IN THE MATTER OF THE Thomas R. Braidwood, Q.C., Hearing and Study Commission to inquire into and report on the death of Mr. Robert Dziekanski at the Vancouver International Airport on October 14, 2007 under the *Public Inquiry Act*, S.B.C. 2007, c.9

FINAL SUBMISSIONS OF CORPORAL BENJAMIN ROBINSON

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FINAL SUBMISSIONS OF CPL. ROBINSON

Introduction

1. The evidence clearly demonstrates that Corporal Robinson's conduct was professional, lawful and consistent with his training and how a similarly situated officer would have conducted him - or herself.

2. Moreover, there is no evidence justifying or supporting the suggestion that Corporal Robinson fabricated or evidence or statements, or that he engaged in a collaborative effort designed to conceal the events involving Mr. Dziekanski.

3. These submissions begin by setting out the relevant law, followed by an analysis of Corporal Robinson's involvement at each phase of the incident. Following this, there will be a discussion regarding Corporal Robinson's notes, his statements to the Integrated Homicide Team (IHIT) and the evidence he provided at the Inquiry. Finally, there will be argument addressing those issues raised in the Notice of Misconduct not previously commented on.

Legal Principals

Commissions

4. The Commissioner issued a particularized Notice of Misconduct to Corporal Robinson pursuant to s. 11(2) of the *Public Inquiry Act*, S.B.C. 2007, c.9.

5. The Supreme Court of Canada, in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, provided clear guidelines on the use of a Commission of Inquiry's power to find misconduct. The following comments of Cory J. are important:

- A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. (para. 34)

- Misconduct is "improper or unprofessional behaviour" or "bad management". (para. 40)

- What then can commissioners include in their reports? The primary role, indeed the *raison d'etre*, of an inquiry investigating a matter is to make findings of fact. In order to do so, the commissioner may have to assess and make findings as to the credibility of witnesses. From the findings of fact, the commissioner may draw appropriate conclusions as to whether there has been misconduct and who appears to be responsible for it. However, the conclusions of a commissioner should not duplicate the wording of the *Criminal Code* defining a specific offence. If this were done it could be taken that a commissioner was finding a person guilty of a crime. This might well indicate that the commission was, in reality, a criminal investigation carried out under the guise of a commission of inquiry. Similarly, commissioners should endeavour to avoid making evaluations of their findings of fact in terms that are the same as those used by courts to express findings of civil liability. As well, efforts should be made to avoid language that is so equivocal that it appears to be a finding of civil or criminal liability. Despite these words of caution, however, commissioners should not be expected to perform linguistic contortions to avoid language that might conceivably be interpreted as importing a legal finding. (para. 52)

- Findings of misconduct should not be the principal focus a public inquiry. Rather, they should be made only in those circumstances where they are required to carry out the mandate of the inquiry. The public inquiry was never intended to be used as a means of finding criminal or civil liability. No matter how carefully the inquiry hearings are conducted, they cannot provide the evidentiary or procedural safeguards which prevail at a trial. Indeed, the very relaxation of the evidentiary rules which is so common to inquiries makes it readily apparent that findings of criminal or civil liability not only should not be made, they cannot be made. (para. 53)

- Perhaps commissions of inquiry should preface their reports with the notice that the findings of fact and conclusions they contain cannot be taken as findings of criminal or civil liability. A commissioner could emphasize that the rules of evidence and the procedure adopted at the inquiry are very different from those of the courts. Therefore, findings of fact reached in an inquiry may not necessarily be the same as those which would be reached in a court. This may help ensure that the public understands what the findings of a commissioner are – and what they are not. (para. 54)

6. In *F.H. v. MacDougall,* 2008 SCC 53, at paras. 40, 46, Rothstein J. said that "[t]here is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all-important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. The evidence must be "sufficiently clear, convincing, and cogent" to satisfy the balance of probabilities test".

Assessment of the Conduct of the Police

7. While the Commission cannot make any findings that might equate to civil or criminal liability, it cannot ignore the special legal status of police officers. Police officers have been given special protections since the *Constables Protection Act 1750* (U.K.), 24 Geo. II, c. 44, applied by McKenzie J. in *Davidson v. Vancouver* (1980), 4 B.C.L.R. (2d) 68.

8. Today, the assessment of police conduct must take place in the context of the protections and obligations provided and imposed by ss. 25-43 of the *Criminal Code*, and the policy of the police force in question: *Doern v. Phillips Estate* (1994), 2 B.C.L.R. (3d) 349 (S.C.), aff'd (1997), 43 B.C.L.R. (3d) 53 (C.A.); *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88; *Allarie v. Victoria*, 1993 CanLII 1261 (B.C.S.C); *Anderson v. Smith*, 2000 BCSC 1194; *Berntt v. Vancouver (City)*, 1999 BCCA 345.

9. The task of a trial judge is to be a doppelganger for the officer and to go with him or her from the time the events began to unfold, bearing in mind his training, experience and the circumstances on the day. (*Berntt* at paras. 24-25)

10. Police officers are not merely performing an act permitted by the *Code* (and other statutes); they are engaged in the performance of a duty imposed upon

them for the protection of the public which in many circumstances involves risk of injury: *Priestman .v Colangelo* (1959), 30 C.R. 209 (S.C.C.), at 210 – 212.

11. Those duties are derived from the common law but are now statutorily defined in s. 35(2) of the *Police Act,* R.S.B.C. 1996, c. 367, and in s. 18 of the *Royal Canadian Mounted Police Act,* R.S.C. 1985, c. R-10. Section 18(1) provides:

> It is the duty of members who are peace officers, subject to the orders of the Commissioner
>
> > (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and offences, against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may lawfully be taken into custody.

12. Unlike security guards, police officers cannot stand back to "observe and report":

> A policeman's job is not an easy one. However it is his lot to have to deal with persons who, fortified by drink, obstruct and provoke them while they are carrying out their duties. Mr. Justice Dickson in *Foster v. Pawsey* said, "Some allowance must be made for an officer in an exigencies of the moment misjudging the degree of force necessary to restrain a prisoner." The same applies to the use of force in making an arrest or preventing an escape. Like the driver of a vehicle facing a sudden emergency, the policeman "cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course" [citations omitted].
>
> *Breen v. Saunders* (1986), 39 C.C.L.T. 273 (N.B.Q.B.), cited with approval in *Berntt v. Vancouver* (1997), 28 B.C.L.R. (3d) 203 (S.C.) at p. 217.

13. The police need not measure the force to be used with exactitude. In *Levesque v. Sadbury Regional Police Force,* [1992] O.J. No. 512 at 4 (Gen. Div.) (QL), Bernstein J noted:

> It is both unreasonable and unrealistic to impose an obligation on the police to employ only the least amount of force which might successfully achieve their objective. To do so would result in unnecessary danger to themselves and others. They are justified and exempt from liability in these situations if they use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves.

14. In *Schell v. Truba and Hunter* (1990), 89 Sask R. 137 at 139 (C.A.), Wakeling J.A. (in dissent) said:

> By the nature of their work, police are often called upon to make reactive decisions when adrenaline is running high. These decisions ought not to be viewed by the courts as though they were the product of unhurried deliberation after a full debate, such as the process which leads to a trial judgment. (Cited with approval in *Schoenau v. Brymer* (1990), 89 Sask. R. 130 at 132 (Q.B.))

15. The Court must not "take an armchair view of the conduct" of the officer, but instead should "consider the officer's conduct given the exigencies of the circumstances as they presented themselves to him at the time". "Hindsight reflection" is not an appropriate method of resolving a case: *Goulet v. British Columbia,* [1987] B.C.J. No. 2778 (Co. Ct.) (QL) at p. 7.

16. To conclude the overview of the applicable framework, care must be taken not to substitute what another person might have done in the circumstances. Rather, the analysis is whether the officer, based on his or her training and experience, was acting reasonably.

PHASE ONE – CORPORAL ROBINSON'S ARRIVAL AND APPROACH

Opening

17. Corporal Robinson's arrival at YVR and his approach to Mr. Dziekanski did not breach RCMP policy nor was it inconsistent with his training. Moreover, there is no reliable evidence supporting the notion that Corporal Robinson committed an error by having three officers approach Mr. Dziekanski or by allowing a constable with lesser seniority make the initial contact with Mr. Dziekanski.

Analysis

18. On October 14, 2007, Corporal Robinson was the duty supervisor for the YVR detachment. On that date he responded to a police radio broadcast indicating that there was an intoxicated male throwing luggage. Corporal Robinson and Constables Bentley, Rundel and Millington responded. While en route Corporal Robinson received radio updates indicating that the male was now breaking glass.

19. The updated information is noteworthy. It signaled to the officers that the male's behavior (later identified as Mr. Dziekanski) was escalating and that it was now being alleged that there was a crime in progress. All of this information not only formed part of the officers' risk assessment, but it dictated that the officers attend as quickly as possible. **[Cpl. Gillis May 12/09 T. pp. 54 - 55]**.

20. On arrival at YVR the officers entered the meet–and-greet area and moved towards the railing. Corporal Robinson was the last officer to arrive at the railing. The officers did not run; rather, they walked in a purposeful fashion towards the railing **[YVR and Pritchard videos].** While moving through the meet-and-greet area the officers did not stop and formulate a plan, nor, did they stop and speak with any witness. At some point prior to crossing the railing Corporal Robinson

heard someone shout "*Policja, policja*". Corporal Robinson did not know who shouted these words.

21. Corporal Gillis opined that it would have been inappropriate for the officers to stop, formulate a plan and speak to witnesses before some degree of control or calm could be re-established. **[May 11/09 T. pp. 61-62 ll. 12- 47, 1-3]**. Accordingly, the officers were acting appropriately in going directly to Mr. Dziekanski.

22. In his direct evidence, Dr. Webster was critical of the officers for not stopping and making a plan. Yet, during cross examination, he acknowledged that formulating a plan does not mean stopping and having a huddle, rather, he meant that the officers individually work the situation through in their heads. He also testified that part of the planning would include locating the subject, isolating the subject, and interacting with the subject with the intention of learning about the problem **[May 12/09 p. 84 ll. 1-47, p. 85 ll. 1- 13].** It is submitted that this is exactly what the officers did: they located Mr. Dziekanski, they attempted to isolate him and they attempted to interact with him.

23. Upon reaching the railing, Corporal Robinson saw someone whom he believed to be a YVR employee point and say something to the effect of, "He only speaks Russian. He's freaking out." **[March 23/09 T. p. 13 ll. 11-19].** This observation formed part of Corporal Robinson's risk assessment.

24. Just before crossing over the railing, Corporal Robinson heard an officer who he believed to be Constable Bentley state "How's it going, bud? How you doing, sir?" **[March 23/09 T. p. 15 ll. 6-13].**

25. Corporal Robinson then went over the railing. During this stage he did not hear what the officers said to Mr. Dziekanski as his attention was focused on crossing over the railing. Once over the railing Corporal Robinson made his way

to the secure doors and it was here that he first saw Mr. Dziekanski. **[March 23/09 T. p. 14 39-47].** Cpl. Robinson also noticed damaged computer equipment on the ground.

26. There has been much criticism regarding the approach by the officers. Specifically, it has been suggested that too many officers approached Mr. Dziekanski, Corporal Robinson should have been the lead officer, and the method of approach "rushing" and "vaulting" the railing was inappropriate. Corporal Gillis's and Sergeant Fawcett's evidence do not support these criticisms.

27. Dr. Webster was originally critical of the police officers' approach and their initial contact with Mr. Dziekanski as it was his view that their conduct escalated the situation. Yet in cross examination, Dr. Webster acknowledged that the Pritchard video showed no observable change in Mr. Dziekanski's physical state and, of significance, is Dr. Webster saw nothing supporting the assumption that the officers' approach caused Mr. Dziekanski emotional disturbance or upset. In fact, Dr. Webster acknowledged that when the officers were first in front of Mr. Dziekanski he seemed to calm down. Dr. Webster testimony is as follows:

Q All right. Hands down at his sides and welcoming him (sic), and he remained in that position when the four officers were standing in front and engaged in the dialogue of passport. Do you agree with that?
A Yes, I do.
Q So, in essence, up until that point, the officers approach had no impact on Mr. Dziekanski's behaviour. We agree on that, Doctor?
A No.
Q On his physical behaviour, there was no change from the --
A I'm not sure what the impact vaulting over the barrier had, and I'm not sure what state of mind he was in now. I'm sure his state of mind was somewhat agitated as a result of the altercation

he had with the civilian previously, and I'm sure his state of mind was somewhat agitated by the airport security people, who were less than effective, strutting back in forth in front of the doors like little banty roosters, that caused him to say, I think, if I remember correctly, "So you're not going to let me out of here? So you're going to keep me in here? How long are you going to keep me here?" Now we have four policemen vaulting over this hand railing to get to him. I'm not sure just exactly what he was experiencing. However, I am encouraged because he kept his hands at his sides and he seemed to calm down.

Q Doctor, the physical observations, setting aside your assumption vis-à-vis his emotional state --

A Right.

Q -- his physical response, the vaulting over the counter did not change Mr. Dziekanski's physical presentation in any way, shape or form. You agree with that?

A I do.

Q And until those four officers -- and even when those four officers were in front of him, right around the time of asking for the passport, did not change Mr. Dziekanski's physical presentation in any way, shape or form. Do you agree with that?

A Before they opened their mouths you're talking about?

Q Well, no. In fact, Constable Bentley had opened his mouth by saying words to the effect of, "Hi bud," or, "How's it going, bud," or words to that effect.

A Right.

Q Do you recall that on the Pritchard video?

A I do. I do.

Q And that happened before the ask for the passport.

A Right, okay. And –

Q So --

A -- up until that point, I agree with you. His behaviour had not changed. He was standing with his hands at his sides and seemed to be willing to engage the contact officer.

Q And there was no evidence of physical change in his behaviour.

A Correct.

39 Q In fact, Doctor, up until this point, there is
40 nothing that you can see on the video to suggest
41 that their approach has caused emotional
42 disturbance or aggravated Mr. Dziekanski's
43 emotional state up until this point; that is,
44 asking for the passport. You agree with that?
45 A I do.
[May 12/09 T. p.82 (ll. 24-47) p. 83 (1-47)]

28. Interestingly, Mr. Meltzer also felt that the officers' contact with Mr. Dziekanski appeared to have a calming effect. In fact, Mr. Meltzer testified that Mr. Dziekanski seemed to go from a "9" to a 6 on a scale of 10.

29. Corporal Gillis's and Sergeant Fawcett's testimony is also noteworthy. In essence they testified that they saw nothing wrong with the officers' approach. Sergeant Fawcett testified as follows:

23 Q All right. You've seen the officers go over the
24 railing in this case, in the video you've looked
25 at?
26 A I have, Mr. Commissioner.
27 Q And when they went over the railing and their
28 method of approach of Mr. Dziekanski, you watched
29 that?
30 A I have, yes.
31 Q And did you see anything in their approach to
32 suggest that they were approaching him an
33 intimidating or threatening manner?
34 A I didn't see them approach in any way that I would
35 deem unusual, Mr. Commissioner, no.
[April 20/09 T. p. 52 ll. 23-35]

30. Corporal Gillis testified to similar effect, and went further and explained why it would have been ill-advised for the officers to turn and walk around the railing. Corporal Gillis testified:

34 Q Now, this process of lifting himself over the
35 railing, you've seen that on the video.

A That's correct, Mr. Commissioner.
Q Is there anything inappropriate with respect to that action in the circumstances?
A No, it allows him to maintain contact with the person that that complaint is generated about. It's a direct route for him to get there. The configuration of that area in International Arrivals would require him to turn and go back some distance If he was to not take that path but was to walk back to the very end of the railing, walk back around and then come up the walkway. So as a result, it's appropriate for him to go over that and it's completely reasonable, it gives him a direct line of approach and allows him to maintain observation of the person. And again it's more information coming to him now instead of getting information from a dispatcher over the radio without a visual aspect, without getting information from people now that he's in the environment, he's now starting to through his own senses pick up information, which is again going to be assessed and allow him to make decisions as to how he's going to respond.
Q It's been suggested that in these circumstances why not go all the way around and approach in the normal fashion, as opposed to lifting himself over the railing. What can you say about doing that, based upon the training that's given?
A Well, it's certainly an option, Mr. Commissioner, to do that, but it would put him further away from the person. Potentially, depending on where members of the public are at, creates more distance and places the public potentially between him and the party that he's concerned with. By not taking the most direct route, if there's other persons that enter into the area from, for example, CBSA employees or partner agencies that work at the airport, or direct employees and staff at the airport, cleaners, security personnel, construction or maintenance people that might be in the International terminal area, that all those people could come into that area and place him farther away from intervening to either stop those people from being at risk themselves, or from engaging in that interaction with that person. So it's appropriate for them to continue in a

direct path, in this case there's a small railing, to vault the railing and carry on through the -- into the door, rather than turn around and walk back in the opposite direction.
any training or guidelines with respect to observations of a subject in the circumstances?
A Well, Mr. Commissioner, by keeping the person under observation, they're able to gather more information, they're able to assess the person's actions, they're able to watch the person's hands, see whether or not they approach or go out near other equipment or property. It just allows them to carry on with their risk assessment as opposed to trying to walk backwards and maintain that observation, because as human beings we don't move very efficiently walking backwards. So to work efficiently, to turn their back on the person and walk the length of the railing, come back to the other side and then walk back up the walkway again, would allow a period of time where they lose observation, can lose contact with the person, or more importantly lose contact with what they may be assessing or picking up with their hands.

[May 11/09 T. p. 58 ll. 34-47, p. 59 ll.1-47, p. 60 ll. 1-12].

31. Corporal Gillis concluded that the number of officers was completely reasonable. **[May 11/09 T. p.62 ll. 38-42].** Sergeant Fawcett gave testimony that having a greater number of officers can induce a suspect to simply comply. **[April 20/09 p. 53 ll. 33-47, p. 54 ll. 1-5].** Accordingly, it would be misguided to criticize the officers for the number of members present; from a policy perspective, to do so would cause significant hesitation by responding officers.

32. With respect to Corporal Robinson, who assumed a monitoring function and let the junior officers initiate contact with Mr. Dziekanski, all of the experts, with the exception of Dr. Webster, saw nothing wrong with his approach. Sergeant Fawcett testified:

Now, assuming as the officers make their way to that railing and about to go over, do you see any

difficulty with the more junior officers, that is, not Corporal Robinson, having the initial contact with Mr. Dziekanski?
A No, Mr. Commissioner, generally speaking, as the senior person on scene, I'd want to have the widest view of what was going on.
Q Can you expand on what you mean, the "widest view"?
A I'd want to have, I guess, the most information coming into me. The more I become involved in the actual investigation, the narrower -- the narrower my view is going to become, both literally and figuratively. I'm no longer looking at the whole scene, if you will. I end up developing, for lack of a better term, radar lock on the subject that I'm now interacting with and no longer able to see the -- the whole scene, if you will.

[April 20/09 p. 51 ll. 37-47, p. 52 ll. 1-8].

33. Corporal Gillis similarly testified:

Q Anything that you see as an issue as the officers as a group of four approaching ion that particular fashion as depicted on the video?
A No, it's consistent with a reasonable response by the officers who were at the scene. Three officers approaching, the NCO holding back just a little bit just to allow the other officers to approach and see what occurs.
Q The NCO holding back, to whom do you refer, sir?
A Sorry, Corporal Robinson.
Q All right. A corporal holding back as Corporal Robinson was in this particular case leading up to the point in which he becomes involved, do you see any difficulty with that?
A No. That's appropriate with his role as a patrol supervisor is to let the constables undertake the steps in relation to resolving the situation, to stand back, and assess and assist if required.
Q You said it's appropriate. Why is it appropriate for the patrol NCO to stand back as Corporal Robinson was?
A A number of reasons, Mr. Commissioner. One is that if the event ends up de-escalating very

quickly and becomes resolved, it allows him not to be one of the key officers directly involved in the event, tying himself up so that he's able to go to other events, as a supervisor. It allows him by standing back to observe and potentially re-deploy some of those officers, either at that scene or if there's other areas where they need to be, or just simply to try and -- for a degree of calm to the situation have diminished policing resources in the area once the situation is under control. And ultimately it allows him to be in a good position to assess the actions of his officers and as a more senior officer, if he sees a need for himself to step in and take action, then he's in a position to do that.

Q Can you comment or assist us in terms of which is preferable: would it have been more preferable for Corporal Robinson to lead and make the first contact, or more preferable for Corporal Robinson to hang back as he was depicted in the Pritchard video?

A Well, as he knows the officers that he's working with, Mr. Commissioner, as their supervisor, so he understands their skill sets, their strengths, it's appropriate for him under those circumstances to let the officers proceed and undertake the management of the call and stay back as a supervisor and do just that, supervise the call.

[May 11/09 p. 100 ll. 28 – 47, p. 101 ll.1-21].

34. In contrast, Dr. Webster was of the view that, because the CAPRA model suggests training and experience as factors to be considered, that Corporal Robinson (the most senior officer), should have been the person to initially contact Mr. Dziekanski. **[May 12/09 p. 86 1- 47, p. 87 ll. 1-47, p. ll. 1-33].**

35. We respectfully submit that Dr. Webster's opinion should be discounted. First, he does not have the experience (operational policing) or training that Corporal Gillis and Sergeant Fawcett have. Second, he relies on CAPRA for the proposition that training and experience are requisite factors to consider. It is

noteworthy that CAPRA is simply a model of factors to be considered not a model of "must do". Third, Dr. Webster failed to recognize Corporal Robinson's knowledge regarding Constables Millington's, Rundel's and Bentley's experience. In essence, Corporal Robinson was the best person to determine if the officers were sufficiently experienced to interact with Mr. Dziekanski. Lastly, Dr. Webster's only reason for his opining that Corporal Robinson should have initiated contact with Mr. Dziekanski, is that Corporal Robinson was the most experienced officer present. If one were to apply this reasoning to policing scenarios the implausible result would be that only the most experienced officers would be allowed to interact with distraught subjects. For the reasons described, no fault can be found with Corporal Robinson's decision to allow the other officers to interact with Mr. Dziekanski.

Summary

36. In summary, there is no convincing evidence showing that Corporal Robinson's arrival, approach, or his decision to interact with Mr. Dziekanski prior to speaking to witnesses or formulating a plan violated RCMP policy or was inconsistent with training. Nor, is there any evidence demonstrating that Corporal Robinson failed to conduct an appropriate assessment. In fact, there is clear, cogent evidence from Corporal Gillis and Sergeant Fawcett indicating that Corporal Robinson's arrival, approach, assessment and decision not to stop was reasonable and appropriate.

PHASE TWO – CONTACT TO CEW DEPLOYMENT

Opening

37. Corporal Robinson's actions during this phase were consistent with RCMP policy, his training and the criminal law. In this regard, Corporal Robinson was in the lawful execution of his duty, he had reasonable grounds to believe that he

was about to be assaulted and reasonable grounds to believe that the use of the CEW was necessary and not excessive.

ANALYSIS

Lawful Execution of his Duties

38. During this phase Corporal Robinson was in the lawful execution of his duty. He had a duty (amongst other things) to preserve the peace, prevent crime, apprehend criminals, and to protect life and property. These duties are set out in the common law and in section 18 of the *RCMP Act*.

39. The above duties demanded that Cpl. Robinson respond to the call from YVR, investigate the complaint of damage to property, and ensure that Mr. Dziekanski did not commit further offences; further, if necessary, apprehend Mr. Dziekanski.

Controlling Access to the Luggage

40. Corporal Robinson was acting appropriately and reasonably when he prevented Mr. Dziekanski from accessing the luggage. Further, the methods used to achieve this were measured, minimal and appropriate.

41. With respect to the above, once at the secure doors Corporal Robinson assumed the position of observation because the other officers were already dealing with Mr. Dziekanski. Almost immediately after assuming this position, and before he had a chance to observe the area, he saw Mr. Dziekanski reach down towards some luggage. Corporal Robinson's assessment was that this was a potentially dangerous situation. Accordingly, Corporal Robinson stepped forward put his hand out and told Mr. Dziekanski, "No. Stop." Corporal Robinson then motioned with his hand for Mr. Dziekanski to calm down, followed up with a motion for Mr. Dziekanski to put his hands on the end of the counter.

42. Corporal Robinson's concern regarding the luggage was reasonable. The luggage had not been checked by the police and therefore it was unknown if the luggage contained anything that could be used as a weapon. As such and for safety reasons, given the information the police heard at this juncture, it was entirely reasonable for Corporal Robinson to have concerns regarding the luggage.

43. The actions taken to control Mr. Dziekanski's access to the luggage were minimal, and appropriate. Corporal Robinson did not grab push or even shout at Mr. Dziekanski. Corporal Robinson simply responded by stepping forward and stating "No. Stop." This statement was made with his hand out. The tone and voice was appropriate. Corporal Gillis, Sergeant Fawcett and Mr. Nickel all testified that the actions and concern over access to the luggage was reasonable. **[Gillis- May 11/09 T. p. 102 ll. 35 – 47 p. 103 ll. 3 – 12, Fawcett p. 54 ll. 6- 47, p. 55. ll. 1- 7, Nickel pg. 18 – 24].**

Reasonable Grounds that he was About to be Assaulted

44. Mr. Dziekanski responded to Corporal Robinson by throwing his hands up, stepping away, turning and arming himself with a stapler. Corporal Robinson responded by repositioning himself; when he was doing this he noticed something clenched in Mr. Dziekanski's fist. His other hand was also clenched into a fist. At this stage Mr. Dziekanski raised his voice and Corporal Robinson stepped backwards. Mr. Dziekanski then raised his voice again. Corporal Robinson drew his defensive baton but he did not expand it. He noted that Mr. Dziekanski was making motions with the item in his hand. Corporal Robinson then saw staples coming out of the item in Mr. Dziekanski's hand and it was at this point that Corporal Robinson realized that the item was a stapler.

45. Despite Corporal Robinson having his defensive baton prominently displayed, Mr. Dziekanski took a step forward. At this point Corporal Robinson believed that Mr. Dziekanski was going to hit him with the stapler, accordingly, and for the purposes of protecting himself and controlling Mr. Dziekanski, Corporal Robinson instructed Constable Millington to deploy the CEW. Almost simultaneously with this instruction Constable Millington discharged the CEW. **[March 23/09 T. p. 23 ll. 1 – 47, March 24/09 T. p. 22 l. 29, p. 23 ll. 31 – 36].**

46. There are several facts that support Corporal Robinson's belief that Mr. Dziekanski was about to strike him. These facts are: Corporal Robinson saw evidence of Mr. Dziekanski's destructive behavior (the damaged computer equipment); Mr. Dziekanski did not have to grab the stapler; Mr. Dziekanski did not have to brandish the stapler; the escalation in Mr. Dziekanski's voice; Mr. Dziekanski's visual fixation on Corporal Robinson; and the fact that despite Corporal Robinson displaying his defensive baton, Mr. Dziekanski moved towards Corporal Robinson while brandishing the stapler.

47. Not only did the other officers testify that they believed that Mr. Dziekanski was becoming assultive, but an analysis of their physical response as shown on the Pritchard video strongly supports their contemporaneous conclusion that Corporal Robinson was about to be assaulted. In this regard, all of the officers simultaneously repositioned themselves. Second, both Constable Bentley and Corporal Robinson drew their defensive batons at approximately the same time, and finally, without hearing the direction given by Corporal Robinson, Constable Millington deployed the CEW.

The Civilian Witnesses

48. The evidence given by Ms. Ashrafinia, Mr. Meltzer, Mr. Ginter, Mr. Sambrook, Ms. Arora, and Mr. Rudek also supports Corporal Robinson's perspective that he was about to be hit by Mr. Dziekanski.

49. In her October 17th 2007 statement, Ms. Ashrafina told investigators that she saw Mr. Dziekanski waving a stapler at the police. In her evidence she confirmed that she told the police what she had seen. **[Feb. 5/09 T. p.6 ll. 25 – 32].**

50. Mr. Meltzer testified as follows:

Q And so you don't see an actual lunge, but you do see a movement towards --
A Kind of. I can show you.
Q -- the officers.
A I remember seeing a stapler going up in the air and kind of like this (demonstrating).
Q Okay. Can you describe that for us?
A Yeah.
Q A movement forwards with the stapler up?
A Yeah, that's what I said.
Q Yeah.
A It wasn't -- I don't feel like it was a lunge, but it was -- the stapler got pulled out, opened up like this, and kind of -- and then --
Q And you're holding your right arm above your head?
A Yes. Kind of like he opened -- opened it up midway and then leaned.
Q And it was immediately after that that he was tasered?

[Feb. 4, /09 T. p.7 ll.4-22].

51. In his testimony Mr. Sambrook confirmed that Mr. Dziekanski was aggressive, waving a small black item and that he leaned or moved towards the officers. He testified:

Q Thank you. And the next thing you write in the third paragraph is the RCMP confronted the male who continued to yell in a foreign language and act aggressively towards the RCMP. Do you see that?
A Yes.
Q That was your recollection then?

A Yes.
Q And I suggest it's your recollection now.
A My recollection, video aside, going back on it -- in the next sentence, you know, it says he was waving his arms, yelling. In reading this and trying to recall this, I would suggest that that is what I meant by acting aggressively.
Q Okay. What you're saying to the Commissioner is that the aggressive action was waving his arms and yelling. Is that a fair statement by me?
A Yes, I wrote this, and I said I recalled him -- something -- some sort of communication going on and moving about and...
Q Your recollection, I'm going to suggest to you, was that -- your recollection then and your recollection now was that he was acting aggressively towards the RCMP. Would you agree with my statement?
A I would say he wasn't following commands, moved over towards the counter. I mentioned he reached for something and was moving it around and not following commands.
Q Yes. And you viewed that as acting aggressively towards the RCMP. Would you agree with me?
A I'm trying to think of how I would refer to the word "aggressively". I've explained the motions that he was making and not following directions.
Q Well, you've used the word -- the words "and act aggressively towards the RCMP."
A Yes.
Q You meant those words; is that correct?
A It's -- yeah, it's the word I used when I wrote this, yes.
Q And you still mean those words. In other words, that is your recollection today, that he was acting aggressively.
A It was that he was not following the commands --
Q Thank you.
A -- and he reached for -- yeah.
Q You continue in the third paragraph noting that he backed up -- sorry.

He was waving his arms, yelling and as he backed up towards the IRL counter, he grabbed something from his belt or the counter.

Have I read that correctly?
A Yes.
Q And that was your recollection then?
A Yes.
Q It is your recollection today.
A Yes.
Q Thank you. You continue and you say:

He began to wave the small black item in his right hand back and forth at the officers.

And what -- and that -- and what you recall, video aside, I'm going to suggest to you, is that he was waving something over his head.
A I recall --
Q That he was --
A I recall seeing glimpses of something black in his hand and him moving around.
Q And the hand being above shoulder level as you've just shown us as you sit there.
A For a brief moment, yes, 'cause that's the only way I would have been able to see it.
Q Thank you. So if it's above shoulder level, it's at head level. Would you agree with me?
A It would be up towards the shoulder, yeah.
Q In order for you to be able to see it, it had to be above shoulder level, around the cheek level?
A No, I could see from just the shoulder blades up, and I can't remember if he was rotating or where exactly it was, but I saw something quickly in his hand.
Q And this occurred before the tasering?
A Yes.
Q And that was your recollection then, correct?
A Yes.
Q And it's your recollection now.
A Yes.
Q And you continue in that paragraph:

The officers continued to ask him to calm down as they circled him.

Correct?
A Correct.
Q And that's your recollection then?
A Yes.

Q And it's your recollection now?
A Yes.
Q And then you say:

The male started to lean or move forward towards them.

You wrote that at the time?
A Yes.
Q October 15, correct?
A Yes.
Q It was your recollection then?
A Yes.
Q And it is your recollection now.
A Yes.
Q In other words, you adopt that statement as your evidence today.
A I recall him having something in his hand, and when I say "started to lean or move forward", yeah, I do -- that's my recollection, that there was a lean or a movement.
Q And it was at that point that he was tasered.
A That's my recollection.

[April 15/09 T. p.90 ll.23-47, p.91 ll.1-47, p.92 ll. 1 – 47, p. 93 ll.1 – 3].

52. Mr. Ginter had a similar perspective. He testified:

Q I'm placing before you, Mr. Ginter, a copy of your statement. It spans pages 402 of 1605 -- 1602 I should say, to 408 of 1602. You can see that in the bottom right-hand corner. This is a statement that you gave to Officer Mangan on October 14 at 4:36 in the morning, correct?
A Correct.
Q Some three hours after the incident, correct?
A Correct.
Q And the first point that I -- in the statement that I wish to take you to is page 406. And I'm looking at the first third of the statement up to the point "towards the members". Do you want to just read that first third of the statement to yourself? Not aloud, but just to yourself. Have you done so?
A Yes.

29 Q Is it your recollection that after grabbing the
30 item, he, amongst other things, moved towards the
31 members?
32 A That was my recollection.
[Feb.18/09 T. p. 20 ll. 12 – 32]

53. Mr. Rudek also testified that Mr. Dziekanski was waving the stapler while holding it in his right hand and that he was pushing staples out of the device **[Feb 9/09 T. pp 56, 57, 71].**

54. Mr. Arora also saw Mr. Dziekanski grab the stapler and swing it towards the police.

The Police Officers

55. All of the officers testified Mr. Dziekanski moved towards the police with the stapler in his hand.

56. Constable Millington testified:

6 I was behind him. I don't know what he knocked off.
7 He then picked up a stapler, which was on that
8 same desk and he turned towards us and it was in
9 the open position. He held it up with one hand,
10 fist with the other, and started to approach us
11 with hands up, and I deployed the Taser at that
12 point.
13 Q I wanted to give you an opportunity to tell us
14 everything that happened prior to the first Taser
[March 2/09 T.p.19 ll. 7-12].

57. Constable Bentley testified:

22 I remember Mr. Dziekanski looking side-to-side on
23 the desk, turning his head left to right. I got
24 the feeling then that he was looking for some sort

of object to use against us. I remember seeing a stapler on top of the desk. I remember him grabbing that with his right hand and turning around with it, swinging it out in front of him. At that particular time myself and Corporal Robinson were the closest members to Dziekanski. We were very close, actually, to the point that I thought I was going to be hit with the stapler. I tactically repositioned back, and while I was doing that I grabbed my defensive baton and deployed it. I remember once my defensive baton was deployed, I looked at the peripheral of my right eye and I saw that Constable Millington had deployed the Taser and I heard a -- like a loud sound, the sound of the CEW being deployed and striking Mr. Dziekanski.

[Feb. 25/09 T. p. 68 ll. 22-40].

58. Constable Rundel testified:

to his left with his back to the counter. I recall seeing the stapler in his hand, in his right hand come across his upper shoulder/face area, where he immediately had a firm grasp of it, and brought his elbow down towards his chest with his fist grasping the stapler up in his upper chest area. At the same time his left -- left arm came up into a fist, a firm fist with his elbow locked, and also brought it up to his upper chest area. His -- I believe his left foot came forward at that time. And again this is all happening split-second, happening very fast. It was at during -- during that time that Mr. Dziekanski had moved away and positioned himself with the stapler.

[Feb. 23/09 T. p. 28 ll. 28- 39].

59. Corporal Robinson testified:

And at that point when I was moving around, Mr. Dziekanski had transitioned around quickly and I noted something in his hand. And at that point

it was -- whatever he had in his hand was clenched like in a fist, and he had another fist down. And at this point I had taken a step back and because he had raised his voice, then raised it louder again. So he raised it, raised his voice again, and I had taken a step back. And at this point he made motions with his fist, because a couple of staples had come out, and that's when I noticed it was a stapler.
And I had taken a step back and he walked, or he took a step forward with the clenched fist, and he took a step forward and at that point I had drawn my defensive baton. I pulled it out but I did not extend it. And so I had my defensive baton.
Constable Millington was off to my right. The other members had transitioned off to my left, and in what order, I don't know. So when he did that, or when he grabbed the stapler, the members pulled off this way around me and Constable Millington was to my right. I had my defensive baton out and when he took the step forward, that's when I gave Constable Millington the command to deploy the Taser. And at that point the Taser was deployed.

[March 23/09 T. p. 24 ll. 10-37].

60. The evidence shows that Mr. Dziekanski was armed with a weapon and was aggressively waving it at the police and moving forward. In the circumstances, it was reasonable for Cpl. Robinson to believe that he was about to be assaulted.

The Experts

61. Corporal Gillis, Sergeant Fawcett and Mr. Nickel confirmed the reasonableness of Corporal Robinson's belief. Specifically, if Mr. Dziekanski moved towards Corporal Robinson while brandishing the stapler then it was reasonable for Corporal Robinson to perceive that he was about to be assaulted.

62. Corporal Gillis's testimony is succinct on the point.

Q Now, while being cross-examined by Mr. Kosteckyj, at this particular point in answering Mr. Kosteckyj's questions, Corporal Robinson responded, "I thought he was going to hit me with the stapler." From your perspective as a training officer, assuming in that assumed facts that the item in the hand is in fact a stapler, is that a reasonably held belief by Corporal Robinson, "I thought he was going to hit me with the stapler"?
A Yes, based on the way it's been described with a stapler and a clenched fist, the person advancing towards the officer, the other fist being clenched, the way this event's unfolded, the initial information that was available to the officers, Mr. Commissioner, is part of the risk assessment as to why they were originally called to this area to deal with the situation, it would be reasonable for an officer to believe that a person closing on them with clenched fists, with an item in that fist, in one of those fists, that they would reasonably be hit with that item.
Q All right. Now, continuing on it says:
[May 11/09 T. p. 107 ll. 43 – 47, p. 108 ll. 1-16].

63. Mr. Nickel also testified on this point:

Q All right. And it would also be reasonable for Corporal Robinson to be concerned if he perceived Mr. Dziekanski moving towards him, yes?
A Yes. Yeah. He would become the target.
Q And at that point there are options available to Corporal Robinson to deal with this, yes?
A Yes.
Q And it would be reasonable for Corporal Robinson, assuming he has properly assessed Mr. Dziekanski coming towards him, that Mr. Dziekanski was doing that to assault?
A Okay. Repeat that again, please.
Q Well, assume Corporal Robinson perceived Mr. Dziekanski coming towards him with the stapler raised.

A Sure. Okay.
Q Stapler out.
A Sure.
Q It would be reasonable for Corporal Robinson to assume that that was being done for the purpose of assaulting Corporal Robinson.
A It may be, yeah. Yeah, we can't see it on the video, but depending on what Corporal Robinson saw and how he's describing it, yeah.
Q All right. And you agree that an officer in this circumstance, assuming Corporal Robinson reasonably perceives that Mr. Dziekanski is about to assault him, the officer does not have to wait to actually be assaulted before taking action? You agree with that?
A No. If he's satisfied that this is what's coming, the best defensive tactic is to -- is to have the first move, make the first move.
Q And the first move would be a move that, step one, is to control the individual -- let me rephrase it -- stop the threat, yes?
A Yeah. Neutralize the threat, yes.
Q And what's important when we're talking use of force

[T. p. 105 ll. 39 – 47, p. 106 ll. 1-30].

Summary

64. The evidence clearly establishes that it was reasonable for Corporal Robinson to believe that Mr. Dziekanski was about to strike him. Moreover, the evidence relating to Mr. Dziekanski's emotional state and his behavior (damaging the computer, smashing a small table against the glass, searching the desk area, and raising his fist at Mr. Meltzer) makes it more likely that he was angry, aggressive and acting out physically.

The Use of the CEW was not Excessive

65. In determining if the force used was excessive, it must be remembered that officers are not expected to measure with exactitude the precise amount of force required. Moreover, the question is not simply whether another person might

have handled the matter differently. (***Berntt v. Vancouver, (City), supra***): as per Corporal Gillis, the use of the CEW was consistent with RCMP policy and training. Moreover, it was used in an environment where other force options were not reasonable. Accordingly, the use of the CEW was not excessive.

Analysis

66. Sergeant Fawcett and Corporal Gillis gave evidence that the use of the CEW was not excessive. As part of their opinion, consideration was given to the advantages of deploying the CEW in the probe mode. Specifically, it gives officers the ability (at a safe distance) to achieve instantaneous control with minimal injury to the subject.

67. The experts also confirmed that the availability of other force options does not necessarily make the use of the CEW unreasonable. With respect to the other force options not being reasonable, the experts opined: OC spray would not have offered immediate control and there was a risk of contaminating YVR and the officers; the defensive baton would not have provided immediate control and there was a risk of injury; and several officers tackling Mr. Dziekanski would not have provided immediate control, and indeed would introduce a real risk of officer and subject injury.

Summary

68. One must be mindful that police officers are not required to use the least amount of force necessary to carry our their duty. ***Levesque* v. *Sudbury Regional Police, supra.*** Moreover, police are not required to measure with exactitude the amount of force required. ***R* v. *Botrell*** (1981), 60 C.C.C. (2) 211 (B.C.C.A) at p. 218. Additionally, when determining if the force used was reasonable a judge must not take into account what the injured person was

intending to do, nor, the actual consequences of the force used; no matter how tragic. ***Berntt* v. *Vancouver (City), supra.***

69. Corporal Robinson gave instructions for the CEW to be deployed because he reasonably believed that he was going to be hit with the weapon that Mr. Dziekanski was holding. The instruction was given with the belief that the CEW would provide instantaneous control with minimal injury, and with the understanding that other force options were not reasonable. For the reasons cited the use of the CEW was reasonable and not excessive.

PHASE THREE – AFTER FIRST CEW DEPLOYMENT UNTIL HANDCUFFED

Opening

70. Corporal Robinson's actions during this phase were reasonable and without fault. His direction for the second CEW deployment was given because he felt that the first deployment was not completely effective. The experts support his opinion on this point.

71. Corporal Robinson's handcuffing technique was, according to Sergeant Fawcett, without fault. Finally, and with respect to the possibility that Corporal Robinson directed a third deployment, it must be noted that the direction was heard when the officers were trying to handcuff a struggling and resisting Mr. Dziekanski, accordingly, this direction is without fault.

The Second CEW Deployment

72. Corporal Robinson directed that the CEW be deployed immediately after he recognized that the original deployment was not effective. Corporal Robinson's opinion was based on his observations, experience and training. With respect to his observations, Corporal Robinson noted that Mr. Dziekanski did not

immediately drop the stapler nor did he immediately go to ground after being struck with the probe. Releasing items and falling to the ground are events that Corporal Robinson has previously witnessed during other probe deployments and these are events that he has been trained to expect. **[March 23/09 T. p. 85 ll. 28-42, Corporal Gillis May 11/09 T. p. 112 ll. 3-23].** Sergeant Fawcett supported Corporal Robinson's view in regards to the first TASER deployment not being completely effective. **[April 20/09 T. p. 61 ll. 29-39].**

73. Sergeant Fawcett also testified that, even though the partial effects of the TASER may have created a window for another technique, Corporal Robinson's direction for the TASER to be deployed a second time was not unreasonable. In this regard, Sergeant Fawcett testified:

Q Now, after feeling that it was not being effective, I assume Corporal Robinson instructed Constable Millington with words to "Hit him again," meaning run some more current through the Taser. Can you comment on the reasonableness of such a command, assuming these facts?
A Again, the officer would have to determine that they couldn't otherwise -- there wasn't a window of opportunity, if you will, being created even by partial effects to control the subject, and that a second application may be necessary. If they were concluding that set of facts, then, yes, they could certainly believe that a second application was necessary.
Q Given Mr. Dziekanski's response to the Taser deployment, did you see a window where an officer could safely, without the risk of injury, go in and assume control of Mr. Dziekanski?
A There may have been an opportunity on the side that he appeared to be having the most impact on to perhaps step in and deliver a thrust kick, or something along those natures to hope to unbalance the person, knock them to the ground. But I certainly wouldn't want anybody approaching from the side on which he was brandishing the stapler.
Q Despite that window for this other technique, does that rule out whether or not a Taser was

20 reasonable and saying "Hit him again"?
21 A No, Mr. Commissioner, it does not. It's just
22 another tactical option that an officer might
23 consider.

[April 20/09 T. p. 61 ll. 40 – 47, p. 62 ll. 1 – 23]

The Third CEW Direction

74. Eventually Mr. Dziekanski fell to the ground. At this stage Corporal Robinson approached Mr. Dziekanski from behind and with the assistance of the other officers he attempted to handcuff him. Corporal Robinson perceived that Mr. Dziekanski was very strong; that he was trying to push himself off of the ground and that he was resisting the officers' efforts to control him **[March 23/09 T. p. 41 ll. 38-47]**. Corporal Robinson's perceptions are confirmed by the Pritchard video.

75. During examination by Commission Counsel, and in reference to the third TASER deployment, Corporal Robinson acknowledged that he does not recall if he was the person heard saying, "Hit him again." nor, does he deny that it could have been him making the statement. Regardless, the use of the TASER in the circumstances is precisely the type of scenario where its use is contemplated **[Sergeant Fawcett April 20/09 T. p. 63 ll. 1-18].**

The Handcuffing Technique

76. Corporal Robinson testified that he placed his knee across the shoulder blades of Mr. Dziekanski in order to prevent him from pushing up. He also testified that he has used this technique in excess of fifty times and that he was trained not to put his knee on a subject's neck **[March 23/09 T.p.86 ll. 10 – 43].**

77. During cross-examination Corporal Robinson was challenged regarding the exact placement of his knee. He was adamant that it was not on Mr.

Dziekanski's neck. In support of Corporal Robinson's evidence is the complete absence of any forensic evidence showing that force was applied to the back of Mr. Dziekanski's neck.

78. Corporal Gillis viewed the video depicting the handcuffing procedure. On this issue Corporal Gillis testified:

> 7 Q Now, applying the video, your observations of the
> 8 video, I have the same question with respect to
> 9 both of the officers with respect to your
> 10 observations of the video.
> 11 A From the limited perspective the video offers, I
> 12 can find no fault with the actions of the
> 13 officers. It's consistent with training and what
> 14 I would expect of a reasonably trained and
> 15 similarly trained police officer.
> **[May11/09 T. p. 118 ll. 7-15].**

79. Even if Corporal Robinson's knee happened to come into contact with the back of Mr. Dziekanski's neck, the video strongly supports the notion that, if this occurred, it was brief and accidental. With respect to this possibility, Corporal Gillis testified that in a dynamic and chaotic environment it is not uncommon for an officer to accidentally place his/her knee on the back of a subject's neck and that when this happens the officer should continue with their efforts to handcuff and once the subject is handcuffed to get off as quickly as possible **[May11/09 T. p. 114 ll. 21-39].** Accordingly, if there is a finding that Corporal Robinson's knee came into contact with Mr. Dziekanski's neck it was accidental and he immediately removed his knee upon the handcuffs being secured.

PHASE FOUR – POST-HANDCUFFING

Opening

80. It argued that Corporal Robinson's conduct during this phase is entirely consistent with what would be expected of a similarly situated police officer. Specifically, he repositioned Mr. Dziekanski when he realized that Mr. Dziekanski was unconscious, he ensured that Code 3 medical help was enroute, he monitored Mr. Dziekanski's pulse and breathing, he briefed the responders, and, after initial reluctance, he removed the handcuffs from Mr. Dziekanski. In all of the circumstances, and recognizing that police officers are not medically trained, his actions were responsible and appropriate.

Analysis

81. Shortly after Mr. Dziekanski was handcuffed Corporal Robinson detected what sounded like snoring coming from Mr. Dziekanski. This caused Corporal Robinson to believe that Mr. Dziekanski was unconscious. In response, Corporal Robinson moved Mr. Dziekanski to a modified recovery position and when he did this he noted that the snoring sound stopped. This response was appropriate because it is a reasonable to adjust an unconscious subject until there is a change in the sound of the subject's breathing **[Maciak T. p. 50 ll17-26].** Corporal Robinson's actions in this regard show that he was properly assessing and responding to the situation.

82. A significant amount of evidence was heard regarding Mr. Dziekanski's positioning. On the one hand, there is the evidence from Richmond Fire Department witnesses indicating that Mr. Dziekanski was flat on his stomach with his head turned sideways. However, the video evidence and a photograph in exhibit 46 clearly shows that Mr. Dziekanski was partially on his side. Additional

evidence is the testimony of Mr. Maciak who recalled what Corporal Robinson stated to him:

> We kind of were walking and talking, I guess. At that point he told us that this gentleman was being aggressive, throwing stuff. I don't recall word for word exactly what he said, but he said, "We had to taser him and we laid him on his side and we're monitoring his vitals."
> **[T. p. 26 ll.1-7].**

83. Mr. Dziekanski's position can be inferred from Mr. Enchelmaier's evidence. Mr. Enchelmaier, who is an experienced first aid responder, indicated that he was satisfied with Mr. Dziekanski's airway. The inference is Corporal Robinson had repositioned Mr. Dziekanski's so that the airway was properly extended and that Mr. Enchelmaier was satisfied with this. Mr. Enchelmaier also testified Mr. Dziekanski's original positioning changed dramatically in that Mr. Dziekanski had been positioned partially on his side in the recovery position **[Feb 17/09 T. p. 42 ll. 18-21, p. 37 ll. 22-34].**

84. It was Corporal Robinson's view that the ear turning blue indicated that there was either a breathing issue or that the ear was bruising. Given that his monitoring told him that Mr. Dziekanski was breathing he assumed that the ear was turning blue as a result of Mr. Dziekanski striking it on the ground. Mr. Maciak testified regarding this issue;

> Q An individual turning blue, first of all, it's a gradual process, from what I understand. You would agree with that?
> A Yes.
> Q And it starts in the periphery of an individual's body and moves centrally. You'd agree with that?
> A Yes, as it gets worse.
> Q And the starting of turning blue, it's not uncommon to first notice the progression in one's ears? That's one of the periphery areas?
> A That would be one of the first places, that and

the nail beds are usually a good indication.
Q And the turning blue does not necessarily mean that the individual is in cardiac arrest, does it?
A No.
Q As well, sir, an extremity or a part of the body such as an ear, I think you'd agree, if it received a blow such as a strike from a fall to the ground, that's a reason why an ear could turn blue, the bruising process?
A Yeah. If there was damage to any veins or -- yeah, any veins inside causing blood to leak out, yeah, that causes bruising.

[T. p. 46 ll. 43-47, p. 47 ll. 1-18].

85. The above evidence and the evidence of Mr. Dziekanski having fallen to the ground shows that Corporal Robinson's belief that the ear turning blue but was the result of an injury was reasonable.

86. While waiting for emergency personnel Corporal Robinson checked Mr. Dziekanski's pulse and breathing. He checked the breathing by touch, listen and feel. Some of these actions were captured by the Pritchard video. It is submitted that this method is entirely appropriate for a non-medically trained police officer. Of note is Mr. Maciak's testimony:

Q An individual that's tasked with monitoring an unconscious patient, I'm going to suggest to you, sir, you would find it an acceptable practice for that individual to be kneeling down beside the patient?
A Yes.
Q I'm going to suggest to you, sir, that you would find it an acceptable practice for that individual to place his hand on the subject's chest or side area to feel for breath?
A That's one way of assessing respirations, yes.
Q You would find it as well acceptable while they're doing that to lean down towards the patient and listen for the sound of breath?
A Yes, and look for chest movement.
Q So touching, looking and listening?

43 A Look, listen, feel is how we describe it, yes.

[T. p. 50 ll. 27-43].

87. Corporal Robinson also checked Mr. Dziekanski's pulse. He testified that he checked the carotid pulse and that he did this with a glove off. This is confirmed by the Pritchard video which shows Corporal Robinson with his glove off and reaching towards the carotid area of Mr. Dziekanski. Corporal Robinson also testified that he checked the pulse on more than one occasion but he does not know how many times he did this. He stated that he was checking to see if there was a pulse and he was unable to give details regarding rate. Mr. Enchelmaier who checked Mr. Dziekanski's pulse on at least three occasions. **[Feb. 17/09 p. 36 ll. 40-45].**

88. It is argued that the monitoring of Mr. Dziekanski's pulse was reasonable and appropriate given the circumstances. The evidence clearly establishes that Corporal Robinson and Mr. Enchelmaier checked Mr. Dziekanski's pulse. Corporal Robinson's failure to record pulse rate or strength was not unreasonable. In this regard, it would be unrealistic to expect an operational police officer to be trained to the level of noting and documenting pulse rate and change. With respect to the frequency of checking the pulse and monitoring breathing, firefighter Duranleau, a qualified responder, testified that you would do these checks every five minutes. The timing of the events and Mr. Enchlemaier's evidence makes it clear that the monitoring of Mr. Dziekanski exceeded this expectation.

89. With respect to Corporal Robinson's reluctance to remove the handcuffs, Corporal Gillis, Sergeant Fawcett and Mr. Maciak testified that they have seen patients become violent upon regaining consciousness. Corporal Robinson also testified that he has experienced individuals violently regaining consciousness. Corporal Robinson's reluctance to remove the handcuffs was based on his experience and his knowledge regarding Mr. Dziekanski's damage to property,

and his actions against the police, as well as Mr. Dziekanski's resistance to being handcuffed. It should be noted that when it was made clear to Corporal Robinson that the handcuffs needed to be removed "now" that he immediately started to remove the handcuffs. On this issue Mr. Maciak testified:

> Q Yes.
> A Okay. I did a quick assessment of his airway and breathing. I couldn't be sure if he was breathing in that position so I asked Cpl. Robinson if he could remove the handcuffs because we need to get this gentleman onto his back. At that point Cpl. Robinson told me that the male had been quite aggressive, and I looked at him and asked a second time. I said, "We really need to get this guy onto his back," and he proceeded to take the cuffs off.
> **[T. p. 29 ll. 3-12].**

90. Evidence was received suggesting that Corporal Robinson failed to continuously monitor Mr. Dziekanski. Corporal Robinson denied this allegation and he testified that he continuously monitored Mr. Dziekanski until the arrival of emergency medical personnel. In support of his testimony, the entirety of the Pritchard video shows Corporal Robinson with Mr. Dziekanski. Further a photograph in exhibit 46 shows Corporal Robinson kneeling at Mr. Dziekanski's side and monitoring. In addition, Mr. Enchelmaier testified that to the best of his recollection Corporal Robinson stayed with Mr. Dziekanski until Fire arrived **[Feb 17/09 T. p. 41 ll. 21-39].**

Summary

91. The evidence related to this phase clearly demonstrates that Corporal Robinson conducted himself in a manner consistent with his training and a similarly situated police officer. Specifically, Corporal Robinson placed Mr. Dziekanski in the appropriate recovery position, he continuously monitored Mr.

Dziekanski, he satisfied himself that a Code 3 ambulance had been called, and he briefed medical responders.

ALLEGATIONS OF MISCONDUCT

Failure to provide proper supervision or direction

92. It is submitted at all times Corporal Robinson provided strong supervision and leadership. Specifically, he heard the radio dispatch and he responded in a supervisory capacity. He maintained this role until he saw a need to intervene (controlling access to the luggage). When he intervened he directed Constable Millington to deploy the CEW on two and likely three occasions. He instructed officers to obtain witness statements, seize evidence (the Pritchard video), and to photograph the scene. He also informed his supervisors about the events, he saw to it that IHIT was notified and he ensured that the integrity of the scene was maintained until IHIT arrived.

NOTES AND STATEMENTS TO IHIT

The Notes

93. With respect to Corporal Robinson's notes there are no entries outlining his actions with Mr. Dziekanski. As such, it cannot be substantiated that he made misleading entries regarding his interaction with Mr. Dziekanski. It is conceded that the notes are not "excellent" as directed by S/Sgt. Wright.

The Statements

94. Corporal Robinson's statements had some errors. He candidly acknowledged the errors and stated that he did his best in the circumstances. More specifically, he was asked to recount complex events that happened in a matter of seconds. In addition, the first statement was taken when he had

worked all night and without the benefit of reflection. The errors are not material. Of importance is the fact that a number of witnesses as well as the Pritchard video corroborates Corporal Robinson's accounting of what happened.

95. As for the suggestion that Corporal Robinson deliberately tried to mislead the investigators, we offer these comments. First, there is no evidence that this was his intention. Second, why would he feel compelled to mislead the investigators? He had done nothing wrong. Third, he ordered the Pritchard video seized. In other words, Corporal Robinson had every reason to believe that the entire events were captured on video and if he had wanted to engage in a cover up he certainly would not have turned the video over to IHIT. Fourth, Corporal Robinson knew that there were eye witnesses to the events. A fabrication would have been discovered. Fifth, the events occurred in an environment where one could reasonable expect there to be security video. Again, why would he fabricate if this type of evidence was likely available? One must be careful not to confuse errors with fabrication.

TESTIMONY BEFORE THE COMMISSION

96. It has been suggested that Corporal Robinson's evidence not only misrepresented Mr. Dziekanski's behavior and the events at the YVR, but that he placed self serving interpretations on his statements and notes.

97. Corporal Robinson's evidence was forthright and candid. It was internally consistent and consistent with the numerous witnesses and the Pritchard video. There is no evidence to suggest that his evidence was designed to achieve anything but set out how he recalled the events.

98. An example of Corporal Robinson's truthfulness arises in his testimony that he gave the first, second and likely the third CEW deployment commands. He gave this testimony even though no previous evidence had been received

regarding the first and second commands. Such acknowledgement cannot be seen as self serving evidence. Likewise with the third command, acknowledging that he likely made this command cannot be interpreted as giving self serving evidence.

CONSLUSION

99. The death of Mr. Dziekanski is sad and tragic. Despite this, care must be taken to ensure that sympathy does not hijack critical analysis.

100. A critical analysis of the evidence shows that Mr. Dziekanski transitioned in a split second from interacting with the officers to behaving in a manner that caused Corporal Robinson to honestly and reasonably believe that he was about to be assaulted. Further critical analysis shows that the CEW was honestly and legitimately felt to be the best device to bring a quick and safe resolution to the event.

101. The handcuffing of Mr. Dziekanski involved a chaotic and intense struggle. Despite this Corporal Robinson did the best that he could to get Mr. Dziekanski handcuffed in a safe and expeditious fashion.

102. Shortly after the handcuffs were on it was recognized that Mr. Dziekanski was in medical distress. Critical analysis shows that Corporal Robinson immediately transitioned from trying to arrest Mr. Dziekanski to treating him as a patient. In this regard, Corporal Robinson repositioned Mr. Dziekanski, and he carefully monitored and stood by Mr. Dziekanski until more qualified medical responders arrived. Sadly, Mr. Dziekanski passed away.

103. Since the passing of Mr. Dziekanski there has been an extensive review of all of the information. This review has included a critical analysis by three use of force experts, and they all agree that Corporal Robinson's actions were without

fault. In addition, a critical analysis of the reliable evidence also confirms that Corporal Robinson's actions were with without fault. As such, it is respectfully submitted that the findings of misconduct against Corporal Robinson would be unwarranted and without foundation.

"R. Harris"

Reginald P. Harris
Counsel for Corporal Robinson

Dated at Vancouver, BC, this 29th day of September, 2009