Prosecution Service

Media Statement

September 11, 2018 18-20

Special Prosecutor concludes involvement regarding Robert Dziekanski

Victoria – The BC Prosecution Service (BCPS) announced today that Special Prosecutor Richard Peck QC has concluded his involvement in the prosecutions related to the in-custody death of Robert Dziekanski.

Mr. Peck was appointed on June 18, 2010 by then Assistant Deputy Attorney General Robert W. G. Gillen, QC to determine whether, in view of the evidence heard at the Braidwood Inquiry and the findings and recommendations of Commissioner Braidwood, it was appropriate to reassess a decision of the BCPS not to prosecute any of the officers involved in the incident. Mr. Peck was also asked to review other conduct of the officers in connection with the incident.

On June 29, 2010, the BCPS announced that Mr. Peck recommended that the initial charge assessment should be revisited, noting that the Braidwood Commission Report into the death referred to factual material that was not available at the time of the initial charge assessment decision.

On May 6, 2011 the BCPS announced that Mr. Peck had recommended that each of the four officers should be charged with perjury in relation to the evidence that each officer gave at the Braidwood Inquiry, and that the charges should proceed by way of Direct Indictment. No other charges were approved.

Mr. Peck indicated that a further clear statement would be released at the conclusion of the proceedings against the officers. On July 12, 2018 those proceedings concluded when the sentence appeal of Kwesi Millington was formally abandoned.

Mr. Peck's clear statement relating to the in-custody death of Robert Dziekanski is attached to this statement.

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Clear Statement 18-20

Charge Approval and Final Report Relating to the In-Custody Death of Robert Dziekanski

In accordance with Crown policy in cases such as this, I am issuing a "Clear Statement" respecting my work as Special Prosecutor in this matter.

On June 18, 2010, I was appointed by the Ministry of the Attorney General to act as a Special Prosecutor. In my role as Special Prosecutor, I was asked to conduct an independent charge approval assessment with respect to allegations of misconduct involving four members of the Royal Canadian Mounted Police ("RCMP") as they pertained to the in-custody death of Robert Dziekanski on October 14, 2007. My mandate included *consideration of any potential criminal charges, including, but not limited to, offences arising from the physical altercation with Mr. Dziekanski, the subsequent RCMP investigation into his death and the testimony of the four officers before the Thomas R. Braidwood, Q.C. Commission of Inquiry ("Inquiry")*. The following sets out the background and context of my assessment and a brief summary of my conclusions.

Background

On October 14, 2007, Robert Dziekanski travelled to Vancouver, Canada to meet his mother. After spending many confusing and frustrating hours at the Vancouver International Airport, Mr. Dziekanski became upset and started to act out. His behaviour led several people to contact the Richmond RCMP and four officers responded to the call: Cst. Kwesi Millington ("Millington"), Cst. Bill Bentley ("Bentley"), Cst. Gerry Rundel ("Rundel"), and Cpl. Benjamin Robinson ("Robinson" and collectively the "Four Officers"). Upon their arrival, the Four Officers made first contact with Mr. Dziekanski and the situation quickly deteriorated. Within a short time, Mr. Dziekanski was struck with a Conducted Energy Weapon (also known as a "Taser") multiple times and lay dead or dying on the floor. A bystander captured some of the events on video (the "Pritchard Video").

As a result of an investigation into Mr. Dziekanski's death, a report was forwarded to the Crown for its consideration. A senior member of the Crown's office was assigned to review the matter. On November 21, 2008, Crown counsel concluded that no charges would be laid against any of the officers in relation to Mr. Dziekanski's death.

In the interim, in February of 2008, the government of British Columbia called a public inquiry into the circumstances of Mr. Dziekanski's death. Commissioner Braidwood carried out the Inquiry in two phases.

On January 19, 2009, Phase Two of the Inquiry commenced. This included evidentiary hearings in Vancouver over 61 days at which 91 witnesses testified under oath or affirmation. During this phase, the Four Officers testified under oath on the following days:

- Cst. Rundel – February 23-25, 2009
- Cst. Bentley – February 25-26, 2009

- Cst. Millington – March 2-4, 2009
- Cpl. Robinson – March 23-25, 2009

During their testimony, each officer was cross-examined at length about the events surrounding Mr. Dziekanski's death. The Four Officers were confronted with inconsistencies in their police notes, statements, and testimony before the Commission, and each officer was taken through the Pritchard Video in detail. The Four Officers defended their actions, notes, and statements during their testimony.

On May 20, 2010, Commissioner Braidwood released a report summarizing the evidence he heard during Phase Two of the Inquiry. The report enumerated Commissioner Braidwood's findings of fact and conclusions respecting, among other things, the testimony of the Four Officers and the events of October 14, 2007.

On June 10, 2010, as noted above, I was appointed special prosecutor.

The Charge Approval Process

The Charge Assessment Guidelines of the British Columbia Prosecution Service establish the criteria to be applied by Crown counsel (or a Special Prosecutor) in determining whether or not a prosecution should proceed. This consists of a two-part test. Crown counsel must:

> *fairly, independently, and objectively examine the available evidence in order to determine:*
>
> 1. *whether there is a substantial likelihood of conviction; and, if so,*
>
> 2. *whether a prosecution is required in the public interest.*

The guidelines provide a further explanation as to the first part of the test as follows:

> *A substantial likelihood of conviction exists if Crown Counsel is satisfied there is a strong and solid case of substance to present to the court.*

It should also be noted that when assessing the substantial likelihood of conviction test, Crown Counsel must have regard to the likely admissibility and objective reliability of evidence as well as the likelihood of success of any viable defences.

Charge approval in this matter was initially conducted by a senior member of the Crown office. The specific offences under consideration were manslaughter, assault and assault with a weapon. On November 21, 2008, he concluded that charges should not be laid because, on the

available evidence, there was not a "substantial likelihood of conviction". He further concluded that a prosecution would likely not prove to be in the public interest.

At the time of my assessment, I agreed that the "substantial likelihood" test could not be met in relation to those offences. This was especially so in light of the fact that each of the Four Officers had been subpoenaed and compelled to testify at the Inquiry on the same subject matter. I also considered the time which had elapsed since the incident at the airport.

Given the breadth of my mandate, I was required to consider a range of other potential offences in the *Criminal Code* (the "*Code*") in addition to those initially considered by senior crown. I divided these potential offences into three categories: (1) offences arising directly from the officers' conduct immediately before and after Mr. Dziekanski's death; (2) offences arising from the officers' conduct in relation to the subsequent investigation by members of the Integrated Homicide Investigative Team ("IHIT"); and (3) offences arising from the officers' testimony at the Inquiry.

In category one, "Death-related Offences," I considered [in addition to manslaughter, assault and assault with a weapon] whether any of the Four Officers could be held criminally liable for a failure to provide Mr. Dziekanski with the necessaries of life, pursuant to s. 215 of the *Code*. In category two, "Investigation-Related Offences," I considered whether, in preparing their notes or in providing their statements to members of IHIT, any of the officers had committed the offences of mischief, obstruction of justice or breach of trust.

I determined that there was no substantial likelihood of conviction in relation to any of the proposed offences in categories one or two. I reached this conclusion after determining either that the evidence did not satisfy the elements of the particular offence, or that even where the elements were met, the case was not sufficiently strong to meet the charge approval standard. In carrying out this task, I had to consider viable *Charter* and evidentiary defences.

With respect to *Charter* and evidentiary concerns, I specifically considered the impact of the Four Officers having testified at the Inquiry under compulsion, and potential issues that could arise in prosecuting them for offences which were the subject matter of their compelled testimony. I will briefly discuss these problems.

Under Canadian law, a person, if subpoenaed, must testify. This is referred to as testimonial compulsion. At the same time, the law protects the person from having such testimony used, either directly or indirectly, against that person at the person's subsequent criminal trial (except in the case of a perjury charge). From the Crown's perspective, this raised the practical problem of having to demonstrate that the evidence at the criminal trial was not derived, in any way, from the compelled testimony. Failing such clear demonstration, the prosecution's evidence may be excluded. As the Supreme Court of Canada has stated "the criminal trial… may possibly be irreparably compromised… because much of the evidence given at the Inquiry may prove to be inadmissible testimony or derivative evidence…" In short, the fact that the Four Officers were

compelled to testify at the inquiry presented a significant obstacle to the prosecution. To proceed with a prosecution of these offences, the Crown would be, to use a well-known expression, trying "to put the genie back in the bottle."

A further and somewhat related problem flowed from the proceedings at the Inquiry. Commissioner Braidwood's report, which included a summary of the evidence and findings of misconduct on the part of the Four Officers, was released on May 20, 2010 and widely disseminated through the media. This raised the further concern that the likelihood of a fair trial (on charges relating to conduct which predated the Inquiry) may be prejudiced - another obstacle standing in the way of a successful prosecution for category one and two offences.

I also considered the pre-charge delay and any potential abuse of process argument that could be raised by the defence in these cases.

These various concerns were of particular relevance to whether there was a substantial likelihood of conviction with respect to charges of obstruction of justice and breach of trust.

In relation to category three, "Testimony-related Offences," I considered whether any of the Four Officers had committed a criminal offence in the course of their testimony at the Inquiry. In particular, I focused on the offences of perjury and obstruction of justice. After a comprehensive review of the officers' testimony, and taking into account all of the other independent evidence, I concluded that there was sufficient evidence to support a charge of perjury against each of the Four Officers.

Despite the possible *Charter* applications that could be available to each of the accused, I was of the view that there was a substantial likelihood of conviction in relation to these offences and that it would be in the public interest to proceed with such charges. Indeed, by proceeding solely with perjury charges, the *Charter* issues related to officers' compelled testimony could be minimized if not avoided altogether. As it turned out, all the *Charter* and evidentiary challenges brought by the defence in the course of the perjury trials were dismissed.

In approving charges only in respect of the Four Officers' conduct at the Inquiry, I was and remain mindful of the tragic consequences of that fateful confrontation at the Vancouver International Airport. I am also cognizant that my decision may not have been popular with some, but I could not be swayed by emotion or public opinion. As a Special Prosecutor, I had a duty to uphold the principles of fairness, and the constitutional imperative of prosecutorial independence.

The Trial and Appeal Timeline

Charges of perjury were laid against the Four Officers in May 2011. The Four Officers were tried separately from 2013 to 2015. The trials were conducted separately as part of my discretion as a Special Prosecutor taking into account several factors.

Millington and Robinson were ultimately convicted of perjury and sentenced to 30 months and 24 months less a day imprisonment respectively. Their conviction appeals to the Court of Appeal for British Columbia and the Supreme Court of Canada were dismissed. Bentley and Rundel were acquitted at trial and Bentley's acquittal was upheld on appeal. The matter then came to an end on July 12, 2018, when Millington abandoned his appeal from sentence. This Clear Statement concludes my involvement in this matter as Special Prosecutor.

Dated this 4th day of September, 2018.

Richard C.C. Peck, Q.C.