

BRAIDWOOD STUDY AND HEARING COMMISSION
Into the death of Robert Dziekanski

RULING

Thomas R. Braidwood, Q.C., Commissioner

October 2, 2009

NATURE OF THE APPLICATION

1. This application is brought by counsel for Cst. Bill Bentley, a participant in these proceedings. The Applicant seeks two Orders:

- That the order of closing oral submissions be changed, so that counsel for the BC Civil Liberties Association and for the Government of Poland follow counsel for Ms. Cisowski, which would mean that those three counsel would make their closing oral submissions before counsel for Corporal Robinson and Constables Bentley, Millington and Rundel.
- That he be permitted to make oral submissions for up to half a day, instead of one hour.

2. The application is grounded in the fundamental principles of fairness and natural justice. It is argued that Cst. Bentley is at jeopardy as a result of the Notice of Misconduct sent to him by the Commission, and Ms. Cisowski, the BC Civil Liberties Association and the Government of Poland are all advancing arguments that misconduct should be found, while none of those Participants is in any jeopardy. Their submissions require a substantial reply. Those advancing allegations should go first, so that the person in jeopardy knows what is being alleged before being required to respond.

3. The applicant also submits that it is unfair to give Ms. Cisowski, the BC Civil Liberties Association and the Government of Poland, cumulatively, four hours of submission time for what will likely be very similar positions, and allot only one hour to Cst. Bentley, who they will accuse of wrongdoing.

POSITIONS OF THE OTHER PARTICIPANTS

4. Seven participants have filed written materials in response to this application. With respect to the order of closing oral submissions, five participants agree with the Applicant. Counsel for the Government of Poland disagrees, arguing that counsel for Cst. Bentley will have the written submissions of all other participants several days in advance of making his closing oral submissions, and will have ample time to include in his closing oral submissions any response to those other participants' submissions. Further, if those other participants raise in their closing oral submissions matters not contained in their written submissions, counsel for Cst. Bentley will have the right of reply respecting those new matters. Finally, counsel for the Government of Poland submits that changing the order of closing oral submissions at this late date causes significant inconvenience to his client. The client and the Polish media have been advised for some time that the likely date of his closing oral submissions will be Wednesday, October 7, and one Polish network has advised him that they intend to send a crew to Vancouver for the day that counsel for the Government makes his closing oral submissions. The BC Civil Liberties Association adopts the position of the Government of Poland.

5. With respect to the Applicant's request for up to half a day to make closing oral submissions, no other participant has objected to that request. Several participants have indicated that they would like to have a similar length of time for their submissions.

ORDER OF CLOSING ORAL SUBMISSIONS

6. On a prefatory note, let me say that I do not think that the order that counsel for participants cross-examined witnesses during our evidentiary hearings is determinative of the order that counsel for participants should make closing oral submissions. In my view the governing principles are quite different.

7. There is considerable merit to the Applicant's submissions. On the basis of the written submissions that have been filed, I think it is fair to say that three participants (Ms. Cisowski, the BC Civil Liberties Association, and the Government of Poland) are the ones most likely to make allegations against Cst. Bentley.

8. If counsel for Cst. Bentley is required to make his closing oral submissions first, it would likely mean that he would have to split his submissions into two parts. He would be expected, in his main oral submission, to respond to allegations made in the written submissions of those who criticize his conduct. But if other participants make new allegations against him in their oral submissions, then counsel for Cst. Bentley will have to respond to those new allegations in a reply. In my view, it would foster the efficient conduct of these proceedings to adopt an order of closing oral submissions that avoids as much as possible the necessity for counsel to split their submissions, and limits the right of reply to matters that could not have been foreseen.

9. I do not mean to suggest that a participant against whom allegations might be made is always entitled to go last. While such a schedule would have certain advantages, it would only be in the rarest of cases that the order of closing oral submissions might lead to an unfairness for a participant, and this case is not one of those rare cases. That being said, re-ordering the schedule as sought by the Applicant in this case will limit the necessity for lengthy reply.

10. While the Commission has made every effort to accommodate the interests of the media throughout our proceedings, the materials before me do not expressly state that changing the order of closing oral submissions as sought by the Applicant would preclude the Polish media from attending during the closing submissions of counsel for the Government of Poland. In any event, on balance I consider that the interest in the efficient conduct of the proceedings, as discussed above, should take precedence.


11. Consequently, I order that counsel for the BC Civil Liberties Association and counsel for the Government of Poland make their closing oral submissions immediately following Ms. Cisowski, and before Cst. Bentley and the other RCMP officers involved in the incident with Mr. Dziekanski. Counsel will also have a right of reply, to the extent necessary to address unforeseen matters.

TIME ALLOTMENT FOR EACH SUBMISSION

12. It was never my intention to impose strict limits on the time that counsel would have to make their closing oral submissions. To the contrary, I want to ensure that all participants have as much time as reasonably necessary to make thorough submissions on behalf of their clients.

I do not think that it would be appropriate to impose hard and fast time limits. If counsel for a particular participant considers that up to two hours or half a day are required to make full and complete submissions, then I will respect that exercise of professional judgment.

13. Depending on the number of counsel who need additional time for their closing oral submissions, it is likely that these proceedings may need to extend into a second week. Subject to persuasive arguments to the contrary, we will convene from Monday, October 5 to Thursday, October 8, and then resume on Tuesday, October 13 if necessary.

A handwritten signature in cursive script, appearing to read "Thomas R. Braidwood", is written above a horizontal line.

Thomas R. Braidwood, Q.C.
Commissioner