RCMP officers be trained in the use of the Taser. Clearly there is acknowledgment by the public that it is preferable to use the TASER to subdue someone than to shoot him with bullets. The mortality rate when the TASER is deployed is far likely to be lower than when someone is shot with a firearm. That is not, however, a guarantee that the TASER can be used safely in all instances, nor that death will not result. The jury is literally out on that issue. There are reports of recent studies involving pigs that postulate that repeated applications of the TASER may cause fatal

heart arrhythmia. There is also a recently reported concern that the multiple application of the TASER may cause a condition known as **acidosis**, about which very little is known and about which even less study or training has been undertaken.

Furthermore, TASERS are often being used on the very people that are already physically compromised. The mentally ill, people on drugs, those who are experiencing excited delirium are often difficult for officers to deal with using regular means or weapons, and they appear to be the most susceptible to adverse effects from the application of the TASER.

But therein lies the problem. Unfortunately, the TASER has become a tool of convenience in some situations – sort of a “come along” device. In essence it is being used in situations far short of an alternative to lethal force. In my view, the use of the TASER should be restricted to situations where the subject is clearly demonstrating combative behaviour and is likely to be a threat to the safety of the public, the officer or to himself. The deployment of the TASER should be approved for use considerably higher up on the Use of Force continuum than it is currently pegged. In brief, its use should be restricted to an alternative to using more lethal force in situations where that is appropriate. One is likely prepared to acknowledge that in certain circumstances the use of the TASER may indeed amount to lethal force; the main difference being that the lethal consequences of using the TASER are less likely to occur than when a firearm such as a handgun is deployed at centre mass.

My recommendations for your consideration include the following:

One of the most important requirements is for there to be a National Use of Force determination as to where the TASER fits in the use of force continuum. Once that has been determined, police forces across Canada should be trained to the same standard.

Secondly, independent testing of the TASER is required to determine whether the device produces the appropriate output.

Thirdly, in the interim, I am of the view that it would be prudent if the recommendations contained in the Victoria Police Report of 2004 and 2005 were to be implemented forthwith as a precaution.

I would also urge that an ongoing study by a multidisciplinary panel of experts be conducted to determine whether the TASER is capable of causing death in subjects, and if so, which subjects are most at risk.

2. Finally, having made my comments with respect to the use of the TASER from a safety and use of force perspective, I feel obliged to share with you Mr. Commissioner, some concerns that I now have about the “paperwork” respecting the authorization for use of the TASER in this Province and elsewhere in Canada. That is the second heading I indicated I would be addressing today.

As you may know, in addition to The Report by the Commissioner of Complaints Against the RCMP (Mr. Kennedy's report) and the House of Commons' Standing Committee on Public Safety and National Security (SECU), investigation on the use of Tasers, Commissioner Elliot from the RCMP also asked for an independent review on the use of conducted energy weapons by the RCMP. This study was being conducted by Mr. John Kiedrowski from the Compliance Strategy Group in Ottawa. As part of his review, I had the privilege of meeting Mr. Kiedrowski in April of this year. During this meeting he raised a extremely interesting point with me with respect to Tasers being mis-classified as a prohibited weapon. Mr. Kiedrowski was very adamant that the classification of a Taser was that of a prohibited **firearm** under the Criminal Code. Furthermore Mr. Kiedrowski noted that because of this misclassification, the policing community in Canada may be faced with a very major challenge.

At first blush, that did not attract my attention per se since a prohibited weapon would in my view include a prohibited firearm. Furthermore, many of the police policies and procedures and regulations that govern the use of Tasers are based on the assumption that the TASER is defined as a prohibited weapon.¹ However, on reflection, Mr. Kiedrowski's argument and reasoning with citations to the Criminal Code and other provincial statutes and regulations, made me recognize that the regulations permitting its use and the authorization for deployment and the rules regarding training, storage, certification and reporting structures may depend on the appropriate classification of the TASER. If it is indeed regarded as a prohibited firearm as opposed to a prohibited weapon, it may be argued from my perspective that its present use in British Columbia and elsewhere may not in fact be authorized in accordance with the governing provincial acts and regulations. Despite having had dealings with the police, subject matter experts, lawyers and government officials respecting the use of Tasers, Mr. Kiedrowski was the first person to inform me that the TASER is in fact a prohibited firearm. **If he is right**, that designation creates significant problems about whether the TASER is currently authorized to be used in this Province, and whether the training, certification and reporting protocols are adequate.

To shed some light on this confusion on how the Taser has been classified as prohibited weapon versus a prohibited firearm, Mr. Kiedrowski pointed out that prior to October 1, 1998, the CEW was referred to as a prohibited weapon in Canadian law under Prohibited Weapons Order, No. 3 (SOR/78-278), "*Order Declaring Certain Weapons to be Prohibited Weapons*," which referred specifically to the "Taser Public Defender" as "a gun or a device similar to a gun capable of injuring, immobilizing or otherwise incapacitating a person by the discharge therefrom of darts or any other object carrying an electric current or substance." The Taser first became a Prohibited Weapon under the Criminal Code in 1992 under the Cartridge Magazine Control Regulations.

¹ Not only have the RCMP treated the TASER as a prohibited weapon, but I note that the Nova Scotia Conducted Energy Review prepared by the Nova Scotia Department of Justice as recently as March 2008 also states that "CEDs are considered to be prohibited weapons as defined in s. 84.1 of the Criminal Code" Since there is no s. 84.1, I assume they refer to the definition section of s.84(1) which refers to a prohibited firearm and then lists (d) "any firearm that is prescribed to be a prohibited firearm." "Prohibited weapon" is defined in that section to be either a knife under subsection (a) or, (b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon".

Now I recognize Mr. Commissioner that the Taser Public Defender is an old model which has been replaced by the M-26 and the X-26 and that the barrel length may not be the same. Nevertheless, it appears that confusion reigns because the paperwork regarding the designation and classification may not have caught up to the changes in technology.

Nevertheless, on October 1, 1998, , the Governor General in Council, on the recommendation of the Minister of Justice, amended the Criminal Code to define the "Taser Public Defender (CEW)" as a prohibited **firearm**. This change in the Criminal Code in 1998 was part of the federal government amendments to the *Firearms Act*. According to the Regulatory Impact Analysis Statement which the Federal government publishes to explain why it is amending a regulation, "The 'Taser Public Defender,' which discharges a dart carrying an electrical current and which is now in the prohibited weapons category, has been moved to the prohibited firearms class because it is a barrelled weapon and thus comes within the 'firearm' definition in the Code".²

Consequently, as of December 1, 1998 the Criminal Code (under the definition section of prohibited firearm in s. 84(1)) included "any firearm that is prescribed to be a prohibited firearm".

The Criminal Code *Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted* (SOR/98-462) define prohibited firearms as "any firearm capable of discharging a dart or other object carrying an electrical current or substance, including the firearm of the design commonly known as the Taser Public Defender **and any variant or modified version of it.**"³ That regulation also indicates that "The firearms listed in Part 1 of the schedule are prohibited firearms for the purposes of paragraph (d) of the definition "prohibited firearm" in subsection 84(1) of the Criminal Code."⁴ Hence, it appears to me that the TASER is a prohibited firearm, although I am the first to admit that the whole area is convoluted and confusing.

Mr. Kiedrowski who was hired by the RCMP to conduct an independent review on the RCMP's adoption of the Taser, has obviously challenged the conventional wisdom of the Canadian policing community, who have considered that the Taser is a prohibited weapon. This revelation by Mr. Kiedrowski has major consequences on policing firearm regulations, operational policies and procedures. First of all, as the Taser is classified as a prohibited firearm, it must be treated the same as a police service pistol or revolver, in both legislation and in policy.

In British Columbia, our Use of Force Regulations stipulate that under Section 10(1) each member of a police force who is authorized to carry and use a firearm must be re-qualified on the firearm within a period of not less than once a year. However, for example the Vancouver Police recertification period for a Taser is every three years, while for the RCMP it is every two years. Arguably, **if** it is a firearm, it should be one year in accordance with the regulations.. The recognition that the Taser is a prohibited

² Government of Canada Gazette Vol 132, No. 25 – June 20 1998

³ Federal S.O.R./98-462 Former Prohibited Weapons Order, No.3

⁴ S.O.R./98-462 Prescription 2.

firearm also impacts the storage and reporting provisions which necessarily must be the same as for any firearm.

Mr. Kiedrowski's revelation that the Taser is in fact a prohibited firearm raises the concern as to whether the police in British Columbia (or for that matter other police in Canada), have the proper authorization to even deploy a Taser. Under the current BC *Police Act* and the *Use of Force Regulations* the legislation allows police officers to carry a firearm. S.3(1) of the Use of Force regulations lists the firearms and ammunition that a chief constable may authorize his officers to use. Under regulation 3(1) it allows the police to carry a firearm that must be a semi-automatic pistol that includes its specifications. Under regulation 3(2) the police can also carry a firearm called a Smith and Wesson which also includes specifications for that weapon. However, there is no mention that the police can carry a "Taser" or conducted energy weapon under the Regulations. Therefore, because the regulation is silent, it is arguable that they may not be authorized to use it at all.

The police community may argue that the police have authority to use the TASER under section 3(3) in that the chief constable or a police officer designated in writing by "the chief constable may authorize a member of his or her police force to carry, for a special purpose, a firearm and ammunition of a type of than that referred to in this section". However, the response to this suggestion is that the carrying of a Taser for daily use is not "a special purpose". If this is the case, then I would question whether this is a potential abuse of regulatory power and suggest that it needs to be examined further.

I recognize that Mr. Kiedrowski's observations may have raised some fundamental concerns about the authorization of the use of TASERS, however, it appears that the policing community and those responsible for the governance of policing may have inadvertently misclassified the Taser as a prohibited weapon and consequently have developed a regulatory framework, policies and procedures based on this misclassification. Flowing from this misclassification is the fact that police may also inadvertently be in violation of the training, certification and reporting protocols that affect prohibited firearms as opposed to prohibited weapons.

Therefore, Mr. Commissioner, during the course of your very important deliberations, you may wish to consider this very significant issue and make whatever recommendations you deem appropriate.

Respectfully submitted,

Dirk Ryneveld, Q.C.
Police Complaint Commissioner for British Columbia