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, Q.C., 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

Citation: *Taser International, Inc. v. British Columbia (Thomas Braidwood, Q.C. Study Commission),* 2010 BCSC 1120

Date: 20100810
Docket: S095931
Registry: Vancouver

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

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Petitioner:	David T. Neave -and- Eleni Kassaris
Counsel for the Respondent Thomas R. Braidwood, Q.C.:	Arthur Vertlieb, Q.C. -and- Patrick McGowan
Counsel for the Respondent Attorney General of British Columbia:	Craig E. Jones -and- Karrie Wolfe
Place and Date of Hearing:	Vancouver, B.C. July 5-9, 2010
Place and Date of Judgment:	Vancouver, B.C. August 10, 2010

INTRODUCTION

[1] On February 15, 2008, the provincial government established two commissions of inquiry under s. 2 of the *Public Inquiry Act*, S.B.C. 2007, c. 9, in response to an incident which led to the death of Robert Dziekanski, who died at the Vancouver International Airport while being restrained by members of the RCMP. In the course of their confrontation with Mr. Dziekanski, the RCMP members struck him several times with conducted energy weapons manufactured by the petitioner. The Honourable Thomas R. Braidwood, Q.C. (the "Commissioner") was appointed Commissioner of both commissions.

[2] The first commission (the "Study Commission") was designated as a study commission to make recommendations regarding the appropriate use of conducted energy weapons in the province. The second commission was designated as a hearing and study commission. Its mandate was to inquire into and report on the death of Mr. Dziekanski.

[3] The powers of a study commission are found in s. 20 of the *Public Inquiry Act*:

> **20** (1) Subject to this Act and the commission's terms of reference, a study commission may engage in any activity necessary to effectively and efficiently fulfill the duties of the commission, including doing any of the following:
>
> (a) conducting research, including interviews and surveys;
>
> (b) consulting with participants, privately or in a manner that is open to the public, either in person or through broadcast proceedings;
>
> (c) consulting with the public generally and, for that purpose, issuing directives respecting any of the matters set out in subsection (2).
>
> (2) Without limiting the powers of a commission set out in Division 1, a study commission may make directives respecting any of the following:
>
> (a) the notification of participants and the public regarding a consultation under this section;
>
> (b) the holding of public meetings, including the places and times at which public meetings will be held and the frequency of public meetings;
>
> (c) the conduct of, and the maintenance of order at, public meetings;
>
> (d) the receipt of oral and written submissions.

> (3) A study commission must not exercise the powers of a hearing commission as set out in sections 21 (1), 22 and 23, unless the study commission is also designated as a hearing commission.

[4] The powers of a hearing commission are set out beginning at s. 21 of the *Public Inquiry Act*. Section 21 is in the following terms:

> **21** (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:
>
> > (a) issuing directives respecting any of the matters set out in subsection (2);
> >
> > (b) holding written, oral and electronic hearings;
> >
> > (c) receiving submissions and evidence under oath or affirmation;
> >
> > (d) making a finding of misconduct against a person, or making a report that alleges misconduct by a person.
>
> (2) Without limiting the powers of a commission set out in Division 1, a hearing commission may make directives respecting any of the following:
>
> > (a) the holding of pre-hearing conferences, including confidential pre-hearing conferences, and the requiring of one or more participants to attend a pre-hearing conference;
> >
> > (b) procedures for preliminary or interim matters;
> >
> > (c) the receipt and disclosure of information, including but not limited to pre-hearing receipt and disclosure and pre-hearing examination of a participant or witness on oath, on affirmation or by affidavit;
> >
> > (d) the exchange of records by participants;
> >
> > (e) the filing of admissions and written submissions by participants;
> >
> > (f) the service and filing of notices, records and orders, including substituted service and the requiring of participants to provide an address for service;
> >
> > (g) without limiting any other power of the commission, the effect of a participant's non-compliance with the commission's directives.
>
> (3) A hearing commission must not exercise the powers of a study commission as set out in section 20 (1), unless the hearing commission is also designated as a study commission.

[5] The Order-In-Council establishing the commissions provided in part as follows:

> Establishment of two commissions
>
> 2(1) A study commission, called the Thomas R. Braidwood, Q.C., Study Commission, is established under section 2 of the Public Inquiry Act to inquire into and report on the use of conducted energy weapons by the following in the performance of their duties and the exercise of their powers:
>
> (a) constables of police forces of British Columbia, other than the RCMP;
>
> (b) sheriffs under the Sheriff Act;
>
> (c) authorized persons under the Correction Act.
>
> (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.

[6] In this proceeding the petitioner seeks judicial review of the report of the Study Commission, entitled "Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia" (the "Study Commission Report"), issued on June 18, 2009. I note that the style of cause in the petition misdescribed the Study Commission but no one made any objection to the style of cause and it is obvious that the subject matter of the proceeding is the Study Commission Report. Specifically, the petitioner seeks an order quashing all findings of the Commissioner in respect of the safety of conducted energy weapons, an order quashing Parts 9 and 10 of the Study Commission Report, and the following declarations and injunction:

> ...
>
> 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;
>
> ...
>
> 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 Report in his deliberations, report and findings for the Thomas R. Braidwood, Q.C., Hearing and Study Commission ("Hearing Commission").

[7] The Attorney General was served with the petition and appears as of right pursuant to section 16 of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 (the "*JRPA*").

[8] In Part 9 of the Study Commission Report, the Commissioner concluded that there was some risk of death or serious injury associated with the use of conducted energy weapons which required a risk benefit analysis of their use and deployment.

[9] In Part 10, the Commissioner set out his recommendations for rules governing the threshold for conducted energy weapon use, multiple deployments, other precautionary measures, training, and testing. The recommendations were all adopted by the Solicitor General for provincially constituted municipal forces, sheriffs and corrections officials, and have since also been endorsed by the RCMP in British Columbia.

IS THE STUDY COMMISSION REPORT SUBJECT TO JUDICIAL REVIEW?

[10] Throughout these proceedings the Attorney General's position has been that study commissions are not subject to judicial review and that the petitioner has no standing to bring the petition and had no procedural rights with respect to the manner in which the Study Commission was conducted.

[11] On this issue, the Attorney General's submissions are that a study commission appointed pursuant to the provisions of the *Public Inquiry Act* acts in a purely administrative and advisory capacity. The Court should not interfere with or attempt to exercise any supervisory control over study commissions because such commissions are by their very nature inappropriate for judicial intervention. The Attorney General also submits that imposing an obligation to observe the rules of natural justice and fairness upon study commissions carries with it the risk of frustrating the very purpose and function of such commissions by inhibiting their ability to assess independently the matters before them.

[12] Section 2 of the *JRPA* provides as follows:

> **Application for judicial review**
>
> 2 (1) An application for judicial review is an originating application and must be brought by petition.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> (a) relief in the nature of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[13] "Statutory power of decision" and "statutory power" are defined in s. 1 of the *JRPA* as follows:

> **"statutory power of decision"** means a power or right conferred by an enactment to make a decision deciding or prescribing
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
>
> (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,
>
> and includes the powers of the Provincial Court;
>
> **"statutory power"** means a power or right conferred by an enactment
>
> (a) to make a regulation, rule, bylaw or order,
>
> (b) to exercise a statutory power of decision,
>
> (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,

> (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
>
> (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

[14] For the Attorney General, Mr. Jones submits that the relief sought in this case does not relate to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power because the Study Commission Report does not constitute an exercise of a statutory power. He submits that study commissions perform a purely advisory function and cannot speak to any person's rights, duties or liabilities. He relies on ss. 20 and 21 of the *Public Inquiry Act*, quoted above at paragraphs 3 and 4.

[15] Mr. Jones contrasted the provisions relating to study commissions found in s. 20 of the *Public Inquiry Act* with the provisions which set out the powers and procedures of a hearing commission. His submission is that judicial review is appropriate only with respect to the conduct and reports of hearing commissions because only hearing commissions can be said to be acting in a quasi-judicial capacity or exercising any of the functions addressed in s. 2 of the *JRPA*.

[16] The Attorney General does concede that there is authority for the proposition that some commission reports which contain recommendations only are subject to review by way of *certiorari.* However, he submits that *certiorari* is only available in relation to commissions exercising advisory or administrative functions where there is a close proximity between the function and the final disposition of a person's rights. He submits that that proximity can only be found in cases in which the advice or recommendations of a commission are likely to be acted upon to the detriment of a person's legal rights.

[17] The Attorney General submits that the Study Commission was doing nothing more than making policy recommendations, which by their very nature are not subject to judicial review. He further submits that the petitioner does not have standing because the Study Commission Report has not affected its legal rights, powers, privileges, immunities, duties or liabilities. He relies on the Supreme Court

of Canada decision of *Canada (Minister of National Revenue) v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 (*Coopers and Lybrand*).

[18] The petitioner relies upon a number of authorities beginning with *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; 1979 CarswellNat 2 (*Martineau*), in support of the proposition that an advisory commission is under a legal duty to act fairly with respect to those whose interests may be adversely affected by the commission's report.

[19] In *Martineau*, Mr. Justice Dickson stated at paragraphs 72-74 of the Carswell Report (628-29, S.C.R.):

> The authorities, in my view, support the following conclusions:
>
> 1. *Certiorari* is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.
>
> 2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad of decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum. That is what emerges from the decision of this Court in *Nicholson.* In these cases, an applicant may obtain *certiorari* to enforce a breach of the duty of procedural fairness.

[20] The petitioner relies on the first conclusion stated by Dickson J. in *Martineau.* It submits that its interests have been affected in a fundamental way by the Study Commission Report. The interests identified by the petitioner are the commercial interests associated with selling its products. The petitioner says that those interests are sufficient to make the Study Commission subject to judicial review.

[21] There is little guidance in the authorities as to what constitutes an *interest* sufficient to give an applicant standing to seek judicial review and impose the

correlative duty of fairness on a purely advisory tribunal with respect to the applicant. In most of the cases in which the Courts have granted a remedy the decision of the tribunal has uniquely affected the reputation, status or liberty of the applicant.

[22] In *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 at 327-28(*Nicholson*), the Court referred to *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 13, as follows:

> A more recent illustration of a court considering a duty to act fairly is *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 13, where the Court of Appeal was satisfied that the Board, and administrative agency with no judicial functions, concerned primarily with conciliation in relation to its duty to investigate complaints of unlawful discrimination and to form an opinion thereon, had acted fairly in concluding after a review of the evidence that there was no such discrimination. Lord Denning had this to say about the duty to act fairly (at p. 19):
>
> > ...In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. Notably the Gaming Board, who have to enquire whether an applicant is fit to run a gaming club (see *R. v. Gaming Board for Great Britain, ex parte Benaim*, [1970] 2 All ER 528), and inspectors under the Companies Acts, who have to investigate the affairs of a company and make a report (see *Re Pergamon Press Ltd.*, [1970] 3 All ER 535), and the tribunal appointed under s. 463 of the Income and Corporation Taxes Act 1970, who have to determine whether there is a prima facie case (see *Wiseman v. Borneman*, [1971] AC 297). In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

[23] Mr. Justice Dickson continued his reasons at page 328 of *Nicholson* as follows:

> In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

[24] My review of the authorities leads me to the conclusion that the courts have readily found a duty to act fairly on the part of investigatory or inquiry tribunals and have focused their analysis on the nature and extent of the duty rather than on whether any such duty exists. As the above passages illustrate, at its most basic the duty of fairness requires that an affected person have notice of the issues being considered by the inquiry that affect his or her interests and that the applicant be given a reasonable opportunity to be heard with respect to those issues.

[25] It seems to me that the second conclusion Mr. Justice Dickson reached in *Martineau* supports the proposition that the determination of the nature, extent and content of the duty of fairness owed in any particular situation must be assessed with respect to the particular facts and circumstances of the decision which is sought to be reviewed.

[26] The authority for granting the declaratory and injunctive relief sought by the petitioner is found in s. 2(2)(b) of the *JRPA.* This Court has an inherent common law jurisdiction to grant *certiorari.*

[27] I considered the issue of whether declaratory relief and injunctive relief are available with respect to the Study Commission Report on an earlier application by the respondent Attorney General to have the petition dismissed under Rule 19(24)

as disclosing no reasonable cause of action. My reasons addressing that application are indexed as 2010 BCSC 623. At that time extensive submissions were made, which were not repeated in any detail on the application to which these reasons apply.

[28] Based on my reading of the provisions of the *JRPA,* I have great difficulty in understanding how s. 2(2)(b) is applicable to the Study Commission Report. The Court has power to grant a declaration or an injunction only with respect to the exercise of a statutory power. It does not appear to me that any of the definitions of statutory power set out in the *JRPA* apply to the Study Commission Report. The mandate of the Study Commission was to make recommendations to the government with respect to the appropriate use of conducted energy weapons, the appropriate training or retraining of peace officers using conducted energy weapons and to review research studies, reports and evaluations respecting the safety and effectiveness of conducted energy weapons when used in policing.

[29] In my view, none of the terms of reference of the Study Commission, and in particular the mandate to review research studies, reports and evaluations respecting the safety and effectiveness of conducted energy weapons constituted the exercise of a statutory power of decision. I therefore can see no basis on which this Court has jurisdiction to grant a declaration or injunction with respect to the Study Commission Report.

[30] This does not, however, mean the Commission is not subject to the supervision of the Court pursuant to the prerogative writ of *certiorari*. The circumstances in which the Court will exercise supervision over an administrative tribunal through its power to grant *certiorari* are significantly broader than the statutory jurisdiction to grant a declaration or injunction. This is the essential distinction between the Supreme Court of Canada decisions in *Coopers and Lybrand* and *Martineau.*

[31] In *Martineau*, the Court held that the nature of the administrative action was such as to impose a duty to act fairly that the Court has jurisdiction to enforce by *certiorari*.

[32] In *Martineau*, the applicants were inmates who faced a prolonged period of segregation. The petitioner's complainants in this matter relate to the Commissioner's conclusion with respect to the attributes of the product it manufactures and sells. It seems to me that the effective administration of government may well be severely hampered if the government's review and analysis of the attributes of a particular product were subject to judicial review on the grounds of fairness. I therefore think that if a duty of fairness is to be found in a case where a government agency is reviewing the attributes of a particular product or substance there must be special circumstances which give rise to that duty.

[33] In this case I have concluded that there are such special circumstances. I reach this conclusion because it is common ground and obvious that the mandate of the Study Commission was to inquire into the conducted energy weapons manufactured by the petitioner. The terms of reference of the Study Commission were as follows:

> **Terms of reference**
>
> 4 (1) The terms of reference of the inquiries to be conducted by the study commission established under section 2 (1) are as follows:
>
> > (a) to review current rules, policies and procedures applicable to constables, sheriffs and authorized persons referred to in section 2 (1) in respect of their use of conducted energy weapons and their training and re-training in that use;
> >
> > (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;
> >
> > (c) to make recommendations respecting
> >
> > > (i) the appropriate use of conducted energy weapons by constables, sheriffs and authorized persons referred to in section 2 (1) in the performance of their duties and the exercise of their powers, and

> (ii) the appropriate training or re-training of those constables, sheriffs and authorized persons in that use of conducted energy weapons;
>
> (d) to submit a report to the Attorney General on or before June 30, 2008.

[34] It is also quite clear that the Commissioner invited the petitioner to participate in the process of the Study Commission. In my view a company in the position of the petitioner would reasonably expect that it would be treated fairly by the Study Commission in view of the above circumstances. I therefore conclude that in the special circumstances of this case, the Study Commission did owe a duty of fairness to the petitioner.

[35] Having decided that the Study Commission owed the petitioner a duty of fairness, I must consider the nature and extent of that duty. In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 (*Baker*), Madam Justice L'Heureux-Dubé stated the following at paras. 21-22:

> **21** The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: Knight, at pp. 682-83; Cardinal, supra, at p. 654; Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170, per Sopinka J.
>
> **22** Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[36] Madam Justice L'Heureux-Dubé went on to enumerate a number of non-exhaustive factors that a Court should address in determining the content and extent

of a duty of fairness in a particular situation. The factors outlined may be paraphrased as follows:

> (a) the nature of the decision being made and the process followed in making it;
>
> (b) the nature of the statutory scheme and the terms of the statute pursuant to which the administrative body operates;
>
> (c) the importance of the decision to the individual or individuals affected;
>
> (d) the legitimate expectations of the persons challenging the decision; and
>
> (e) the choices of procedure made by the agency itself particularly when the statute leaves the decision-maker the ability to chose its own processes.

[37] The critical question is whether the procedures followed by the tribunal respected the duty of fairness in that the person affected has had an opportunity to present its case fairly and fully and that decisions affecting its interests were made using a fair, impartial and open process appropriate to the context of the decision.

[38] While the factors expressly set out in *Baker* are non-exhaustive they do provide an analytical framework for considering the content of the duty of fairness. I therefore propose to review each of the factors insofar as they relate to the facts of this proceeding.

(a) Nature of the decision being made

[39] In this case the nature of the decision made was purely advisory. The terms of reference under which the Study Commission operated mandated it to, *inter alia*, 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 other jurisdictions. This decision is more analogous to that described in *Coopers and Lybrand*, than it is to the decision under review in *Martineau.* Given the advisory nature of the decision and the express mandate of the Study Commission to review research material prepared by others it

seems to me that it would be inappropriate to saddle the Study Commission with an obligation to act in a judicial or quasi-judicial manner in carrying out its functions.

(b) Statutory terms pursuant to which the Study Commission operates

[40] In this case the Study Commission is governed by the provisions of the *Public Inquiry Act* and in particular is restricted in the exercise of its powers by s. 20 of the *Public Inquiry Act*. Section 20(3) of the *Public Inquiry Act* places significant limitations on the proceedings of a Study Commission. Those limitations are consistent with a legislative intention that Study Commissions should not be expected to act with a high degree of formal procedural fairness.

(c) Importance of the decision to the individual

[41] In this case I think it is necessary to distinguish between the importance of the decision to the petitioner's commercial interests and the importance of the decision to its reputation and status. In my view, there is nothing in the Study Commission Report which a fair-minded person would construe as an attack or criticism of the petitioner's reputation as a corporate citizen or its right to carry on business and market its products. It is important to remember that the Commissioner, despite many submissions made to him, recommended the continued use of conducted energy weapons and commented favourably on the advantages of using such weapons in circumstances in which the police would otherwise have been required to use other means of force.

[42] I think that courts must proceed with very great caution when assessing complaints made by the manufacturer of a product about findings made by public inquiries with respect to the characteristics and potential risks of that product. The essential mandate of the Study Commission was to conduct a risk benefit analysis with respect to a particular product. This is a mandate which inherently invokes an exercise of judgment as opposed to a determination of rights or status.

[43] Moreover, in this case there is little evidence that the Study Commission Report had any serious impact on the petitioner's business. I have not overlooked

the evidence of Mr. Thomas P. Smith, Chairman of the Board of the petitioner. In his affidavit, Mr. Smith deposes to the fact that the petitioner has had to deal with the issues raised in the Study Commission Report in "virtually every meeting" he has had with potential customers and customers since the Study Commission Report was released. However, I find his evidence to be of little assistance. It consists essentially of vague, self-serving statements totally lacking in specificity.

[44] The closest that the petitioner comes to leading evidence of any actual impact on its sales is in para. 21 of Mr. Smith's affidavit. However, Mr. Smith's statements of belief in para. 21 are not admissible evidence that there has been any actual loss of sales for the petitioner as a result of the Study Commission Report. I therefore am unable to conclude that the Study Commission Report has had any serious impact on the petitioner's reputational or commercial interests.

(d) Legitimate expectations of the petitioner

[45] The petitioner has placed considerable reliance on it having a legitimate expectation that it would be treated fairly by the Study Commission. It relies heavily in this regard on the statements made by the Commissioner and by Commission counsel with respect to the manner in which the Study Commission would be conducted. For example, the petitioner quotes the Commissioner's opening statement to the effect that he was determined to make the inquiry's activities and process as public and transparent and as accessible as possible. The petitioner relies on the decision of Justice Teitelbaum in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417, with respect to the importance of a commission adhering to its own stated procedural standards in the conduct of its hearings. These considerations support a finding that the Commission did owe a duty to act with substantial fairness to the petitioner.

[46] These considerations apply also to the final factor set out in *Baker*, that is the choice of procedures made by the agency itself.

DID THE STUDY COMMISSION DISCHARGE ITS DUTY TO ACT FAIRLY?

[47] I can find nothing in the record which would suggest that the Commissioner carried out the inquiry, the public forums and his investigation in a manner which was in any way inconsistent with his publicly stated intentions. In particular it would appear that the Commissioner gave the petitioner every opportunity to bring forward all information, scientific studies and other material that the petitioner considered to be relevant and of importance to the Commissioner's mandate. In giving the petitioner an opportunity to be heard, the Commissioner was of course circumscribed by the statutory provisions of ss. 20 and 21 of the *Public Inquiry Act*. In particular the Commissioner was precluded by s. 20(3) of the *Public Inquiry Act* from conducting the inquiry in a judicial or quasi-judicial manner.

[48] Based on the evidence and submissions that I have heard, I have concluded that the Study Commission fully discharged any duty of fairness which it owed to the petitioner with respect to the conduct of its mandate and with respect to its decision making process. The petitioner was invited to and did participate fully in the proceedings before the Commissioner. The petitioner was invited to provide the Study Commission with any research or literature it considered relevant to the Study Commission's terms of reference. It took advantage of that opportunity by providing a vast amount of material to the Study Commission. It identified additional experts from whom it recommended that the Study Commission receive presentations. The Study Commission arranged for those experts to make presentations. Finally, representatives of the petitioner made extensive presentations to the Study Commission.

[49] The petitioner submitted that, despite the above, it was deprived of procedural fairness because it was not given advance notice of the Study Commission Report and an opportunity to respond to its findings with respect to the safety of conducted energy weapons prior to its publication.

[50] In my view, there is no merit in this submission. The obligation to provide notice to a person prior to the release of a commission report arises in respect of

reports in which findings of fault or misconduct are made against an individual or corporation. In this case, the petitioner submitted that the findings of the Study Commission were analogous to the findings made in a number of cases relied on in argument. There are two fundamental flaws in this argument. Firstly, as I have already found, the Study Commission Report is in no way analogous to the findings made by the commissions considered in those cases. Secondly, the submission is legally flawed in that it seeks to analogize from those cases to the circumstances of this case. The Study Commission was expressly precluded from making any findings of fault or misconduct. The petitioner's entire submission with respect to the necessity of being given notice is premised on the Study Commission Report constituting a finding of fault or misconduct on its part.

[51] If I had been of the view that the Study Commission report did, in fact, constitute a finding of fault or misconduct on the part of the petitioner, that in of itself would have compelled me to grant the remedy of *certiorari*. This is because such a finding would clearly have been beyond the jurisdiction of the Study Commission. However, in this case I made no such finding and indeed made a contrary finding. The analogy that the petitioner therefore seeks to draw to the cases in which such findings have been made is simply inapt to the facts and circumstances of this case.

WAS THE DECISION OF THE COMMISSIONER PATENTLY UNREASONABLE?

[52] The petitioner's alternative argument before me was that the Study Commission Report's conclusion that conducted energy weapons have the capacity to cause death was patently unreasonable and unsupported by any credible evidence. I find no merit in this submission. It is quite clear to me that there were presentations made to the Commissioner by medical experts and others to the effect that such weapons can cause serious harm and even death in exceptional circumstances. The Commissioner carefully reviewed these presentations and the literature on this subject in Part 9 of the Study Commission Report. Even assuming that it would be appropriate for this Court to review the merits of the Study Commission Report on the basis of reasonableness as opposed to procedural

fairness, I can see nothing in the report on which I could base a conclusion that the Commissioner's findings were unreasonable.

DISPOSITION

[53] For the foregoing reasons, I have concluded that there is no basis for judicial review of the Study Commission Report and the petition is accordingly dismissed.

COSTS

[54] I have concluded that there are no exceptional circumstances in this proceeding which would justify a departure from the usual practice of this Court in declining to grant costs for or against a Commission or the Attorney General.

[55] Accordingly, the petition is dismissed without costs.

"Sewell J."

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The Honourable Mr. Justice Sewell