

TASER International's Judicial Review Filing Regarding the Braidwood Study Commission Report

Today, TASER International applied for a Judicial review of the Braidwood Report in the Supreme Court of British Columbia. We believe that the Commission was derelict in its duties, selectively including or excluding information based on a political agenda. Our grounds are as follows:

1. **The Commission failed to disclose the results of the Dziekanski autopsy for over a year.** During this time, the Commission had full knowledge that the autopsy report found no evidence that the TASER device played a causal role in the tragic death of Mr. Dziekanski. However, the Commission comported itself in a negatively biased manner toward both law enforcement and TASER devices as though it was a foregone conclusion the TASER was the cause of death, all the while they possessed (yet failed to disclose) proof to the contrary.

According to the [British Columbia Criminal Justice Branch](http://www.ag.gov.bc.ca/prosecution-service/media-statements/pdf/CJB-ClearStmt-12Dec2008.pdf) statement of December 20, 2008, the autopsy findings indicated, "The Forensic Pathologist concluded that Mr. Dziekanski's death was as a result of 'Sudden Death Following Restraint'. He found no definite cause of death, which is typical of these types of incidents. Sudden Death Following Restraint cases usually involve individuals who exhibit combative and bizarre behaviour. As a result, these cases often involve law enforcement personnel, but some cases include medical personnel and occasionally ordinary citizens. Sudden Death Following Restraint has been associated with virtually all forms of physical restraint, most instances of which did not involve the use of a TASER. Before the TASER was in use in Canada, Sudden Deaths Following Restraint were not uncommon." (Source: <http://www.ag.gov.bc.ca/prosecution-service/media-statements/pdf/CJB-ClearStmt-12Dec2008.pdf>)

2. **It appears that Justice Braidwood failed to consider scientific evidence and selectively discarded approximately 25 peer-reviewed studies that demonstrated important safety characteristics of the TASER device in order to advance a political agenda at odds with these scientific findings.** The Commission requested, and received an extensive body of medical and scientific literature, including recent peer-reviewed research in leading journals on the safety of CEWs. More than 170 studies were sent yet only 115 were cited in the bibliography, with many landmark human studies that contradict the Commission's recommendations being specifically omitted. For reasons unknown to TASER, the Commission failed to acknowledge, discuss or consider substantial portions of this literature in coming to its conclusions in its Report. The opinions of a number of the medical experts who presented at the Study Commission did not survive cross-examination unchallenged at the Hearing Commission. To rely on their presentations alone in making findings at the Study Commission is misleading and a disservice to the public.

In supporting its negative findings, the Commission relied primarily on theoretical reports, extrapolations of animal studies, and computer modeling. These studies were directly refuted by numerous human studies provided to the Commission that were not included in the findings. The Braidwood Study Commission also failed to provide TASER International with the right to be heard and to respond to the Commission's initial conclusions in advance of making any findings, contrary to law.

3. **The Commission recommendation that all officers issued a TASER device must carry an external defibrillator is contra-indicated by the fact that two defibrillators were utilized on Mr. Dziekanski, both of which indicated that Mr. Dziekanski was NOT in fibrillation and could not resuscitate him from the underlying cause of death, which was clearly not fibrillation.** In fact, none of the cases of deaths in police custody following TASER application in Canada have been shown to be related to ventricular fibrillation. This recommendation is impractical (in fact impossible for officers on foot patrol, bicycle patrol, etc.), financially infeasible, and completely unsupported by either the Dziekanski case or any other case in Canada.
4. The Commission breached basic principles of fairness and fundamental justice in the procedure it followed in arriving at the conclusions and recommendations in the Report.

If implemented, Braidwood's findings will severely restrict a technology that has dramatically reduced injuries to police officers and the public, putting law enforcement and citizens alike at risk. TASER ECD's have saved thousands of lives worldwide with a demonstrated lower risk of injury or death than alternative force options.

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 1996, c. 241 and the *Public Inquiry Act*, S.B.C. 2007, c. 9, and in the matter of the Thomas R. Braidwood, QC, Commissions of Inquiry, Study Commission to Inquire and Report on the Death of Mr. Robert Dziekanski and said Report and Recommendations dated 18 June 2009

BETWEEN

TASER INTERNATIONAL, INC.

PETITIONER

AND

**THOMAS R. BRAIDWOOD, Q.C., COMMISSIONER,
THOMAS R. BRAIDWOOD, QC, COMMISSIONS OF INQUIRY,
STUDY COMMISSION TO INQUIRE AND REPORT ON THE DEATH OF
MR. ROBERT DZIEKANSKI**

RESPONDENT

PETITION

THIS IS THE PETITION OF:

TASER INTERNATIONAL, INC.
in care of its solicitors, Blake, Cassels & Graydon LLP
Suite 2600, 595 Burrard Street
P.O. Box 49314, Three Bentall Centre
Vancouver, BC V7X 1L3
Attention: David T. Neave and Jennifer Spencer

ON NOTICE TO:

THOMAS R. BRAIDWOOD, Q.C. COMMISSIONER,
Thomas R. Braidwood, Q.C., Commissions of Inquiry,
Study Commission to Inquire and Report on the Death of Mr. Robert Dziekanski
980 - 1500 West Georgia Street
Vancouver, BC V6G 2Z6
Attention: Arthur Vertlieb, Q.C., Commission Counsel

NOTICE AS REQUIRED BY ss.15 and 16 of the *Judicial Review Procedure Act*:

**THE ATTORNEY GENERAL OF THE
PROVINCE OF BRITISH COLUMBIA,**
Ministry of Attorney General,
Parliament Buildings
Victoria, BC

ARTHUR E. VERTLIEB, Q.C.
Suite 200, 1462 West 8th Avenue
Vancouver, BC V6H 1E1

KEITH CHAMBERS
4550 Bellevue Drive
Vancouver, BC V6R 1E5

Let all persons whose interest may be affected by the Order sought TAKE NOTICE that the Petitioner applies to Court for the relief set out in this petition.

APPEARANCE REQUIRED

IF YOU WISH TO BE NOTIFIED of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this court within the Time for Appearance and YOU MUST ALSO DELIVER a copy of the "Appearance" to the petitioner's address for delivery, which is set out in this petition.

YOU OR YOUR SOLICITOR may file the "Appearance". You may obtain a form of "Appearance" at the registry.

IF YOU FAIL to file the "Appearance" within the proper Time for Appearance, the Petitioner may continue this application without further notice.

TIME FOR APPEARANCE

Where this Petition is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

Where this Petition is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

TIME FOR RESPONSE

IF YOU WISH TO RESPOND to the application, you must, on or before the 8th day after you have entered an appearance,

- (a) deliver to the Petitioner
 - (i) 2 copies of a response in Form 124, and
 - (ii) 2 copies of each affidavit on which you intend to rely at the hearing, and
- (b) deliver to every other party of record
 - (i) one copy of a response in Form 124, and
 - (ii) one copy of each affidavit on which you intend to rely at the hearing.

(1) The ADDRESS OF THE REGISTRY is: Law Courts 800 Smithe Street Vancouver, BC V6Z 2E1
(2) The ADDRESS FOR DELIVERY is: BLAKE, CASSELS & GRAYDON LLP Suite 2600, Three Bentall Centre 595 Burrard Street, P.O. Box 49314 Vancouver, B.C. V7X 1L3 Attention: David T. Neave and Jennifer Spencer Fax number for delivery is: (604) 631-3309
(3) The NAME AND OFFICE ADDRESS OF THE PETITIONER'S SOLICITORS are: David T. Neave and Jennifer Spencer BLAKE, CASSELS & GRAYDON LLP Suite 2600, Three Bentall Centre 595 Burrard Street, P.O. Box 49314 Vancouver, B.C. V7X 1L3

The Petitioner applies for the following:

1. an order quashing all findings made by the Respondent in respect of the safety of conducted energy weapons;

2. an order quashing Parts 9 and 10 of the Report titled “Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia” dated 18 June 2009 (“**Report**”) therein of the Respondent, Thomas R. Braidwood, Q.C. in his capacity as Commissioner, Thomas R. Braidwood, QC, Commissions of Inquiry, Study Commission to Inquiry and Report on the Death of Mr. Robert Dziekanski (“**Study Commission**”);
3. a declaration that the Respondent failed to take relevant information into account in preparing Parts 9 and 10 of his Report and the Recommendations therein, contrary to the principles of natural justice;
4. a declaration that Keith Chambers was in dereliction of his duty to act honestly, in good faith and exercise the care and skill of a reasonable person of similar education and experience in carrying out his role as overseer of the work of the Commission’s medical and scientific researchers, including the Commission’s literature survey;
5. a declaration that there is a reasonable apprehension that Keith Chambers was biased in carrying out his duties as overseer of the work of the Commission’s medical and scientific researchers, including the Commission’s literature survey;
6. a declaration that Arthur Vertlieb, Q.C. failed to fulfill his duties and obligations as Commission Counsel in that he failed or neglected to ensure that all available and relevant information was before the Commissioner in respect of the medical, scientific and policy literature on the safety of conducted energy weapons;
7. a declaration that there is a reasonable apprehension that Arthur Vertlieb, Q.C. was biased in carrying out his duties as Commission Counsel in respect of the Study Commission hearings and subsequent Report;
8. a declaration that the Respondent fell into jurisdictional error given there is no reasonable basis in the material available to the Respondent to justify his findings in Part 9 of the Report;
9. a declaration that, contrary to the principles of natural justice, the Respondent failed to give the Petitioner notice of or an opportunity to be heard in respect of the Respondent’s

intention to make findings as to the causative or contributive role of the Petitioner's products in injury or death;

10. a declaration that the Respondent has legal duties to give TASER notice of the Commission's potential findings in advance to the extent they may affect TASER's interests and to give TASER the opportunity to be heard in respect of those potential findings;

11. a declaration that the Respondent did not satisfy his legal duties to give TASER notice and the opportunity to be heard concerning findings adverse to TASER's interests in respect of the Report;

12. an injunction restraining the Respondent from relying on his research and findings as to medical safety or risk in relation to a conducted energy weapons in the Study Commission in his deliberations, report and findings for the Thomas R. Braidwood, Q.C., Hearing and Study Commission ("**Hearing Commission**");

13. a declaration that an Order that the Petitioner is entitled to its costs of this Application; and

14. such further and other relief as this Honourable Court deems just.

The grounds upon which the application by the Petitioner for the Orders sought is brought, are:

1. the Respondent exceeded his jurisdiction by:

- (a) making unreasonable findings of fact;
- (b) breaching the principles of procedural fairness, including *audi alteram partem*;

2. in the alternative, the Respondent made an error of law on the face of the record;

3. in the further alternative, the proceedings before the Respondent are tainted by the reasonable apprehension of bias, and in particular, that of Commission Counsel, Arthur Vertlieb, Q.C., and the Commission's overseer of medial and scientific research, Keith Chambers.

The Petitioner relies on:

1. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
2. *Public Inquiry Act*, S.B.C. 2007, c. 9;
3. Order in Council 92/2008 (as amended by Orders in Council 273/2008 and 882/2008);
4. *Law and Equity Act*, R.S.B.C. 1996, c. 253;
5. Rules 10, 44 and 57 of the *Rules of Court*.

At the hearing of this Petition will be read the Affidavit of:

1. Lisa Caesar, sworn on August 12, 2009 and filed in these proceedings;
2. Such other material as counsel may advise and this Honourable Court may permit.

F A C T S

The facts upon which this Petition is based are:

1. The Petitioner, TASER International, Inc. (“**TASER**”) is a limited company, duly incorporated pursuant under the laws of the State of Delaware, United States of America, with a head office located at 17800 N. 85th Street, Scottsdale, Arizona, U.S.A., 85255 and an address for service in these proceedings at Suite 2600, Three Bentall Centre, 595 Burrard Street, P.O. Box 49314, Vancouver, BC V7X 1L3.
2. TASER designs and manufactures conducted energy weapons which are sold in Canada and used by law enforcement officers in the course of their duties.
3. The Respondent, Thomas R. Braidwood, Q.C., was appointed as the sole Commissioner in two Commissions of Inquiry pursuant to the *Public Inquiry Act*, S.B.C. 2007, c. 9 and Order in Council 092/2008 (as amended by Orders in Council 372/2008 and 882/2008) (“**Commission**”). The Respondent has an office at Suite 980, 1500 West Georgia Street, Vancouver, BC V6G 2Z6.
4. The first, the Study Commission, was established to inquire into and report on the use of conducted energy weapons by constables of police forces of British Columbia (other than the RCMP), sheriffs under the *Sheriff Act*, R.S.B.C. 1996, c. 425, and authorized persons under the *Correction Act*, S.B.C. 2004, c. 46 in the performance of their duties and the exercise of their powers (“**Study Commission**”).
5. The purpose of the Study Commission was to make recommendations respecting the appropriate use of conducted energy weapons by constables, sheriffs and other authorized persons in the performance of their duties and the exercise of their powers.
6. As part of the Commission’s Terms of Reference set out in the Order in Council 92/2008, the Study Commission was tasked:
 - 4(1)(b) to review research, studies, reports and evaluations respecting the safety and effectiveness of conducted energy weapons when used in policing and law enforcement in British Columbia and in other jurisdictions;

7. TASER sought standing before the Commission in respect of the Study Commission on the basis that TASER's interests were directly engaged by the Commission's mandate under the *Public Inquiry Act*.

8. The Commission convened public forums in Vancouver on May 5-9, 12-16, 20-23, 2008 and June 25, 2008 at which some 61 individuals made presentations. These presentations were not under oath.

9. TASER was not afforded the right to pose questions of the presenters nor to conduct cross-examination at the Study Commission, notwithstanding the fact that TASER raised issues with both Commission Counsel, Arthur Vertlieb, Q.C., and with the Commissioner as to the Commission's selection of expert witnesses as well as the quality of the medical and scientific opinions being placed before the Commission giving rise to concerns with the fairness of the Study Commission process.

10. The second Commission, the Hearing and Study Commission, was established to inquire into and report on the death of Mr. Robert Dziekanski ("Hearing Commission").

11. The opinion evidence of key witnesses solicited at the Hearing Commission under cross-examination differs in material respects from their presentations before the Study Commission.

12. TASER provided the Commission, through Commission Counsel, with written submissions and material responsive to inquiries posed by the Commissioner and his staff. Further, TASER provided the Commission with an extensive collection medical and scientific papers responsive to the Commission's mandate.

13. After TASER expressed concern with relevant expertise of witnesses before the Commission, TASER suggested the Commission have the benefit of hearing from leading international researchers on human exposure to conducted energy weapons, including:

- (a) Dr. Charles Swerdlow (cardiac electro physiology, Cedars Sinai, University of California (Los Angeles));

- (b) Dr. Dorin Panescu (bio-electrical engineer and Chair of the International Institute of Electrical and Electronics Engineers (IEEE) Engineering in Medicine and Biology Therapeutic Systems and Technologies Technical Committee);
- (c) Dr. Christian Sloane (emergency medicine specialist and researcher with Dr. Gary Vilke of leading peer-reviewed articles on human exposure to conducted energy weapons); and
- (d) Dr. William Bozeman (emergency medicine specialist, epidemiologist and lead author of a US Department of Justice multi-centre five year study on injury rates with conducted energy weapon exposure).

14. The Commission failed or neglected to consider the material or the experts TASER provided to the Commission, including the vast majority of the peer-reviewed published medical research on human exposure to conducted energy weapons.

15. The medical research the Commission used to make its findings was inadequate: the Commission failed or neglected to consider relevant portions of the body of literature in the medical and scientific community on human exposure to conducted energy weapons.

16. The Commission relied to its detriment on the work of Keith Chambers in identifying relevant scientific and medical literature on human exposure to conducted energy weapons. Keith Chambers oversaw the Commission's medical and scientific research. He also prepared the Commission's medical and scientific literature review which is set out as Appendix C to the Report.

17. Further, the Commission's analysis of the medical and scientific literature lacks any reasonable degree of academic rigueur in that:

- (a) the relevant research necessary to making informed findings in respect of the safety of conducted energy weapons is not discussed, or not cited, or neither in the Report; and
- (b) the Commission's medical and scientific literature review (Appendix C) is missing references to significant material, including peer-reviewed articles,

necessary to make informed findings in respect of the safety of conducted energy weapons.

18. The Commission made findings about the medical safety of conducted energy weapon exposure in human beings based on research that was flawed or irrelevant.

19. The Commission was selective in the material it considered without good or any cause. Further, the Commission refused or neglected to consider the medical and scientific research which supports the general safety or efficacy of conducted energy weapons when deployed against a human being, giving rise to a reasonable apprehension of bias.

20. The Commission made findings of fact which are:

- (a) unsupportable in the face of existing medical science; and
- (b) unsupportable in the face of the medical and scientific material TASER provided to the Commission.

21. The Commission gave TASER no notice of its potential findings, no opportunity to respond to the medical and scientific assumptions underlying the Commission's findings, and no opportunity to be heard in respect of findings which are adverse to TASER's interests.

22. The following relevant documents are attached:

- (a) Order in Council 92/2008 (as amended by Orders in Council 273/2008 and 882/2008) as Schedule 1.

DATED at Vancouver, British Columbia, on August 13, 2009.

Solicitor for Petitioner
David T. Neave

This PETITION is filed by David T. Neave and Jennifer Spencer, of the firm of Blake, Cassels & Graydon LLP, solicitors for the Petitioner, whose place of business and address for delivery is Suite 2600, Three Bentall Centre, 595 Burrard Street, P.O. Box 49314, Vancouver, British Columbia, V7X 1L3. Telephone: 604-631-3300.