

IN THE MATTER OF THE THOMAS R. BRAIDWOOD, QC,
HEARING AND STUDY COMMISSION OF INQUIRY
INTO THE DEATH OF ROBERT DZIEKANSKI
AT THE VANCOUVER INTERNATIONAL AIRPORT, ON OCTOBER 14, 2007,
UNDER THE *PUBLIC INQUIRY ACT*, SBC 2007, C. 9.

SUBMISSIONS OF CONSTABLE GERRY RUNDEL

These Submissions are made on behalf of Constable Rundel, a Participant in the hearing and study portion of the Braidwood Commission of Inquiry, which commenced January 19, 2009, at Vancouver, British Columbia.

The purpose of the Hearing and Study Commission is to provide Mr. Dziekanski's family, and the public, with a complete record of the circumstances of, and relating to, Mr. Dziekanski's death, and to make recommendations.

The *Terms of Reference* of the Hearing and Study Commission are to make a complete report of the events and circumstances of, and relating to, Mr. Dziekanski's death, and to make recommendations, where the Commission considers it necessary and appropriate.

The objective of this Submission is to describe, from Constable Rundel's point of view, his role in the events that unfolded on the 14th of October, 2007, at the Vancouver International Airport ("YVR") and to address issues involving Constable Rundel that arise from those events.

A. ISSUES

A.1 What was Constable Rundel's part, if any, in the circumstances giving rise to the death of Robert Dziekanski, and did Constable Rundel properly discharge his duty as a peace officer in relation to his attendance at YVR on the 14th of October 2007

A.2 Did Constable Rundel professionally discharge his duty during the course of the R.C.M.P. IHIT investigation, and subsequently, during the course of this inquiry.

B. STANDARD OF CONDUCT

B.1 In relation to the events of the 14th of October 2007 and this Inquiry, what is the standard by which the conduct of Constable Rundel should be measured.

B.2 Given that Constable Rundel was discharging his duty as a police officer at the time, one might be given to consider some of the following, as points of reference.

Public Inquiries

B.3 Public inquiries are a well-established part of the Canadian legal system. Canadian law has created its own definition of the term "standard of conduct" which may be applied by a Commissioner in a public inquiry.

B.4 *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission)*, SCC, [1997] S.C.J. No. 83, at paragraph 40:

"The appellants do not appear to challenge the power of a commissioner to make findings of facts; their objection is to the Commissioner's assessment of those facts. However, in my view, the power of commissions to make findings of misconduct must

encompass not only finding the facts, but also evaluating and interpreting them. . . . According to the Concise Oxford Dictionary (8th Ed., 1990) misconduct is

"improper or unprofessional behaviour", or "bad management".

Without the power to evaluate and weigh testimony, it would be impossible for a Commissioner to determine whether the behaviour was "improper" as opposed to "proper", or what constituted "bad management" as opposed to "good management". The authority to make these evaluations of facts established during an inquiry, must, by necessary implication, be included in the authorizations to make findings of misconduct . . . "

B.5 At page 10 paragraph 19 of the *Krever* Federal Court of Appeal judgment, SCC, [1997] S.C.J. No. 83:

"Decary J.A. noted that s. 13 of the Act expressly permits a commissioner to make findings of "misconduct". He concluded that this encompasses the power of the commissioner to find that an individual breached a standard of conduct. Since that standard of conduct may be moral, legal, scientific, social or political, a conclusion that someone breached a duty does not necessarily mean that the individual broke the law. It simply means that the individual failed to meet a standard proposed by the Commissioner. To hold otherwise would completely muzzle public inquiries and would be inconsistent with s. 13."

(Emphasis added.)

B.6 The above paragraph (comments) begs the question, in our case, "*what is the standard proposed by the Commissioner?*" This question seems to be answered in the *Krever* Federal Court of Appeal judgment, SCC, [1997] S.C.J. No. 83, para. 36, 37, 38:

"36 *It must be recalled that the findings made by a commissioner are merely the statement of an opinion formed by the commissioner with respect to the conduct of a person, after an inquiry which does not apply normal legal criteria and at which the rules of evidence and procedure are not so strict as those that apply to a trial between adverse parties. Such an opinion does not, cannot and cannot claim to have the weight, force or effect of a judgment; it cannot be analyzed or interpreted as if it were the product of a traditional trial. A threat to subject a commissioner's work to systematic legal-style dissection of*

the findings of fact made by him or her would seriously hinder that work.

(Emphasis added.)

(A) *Breach of a duty*

37 *According to the appellants, a commissioner may not suggest in his or her findings that the fact that someone has done or failed to do something implies that the person has failed to comply with a legal standard of conduct that he or she was bound to observe.*

38 *Section 13 of the Act expressly permits a commissioner to make findings of "misconduct" ("faute"). When we say "misconduct", we are necessarily saying breach of a standard of conduct. That standard may be moral, legal, scientific, social, and political and so on. To contend that a commissioner may not find that a person has breached a duty is to strip section 13 of any meaning, and to all intents and purposes to muzzle a commissioner."*

(Emphasis added.)

B.7 In relation to the words "*it simply means that the individual failed to meet a standard proposed by the Commissioner*", surely this means something more than "*at the whim of the Commissioner*".

B.8 In relation to Constable Rundel, the standard of conduct being examined is that of an R.C.M.P. Officer facing the circumstances that Constable Rundel faced on the 14th of October 2007.

B.9 Given the fact that the *Public Inquiry Act* does not permit the Commission to make findings of a criminal or civil liability, the above extracts (*Krever*) would suggest, based on the evidence, an objective finding of facts by the Commission, the application of a standard of conduct (proposed by the Commissioner) set against those objective findings, then a subjective interpretation by the Commission.

B.10 The standard of conduct is likely to depend on the subject matter of the inquiry as it relates to any particular witness; that standard could very likely be different for different witnesses.

B.11 The question becomes, "what is the standard of conduct to which the Commissioner will compare/weigh the conduct of Constable Rundel." In this case it is submitted, that standard should be, that of a reasonable peace officer with training and experience similar to the training and experience of Officer Rundel. Now the question becomes: How might that reasonable peace officer conduct himself in a similar situation.

B.12 The Commissioner is directed to the testimony of Corporal Gillis under cross-examination by Mr. Kosteckyj:

Q Now when an officer is judged on his use of force, he is judged by an objective standard, correct?

A Correct.

Q He is judged by a standard of what would a reasonable police officer do in the circumstances.

A Yeah, a person making a similar assessment with similar training. That's correct.

(23 April 2009, T. 47, l. 32-40.)

The Facts relating to the training and experience of
Constable Rundel and his attendance at YVR on October 14, 2007

B.13 It is suggested that the following evidence/facts relating to Officer Rundel's attendance at YVR on 14 October 2007 is well-established and is not likely in issue. Those facts are as follows:

- 1) In May of 2005, Constable Rundel entered the R.C.M.P. Training Depot in Regina; he completed this training in October of 2005. Subsequent to his training, Constable Rundel was posted directly to the City of Richmond to complete a six-month field training program;

- 2) Constable Rundel completed his field training in February of 2006. After completing this field training, he remained posted to the City of Richmond;
- 3) Constable Rundel was assigned to the Richmond sub-detachment approximately July of 2006;
- 4) The airport sub-detachment was responsible for policing Sea Island (a residential area of approximately 200 residences), two parks and the Vancouver International Airport (YVR). The airport policing responsibilities consumed approximately 90% of the sub-detachment's policing time;
- 5) In July of 2007, Constable Rundel completed his training and certification in the use of the Conducted Energy Weapon (CEW-Taser), on the 14th of October 2007, his CEW certification was valid;
- 6) As of the 14th of October 2007, Constable Rundel had never carried a CEW on patrol nor had he ever had occasion to deploy a CEW (other than during his CEW training);
- 7) Constable Rundel's "watch" at the Richmond sub-detachment consisted of one Corporal (Cpl. Robinson) and six Constables;
- 8) On the 13th of October 2007, Constable Rundel commenced an eleven hour shift at 6:00 p.m.;
- 9) On the 14th of October 2007, the R.C.M.P. members on shift with Constable Rundel were Corporal Robinson, Constable Millington and Constable Bentley;
- 10) Of the four Officers, Constable Millington was the only Officer who had a CEW as part of his complement of enforcement tools;
- 11) As of the 14th of October 2007, Constable Millington had been trained and was validly certified to carry a CEW;
- 12) During the early hours of the 14th of October 2007, Corporal Robinson, Constables Millington, Bentley and Rundel were in the YVR sub-detachment when a dispatch was received by radio transmission. The dispatch described an incident that was unfolding at YVR. All four Officers received the dispatch at the same time. Constable Millington acknowledged the dispatch. Dispatch advised the following:
 - intoxicated male throwing luggage;
 - the dispatch did not have much information;
 - 55 year old male arriving at the reception lobby of YVR throwing luggage;

- non-white, dark hair, white coat;
- 13) All four Officers left the sub-detachment at the same time, in their individual police cars;
 - 14) While on route to YVR, Constable Rundel received a further dispatch stating that "Airport Operations" had updated their information, reporting:
 - that the male was throwing a chair through glass;
 - 15) All four Officers arrived at the airport at approximately the same time. Officers Millington, Bentley and Rundel entered the public area of YVR together with Corporal Robinson entering immediately behind. The Officers arrived at approximately 1:27 a.m. (on the 14th of October 2007);
 - 16) Constable Rundel was armed with a firearm, OC spray and an extendable baton;
 - 17) There were a number of people in the area that has been described as the "meet and greet" area;
 - 18) The Officers approached the "secure area" at a reasonably quick pace. Mr. Dziekanski called out towards the Officers, "Policizia, Policizia". Constable Rundel heard an unknown female state words, to the effect, "he's over there"; this statement was made in a distressed voice;
 - 19) Mr. Dziekanski did not speak English;
 - 20) As the Officers approached Mr. Dziekanski, unidentified persons in the meet and greet area said words to the effect, "he's over there, he doesn't speak English";
 - 21) Two YVR security officers were standing in front of the approach to what has been described as the "secure" area;
 - 22) Mr. Dziekanski could be seen by the approaching Officers, standing just inside the secure area;
 - 23) There was no evidence of broken glass, either in the meet and greet area or in the secure area;
 - 24) Just inside the entrance to the secure area, there was a chair that seemed to be the height of a counter stool, some broken computer parts, and some luggage;

- 25) On approaching the secure area, the Officers stepped over a shallow railing dividing the approach to the secure area from the meet and greet area;
- 26) Constable Bentley was the first to enter the secure area, followed by Constable Millington, then by Constable Rundel and lastly, Corporal Robinson;
- 27) Constables Bentley and Millington were the first Officers to approach and engage Mr. Dziekanski;
- 28) Upon entering the secure area, Constable Rundel positioned himself to the left behind Officers Millington and Bentley, facing Mr. Dziekanski, and a distance of approximately 8 to 10 feet from Mr. Dziekanski;
- 29) Officers Bentley and Millington assumed the roles of "contact officers"; Officer Rundel assumed the role of "cover officer";
- 30) Since Officers Millington and Bentley had already verbally engaged Mr. Dziekanski, Officer Rundel said nothing to Officers Millington, Bentley or Corporal Robinson. Constable Rundel did not attempt to communicate with Mr. Dziekanski, nor did he attempt to direct the investigation, given that others had assumed those roles;
- 31) Officers Bentley or Millington conversed with Mr. Dziekanski, with introductory words to the effect of "*how's it going*" or "*how are you doing bud*" and "*how is it going sir*";
- 32) As a result of the contact between Officers Millington, Bentley and Mr. Dziekanski, Mr. Dziekanski reached towards some luggage that was to Mr. Dziekanski's left;
- 33) Corporal Robinson interjected and interrupted Mr. Dziekanski's reach towards the luggage. Corporal Robinson put his right hand up towards Mr. Dziekanski. In response, Mr. Dziekanski stopped moving towards the luggage and with a quick upper flick of his hands over his shoulders, swung and moved to his left and, at the same time, picked up a metal object from a counter that was immediately behind Mr. Dziekanski (this object was later identified as a stapler). The stapler was held in Mr. Dziekanski's right hand;
- 34) Mr. Dziekanski moved to the centre of the adjacent counter, a distance of approximately 8 to 10 feet from where he had been initially standing;
- 35) The actions of Corporal Robinson and Mr. Dziekanski happened in seconds;

- 36) In response to Mr. Dziekanski's actions, Officer Rundel immediately moved to his left and repositioned himself in front of Mr. Dziekanski, a distance of approximately 8 feet from Mr. Dziekanski;
- 37) Constable Bentley repositioned himself to the left of Constable Rundel, a distance of approximately 8 feet from Mr. Dziekanski;
- 38) Corporal Robinson and Officer Millington remained to the left of Mr. Dziekanski at the end of the counter closest to the entrance of the secure area;
- 39) Within seconds of Officers Rundel and Bentley repositioning themselves, Officer Millington deployed the CEW (probe mode). Mr. Dziekanski did not immediately fall to the floor as a result of this CEW deployment;
- 40) As a result of the CEW deployment, Mr. Dziekanski threw his hands above his shoulders, continuing to clutch the stapler in his right hand;
- 41) As a result of the deployment of the CEW, a loud clacking sound was heard, suggesting that the CEW had not made a satisfactory contact with Mr. Dziekanski;
- 42) Mr. Dziekanski fell to the ground and continued to evidence pain and the effect of the CEW being applied;
- 43) A second deployment of the CEW (probe mode) was ordered by Corporal Robinson;
- 44) Constable Rundel moved to assist Corporal Robinson and Constable Bentley in handcuffing Mr. Dziekanski;
- 45) At the commencement of the struggle to handcuff Mr. Dziekanski, Corporal Robinson was to the left of Constable Rundel; Corporal Robinson repositioned himself to the right of Constable Rundel, Constable Bentley assisted in trying to handcuff Mr. Dziekanski, opposite Officers Rundel and Robinson;
- 46) Officer Bentley was trying to "unlock" Mr. Dziekanski's left hand. Officer Rundel and Corporal Robinson were able to handcuff Mr. Dziekanski's right hand and, with the effort of the three Officers together, they were able to secure Mr. Dziekanski's left arm;
- 47) Within seconds of being handcuffed, Mr. Dziekanski stopped struggling;
- 48) At the time of being handcuffed, Mr. Dziekanski was breathing;

- 49) Corporal Robinson directed Constable Rundel to go to Constable Rundel's police car to retrieve some "hobbles" to further secure Mr. Dziekanski;
- 50) It took approximately 1 minute for Constable Rundel to return with the hobbles. Corporal Robinson advised Constable Rundel that it would not be necessary to use the hobbles. Constable Rundel assisted in a "pat-down" of Mr. Dziekanski;
- 51) At this time Constable Rundel again observed that Mr. Dziekanski was still breathing. From this point on, Constable Rundel had no further direct dealings with Mr. Dziekanski;
- 52) Shortly thereafter, Mr. Dziekanski was pronounced deceased;
- 53) IHIT arrived at YVR and was tasked with the investigation of Mr. Dziekanski's "in-custody death";
- 54) Officer Rundel was directed by Corporal Robinson to obtain statements from witnesses;
- 55) Officer Rundel returned to the YVR sub-detachment shortly before 5:00 a.m.;
- 56) At the Richmond sub-detachment, Officer Rundel provided a recorded statement at 5:00 a.m. on October 14, 2007 to IHIT Investigator, Corporal Attew;
- 57) Officer Rundel provided a second recorded statement on October 18, 2007 to IHIT Investigator, Constable Brassington;
- 58) Sometime after Cst. Rundel gave his two recorded statements to IHIT investigators, the four Officers received the benefit of a counseling session in relation to the death of Mr. Dziekanski.

It is submitted that the above are statements of the events that the Commissioner should have no difficulty finding as "facts".

B.14 It is suggested that the following evidence/facts relating to Constable Rundel's attendance at YVR are well-established, however, may be evidence the Commissioner may consider it necessary to weigh, in light of the totality of the evidence, before coming to a conclusion:

- 1) Constable Rundel did not recall how he was made aware that Mr. Dziekanski did not speak English;
- 2) As Officer Rundel approached the secure area and Mr. Dziekanski, he observed Mr. Dziekanski to be standing behind a chair, his hair to be matted, he appeared to have been sweating, he was observed to have a wide-eyed glazed, focused look (possibly intoxicated, perhaps disoriented) and in an agitated state of some sort;
- 3) Constable Rundel heard Constable Bentley say words, to the effect, "Hi, how are you doing" or "How's it going";
- 4) Once in the secure area, Constable Rundel did not see any broken glass; however, given the two dispatches he had received, it appeared to Constable Rundel that Mr. Dziekanski's behaviour may have escalated;
- 5) As a result of the communication between Officers Bentley, Millington and Mr. Dziekanski, Constable Rundel observed Mr. Dziekanski turn and bend towards some luggage. With that action Corporal Robinson interjected, saying, "no" in an authoritative voice; at the same time, Corporal Robinson held his hands out. Mr. Dziekanski stopped moving towards the luggage. Constable Rundel believed that Mr. Dziekanski understood Corporal Robinson's command;
- 6) Officer Rundel observed Mr. Dziekanski (in response to Corporal Robinson's command) turn with a quick upper flick of his hands, in a motion that Officer Rundel interpreted to mean, "To Hell with you guys, I'm outta here";
- 7) Although Officer Rundel did not recognize what the object was, he observed Mr. Dziekanski holding something in his right hand, in the area of his upper chest. At the same time, he observed Mr. Dziekanski make a fist with his left hand. Mr. Dziekanski's left arm came up with his elbow 'locked' in his upper chest area;
- 8) Constable Rundel observed Mr. Dziekanski's left foot to come forward and perceived him to be "combative";
- 9) All of these events happened within split seconds, Constable Rundel had some concern for his and his fellow Officers' safety;
- 10) Within split seconds before its deployment, Constable Rundel felt the CEW was going to be deployed because either he heard something he can't now recall, or because of the circumstances unfolding; it became a situation where the CEW would be an option;

- 11) As defined by his R.C.M.P. training, the IMIM R.C.M.P. Use of Force Model, Constable Rundel believed Mr. Dziekanski's behaviour to be both "resistive" and "combative", and further, given his R.C.M.P. training, the IMIM Use of Force Model, and the fact that the CEW was considered an intermediate use of force device, its use would be appropriate in the circumstances;
- 12) Given his CEW training, Constable Rundel expected Mr. Dziekanski to immediately fall when hit with the CEW; however, he did not immediately fall and it appeared to Constable Rundel that Mr. Dziekanski was "fighting through" the CEW deployment;
- 13) Constable Rundel heard Corporal Robinson order a second deployment of the CEW;
- 14) Subsequent to the handcuffing, and prior to the pronounced death of Mr. Dziekanski, Constable Rundel assisted in what the Officers presumed would be a *Criminal Code* investigation. Once Mr. Dziekanski was deceased, IHIT assumed responsibility for the case and the file proceeded with the investigation as an "in custody" death.

C. USE OF FORCE

Corporal Gregg Gillis

C.1 Corporal Gillis, a member of the R.C.M.P., was called as an expert to comment on the use of force by police officers in the execution of their duty. He was also the officer who trained and certified Constable Rundel in the use and deployment of the Taser (CEW).

C.2 Corporal Gillis defined the terms "contact officer" and "cover officer"; he described the contact officer as the officer who assumed the initial role of contact with a subject, that officer would be the officer responsible for interacting with a person who was the subject of an investigation. The cover officer, on the other hand, was described as the officer who would position himself a relatively short distance from the cover officer and the subject, in order to provide protection for the contact officer in the event that the exchange between the contact officer and the subject should go awry or become dangerous. The cover officer also

provided a broader perspective and point of observation of events that might not be observed by the contact officer who, presumably, was more focused on the subject (T. 23 April 2009, p. 85, 86, 87).

C.3 Corporal Gillis also described the terms “triangulation” and “tactical positioning” as the circumstance in which a subject might move or change position in relation to the contact officer, causing cover officers to reposition themselves in relation to the situation.

Sergeant Brad Fawcett

C.4 Sgt. Fawcett, of the Vancouver City Police Department, was called as an expert to comment on the use of force by police officers.

C.5 Sgt. Fawcett testified, speaking to what might be considered as reasonable force, commenting that the use of force must be judged from the perspective of a “reasonable” peace officer on the scene (T. 16 April 2009, p. 26, l. 19-22 and l. 32-36, p. 33, l. 8-10), and the perception of the Officer must be “reasonable”.

C.6 Sgt. Fawcett was cross-examined with respect to the Statement of Assumed Facts filed on behalf of Constable Rundel (Exhibit 94). He confirmed that he had seen the Pritchard video a number of times and was able to identify Officer Rundel in that video.

C.7 Sgt. Fawcett identified Officers Bentley and Millington as assuming the contact officer roles as a result of their initial contact and communication with Mr. Dziekanski. He further identified Officer Rundel as assuming the cover officer role and that it was this role he would have expected one of the Officers to take, given that contact with the subject had been made by other Officers (16 April 2009, T. p. 35, l. 17-47).

C.8 Sgt. Fawcett confirmed, given the movement of Mr. Dziekanski to the central console area, that the actions of Constable Rundel were a “tactical repositioning” in response to Mr. Dziekanski’s change of position.

C.9 Sgt. Fawcett described Constable Rundel’s role in the contact with Mr. Dziekanski as that of a cover officer up the point where Constable Rundel began assisting in the handcuffing of Mr. Dziekanski, when Constable Rundel’s role transitioned into that of a control officer (T. 16 April 2009, p. 40, l. 1-10).

C.10 Sgt. Fawcett concluded that portion of his examination by testifying, in considering the actions of Constable Rundel, as seen in the Pritchard video, and as described in Constable Rundel’s Statement of Assumed Facts (Exhibit 94), those actions to be consistent with R.C.M.P. training as Sgt. Fawcett knew it, and concluded with his opinion:

Q: And is it your opinion that he discharged a cover . . . he acts as a cover officer and subsequently the control officer on fixing the handcuffs in the correct manner.

A: As I recall, yes Mr. Commissioner. My only criticism might be, I’d prefer the Officers to have moved in sooner and tried to gain physical control while the subject was under current.

(16 April 2009, T. p. 40, l. 9-27).

Orville Nickel

C.11 Orville Nickel testified as an expert to comment on the use of force by law enforcement personnel in the execution of their duties.

C.12 Mr. Nickel, likewise, defined the terms “contact” and “cover” officer and his description of the terms were consistent as given by Sgt. Brad Fawcett and by Dr. Michael Webster.

C.13 In describing those roles, he discussed the concept of complacency as being the “biggest killer of police” and “one of the main factors that can cost people lives”. He agreed “that the twin of (complacency) is vigilance” and given the nature of police work, a cover officer would be trained to be vigilant with respect to the carrying out of his role as a cover officer; particularly, because any contact had the potential to be very unpredictable (given the information that the R.C.M.P. Officers had received, for example - - an “intoxicated male”, “perhaps some damage that’s been done” and “observed damage”).

C.14 He further commented on Constable Rundel’s repositioning himself as a result of Mr. Dziekanski’s move to the centre of the console in the secure area; he testified this repositioning would be an expected reaction from Constable Rundel, in that particular circumstance, that this would be “proper containment” of a potentially difficult situation.

C.15 He also agreed that, given that the situation had the potential of unpredictability, it was an advantage to have four Officers present, pending control of the situation (22 May 2009, T. p. 96). Once control had been established, or an assessment of the situation had been made, then at that point the Officers could then have (perhaps) released one or two of their company to inquire further into the circumstances surrounding the events.

C.16 Mr. Nickel, in response to the question:

Up to the point where Officer Rundel repositioned himself, do you see anything there you can be critical of, in terms of how he discharged his duties?

Answer:

The way he repositioned himself? No. And actually, when in that semi-circle where all four of them have Mr. Dziekanski contained, there is nothing wrong with containing the circumstances in that way.

(22 May 2009, T. p. 96.)

C.17 In further response to the question:

Well, not just as to the repositioning, but as to the manner in which he approached and positioned himself as the cover officer, at that point, there is nothing you can criticize his conduct for?

Answer: No, that's not a point of criticism at all.

(T. 22 May 2009, p. 96.)

C.18 When asked about the observations of Officer Rundel and Officer Bentley having difficulty with the handcuffs, Mr. Nickel commented that Officers were trained to keep their handcuffs in their pouch until they were able to restrain a subject's hands (allowing the arresting officers to use both hands), and then, when control had been obtained, use the handcuffs.

C.19 However, Mr. Nickel noted that he didn't see that as a criticism as such but commented on it (referring to his report) because he had been asked about it.

C.20 In reference to Mr. Nickel's comments in relation to the handcuffs, he was asked:

So, in the scheme of things, would you characterize that as a rather minor criticism?

Answer: Well it's not even a criticism, it's that it would have been more effective to use two hands to do the work that they were trying to do with one hand.

(T. 22 May 2009, page 97, l. 30-35.)

Dr. Michael Webster

C.21 Dr. Webster testified as an expert to comment on the use of force (T.12 May 2009, p. 63-71).

C.22 Dr. Webster likewise commented on the roles of the contact officer and the cover officer. He confirmed that he had read the transcripts of the Officers and had seen the Pritchard video.

C.23 He opined that he was not critical of the Officers up to the initial contact with Mr. Dziekanski. He conceded that the Officers, on initial contact, would not know whether they were dealing with “the regular general duty fare” or “an emotional crisis”.

C.24 In response to the question:

Right. So, if I understood some of your answers that you gave to Mr. Hira in his previous examination, you felt that, to that point, just prior to being directed to the luggage, what these four officers had done was excellent, if I recall you correctly.

Answer: Yeah, I like it, it was good, yeah.

(T. May 13 2009, p. 69, l. 28-35.)

C.25 Dr. Webster agreed “something triggered him (Dziekanski) off” and that from that point, things went very quickly, within seconds”. He further agreed that the events did not provide time for the cover officer to advise or direct the contact officers.

C.26 He further agreed that Officer Rundel’s repositioning in response to Mr. Dziekanski’s movement to the centre of the console was the proper action for him to take, in the circumstances:

Q: So in reviewing the facts that – as you saw them, the video, the statements of the RCMP, the transcripts, is there anything that you can see in that – or bring to this Commission any criticism of the cover officer, in this case Officer Rundel?

A: No, there isn't. I would – in my mind, I want to go back to the turning point at the luggage and I can't – I can't see him –

Q: Well, that's a whole different issue.

A: I can't see him back there. I don't – I don't know what he said, I don't know how he handled himself. I don't know how he comported himself, what his body posture was like. I don't know the tone of his voice. I don't know what he was going with his eyes to –

Q: But you did see the video. You've seen – had the opportunity to –

A: But what's I'm saying is I can't see that in the video.

Q: All right.

A: I mean, this is the famous pillar –

Q: But based on – based on what you did see –

A:-- is in the way. Yes, based on what I did see.

Q: Thank you, sir.

(13 May, 2009, T. p. 71, l.1-31.)

D. SUBMISSIONS - USE OF FORCE

D.1 It needs to be said on behalf of Officer Rundel, he is proud of his chosen profession and takes his duties as a police officer seriously. None of the Officers neither wanted nor expected the results of their attendance at YVR on the 14th of October 2007. The death of Mr. Dziekanski was tragic.

D.2 With 20/20 hindsight, it is very easy to be critical and judgmental of people's decisions and actions, particularly when those decisions are made with limited information and under stress.

D.3 The following points are not made in any way to argue that the end result of this unfortunate incident falls on the shoulders on Mr. Dziekanski. However, it does need to be said, and it is submitted, that he is a part of the unfortunate circumstances which invite a "*what if*" speculation. What if Mr. Dziekanski:

- was not physically suffering from the abuses of alcohol, as confirmed in his autopsy report;
- had accessed his English-Polish language dictionary in his possession;
- had in his possession a cellular phone with roaming capacity in North America;
- and his mother had acquired greater information with respect to where one met exiting passengers at YVR;
- had taken steps to communicate with customs officers when he must have realized very early on, that in some way, he had missed his mother;
- had tried to engage the YVR security officers and/or members of the public, to seek help with his dilemma;
- had accepted the invitation for help from members of the public (Simi Ashrafinia);
- had chosen a more appropriate action to draw attention to his dilemma, rather than barricading himself and damaging property (assuming that was his reason for doing so);
- had chosen a more appropriate reaction to Cpl. Robinson's instruction.

D.4 However, having said that, it is conceded, "it is what it is". *What if* speculation does not change the fact that it was necessary for the police Officers to deal with the factual situation that was facing them; a factual pattern which, in the greater scheme of police work, was not particularly unusual or complicated.

D.5 The Officers were called to investigate/deal with an apparently intoxicated male who may have been throwing chairs or broken some glass, a situation very likely similar to situations police officers, unfortunately, have to deal with on a daily basis.

D.6 The situation of the 14th of October 2007 did not call for any complicated pre-planning. It did call for sufficient Officers to be present to control the potential subject (four Officers in this case were more than adequate), it did call for relatively quick attendance to the scene and it did call for the initial contact to be "friendly" but cautious.

D.7 The training and experience of the police officers was more than sufficient to deal with this situation. Officers Bentley and Millington made the initial contact, contact which was friendly and courteous, yet, at the same time, they were assessing the general circumstances and Mr. Dziekanski himself. These two Officers, as they were trained to do, took on the role of the contact officers. Constable Rundel assumed the role of cover officer. Corporal Robinson likewise, assuming the role of a cover officer, initially stood back from the two contact officers (Bentley and Millington).

D.8 From the perspective of hindsight, it was likely happenstance and good fortune for Constable Rundel that he assumed the role of cover officer.

D.9 Up to the point of the initial contact the facts are fairly straightforward and all *use of force* experts agree -- that the investigation and behaviour of the Officers was consistent with their training and how one might expect a reasonable peace officer would have conducted himself in similar circumstances.

D.10 The facts are also clear that from the time Corporal Robinson gave the command to Mr. Dziekanski to stop moving towards his luggage, events unfolded very rapidly, within seconds, not allowing Officer Rundel, even if he had been

inclined to do so, to do anything other than to react to the events. Officer Rundel did so by repositioning himself in front of Mr. Dziekanski, a distance of approximately 8-10 feet.

D.11 The expert evidence given on use of force agrees that this action by Officer Rundel was reasonable, was within his training and stands, without criticism, appropriate in the circumstances.

D.12 Within split seconds of Mr. Dziekanski moving to the centre of the console and Officer Rundel repositioning himself, the Taser was deployed. Officer Rundel had no part in, nor opportunity to be part of, the decision to deploy the Taser.

D.13 Likewise, on the deployment of the Taser, the course of events had been fixed; Officer Rundel assisted in the handcuffing of Mr. Dziekanski. Officer Rundel discharged that duty, with the minor observation by Mr. Nickel, that it would have been preferable for Officer Rundel to have left his handcuffs in their pouch until he was able to control Mr. Dziekanski's arms.

E. NOTES, STATEMENTS AND TESTIMONY

E.1 During the course of the Inquiry, the Pritchard video remained a fixed record, a constant, unchanging record of the events of the 14th of October 2007, a record not troubled by emotion, self-interest or the frailty of human recollection. However, the video was found to be not necessarily a complete, infallible record of events. Even with the benefit of the video record, the interpretation of what exactly was recorded is the subject of considerable debate, some of which has been settled, some of which has not, for example:

(a) where was Corporal Robinson positioned as he interacted with Mr. Dziekanski;

- (b) what was the motion between Corporal Robinson and Mr. Dziekanski, did Mr. Dziekanski obtain the stapler from the counter or from the counter-top;
- (c) did Mr. Dziekanski take a step forward towards the Officers before the deployment of the Taser, or did he step from side to side, or did he move at all;
- (d) did Mr. Dziekanski put his hands above his head before or after the Taser was deployed;
- (e) was the second deployment of the Taser made while still standing or after he had fallen to the floor.

E.2 These are legitimate questions that needed to be asked and explored by the Commission and counsel.

E.3 It is common ground that the exchange between Mr. Dziekanski and the Officers unfolded very rapidly. It was just slightly over one minute from the time the R.C.M.P. Officers entered YVR until the deployment of the Taser. From the point of Mr. Dziekanski's contact with Corporal Robinson and the time Mr. Dziekanski threw his arms up, turned away from the Officers, picked up the stapler, and the deployment of the Taser, was all a matter of seconds.

E.4 Points of comment between Constable Rundel's recollection (notes, statements and evidence) and the Pritchard video:

- (a) firstly, was the deployment of the Taser justified;
- (b) secondly, whether Mr. Dziekanski was "resistant" and "combative" in his contact with the police Officers;
- (c) thirdly, whether or not Mr. Dziekanski had raised the stapler above his head before the deployment of the Taser or after; and
- (d) fourthly, did Mr. Dziekanski step towards the Officers in a "combative stance" before the deployment of the Taser.

E.5 Commenting on the first and second points (whether or not the deployment of the Taser was justified and whether or not Mr. Dziekanski's behaviour was resistant or combative):

(a) there was considerable examination and cross-examination of Constable Rundel's viewpoint on the various stages of Mr. Dziekanski's behaviour, as to whether, at any particular point, it was either resistant, combative, or both;

(b) the meanings of those terms were debated and Constable Rundel was asked to interpret and define Mr. Dziekanski's behaviour, in relation to whether that behaviour was resistant and/or combative.

E.6 It is submitted that all of that examination, and in fact, his testimony on these points, is really, "simply academic".

E.7 Meaning, Constable Rundel had no input into either the decision to use or deploy the Taser. There was really no necessity for Constable Rundel to comment, one way or the other, as to whether or not Mr. Dziekanski was resistant or combative. In doing so, he was simply offering his opinion (right or wrong, nonetheless, simply an opinion).

E.8 However, once an opinion is offered by Constable Rundel, it might be asked, that in doing so (offering an opinion), was Constable Rundel purposely misrepresenting the behaviours of Mr. Dziekanski in order to favour his brother Officers. In reply, Constable Rundel would offer the rhetorical question: how is his opinion of Mr. Dziekanski's behaviour any different than the conclusion of, for example, Sgt. Fawcett:

Q: Given the video that you had seen and the statement of facts that is now before you, would you agree with Officer Rundel's view or perception that Mr. Dziekanski was combative?

A: I can see how the Officer could have had that perception, yes, Mr. Commissioner.

(20 April 2009, T. p. 37, I-43-47, p. 38, I-1.)

E.9 In addition to the above, on cross-examination by Mr. Hira (having reference to Exhibit 93 and the behaviours identified in the Pritchard video), Sgt. Fawcett was prepared to classify Mr. Dziekanski's behaviour as assaultive/combative (Constable Millington's Statement of Assumed Facts, paragraphs 1-14). (20 April 2009, T. p. 5.)

E.10 Finally, in weighing Constable Rundel's evidence with respect to his description of Mr. Dziekanski's behaviour as resistive and combative, even if one should not accept this conclusion, one must consider the possibility that Constable Rundel actually believes his interpretation to be true. This does not make his evidence misleading or self-serving, only wrong.

E.11 With respect to the third point of comment:

Whether or not Mr. Dziekanski had raised the stapler above his head before the deployment of the Taser or after; and

with respect to the fourth point of comment:

Did Mr. Dziekanski step towards the Officers in a combative stance before the deployment of the Taser.

Notes Constable Rundel

E.12 Constable Rundel, on the 14th of October 2007, wrote in his notebook:

In secure side, held stapler yelling, arms up, not English, steps towards us in front of counter, Constable Millington deployed Taser.

Statement of Constable Rundel 14 October 2007

E.13 Constable Rundel in his statement of October 14, 2007, said the following, at page 5,

for lack of a better word. He picked up a stapler and he started--clenching his fists and--putting the stapler above his head, motioning -- making motions with it, towards us--and then at that point, Constable Millington had--pulled out his --Taser and -- activated it.

and at page 6,

after the first -- first Taser, blow or trigger, he was still clenching, and motioning towards us -- and so he -- he was --Constable Millington gave him, gave him the second jolt and -- when that -- was finished, he -- we, the best that I can recall, three -- I know -- Corporal Robinson and Bentley and myself made contact with the male and wrestled him to the ground.

Statement of Constable Rundel 18 October 2007

E.14 Constable Rundel, in his Statement of October 18, 2007, said the following, at page 5,

I don't recall, all I recall is him moving -- over to where this counter area was, which was from our position coming through the doors would be to the right on the other side of the doors and he then picked up a stapler, turned around, had both fists in the air with a stapler. His hand, was motioning towards us in an aggressive combative style and that's when Constable Millington activated the Taser."

Testimony Constable Rundel 23 February 2009

E.15 Officer Rundel testified, on February 23, 2009, (T. p. 28, l. 17-39):

Okay. So after he had pointed and was bending towards his luggage, he did a very quick --quick flick of his hands and arms in a motion that to me said "To hell with you guys, I'm out of here," and then he went off to his left to where the counter was located. And I'll sit down again. And he had his --the front of his --his body was to the counter. He, at that point, and I didn't see this myself, but he had grabbed a metal object that was later determined to be a stapler with his right hand, and swept along the counter, quickly turned 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.

E.16 T. p. 10, l. 10-15,

I observed him clench his left fist, and move his left foot forward, and I don't recall any other motion at that point. Again we're talking split seconds, so it would be a very short period of time after that -- after that observation that the Taser would have been deployed.

T. p. 41, l. 13-17,

Q: Can you see it clearly.

A: I saw it clearly when it was clenched in his fist, when he had his right hand, as I described earlier, up to his chest, clenched in his fist.

T. p. 41, l. 32,

Q: You didn't see that stapler in the hand during the sweeping motion.

A: I don't recall noticing at that point in that motion.

T. p. 41, l. 41,

A: I can't say for sure, I just knew what it was at that point, other than he just had an object in his hand at that point.

T. p. 41, l. 45,

A: I could see a black metal object, 10 to 12 inches long, clenched in his fist, I assumed it was metal.

T. p. 42, line 7:

A: All I recall, is once he swung his arm around and locked his right arm into position, I observed the stapler clenched in his fist at that point.

A: I observed him clench his left fist, and move his left foot forward, and I don't recall any other motion at that point. Again we're talking split seconds, so it would be a very short period of time after that – after that observation that the Taser would have been deployed.

Q: Do you have it clear in your mind whether this observation is before or after the Taser is first deployed.

T. p. 42, l. 21

A: I have it clear in my mind it was before.

Q: Okay, can you tell us how far before.

A: No

Q: Did you see Mr. Dziekanski holding the stapler above his head.

A: I don't recall it ever being over his head.

It's obvious that this observation is referring to a time before the first deployment.

E.17 From the nature of the questioning during the Inquiry, various counsel took issue with Constable Rundel's description in his statement, that Mr. Dziekanski held the stapler above his head before the deployment of the Taser, and took further issue with Constable Rundel's statement that Mr. Dziekanski took a step towards the Officers before the deployment of the Taser. (Cst. G. Rundel Statement 14 October 2007.)

E.18 Constable Rundel was clearly wrong in his statement (that the stapler was above Mr. Dziekanski's head before deployment). However, this statement has to be viewed in conjunction with the record in his notebook he made, describing the "arms up". He does not say "above his head". Neither does he say "above his head" in his statement of the 18th of October 2007, Constable Rundel says ". . . *he then picked up a stapler, turned around, had both fists in the air with a stapler.*" and further, Constable Rundel in testimony, stated in direct examination, that he didn't ever recall the stapler being held above his head before the deployment of the Taser. (T. 23 February 2009, p. 42, l. 24-26.)

E.19 Constable Rundel explained his description in the 14th of October 2007 statement:

. . . for lack of a better word, he picked up a stapler and he started – clenching his fists and putting the stapler up above his head, making motions towards us, and then at that point Constable Millington pulled out his Taser and activated it.

in his testimony of the 23rd of February 2009, by explaining that the statement of the 14th of October 2007 had been given after a long shift, after a stressful event and he did not describe the sequence of events very well. He was describing something that was happening very fast and in a short period of time; he was describing it as one single event and as best as he could at the time. (T. 23 February 2009, p. 60, l. 10-47, and p. 61, l. 1-32.)

E.20 Constable Rundel's recollection as to exactly when the stapler was held above Mr. Dziekanski's head was that this happened during the second Taser deployment. Constable Rundel was incorrect in this recollection (not unreasonable, given the rapidity with which events took place). (T. 23 February 2009, p. 59, l. 40-43 and p. 60, l. 1-4.)

E.21 The questioning by various counsel implied that Constable Rundel had purposely changed his recollection from the time he made his initial police notes to the time he gave his recorded statement of the 14th of October 2007, at 5:00 a.m.

E.22 The question of the discrepancy between his police notes and his statement of the 14th of October 2007 needed to be asked; however, the implication that Officer Rundel had purposely manipulated his evidence is offensive, wrongheaded and does not accord with common sense.

E.23 Set beside the constant of the Pritchard video, given the speed and the stress of the events of the 14th of October 2007, Officer Rundel's recollection is surprisingly accurate.

E.24 Constable Rundel's inquiry testimony on the points of apparent discrepancy in his notes and statements:

(a) whether the stapler was held above Mr. Dziekanski's head before the deployment of the Taser;

(b) whether Mr. Dziekanski stepped towards the officers before the deployment of the Taser;

(c) whether Mr. Dziekanski was standing at the time of the second deployment.

E.25. And in summarized form:

- When Mr. Dziekanski moved in response to Corporal Robinson's direction, Constable Rundel did not see Mr. Dziekanski pick up the stapler, at the time, he did observe Mr. Dziekanski's hand swing above his shoulders across his head, and he didn't recall seeing the stapler at this point. He recalls seeing the stapler after Mr. Dziekanski brought it to his chest area;
- Prior to the Taser deployment he did not observe Mr. Dziekanski with the stapler above his head making motions towards the Officers.
- Prior to the first deployment of the Taser he observed Mr. Dziekanski move his left foot forward, taking up what he perceived to be combative style with his fists and the stapler in his right hand;
- His recollection is that it was during the second deployment of the Taser that Mr. Dziekanski was holding the stapler above his head and was coming towards the Officers.

E.26 It is clear that Constable Rundel is incorrect on this last point. It was during the course of the first deployment that Mr. Dziekanski held the stapler above his head (not an unreasonable error, given the speed and the circumstances of the events).

E.27 There has been much made of the fact that these are “trained” Officers, “trained” to be accurate in their recollections of events. However, it is submitted that the fact is; the Officers do not have any particular expertise or training beyond the ordinary with respect to the recollections of stressful, rapidly moving events.

E.28 As has been referred to earlier in these submissions, Constable Rundel had no motivation whatsoever to describe events other than as he could best recall them.

E.29 During the course of duty, Officer Rundel had never deployed a Taser himself nor had he been present during an arrest when a Taser had been deployed. This was not a “text book” deployment. It can only be concluded that the probes did not make a “clean contact” with Mr. Dziekanski; the deployment did not immediately immobilize Mr. Dziekanski. Rather, the result after deployment was Mr. Dziekanski throwing his arms up in the air and screaming with continuous pain. Even after Mr. Dziekanski fell to the ground, he continued to scream and twist in pain.

E.30 The major, immediate visual part of this sequence of events was the rapid raising of Mr. Dziekanski’s arms, his falling to the ground and his screaming.

E.31 It’s not surprising that Officer Rundel’s recollection offered the raising of Mr. Dziekanski’s arms before the deployment of the Taser.

E.32 The effect of that dramatic visual impact affected, in a similar fashion, the memory of numerous other witnesses. Those witnesses testified before this Inquiry giving testimony that was not only different from their statements, but in some cases, dramatically different.

Sima Ashrafinia

Statement Sima Ashrafinia 19 October 2007

E.33 In Ms. Ashrafinia's statement to the R.C.M.P. on the 19th of October 2007, she testified that Mr. Dziekanski had smelled of what she thought to be alcohol, that he might have been drunk. On cross-examination by Ms. Roberts, she tried to discount this observation by saying that, "it might have been the smell from the long trip", and having met her husband that same evening, noted that "he was smelling too". (T. p. 93, l. 10-24.)

E.34 In her statement of the 19th of October 2007, Ms. Ashrafinia also stated that she felt the police had acted properly and did an excellent job and that "he deserved to be tasered" (page 22 and 23 of her statement). In her testimony before the Inquiry, she justified these statements by testifying that those viewpoints were actually the viewpoints of her husband and not hers. (T. p. 109, l. 6-22.)

E.35 On the issue as to what Mr. Dziekanski did with the stapler after he obtained it in his possession, the witness Sima Ashrafinia, in her statement 19 October 2007, at page 6, states the following:

Q: Okay, then you say Robert moved along the counter.

A: Along the counter.

Q: He grabs the, you see him grab the stapler.

A: Before he move along all the way he just took one step or two steps, he had a stapler. That's what I think, his was a stapler and he had it on his kind of short wave, wave at the police officer.

Testimony Sima Ashrafinia 4 February 2009

E.36 In Ms. Ashrafinia's evidence (T. p. 64, commencing at l.10)

And then there is a post in-between, so I couldn't see all of it, also the height of the desk I couldn't see Mr. Dziekanski from waist below clearly, but I am just standing there. And at one point I saw Mr. Dziekanski's arm went up, like a stapler from the desk in his hand, like that. Then I heard this sound of electricity, like buzz of electricity, at this point Mr. Dziekanski bent forward.

T. p. 66, l.2 - 66

2 he had his hand up and what he did. Like in
3 stapler, if it was here on the desk, when Robert
4 did this, his hand and his head like that, walked
5 away, I just saw. I didn't see the grabbing
6 motion. But I saw when he raised his arm like
7 that he had a stapler, and doing like that
8 (gesturing). Like above his right shoulder. He
9 had it on his right hand.

10 Q Okay. When he did that, were the -- where were
11 the police when he did that?

12 A All four officer kind of moving toward him and he
13 was moving away from officers. That's why in the
14 few minutes from the next to the door, all five of
15 them were the other side of the desk, kind of --

16 Q When Mr. Dziekanski --

17 A -- soft chasing.

18 Q I'm sorry. I'm sorry, I interrupted you. Finish,
19 please, again.

20 A I said kind of soft chasing, slow chasing.

21 Q When Mr. Dziekanski had his right hand in the air
22 holding the stapler in the way you showed the

23 Commissioner, can you tell us about any movement
24 he made with respect to the direction of the
25 police?

26 A One of the officer was about less than a metre
27 away from Mr. Dziekanski, and the stapler on his
28 hand and on his right hand was like that, like
29 that (gesturing). Not -- not toward the officer,
30 like, he was a big guy. He could have, if he
31 raised his arm, he could have hit the officer.

32 But he was like -- like this, more like that.

33 THE COMMISSIONER: Was he threatening the officer with
34 it?

35 A It looked like, like that. I don't know. He was

36 -- he had the stapler on his hand. And then --
 37 then it got dropped when he got tasered. He --
 38 the stapler dropped.

E.37 After comment by the Commissioner with respect to the difficulty on the sequence of events and on cross-examination by Mr. Kosteckyj, Mr. Kosteckyj painstakingly took Ms. Ashrifinia through the video. Ms. Ashrifinia changed her description of the timing with respect to when Mr. Dziekanski raised his hand, holding the stapler. (T. p. 76, l. 10-24.) (T. 4 February 2009, p. 80, 81, 82.)

E.38 Further in her testimony, in cross-examination by Mr. Hira, Q.C., she justified the difference between her statement and viva voce testimony, testifying that "she was still going through emotional up and down", "I am still going through therapy for what I saw." (T. February 4th, 2009, p. 108 , 109, l. 15-19.)

E.39 Ms. Ashrifinia was clearly trying to modify the tenor of the statement given to Corporal Teboul. Can those portions of her evidence be described as self-serving and misleading?

Lorne Meltzer

Statement Lorne Meltzer 19 October 2007

E.40 In Mr. Meltzer's statement of the 19th of October 2007, at page 5, Mr. Meltzer describes his recollection of events subsequent to Mr. Dziekanski being asked for his passport:

In English, right. And he motioned down, what I thought was the passport, but he had a stapler in his hand, which he probably got off that desk there. Um, then I, I'm trying to remember if . . . the taser was drawn then or when he put his hand up in the air with the stapler and he was about, he made a motion like he was gonna go towards an officer. To his right. The officer was quite a ways away. A good maybe six feet, seven feet, maybe five feet away. He was quite a ways away. And then they said, "Put your hands on the desk?" In English again. And then yea it was, it was, I would, I would

more so say that he looked down for his passport and then he was probably looking for the stapler. He had it in his hand. And then they said, "Put your," then the taser was drawn. "Put your hands on the desk!". And that's when the stapler went up in the air and he was about to go, I think, towards an officer and then he got tasered. But I know the taser was drawn, I can almost, I can't say exactly right before he picked the stapler up or when the staple was in his arm. It must have been a couple seconds before because once the taser, or once the uh, stapler was raised in his hand and he made a gesture towards, (indecipherable) to, you know, he opened the stapler up.

Statement Lorne Meltzer 23 November 2007

E.41 On the 23rd of November 2007, Mr. Meltzer gave a second statement, this time to Coroners Jeff Dolan and Kate Corcoran, and at pages 10 and 11, says the following:

. . . the four (4) RCMP Officers, not three (3). And uh, Mr. Dziekanski came from behind the kiosk where he was trying to open doors and he went out to the front of the kiosk. The RCMP Officers surrounded him and I remember the shorter, or sorry, the, the tall black RCMP Officer asked him for a passport. Okay, uh, do you have a passport? And it was in English and he kind of (WRITING SOUND), stood there for a second, and then the other, he was still freaking out but he kind of slowed down from freaking out, and then the shorter RCMP Officer asked him, or no (INDECIPHERABLE) sorry, didn't ask him, he did the same thing I did, he took his hands and pushed them down. He said like, calm down, it's okay, calm down. And then they asked him for a passport again and then Mr. Dziekanski kind of leaned down and he opened a stapler which I assumed he got off of this kiosk desk because it's you know bunch of office stuff or maybe he got it from a drawer. And I can't remember and I told the RCMP this, I can't remember if he got Tasered before he pulled the stapler out like this or while he pulled, I know he leaned down to grab it, but I can't remember like it's such split seconds, got Tasered and his arm went up in the air or if his arm, his two hands went up, opened the stapler and as he was going towards and RCMP Officer, he got Tasered. I can't remember, it's such split seconds.

Testimony Lorne Meltzer 3 February 2009

E.42 Mr. Meltzer's testimony (T. p. 98):

A: Oh, I felt like hell. I couldn't sleep for about two weeks. I remember calling Robert's mother and just crying, you know. I was saying I wish I could have done something more for him. And also, you know, having dreams – at not dreams at night, but just feeling helpless. Kind of like I've had dreams in the

past where -- if you ever had a dream where you're being chased and you're stuck to the ground and -- you can't go anywhere and you feel totally helpless and panic. That's how I felt for about two weeks after, two three weeks after that. I was just, you know -- in hindsight, right, you know, it's like I wish -- you know, help people out all the time at the airport. I wish I could have done something more.

E.43 It is suggested as a result of the unfortunate behaviour of Mr. Meltzer in his dealings with Mr. Dziekanski, his sympathies changed and he was clearly prepared to modify the tenor of his evidence given to the Coroner, can those portions of his evidence be described as self-serving and misleading.

Lance Rudek

Testimony Lance Rudek 12 February 2009

E.44 Lance Rudek testified (T. p. 54, l. 34, p. 55, l. 2):

p. 54, l. 24-33.

24 Q As these events were unfolding did you see
 25 something in Mr. Dziekanski's hand?
 26 A I did, as -- as the officers got closer and closer
 27 and closer to him, and as Mr. Dziekanski started
 28 -- started to walk away, and then stop, and turned
 29 around back towards the officers, it was then that
 30 I -- as the camera is facing his back, all you see
 31 is Mr. Dziekanski's back. I -- I remember seeing
 32 -- seeing an object being waved around and
 33 directed at the constables.

p. 54 l. 34, p. 55 l. 2

34 Q Could you tell what the object was?
 35 A Not right at first, but within five or ten seconds
 36 after him waving it around, then I was able to
 37 distinguish what it was.
 38 Q And what was it?
 39 A It was a stapler.
 40 Q And how did you know it was a stapler?
 41 A My -- I knew it was a stapler because after he

42 finished waving it around at the constables, I was
 43 -- he held it directly out in front of him
 44 (gesturing) and he started to press the -- the
 45 stapler was elongated, it was extended, and he
 46 started pressing it and then the staples started
 47 coming out.

1 Q This was before or after the tasing?

2 A Just before the tasing.

E.45 Even though Mr. Rudek had a better positional view of the events than Mr. Pritchard, can those portions of Mr. Rudek's evidence be described as self-serving and misleading?

E.46 Mr. Rudek refused to concede his recollections. Does this necessarily make his evidence self-serving and misleading?

F. SUBMISSIONS - NOTES, STATEMENTS, TESTIMONY

F.1 There has been much made in this Inquiry of discrepancies between the facts of the case, as represented by the "Pritchard video", as opposed to Statement recollections of Constable Rundel (and the other Officers).

F.2 The Officers have been accused of collaboration, fabrication and lying.

F.3 It is submitted that these allegations are made without a full appreciation of the frailty of human recollection. These allegations pander to emotions, are inflammatory and reckless.

F.4 To suggest that, subsequent to the pronounced death of Mr. Dziekanski the four Officers had a crystal ball that indicated this incident would take on a life of its own and, via the "media" and the internet "go viral", is nothing short of ludicrous.

F.5 Not only would it be necessary to conclude that the four Officers recognized the future enormity of this investigation, it would be necessary to conclude that one or more of the Officers organized a conspiratorial meeting in which they decided that, "they all better get their facts together" and lie about what actually happened. They would lie in their notebooks, they would lie in their statements to IHIT, they would lie if this matter went to a coroner's inquiry, they would lie if this matter went to a public inquiry, they would lie if this matter went to trial, they would lie in any other forum that presented itself.

F.6 Further, one must recognize that this alleged collaboration and fabrication of evidence would be made by the Officers in face of their knowledge that the whole incident had been videotaped by Mr. Pritchard, and in face of the knowledge that they did not have to give statements, or they could delay the giving of statements. To give any credence to the allegations of collaboration and fabrication, one would expect these conspirators to decline or delay the giving of statements, allowing time to review the video or to collaborate their evidence, without the pressure of time.

F.7 The accusers seem to want to have it both ways:

- the Officers, in the discharge of their duties, were grossly incompetent and nothing less than "keystone cops" and, at the same time;
- the Officers were sufficiently sophisticated, shrewd, forward-thinking, devious and without moral restraint to lie about the events that took place in the early morning hours of the 14th of October 2007.

F.8 In relation to this accusation against the Officers, for a moment, let's speculate that such a meeting was called prior to the Officers committing their recollections to notes and statements. It begs the question: Which of the Officers might come up with such a "cockamamie" idea? Constable Rundel?

Not very likely, and in any event, why would Constable Rundel go along with such an absurd suggestion?

F.9 There is no doubt that Officers working together on a daily basis in an organization with command structure, daily dealing with stressful situations that require close team work, do develop close bonds. It is submitted that it is common sense to recognize that human nature, in these circumstances, would dictate a protective relationship in times of stress.

F.10 However, it is also common sense to recognize that it is human nature to protect one's "own backside", and further, that the R.C.M.P. works within laws and procedures that carry very significant punishment if these laws and procedures are transgressed, not the least of which is criminal charges for perjury or obstruction of justice.

F.11 To repeat, in the event that a suggestion by one or more of the Officers is made to fabricate their statements, why would Constable Rundel ever go on with such a suggestion.

F.12 It was likely simply a matter of "happenstance" that Officer Rundel assumed the role of the cover officer in this investigation. Be that as it may, that is the role that he assumed and as a result, really had no control over, or input into, the events as they unfolded after the initial contact with Mr. Dziekanski.

F.13 Assuming for a moment that there is any merit to the ridiculous allegations that these four Officers met to discuss whether they should fabricate their recollections, one has to speculate as to what the reactions of each of the individual Officers might have been to such a suggestion, and what interest each of the individual Officers might have in pursuing such a risky course of action.

F.14 Given Constable Rundel's maturity and role in the events, why would he put himself, his career, his family, and reputation at risk. It is submitted that faced with such a suggestion, Constable Rundel's reaction would have contained a considerable amount of profanity.

F.15 It is common human experience that human memory can be very unreliable, particularly in recalling the detail of events that are stressful, dramatic and unfold within seconds. It is to be noted that Constable Rundel did not see the Pritchard video, either before he made his notes or gave his two statements to the IHIT investigators. Constable Rundel did not see the Pritchard video until January of 2009, in preparation for this Inquiry.

F.16 In reviewing the evidence of the video, the dramatic parts of the events are the directions given by Corporal Robinson, Mr. Dziekanski's reaction to those directions, the discharge of the Taser, and Mr. Dziekanski, while clutching the stapler, throwing his arms up in the air in reaction to the Taser.

F.17 Mr. Grant Fredericks' analysis of the Pritchard video clearly displays movement by Mr. Dziekanski that is not easily discernible in the Pritchard video.

F.18 Whether Mr. Fredericks' conclusion that Mr. Dziekanski took steps forward or not is debatable. There was, at the very least, movement from Mr. Dziekanski's left and right (side to side) in reaction to the repositioning of the police officers; Constable Rundel saw it as one step forward.

F.19 One needs to recall the numerous times that the Pritchard video was played by each of the individual counsel involved in this matter, and the numerous times the video was played in this Inquiry. It took playing and replaying and sophisticated forensic analysis to try to determine and record the exact sequence of events and movements of the four Officers and Mr. Dziekanski.

G. SUMMARY

What was Constable Rundel's part, if any, in the circumstances giving rise to the death of Robert Dziekanski, and did Constable Rundel properly discharge his duty as a peace officer in relation to his attendance at YVR on the 14th of October 2007.

G.1.1 It is clear that the incident to which Constable Rundel was dispatched on the 14th of October 2007, although unusual for YVR, it was not a particularly unusual or complicated incident for the Officers to handle.

G.1.2 It called for a relatively quick response and attendance to the scene. Given the initial observation of the scene, the contact approach by four Officers was appropriate. The Officers had no idea what exactly they might be dealing with; they did not know whether Mr. Dziekanski was an intoxicated person, mentally unstable, or simply under stress from his circumstances. The dispatch and the scene required an initial cautious but friendly approach. Constable Rundel assumed the role of a "cover officer", in the event that Mr. Dziekanski should become uncooperative and/or a threat to the Officers.

G.1.3 As a result of the change in the dynamic of the relationship between Mr. Dziekanski and the Officers (a change over which Officer Rundel had no input or control), Officer Rundel, as a cover officer, reacted exactly as he was supposed to and exactly as a "reasonable peace officer" in similar circumstances would be expected to conduct himself.

G.1.4 As with the change in the dynamic of the relationship between the contact officers and Mr. Dziekanski, whether the decision was right or wrong, Officer Rundel was not part of, nor did he have any control over, the decision to discharge the Taser.

G.1.5 It is submitted that in the totality of the evidence, in particular, considering how Officer Rundel discharged his duties as the cover officer and, given the opinions of the “use of force” experts called in relation to Officer Rundel’s conduct, it meets the standard of conduct that one would expect of a “reasonable peace officer” of Constable Rundel’s training and experience in similar circumstances.

G.1.6 In conclusion, there is no merit or basis for making findings of misconduct against Officer Rundel alleging:

- (a) failure to make a proper assessment of the circumstances;
- (b) failure to ascertain sufficient information with respect to the dispatch report;
- (c) failure to obtain information from persons at the scene;
- (d) failure to develop a plan of action;
- (e) that Constable Rundel acted aggressively towards Mr. Dziekanski; and
- (f) Constable Rundel’s failure to take reasonable steps to restrain Mr. Dziekanski subsequent to the deployment of the Taser.

Did Constable Rundel professionally discharge his duty during the course of the R.C.M.P. IHIT investigation, and subsequently, during the course of this Inquiry.

G.2.1 Summarizing this question is a little more difficult, not because the discharge of that duty was problematic, but rather the fact pattern covers a broader time span and is factually more complicated.

G.2.2 In conclusion, there is no merit or basis for making a finding of misconduct against Officer Rundel:

(a) in finding that the notes and statements given by Officer Rundel were intentionally misleading;

(b) or, in his testimony, in finding that he intentionally misrepresented the behaviours of Mr. Dziekanski.

G.2.3 To make findings of misconduct would ignore, or unreasonably discount, the absence of any motive for Officer Rundel to misrepresent either his recorded statements or his testimony, the frailty of human recollection, the statements and evidence given by other witnesses, and the circumstances under which the recorded statements were given. Inconsistencies in notes and written statements are not surprising, given the dramatic nature and the speed with which the events unfolded. Officer Rundel's recorded statements and notes are generally consistent with the evidence.

G.2.4 In conclusion, it is respectfully submitted that there is no basis in the totality of the evidence to make findings of misconduct against Constable Rundel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: June 16, 2009

G. E. (Ted) Beaubier
Counsel for Constable Gerry Rundel

G. E. (Ted) Beaubier
Barrister and Solicitor
Suite #7 – 4180 Island Highway North
Nanaimo, B.C. V9T 1W6
Telephone (250) 756-2616
Facsimile (250) 756-3063