

PART 2

THE COMMISSION OF INQUIRY

PART 2: THE COMMISSION OF INQUIRY

PART 2: THE COMMISSION OF INQUIRY

A.	THE COMMISSION	31
1.	Appointment of Commissioner	31
2.	Terms of reference.....	32
3.	The Commission team	33
B.	THE EVIDENTIARY HEARINGS	35
1.	Rules of procedure	35
2.	Participants and counsel	35
3.	Hearings	36
4.	Findings of misconduct	37
5.	Policy issues	39
C.	THE COMMISSION'S REPORT	40

PART 2: THE COMMISSION OF INQUIRY

A. THE COMMISSION

1. Appointment of Commissioner

On November 19, 2007, John Les, the provincial Minister of Public Safety and Solicitor General, announced the government's commitment to hold a commission of inquiry into the circumstances surrounding the death of Robert Dziekanski at the Vancouver International Airport on October 14, 2007, and a review of the appropriate use and policies currently employed by law enforcement officers in British Columbia with respect to conducted energy weapons.

The minister stated at that time:¹

This incident has British Columbians, Canadians and people all over the world seeking answers with regard to not only this human tragedy, but how the province welcomes the world to our Airport. By calling a full public inquiry, we want everyone to know that all the facts will be put on the table, we will take action based on those facts and we will learn from this tragedy.

On February 15, 2008,² I was appointed sole commissioner under the *Public Inquiry Act*³ to conduct two separate inquiries:

- *a study commission* to inquire into and report on the use of conducted energy weapons by constables, sheriffs, and authorized persons in British Columbia, and
- *a hearing and study commission* to inquire into and report on the death of Mr. Dziekanski.

Throughout this document we have provided website references, though it must be kept in mind that they may change over time or become unavailable. They are up to date as of May 20, 2010. Wherever possible, we have provided references to the original documents.

1 See http://www2.news.gov.bc.ca/news_releases_2005-2009/2007PSSG0070-001490.htm.

2 See Order in Council 92, approved and ordered on February 15, 2008.

3 S.B.C. 2007, c. 9. The *Public Inquiry Act* can be viewed on the Inquiry website, at <http://www.braidwoodinquiry.ca/legislation.php>.

PART 2: THE COMMISSION OF INQUIRY

When Attorney General Wally Oppal announced my appointment on February 18, 2008, he stated:⁴

Given the overlapping reviews and investigations now being conducted, combined with the jurisdictional complexity of this tragic incident, we felt it prudent to adopt a two-phased approach. The federal government has indicated that it will co-operate.

This report deals only with the hearing and study commission into the death of Mr. Dziekanski at the Vancouver International Airport. On July 23, 2009, I released my study commission report respecting the use of conducted energy weapons.⁵

2. Terms of reference

Section 2 of the *Public Inquiry Act* states that the Lieutenant Governor in Council may establish a commission to inquire into and report on a matter that it considers to be of public interest. When it does, the Lieutenant Governor in Council must define the purposes of the commission, set the terms of reference of the inquiry, and designate the commission as a study commission, a hearing commission, or both.

The Lieutenant Governor in Council designated this inquiry as a hearing and study commission.⁶ The parts of the Order in Council applicable to this inquiry state as follows:

THE THOMAS R. BRAIDWOOD, Q.C., COMMISSIONS OF INQUIRY ORDER

Definitions

1. In this Order:...
 “**Mr. Dziekanski**” means Mr. Robert Dziekanski, who died at the Vancouver International Airport on October 14, 2007....

4 See http://www2.news.gov.bc.ca/news_releases_2005-2009/2008AG0006-000220-Attachment1.htm#.

5 Available at the Commission of Inquiry’s website: <http://www.braidwoodinquiry.ca/reports.php>.

6 The full text of the Order can be found in Appendix A.

Establishment of two commissions

2. (2) A hearing and study commission, called the Thomas R. Braidwood, Q.C., Hearing and Study Commission, is established under section 2 of the *Public Inquiry Act* to inquire into and report on the death of Mr. Dziekanski.
- (3) Thomas R. Braidwood, Q.C., is the sole commissioner of each of the commissions established under this section.

Purposes of the commissions

3. (2) The purposes of the hearing and study commission established under section 2(2) are as follows:
 - (a) to provide Mr. Dziekanski's family and the public with a complete record of the circumstances of and relating to Mr. Dziekanski's death;
 - (b) to make recommendations referred to in section 4(2)(c).

Terms of reference

- 4 (2) The terms of reference of the inquiries to be conducted by the hearing and study commission established under section 2(2) are 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;
 - (d) to submit a report to the Attorney General on or before a date to be determined by the Attorney General in consultation with the Commissioner.

3. The Commission team

In the weeks following my appointment, I appointed **Dr. Leo Perra** to act as Executive Director, and **Cathy Stooshnov** to act as Manager of Finance and Administration. They both brought a wealth of administrative experience – Dr. Perra as a former president of a community college and executive director of several previous public inquiries, and Ms. Stooshnov as an administrator for numerous other public inquiries since the early

PART 2: THE COMMISSION OF INQUIRY

1990s. Together, they secured office space for the Inquiry in downtown Vancouver, hired staff and made administrative arrangements for our hearings.

I retained as Commission Counsel **Art Vertlieb, Q.C.**, a partner in the Vancouver law firm of Vertlieb Dosanjh. Mr. Vertlieb brought to this task his considerable experience as a senior civil, criminal, and administrative law litigator. I retained **Patrick McGowan** as Associate Commission Counsel. Mr. McGowan is an experienced criminal and civil law practitioner in Vancouver.

In light of the many public policy issues arising out of the Terms of Reference for both Commissions, I retained **Sharon Samuels** as Research Counsel. She has served in a similar capacity in several other public inquiries since the mid-1990s. I retained **Keith Hamilton, Q.C.**, as Policy Counsel. Mr. Hamilton has acted as policy counsel and principal report-writer for numerous previous public inquiries.

I also retained **Chris Freimond**, of Chris Freimond Communications Inc., as our communications manager. He advised the Inquiry on matters of public and media communications, and was the key contact person for the Commission.

Finally, I express my thanks to former Provincial Court Judge **Dolores Holmes**, who agreed to serve in an advisory capacity during the evidentiary hearings, to **Len Giles**, who served as registrar, and to **Pattie Kealy** of McEachern & Associates, who acted as court recorder and transcriber.

A listing of the complete Inquiry staff, contractors, and suppliers is included in Appendix B.

I would like to express my sincere appreciation to all members of the Inquiry team for the professionalism, hard work, and enthusiasm they brought to this task. While I accept sole responsibility for my findings of fact, findings of misconduct, and recommendations, in all other respects it was a team effort, and all members of the team can be proud of their contributions.

B. THE EVIDENTIARY HEARINGS

1. Rules of procedure

Section 9(1) of the Act authorizes a commission to control its own processes and to make directives respecting practice and procedure, in order to facilitate the just and timely fulfillment of its duties.

Accordingly, I approved a 44-paragraph *Practice and Procedure Directive for Evidentiary Hearings*,⁷ based in part on precedents used by other public inquiries from across Canada.

2. Participants and counsel

Section 11 of the Act permits any person to apply to a commission to be a participant. A commission may accept an applicant as a participant after considering all of the following:

- whether, and to what extent, the person's interests may be affected by the findings of the commission;
- whether the person's participation would further the conduct of the inquiry; and
- whether the person's participation would contribute to the fairness of the inquiry.

I granted participant status to 16 individuals and organizations, all of whom were represented by counsel:

Participant	Counsel
Attorney General of British Columbia	Craig Jones
BC Civil Liberties Association	Grace Pastine Sara Dubinsky
Constable Bill Bentley	David Butcher Anila Srivastava

⁷ See Appendix E. The Directive can also be viewed on the Inquiry's website: http://www.braidwoodinquiry.ca/procedure_directive.php.

PART 2: THE COMMISSION OF INQUIRY

Participant	Counsel
Government of Canada	Helen Roberts Mitchell Taylor, Q.C. Jan Brongers
Corporal Dale Carr	E. David Crossin, Q.C. Emilie LeDuc
Zofia Cisowski	Walter Kosteckyj Sonny Parhar
City of Richmond (Richmond Fire Department)	James Goulden Michael Kleisinger Geoffrey Trotter
Sergeant Pierre Lemaitre	Joe Doyle Anna Karlen
Constable Kwesi Millington	Ravi Hira, Q.C. Brendan Morley
Government of Poland	Donald Rosenbloom
Public Service Alliance of Canada	Chris Buchanan Brett Matthews
Superintendent Wayne Rideout	Alexander Pringle, Q.C. Anna Konye
Corporal Benjamin Robinson	Reginald Harris
Constable Gerry Rundel	G. E. (Ted) Beaubier
TASER International, Inc.	David Neave Jennifer Spencer
Vancouver Airport Authority	Dwight Stewart Cherisse Friesen

I express my thanks to Messrs. Vertlieb and McGowan, assisted by Jessica McKeachie and John Lunn, for the efficient organization of witnesses and conduct of the evidentiary hearings. I also express my appreciation to counsel for all participants, who rearranged their busy law practices in order to accommodate the timely conduct of these proceedings.

3. Hearings

The evidentiary hearings were originally scheduled to commence in the fall of 2008, but I postponed them several times to await the decision of the Criminal Justice Branch as to whether criminal charges would be laid arising out of the events at the Vancouver International Airport.

On December 12, 2008, the Criminal Justice Branch announced that no criminal charges would be approved, clearing the way for our evidentiary hearings to commence, which they did on January 19, 2009.

There were 61 days of evidentiary hearings between January 19 and September 23, 2009. I heard testimony from 91 witnesses, including several by teleconference. This evidence generated 5,500 pages of transcript.⁸ Counsel for the participants filed written submissions, and made closing oral submissions over five days, between October 5 and 13, 2009.

Our evidentiary hearings were conducted in a large courtroom of the Federal Court of Canada, in a Vancouver office tower. It was conveniently located in the downtown core and was ideal for accommodating so many counsel, as well as members of the public and representatives of the print and electronic media. I extend my sincere thanks to the Federal Court, and particularly to Mr. Sam Thuraiamy and Ms. Julie Gordon, for providing the courtroom and offices.

The first purpose of this Commission of Inquiry is to provide Mr. Dziekanski's family and the public with a complete record of the circumstances of and relating to his death. I am confident that this goal has been achieved. It is my hope that this report will assist Mr. Dziekanski's mother and family in finding some peace and closure.

4. Findings of misconduct

The Supreme Court of Canada has ruled⁹ that a commission of inquiry may make findings of misconduct, which it interpreted as "improper or unprofessional behaviour," or "bad management." The Court recognized that a finding of misconduct may damage a person's reputation, but damaged reputations may be the price that must be paid to prevent a recurrence of a disaster. Findings of misconduct should not

⁸ See Appendix D for a list of witnesses who testified at the evidentiary hearings, and the dates of their testimony. This information, along with the transcripts of witnesses' testimony, is also available on the Commission's website, at http://www.braidwoodinquiry.ca/hearing_transcripts.php.

⁹ *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 (S.C.C.).

PART 2: THE COMMISSION OF INQUIRY

be the principal focus of a public inquiry; they should be made only in those circumstances where they are required to carry out the mandate of the inquiry.

The Court added that a commissioner should endeavour to avoid making evaluations of his or her findings of fact in terms that are the same as those used by courts to express findings of civil or criminal liability. However, a commissioner should not be expected to perform linguistic contortions to avoid language that might conceivably be interpreted as importing a legal finding.

Section 21 of the *Public Inquiry Act* legislates a commission of inquiry's authority to make findings of misconduct. It states:

- (1) Subject to this Act and the commission's terms of reference, a hearing commission may engage in any activity necessary to effectively and efficiently fulfill the duties of the commission, including doing any of the following:...
- (d) making a finding of misconduct against a person, or making a report that alleges misconduct by a person.

Section 11 establishes procedural safeguards, before a finding of misconduct can be made:

- (2) If a hearing commission intends to make a finding of misconduct against a person, or intends to make a report that alleges misconduct by a person, the hearing commission must first provide the person with
 - (a) reasonable notice of the allegations against that person, and
 - (b) notice of how that person may respond to the allegations.

Near the conclusion of the evidentiary hearings, Commission Counsel delivered several Confidential Notices, which advised recipients that "the Commissioner *may* make the following findings that *may* amount to misconduct," and then itemized those possible findings. Counsel for the recipients of those Notices had the opportunity to address the allegations during their closing written and/or oral submissions.

On May 12, 2009, counsel for the four RCMP officers who had dealt with Mr. Dziekanski at the Airport applied to me confidentially, under our *Practice and Procedure*

Directive for Evidentiary Hearings, for an Order that the Notices did not sufficiently particularize the misconduct alleged against them. In a confidential written Ruling dated May 22, 2009, I ordered further particulars in relation to one paragraph of the Notices, but otherwise dismissed the applications. Commission Counsel subsequently delivered revised Notices of Misconduct.

On June 2, 2009, counsel for the same four officers applied to me confidentially for an Order that the Notices of Misconduct be quashed as being beyond the authority of a provincial inquiry and outside the Terms of Reference of this particular Commission. On June 9, 2009, I issued a confidential Ruling dismissing these jurisdictional arguments.

The four officers applied to the BC Supreme Court for judicial review of both these Rulings and, in the course of doing so, disclosed the identity of their clients and the allegations of misconduct made against them. On June 15, 2009, Mr. Justice Silverman issued oral Reasons for Judgment dismissing the officers' claims.¹⁰

Three of the four officers (Constables Bentley, Millington, and Rundel) appealed that decision to the BC Court of Appeal. On December 29, 2009, the Court issued written Reasons for Judgment unanimously dismissing the appeal.¹¹

5. Policy issues

The Terms of Reference include an instruction "to make recommendations the commissioner considers necessary and appropriate." Although unlimited on its face, I have interpreted this direction in light of the overall mandate of this hearing and study commission, which is to inquire into the events and circumstances of and relating to Mr. Dziekanski's death, not limited to the actual cause of death.

Since one of the accepted purposes of a public inquiry is to prevent the recurrence of a tragedy, this instruction to make recommendations must, at a minimum, focus on

¹⁰ 2009 B.C.S.C. 814.

¹¹ 2009 B.C.C.A. 604.

improvements respecting the handling of, and services provided to, arriving international passengers at the Vancouver International Airport, especially those who do not speak English. Consequently, I have concluded that I have been instructed to inquire into the policies, procedures, and practices of those agencies at the Airport that deal with, or provide services to, arriving international passengers, specifically the Canada Border Services Agency (including Immigration and Customs) and the Vancouver Airport Authority.

I invited the Canada Border Services Agency and the Vancouver Airport Authority to tender senior employees who could explain to me their policies, practices, and procedures on these matters, and what changes have been made since October 2007. I have summarized the evidence of those witnesses in Part 9 of this report, along with my recommendations for further improvements.¹²

C. THE COMMISSION'S REPORT

Section 28 of the *Public Inquiry Act* establishes the procedures to be followed, after completion of a commission's report. Subsection (1) directs a commission to make its report to the minister (in this case the Attorney General), setting out:

- (a) any findings of fact made by the commission that are relevant to the commission's terms of reference, and the reasons for those findings, and
- (b) if required by the commission's terms of reference, any recommendations of the commission.

The minister must submit the report to the Executive Council (Cabinet) at its next meeting. On receiving the report, the Executive Council may direct the minister to withhold portions of the report because of privacy rights, business interests, or the public interest. If it so directs, the minister must remove any portions to be withheld

12 The Commission also invited members of the public to express, in writing, their views respecting the issues raised by the Terms of Reference. The names of the people who made submissions are set out in Appendix C. I express my thanks to them for their thoughts, and for the time they took to contribute to the work of the Commission.

and, in the report, identify any withheld portions and, to the extent possible, summarize them.

Following its review of the report, the Executive Council must then direct the minister to lay the report (except any withheld portions) before the Legislative Assembly. The minister:

- must promptly lay the report before the Legislative Assembly if it is in session or will be in session within 10 days of receiving the direction;
- in any other case, must promptly file the report with the Clerk of the Legislative Assembly; and
- must make available to a participant a copy of the report if it includes a finding of misconduct against that participant, or alleges misconduct by that participant.

Section 28(8) is clear that: “A person [which I interpret to include a commissioner] must not release a report of a commission except in accordance with this section.”

PART 2: THE COMMISSION OF INQUIRY