

**IN THE MATTER OF THE THOMAS R. BRIADWOOD Q.C.  
COMMISSIONS OF INQUIRY UNDER THE PUBLIC  
INQUIRY ACT, SBC 2007, c.9**

Federal Courthouse,  
Room 701  
701 West Georgia Street,  
Vancouver, B.C.

September 29, 2009

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**SUBMISSIONS ON BEHALF OF ZOFIA CISOWSKI  
Presented by her counsel WALTER KOSTECKYJ**

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WALTER KOSTECKYJ,  
Barrister and Solicitor,  
800 – 1285 West Broadway,  
Vancouver, B.C. V6H 3x8

Telephone: (604) 731-1161; Fax: (604) 731-6527

### **Introduction**

It is submitted that the death of Robert Dzekanski was the result of systematic failure, human indifference and by police actions which can only be described as excessive and totally contrary to the provisions of Sections 25 through 27 of the Criminal Code of Canada.

The excuses provided for the human indifference are often couched by a reference to privacy laws which are adhered to when it is convenient.

The excessive use of force is explained by an alleged slavish adherence to a teaching model for use of force training. At the end of the day we are expected to believe that common sense and basic principles of policing which have existed since the time of Sir Robert Peel which are essentially encompassed in Section 25 of the Criminal Code, no longer apply. Instead we are left to conclude that automaton action can be justified on the basis of a colourful circle referred to as the IMIM.

In the aftermath of Mr. Dzekanski's take-down we are then left to wonder whether a petty turf war between officials at Vancouver International Airport prevented Mr. Dzekanski from receiving medical attention minutes earlier than he did; precious moments that may have saved his life.

### **Background of Robert Dziekanski**

The police officers, the Government of Canada and Taser International made it clear from the outset that Mr. Dziekanski's background and health were going to be raised as defences and explanations for his death.

In truth, Mr. Dziekanski was a forty year old construction worker, who like others in his country, was left an economic casualty of the transformation of Poland from a communism to a free enterprise system in the making. In the

years before coming to Canada he had to adapt and did various jobs including painting, renovations, and the like.

According to witnesses in Poland, he had no health issues and although he enjoyed alcohol from time to time he was not considered an alcohol abuser.

Mr. Dziekanski was described as a gentle soul and all the witnesses remarked on his interest in geography.

Mr. Dziekanski's health has been placed in issue and a few basic points should be made. In order to immigrate to Canada it was necessary for Mr. Dziekanski to pass rigid medical requirements. No medical concerns were raised in that process. Additional evidence came from his family doctor, Dr. Joblonska, who verified that his health was normal. The only issue at the time of his last check-up prior to seeing the doctor for immigration purposes was that his blood pressure was at the high end of the normal range. She prescribed him a small dosage of beta blockers and her rationale for doing so was to "tune him up." Other medical evidence from cardiologists Tseng and Kerr has confirmed that his blood pressure was in the normal range. There was no indication that Mr. Dziekanski ever started on the medication and it appears to have been something that Dr. Joblonska provided as a "tune up" and on a short term basis. It should be noted that the chest x-ray, considered a significant test by medical people was normal as was the size of his heart.

There is no question that the medical evidence shows that Mr. Dziekanski had abused alcohol at some point in his life but there is no evidence to show any level of present addiction nor was there any evidence of an ongoing problem. In short, no temporal relationship could be made.

There is also no question that Mr. Dziekanski was nervous about travelling to Canada. He was fearful of flying as he had never travelled on an airplane before. In fact, the only time that he had left his native Poland in the past was

for a short trip of approximately one week's duration to Germany to find work. Ryszard Krasinski, a neighbour and friend of Mr. Dziekanski, explained in detail that travelling from Poland to Germany or any other neighbouring countries did not require extensive documentation and that the frontiers were best described as casual.

Unlike his previous travels, his planned trip to Canada involved travelling to a new continent and to a completely new and different culture and language. He had the natural reservations that any immigrant leaving his homeland would have. Additionally, Mr. Dziekanski had never flown before and it was clear that he was fearful of flying, but it is clear that once he was in the car being driven by his friend Mr. Dylski to the airport that he was calm.

Three witnesses testified about Mr. Dziekanski's flight and trip to Canada. Ms. Hower, a passenger on the same flight from Frankfurt, described Mr. Dziekanski as calm. It was to be a long flight and she was looking for people to converse with to pass the time. She dismissed Mr. Dziekanski on the basis of his appearance and decided he lacked the sophistication or intellect she was looking for. There is no denying that Mr. Dziekanski was unsophisticated as a traveller.

Mr. Gonzalez, an employee with Lufthansa, noted no unusual behaviour from Mr. Dziekanski, and in fact found his behaviour normal and calm. The only issue he spoke of was that initially Mr. Dziekanski sat in first class and when he was asked to move he did so.

Mr. Buettner was the purser on the Condor air flight that brought Mr. Dziekanski to Canada. He has no recollection of Mr. Dziekanski drinking alcohol on the flight and Mr. Buettner did not remember smelling alcohol or any other odour on Mr. Dziekanski. He thought Mr. Dziekanski appeared tired and he did think he may have been perspiring a little, which he attributed to normal

nervousness. This witness never thought Mr. Dziekanski looked sick or agitated and found him to be polite and courteous to the crew.

It is submitted that a man's character can be judged by the things he holds dearest to him. In Mr. Dziekanski's case, the things that he held dearest to him and that he packed with care to bring to Canada were his books; principally, geography books. That, in my submission tells us the most about Mr. Dziekanski's personality.

There was also the evidence of Wojteck Dibon, the young man who was unable to testify and whose statement Mr. Butcher asked to be placed in evidence. The most important evidence provided by this witness, in my submission, was that Mr. Dziekanski treated this young man with kindness, acted as a father figure in circumstances where he had no responsibility to do so, and provided a lifeline to a young man who was left to fend for himself. It should be remembered that the statement taken from this young man was taken at a time when he was emotionally at risk and in circumstances which were unethical given his age and mental health. The one message that does come through is the admiration that this young man had for Mr. Dziekanski.

### **The Arrival in Canada and the Initial System Failures**

We know that Mr. Dziekanski's flight arrived in Vancouver at 15:25 hours and we know that he passed through the Primary Inspection Line (PIL) at 16:05. The evidence was that this was a normal time for him to have made it to the PIL from the plane.

Mr. Dziekanski was seen coming down the escalator on the airport video. He didn't act in any unusual manner and appeared to be following other passengers down the escalator.

The first observations made of him at the airport were made by two Marquis employees, Patricia Hunter and Peter Dore (sub-contractors to the Vancouver airport). Interestingly, both Mr. Dore and Patricia Hunter gave statements to the police after hearing the various early pronouncements from the RCMP about Mr. Dziekanski. It is now known that those earlier RCMP reports were significantly flawed and in fact misleading, and in some instances plain false.

In his statement, Mr. Dore was able to identify that Mr. Dziekanski looked Polish. His explanation of how he could have given that information was based on having seen Polish seamen at some point in his life. He also said that he observed Mr. Dziekanski sweating profusely; whereas, Ms. Hunter saw a small sheen of perspiration on his lip. Both seem to remember him sweating profusely while he was filling out his declaration card. In his statement, Mr. Dore thought that Mr. Dziekanski might be a person of violence. Yet, in his examination, Mr. Dore noted that he didn't find anything unusual about Mr. Dziekanski's ability to walk, and that he did not display any suspicious behaviour and that Mr. Dore did not feel threatened. Mr. Dore admitted that had he felt threatened he would have talked to one of the security guards in the Customs hall or reported his suspicions to a Canadian Border Services Agent (CBSA) agent.

Mr. Dore was also certain in his statement that Mr. Dziekanski had no luggage with him and yet when he was questioned and shown the video it was clear that Mr. Dziekanski did have carry-on luggage. The point to all this is, Mr. Dore and for that matter Ms. Hunter, were clearly influenced in their statements by the early pronouncements made by the RCMP in their description of the incident. This is probably one of the most security conscious areas of the airport and any truly suspicious or unusual behaviour would be reported immediately. Clearly there is concern about drug smuggling, terrorism, illegal entry, weapons offences and the like. In normal circumstances one would assume that a

profusely sweaty man trying to enter the country would draw all kinds of attention, at the very least as a potential smuggler.

### **Summary**

In spite of all the evidence provided by these witnesses with respect to Mr. Dziekanski's appearance, we have the airport video showing Mr. Dziekanski entering into the area on the escalators and his demeanour appeared normal.

In addition, Mr. Dziekanski was directed to a Polish translation booklet to help him fill out his declaration card, which he did without incident. Exhibit 3 was entered into evidence as the declaration card that Mr. Dziekanski filled out.

### **Ms. Kullar**

Mr. Dziekanski's first dealings were with the customs officer, Monika Kullar, who also gave a statement suggesting that Mr. Dziekanski was perspiring. Once again, she did not consider his perspiration to be an issue which needed to be addressed. She says that she remembers Mr. Dziekanski because she had so few passengers to deal with that night. It is submitted that once again, Ms. Kullar's evidence was likely tainted by the RCMP reports of the incident. Her initial statement was given on October the 18<sup>th</sup>, after the RCMP pronouncements. What is noteworthy is that Mr. Dziekanski had filled out his declaration card correctly and that he asked for her assistance with filling out the flight number, which she did for him. So he was obviously cognizant of information details on the declaration card.

It is also noteworthy that Ms. Kullar, although aware of Mr. Dziekanski's inability to speak English, did not consider getting an interpreter and in fact didn't realize that one might be available. Instead, she identified the language issue on the declaration card and passed the language issue on for secondary Customs and Immigration to deal with. After stamping his card, she pointed

over her shoulder in the direction of customs secondary. Knowing Mr. Dziekanski's inability in English, and having the Marquis people available, it would have been simple for her to have someone take Mr. Dziekanski to the appropriate area, but that was never considered. Instead he was left to wander and find his way. At the end of her dealing with Mr. Dziekanski Ms. Kullar had met the strict terms of her job description and did no more. The first opportunity to assist Mr. Dziekanski with a translator was lost. Also, the first opportunity to direct Mr. Dziekanski to Immigration was lost.

It is of special note that when Ms. Kullar saw Mr. Dziekanski in the Customs area at around 12:50am, she made no mention of the fact to any of her co-workers that she had previously dealt with him and that she realized that he had been in the secure area of the airport for nearly 7 hours. Once again, indifference was the order of the day. The one observation that Mr. Kullar did make when she was going home at 01:00, was that Mr. Dziekanski seemed calm and she did not observe him to be perspiring.

From 16:05 until 22:33 the only evidence that we had as to what Mr. Dziekanski was doing was to be gleaned from the airport video tapes. We observe him initially to be walking towards the area where he was directed, but he did not appear to understand where he needed to go. He is seen walking back towards the PIL, and at about 16:11 he is checking the baggage monitor with other passengers. We now know from Mr. Jubber that he was in the area of baggage carousel 21 between 4:30 pm and 7:00 pm. Although Mr. Jubber had used the term "looking like a wack-job" in his telephone statement, he couldn't elaborate on why he said that, except to say that Mr. Dziekanski was walking around looking lost and on the basis of his dress.

**Ms. Widner**

It is known from the evidence of the Polish witnesses and Mr. Hutchinson that a plan was in place whereby Mr. Dziekanski's mother was to be meeting him in the baggage area. In our submission, it is appropriate to conclude that he initially went to look for her. While this was happening his bags arrived on carousel 23 and were removed by Ms. Widner, a Lufthansa employee. Ms. Widner thinks that she removed the bags from the carousel at approximately 16:30 and that she took them back to her desk at about 16:45. Ms. Widner checked with immigration to try to find him and was advised that there was no passenger there by that name. She did not tell the immigration officer that she had Mr. Dziekanski's bags, or why she was looking for him. She did not go to secondary customs, but she did go to the PIL and learned that he had entered into Canada through the PIL area at approximately 16:05. Once again, she did not tell the officer at the PIL area that Mr. Dziekanski was separated from his bags and that she had the bags. No discussion or suggestion was made as to how Mr. Dziekanski might be located. Ms. Widner left for home at approximately 17:30. She advised the Air Canada agent, who shared counter space with her, that the bags were behind her desk if anyone came looking for them.

Although there was a PA system available, Ms. Widner did not page Mr. Dziekanski and in fact didn't even consider it because in her words "that is not usually done". She admitted that there was nothing to prevent her from doing it. It was just one more missed opportunity to help Mr. Dziekanski, but other missed opportunities would follow.

At this point the obvious security issue has to be addressed. How is it possible that in an international airport, with today's security concerns that a man can be separated from his luggage and there is no protocol in place for this eventuality? This issue was raised with various CBSA agents, including the senior representatives who attended from Ottawa to give evidence, and no one seemed concerned about this potential security issue. I know of no other

international airport in the world where baggage can be abandoned without raising any security issues. Had Ms. Widner indicated why she was looking for Mr. Dziekanski or had a CBSA agent had been curious enough to ask the question why she was looking for him, Mr. Dziekanski may have been located at 4:30pm, instead of 10:30pm.

During this time, the CBSA had rovers and that night there was at least one rover working. It would be expected that if Mr. Dziekanski had been acting in some unusual way or sitting around perspiring unusually, that he would have been noticed. It is to be remembered that the Customs hall was not busy on this evening and in fact was downright quiet. Once again, we had senior CBSA personnel tell us that it was not a concern to have people in the Customs hall for extended periods of time. Yet, the purpose of the Customs hall, as stated by various CBSA personnel, is to clear people into the country and to keep the area sterile and to keep the traffic flowing as quickly as possible. In addition, CBSA admitted that they received numerous calls from the public trying to locate their passenger, which would only make more sense in terms of clearing people through the Customs hall as quickly as possible.

One issue that is always raised by CBSA in their dealings with people calling from outside the Customs hall relates to issues of privacy. Yet, in the case of Ms. Widiner, who was an airline greeter, she was able to go to the PIL and to Immigration to obtain information about Mr. Dziekanski's whereabouts, and whether he had arrived and when. Yet, the CBSA always hid behind the privacy issues when they were dealing with requests that were raised on Ms. Cisowski's behalf by Mr. Hutchinson.

It is crucial to remember that Ms. Cisowski was the sponsor for her son. Ms. Van Agteren went so far as to say that she might interview the sponsor at the time of processing to determine that it was a bonafide sponsorship application.

This information that Ms. Cisowski was sponsoring her son was available according to Ms. Van Agteren.

### **Summary**

The privacy laws used as a defence or explanation by airport and CBSA officials makes no sense in this context of Ms. Widner's ability to obtain information about Mr. Dziekanski.

### **CBSA Dealings**

Numerous CBSA agents had dealings with Mr. Dziekanski. At approximately 22:33, Mr. Dziekanski tried to exit at the point. No one found any issue with Mr. Dziekanski at the time and he was directed towards Customs secondary. It is at this point that he dealt with CBSA Baryha. Mr. Baryha was one of the CBSA officers that had the longest dealings with Mr. Dziekanski. It was Mr. Baryha that first noticed that Mr. Dziekanski was missing two of his suitcases. These were retrieved by Officer Baryha. Officer Baryha was able to understand from Mr. Dziekanski that he was looking to connect with his mother who lived in Kamloops. No page was made to see if Ms. Cisowski was present at the airport. Mr. Baryha did not consider it necessary to get an interpreter and find out what the delay had been.

Another CBSA officer Kelly Mckenzie, was present when Mr. Baryha was dealing with Mr. Dziekanski. Ms. Mckenzie was not surprised that Mr. Dziekanski was separated from his bags, as she said that the carousels are often confusing. Ms. Mckenzie was mindful that fatigue may have been an influence on Mr. Dziekanski.

Subsequently, Mr. Dziekanski was taken to Immigration. Mr. Dziekanski was in the immigration area for approximately two hours. He had an initial meeting with a supervisor, Alexandra Currie, who passed him off to Juliette Van Agteren.

Ms. Van Agteren tried to page his mother and Mr. Dziekanski heard his mother's name and corrected the pronunciation so she paged again. Ms. Van Agteren wasn't concerned about breaching any privacy issues as Ms. Cisowski was sponsoring her son into the country and it was expected that Ms. Cisowski would be there at the airport waiting. Ms. Van Agteren also called the Kamloops number at about 23:30, but as we know, Ms. Cisowski and Mr. Hutchinson left the airport at about 22:00 and did not arrive back in Kamloops until about 02:00.

It should be noted that after Ms. Van Agteren paged Ms. Cisowski, officer Tina Zadavec came forward and confirmed that she had had a call about Mr. Dziekanski earlier in the evening. Officer Zadavec gave evidence that she told officer Van Agteren that the mother may have gone back to Kamloops because she had told Mr. Hutchinson that Mr. Dziekanski was not there. The acting supervisor that night, Alexandra Currie, admitted that she overheard this conversation. By this point Ms. Currie knew that Mr. Dziekanski could not speak English, that he was a landed immigrant and that the people who had come to meet him had, in all likelihood, left. Yet, she didn't arrange for an interpreter to provide Mr. Dziekanski with an explanation or investigate the circumstances of why he had been in the Customs hall for such a lengthy period of time. Neither did any other officer possessing the same information make any attempt to find an interpreter for Mr. Dziekanski to either explain the circumstances to him or determine where he had been for the past 6-7 hours. These officers were content to let Mr. Dziekanski leave, knowing that he had already spent a considerable amount of time in the Customs hall and knowing that no one was there to meet him on the other side. In short, they were content to abandon him in the meet and greet area of the airport knowing that he couldn't speak English and that his family had left. They were just prepared to pass him off and let the cards fall where they may.

The excuse for not calling an interpreter was provided by Ms. Van Agteren, among others. That excuse was that they would have had to pay a minimum two hour call to the interpreter if one had been called.

In her evidence, Ms. Van Agteren went on to say that when she and Ms. Purewall left that evening they went to see if Mr. Dziekanski was still there. When she didn't see him, she assumed that he had met his family, even though she knew full well that his family had been told to go home. Ms. Van Agteren had gone out into the meet and greet area previously to look for Mr. Dziekanski's family and was unable to locate them at that time.

It was Ms. Van Agteren who enlisted the help of officer Chapin who she thought might have some familiarity with the language. It would be laughable to call Mr. Chapin a Polish speaker. It turns out that Mr. Chapin's familiarity with the Polish language is based on the fact that he once dated a Polish girl. For example, the way he was able to get Mr. Dziekanski to respond to whether or not he was married was to show him his right hand and point to the ring finger. In short, Mr. Chapin may have been able to say such things as hello and goodbye in Polish, but that was the extent of it.

#### **Demeanour of Mr. Dziekanski in the customs and Immigration area**

Much was made in cross-examination of Mr. Dziekanski state of sobriety while he was in the Customs and Immigration area. Some witnesses did indeed indicate that they thought he had some level of impairment. The principle source of this evidence was officer Chapin. It is to be remembered that Mr. Chapin dealt with Mr. Dziekanski on a face to face basis for a maximum of five minutes, by his own evidence, although he may have had the opportunity to observe Mr. Dziekanski for a period of 15-20 minutes. Mr. Chapin was not able to say whether Mr. Dziekanski was slurring his words because he cannot speak Polish. It is interesting to note on the YVR tape that when Mr. Chapin walked Mr.

Dziekanski to the point he, for all intents and purposes he ignored Mr. Dziekanski. They are not observed communicating anymore than a wave goodbye. Mr. Chapin commenced speaking with a fellow CBSA officer at the point rather than directing his attention towards Mr. Dziekanski. If he displayed the same level of interest in observing Mr. Dziekanski previous to this, it is submitted that he would not be a reliable objective observer.

Mr. Chapin made his determination that Mr. Dziekanski may have been drinking based upon the following meagre facts:

- 1) He said what he thought to be the word "drink" in Polish to Mr. Dziekanski and that Mr. Dziekanski replied yes
- 2) On the basis that Mr. Dziekanski's appearance was slightly dishevelled, he was perspiring lightly and he thought that he might be a bit tipsy.

As to the first point, it is not clear if Mr. Chapin could actually say the word drink in Polish. If he could, Mr. Dziekanski may have been of the view that he was asking if he wanted a drink of water and, in fact, Mr. Chapin admits that the reference could have been to water just as easily as alcohol. Further, Mr. Chapin doesn't seem to have considered that Mr. Dziekanski had been in transit for approximately 30 hours by the time Mr. Chapin was interacting with him. If Mr. Chapin was concerned about the level of intoxication, he could have turned over this helpless man to the RCMP. Instead, he walked him out the door. It is to be remembered that the reason he walked him to the door was because Mr. Dziekanski remained in the Immigration area after he was processed. Mr. Dziekanski seemed reluctant to leave. In my submission it was obvious that he had still not connected with his mother and was reluctant to leave the area until that had occurred. This was based on the fact that:

- 1) he had agreed to meet her in the baggage area;

2) he heard his mother being paged by Ms. Van Agteren on two occasions and no explanation was being provided to him as to where he should go or what he should do.

The witnesses that had the most interaction with Mr. Dziekanski, do not appear to share the same view that Mr. Chapin had. Ms. Van Agteren and Mr. Baryha probably had the most interaction with Mr. Dziekanski and neither of them seemed to share the same view as officer Chapin.

Ms. Van Agteren recollects getting him a cup of water and she described him as being fatigued. She did not find his level of perspiration to be inconsistent with someone who had been travelling for some time. She considered his behaviour to be normal after a long flight and after a long period in the airport waiting. She found nothing unusual about his actions given the length of time that he had travelled and been in the airport.

Officer Baryha found Mr. Dziekanski to be cooperative, compliant and in fact, didn't notice anything out of the ordinary about him. Although officer Baryha said in his statement that Mr. Dziekanski was sweating, he didn't have a recollection of that when he was on the stand giving evidence

Kelly Mckenzie thought that Mr. Dziekanski was cooperative and appeared to understand what was being asked of him when he was being given directions. His voice seemed calm and he had a compliant tone. He was cooperative, and she thought that they had established communication with him. She observed him to have a light sheen of perspiration and she thought this might be due to some level of impairment, but changed her mind as the examination progressed as Mr. Dziekanski was calm, cooperative and respectful.

Interestingly, Ms. Currie, the acting supervisor in Immigration, made a report and nowhere in that report does she say that she thought that Mr. Dziekanski was impaired by drugs or alcohol.

### **Summary**

In the final analysis, there was no facility in the airport for the CBSA officers to turn Mr. Dziekanski over to, so they were content to just let him go knowing that they were the ones who had sent his greeting party home. In this regard, we recently heard the important evidence of Ms. Gracie Churchill-Browne. Ms. Churchill-Browne had started her shift at approximately 22:00 on the night of October 13, 2007. She remembered seeing Mr. Dziekanski and observed that he was confused and unable to communicate. She had suggested getting an interpreter for him, but her suggestion was ignored. She remembers that a female CBSA officer came in some time between 10:30 pm and 11:00 pm and seemed surprised to see Mr. Dziekanski and told the approximately 3-4 other officers in the room that Mr. Dziekanski's family had been waiting for him all day and had just left for Kamloops. When Ms. Churchill-Browne expressed her concern to a Customs officer she recollected that she was told that, "he's a big boy and could look after himself". It is submitted that in the context of this information, it was unconscionable to not call an interpreter and explain to Mr. Dziekanski what had occurred.

### **Ms. Cisowski's attempts to make contact with her son**

There are four main witnesses who testified about the attempts made by Ms. Cisowski to connect with her son. Those witnesses are: Mr. Hutchinson, Chris Richard, an employee of Marquis; Janet Sullivan, another employee of Marquis, and Ms. Zadavec, an immigration officer.

Mr. Hutchinson said that he arrived at the airport with Ms. Cisowski at approximately 13:30. Mr. Hutchinson said that his role was to help Ms. Cisowski

with communication as well as to drive her to Vancouver and then back to Kamloops once they had met her son. Mr. Hutchinson confirmed various attempts to get information from the bureau located in the meet and greet area with Ms. Cisowski and on her behalf. Mr. Hutchinson referred to this bureau as an information bureau and believed that it was there for the purpose of providing information to travellers. It was suggested by counsel for YVR that this was merely a tourist information booth, which begs the question as to why YVR would not provide a proper information facility in the area.

### **Mr. Richards - YVR**

A subsequent witness Chris Richards, who manned the tourism information booth, indicated that he would get requests from 100-200 people per night and that half of those requests were people requesting information about incoming flights. He said that his superiors were aware that these kinds of questions were being asked and they were aware of the frequency and the distress that was felt by people meeting passengers.

Mr. Hutchinson says that he and Ms. Cisowski communicated the following information to Mr. Richards:

- 1) Ms. Cisowski was there to meet her son.
- 2) That her son did not speak English.
- 3) That he had never flown before.
- 4) That Ms. Cisowski had told her son that she would meet him in the baggage claim area. Mr. Richards confirmed that this information was relayed to him from Ms. Cisowski and Mr. Hutchinson.

Mr. Richards went on to say that he recollects speaking directly with Ms. Cisowski on at least three occasions, although it could have been more. Mr. Hutchinson's evidence was that they went to that information booth on at least 4 or 5 occasions. In addition, Mr. Richards indicated that Ms. Cisowski was

getting more distressed with each visit and he specifically recollects being told that Ms. Cisowski:

- 1) Was looking for her son
- 2) That he did not speak English
- 3) That he was an unsophisticated traveller, never having flown before
- 4) Ms. Cisowski had planned to meet him in the baggage area.

Mr. Richards recollects telling Ms. Cisowski that interpreters would be available for her son and they would be paged if something was going on with him. Mr. Richards also said that he received no training on how to deal with the issues raised by Mr. Cisowski and others who raised similar issues. He admitted that he had learned to, in his own words, “pass the buck” onto Immigration knowing from his experience that Immigration wouldn’t provide information to passengers.

Ultimately, Mr. Richards suggested that Ms. Cisowski go to the information bureau located at the top of the escalators. Mr. Hutchinson’s evidence is that he provided the same information at the upstairs information booth that he had provided to Mr. Richards.

### **Ms. Sullivan**

Ms. Sullivan, who was working at the information booth at the top of the escalators, recollects interacting with Mr. Hutchinson and Ms. Cisowski on at least two occasions. Ms. Sullivan says that she never knew that Ms. Cisowski was looking for her son and that that information was never relayed to her by Ms. Cisowski. Ms. Sullivan says that she was only told that Ms. Cisowski was looking for a man. This evidence from Ms. Sullivan makes no sense in the context of any mother describing a son as a man as opposed to talking about the relationship. Moreover, it is totally contrary to the evidence provided by Mr. Richards. In his conversations with Ms. Cisowski and Mr. Hutchinson, it was

absolutely clear that Ms. Cisowski was looking for her son and that there had been an error as to the meeting place. It is also to be remembered that Ms. Cisowski was becoming more distressed as time went on, according to the evidence of Mr. Richards, and the suggestion that Ms. Sullivan makes that Ms. Cisowski was simply looking for a man makes no sense in the context of all the other evidence. Ms. Cisowski was getting more desperate for help and clearly would have been communicating more information than Ms. Sullivan admits to, which Hutchinson confirms.

What is clear is that the airport had not provided training to their employees at any of the information bureaus on how to deal with this type of issue. Clearly, something could have been done. Ms. Cisowski had a picture of her son and airport personnel do in fact enter the secure area. Given the fact that Ms. Cisowski had been seeking help from airport personnel for at least 7 hours, which was unusual even to Ms. Sullivan and Mr. Richards, one would have thought that they would have called upon an airport employee who had access to the secure area to investigate. These were unusual facts and went beyond the usual issues that may have arisen with privacy. YVR was unprepared and their people simply lacked training to deal with any circumstance that went outside the ordinary. In short, they were taught to smile, re-assure, and "pass the buck."

As an example of this philosophy, attitude and training of the YVR information personnel, we have Ms. Sullivan's misleading attempt to page Mr. Dziekanski. Ms. Sullivan told Mr. Hutchinson and Ms. Cisowski that she would page Mr. Dziekanski, which she indeed did on two occasions. Both Mr. Hutchinson and Ms. Cisowski could hear the pages. Unknown to Mr. Hutchinson and Ms. Cisowski, however, but known by Ms. Sullivan was that the pages could only be heard in the meet and greet area and would not be heard in the secure area. The only potential outcome of these pages, was to mislead Ms.

Cisowski and Mr. Hutchinson into believing that Mr. Dziekanski was not responding to pages and therefore not there.

### **Mr. Hutchinson's Inquiry at Immigration with Ms. Zadavec - "Chumped Off"**

Mr. Hutchinson gave evidence that at approximately 21:00 he went to Immigration to see what he could find out about Mr. Dziekanski's whereabouts. His evidence was that he had gone down a hallway and was directed to a phone that he was to use to get information. He was put through to a woman who he could not see but who he understood to be an Immigration officer. Mr. Hutchinson says that he told this woman that he was looking for Mr. Dziekanski and he gave her the flight number of Mr. Dziekanski's flight. Mr. Hutchinson also told her that Mr. Dziekanski did not speak English and that a mistake had been made as to where he was to be met. He had a piece of paper with all of Mr. Dziekanski's details and Ms. Cisowski's as well, but the Immigration officer was not interested in that information. Mr. Hutchinson does say that he explained the circumstances of the mistake in meeting place and that it was a landed immigrant situation and that Mr. Dziekanski couldn't speak English. Mr. Hutchinson says that the conversation lasted for approximately 5 minutes and that it was continuous. He has no recollection of being put on hold. During this discussion he was told by the Immigration officer that there were translators available in the Immigration area but that they had waited too long. At the end of the conversation he was told words to the effect of, "I can tell you without breaching any confidentiality that there is no Polish immigrant here tonight." At the end of the conversation, Mr. Hutchinson came to the conclusion that Mr. Dziekanski was not at the airport based on the previous statement made by Ms. Zadavec, and also based on her statements with respect to the fact that they had been there too long. That combined with the pages which had produced no results led Ms. Cisowski and Mr. Hutchinson to leave the airport.

Tina Zadavec's evidence was not substantially different from Mr. Hutchinson's. She doesn't deny that she was told that he was an inexperienced traveller and that he didn't speak English. She doesn't deny that she was told that there was a mix-up as to where Mr. Dziekanski was supposed to meet his mother, namely the baggage area. She doesn't deny that she made the statement: "without breaching any confidentiality there is no landed immigrant here from Poland."

The only pointed dispute by Ms. Zadavec was with respect to whether or not she put the phone down to look for Mr. Dziekanski. By her evidence she put the phone down for less than a minute, checked the shift supervisors office, the front counter, walked pass the cubicles and didn't see Mr. Dziekanski. She herself said that she didn't speak to anyone and she told Mr. Hutchinson to go home because it was not believable to her that someone could be in the Customs hall for that period of time. Once again, this goes to the point that the Customs hall is not meant as a place to loiter and wait.

Ms. Zadavec admits that she could have placed a phone call to Customs to see if they had information about Mr. Dziekanski. She also admits that she could have asked a supervisor to pull up his information on the computer. She also knew that the passports were scanned at the PIL and that that information would be in the computer. She did none of those things.

As Mr. Hutchinson said in his evidence, he was treated like a chump and sent off with false information. Had Ms. Zadavec said nothing, it would have been better. The ingrained systematic indifference prevented Ms. Cisowski from connecting with her son.

As a last ditch effort, Mr. Hutchinson said that Ms. Cisowski went up to the information booth at the top of the escalator one last time on her own where Ms. Sullivan was to see if there was anything else that could be done. After Ms.

Cisowski's return they left the airport terminal at around 22:00 and arrived back in Kamloops between 01:30 and 02:00. Ms. Van Agteren said that she left a message on Ms. Cisowski's phone in Kamloops at approximately 23:30 indicating that Mr. Dziekanski was at the airport. Ms. Cisowski called Immigration when she got home and was connected with Mr. Chapin at around 02:00. Mr. Chapin told Ms. Cisowski that he had dealt with her son and that he was in the area. He also told Ms. Cisowski that he would look for him when he left shift to let him know that his mother was in his way. Mr. Chapin had the details of knowing how to get a hold of Ms. Cisowski. It is to be remembered that after Mr. Chapin's shift ended he went through the IRL and found Mr. Dziekanski dead on the floor. Mr. Chapin then helped the police retrieve his documentation and advise them of the conversation he had had with Ms. Cisowski. There is no evidence that Ms. Cisowski was ever contacted by police or notified as the next-of-kin until she returned to the airport the next day expecting to meet her son.

### **28 Minutes Before the Police Arrive**

There is a crucial time period which bears discussion. This is the time between when Mr. Dziekanski enters into the meet and greet area and subsequently re-enters the International reception lounge (IRL) up until the point where the police arrive. During this time Mr. Dziekanski has some significant interactions with other witnesses, the most significant of which, was Mr. Meltzer, a professional valet.

It is submitted that YVR was responsible for securing the area between the IRL and the meet and greet area. Up until 23:00 the security guard was posted at the doors leading into the IRL. Properly trained security personnel could have averted the tragedy which was about to befall Mr. Dziekanski.

A timeline is of significance here. At approximately 12:52am Mr. Dziekanski entered into the meet and greet area. He sat in the area for some

minutes and then at around 01:09 presented himself at the door to the IRL and was trying to get back into the IRL and presumably the Customs hall. It is submitted that the logical conclusion is that when Mr. Dziekanski found himself in the meet and greet area and was no closer to finding his mother, he wanted to return to where he thought he was supposed to meet her.

### **Mr. Dhari**

At approximately 01:08 he came into contact with Mr. Dhari, a YVR employee who was tasked to collect carts. Mr. Dhari came within a few feet of Mr. Dziekanski. Mr. Dhari couldn't make himself understood. Mr. Dziekanski had been trying to push the IRL doors open. Mr. Dhari thought that Mr. Dziekanski was getting frustrated. Mr. Dhari never felt threatened. His observation of Mr. Dziekanski was that he appeared healthy, not intoxicated and not sick. He didn't find anything unusual about his eyes or his skin and he didn't believe that he was suffering from any form of mental illness. He also didn't observe Mr. Dziekanski to be perspiring. He was face to face with Mr. Dziekanski for at least a couple of minutes.

At this point Mr. Dhari enlisted the help of Mr. Meltzer. He says that he wanted Mr. Meltzer to go get security to help Mr. Dziekanski. Mr. Meltzer doesn't remember that request or any interaction with Mr. Dhari. In any event, Mr. Meltzer comes on the scene at approximately 01:10:30 and begins interacting with Mr. Dziekanski. Mr. Meltzer admits to getting into a shouting match with Mr. Dziekanski and he admits to raising his voice, and in his own words he made Mr. Dziekanski know that he was pissed off. At one point, Mr. Meltzer says that when he reached into his pocket Mr. Dziekanski raised his fists but that when he saw Mr. Meltzer holding a card in his hand he dropped his fists. As an aside, the

witness Sima Ashrafina, who was watching the interaction take place, did not see Mr. Dziekanski raise his fists. She confirms that Mr. Meltzer was shouting and yelling and in her opinion, provoking Mr. Dziekanski. She in fact told Mr. Meltzer that he was provoking Mr. Dziekanski.

Mr. Meltzer then used his prox card on the door at approximately 01:13 and Mr. Dziekanski entered into the IRL. At this point he remained engaged in a face to face verbal argument. At no point in time did Mr. Meltzer feel threatened or in any form of danger. Shortly thereafter Mr. Meltzer leaves and Mr. Dziekanski remains in the area of the doorway.

At 01:16:14 Mr. Canzon, a man of small stature who was a contract cleaner for the airport, met Mr. Dziekanski in the doorway. He saw at this point that Mr. Dziekanski was perspiring. Mr. Canzon had no difficulty walking past Mr. Dziekanski and considered him to be harmless. Mr. Canzon entered the area and began cleaning in the IRL. A short while later he saw Mr. Dziekanski speaking to a man at the IRL doors and this man was yelling at Mr. Dziekanski.

We know that Mr. Meltzer returned to the area at approximately 01:18:29 and remained in the area with Mr. Dziekanski until about 01:20:48 and once again engaged Mr. Dziekanski in a loud argument. It is Mr. Meltzer's evidence that Mr. Dziekanski actually calmed down as a result of being shouted at and verbally abused by Mr. Meltzer. We submit that the opposite is true and that in fact, everytime Mr. Dziekanski had any dealing with Mr. Meltzer he became more enraged and more excited.

Prior to the security guards arriving, Mr. Meltzer makes one more comment to Mr. Dziekanski and subsequently went to meet the security guards at the end of the IRL walkway. He then returned to the area of the IRL doors with the two security guards. It is at this point that Mr. Dziekanski picked up a computer,

dropped it on the floor, and then picked up a small wooden stool and through it against the glass.

There are a number of significant matters that need to be addressed regarding the arrival of the security guards. The witnesses, including Ms. Bosnjak and Ms. Kula, were surprised at how long it took for security to arrive. It is to be remembered that they were called at 01:15am and they didn't arrive on scene until 01:26am. The greater surprise is that when they arrived they were totally inept and unprepared. They were told by Mr. Meltzer that a Russian interpreter was needed and in fact one of the guards, Mr. Rudek, can be heard on tape mentioning to the other guard that a Russian interpreter should be called. Yet, neither security guard contacted Airport Operations to advise them of the need for an interpreter. Mr. Meltzer had previously given the same information to Mr. Agravador, who was posted at elevator 40 but this information was also never passed on. Moreover, when the two security persons did arrive on scene, they effectively turned their backs on Mr. Dziekanski and ignored a man who needed help. Ms. Ashrafina had made much greater attempts at interaction than any other YVR employee or for that matter any police officer that followed. To put the label of security guards on these individuals is a total misnomer.

It is important to note that Ms. Ashrafina and the other witnesses including Ms. Bosnjak and Alison Kula, that each time Mr. Meltzer interacted with Mr. Dziekanski he made the situation worse and that Mr. Dziekanski became more excited after these confrontations.

Of all the witnesses that were called from the meet and greet area, none felt fearful for their own safety or that Mr. Dziekanski was a threat to anyone. They all described Mr. Dziekanski as being lost and frustrated.

During this period of time one can witness Mr. Dziekanski following various directions given to him from witnesses. For example, at one point he picked up the computer again and was asked to put it down and he did.

### **Summary**

If YVR had properly trained security people the problems with Mr. Dziekanski could have been averted. If a guard had been posted at the door as we say should have been the case, the altercation with Mr. Meltzer could have been avoided. In addition, if there were procedures in place which allowed for communication between those waiting for passengers and the passengers in the secure area, this tragedy could also have been averted. The current changes have not involved the posting of a security guard nor have they included any possibility for the people who wait for passengers to let their passenger know that they are waiting. There is no way of communicating back and forth.

### **The Police arrival and the ultimate failure**

The police conduct in relation to how Mr. Dziekanski was dealt with needs to be measured against the provisions of the Criminal Code and even against the operational framework in training under which the Royal Canadian Mounted Police operate. This operational framework is referred to as CAPRA. CAPRA stands for:

- Client
- Acquire and analyse information
- Partnership
- Response
- Assessment for continuous improvement

In our submission there was a complete failure to follow the principles of the CAPRA model under which these four police officers were to operate.

1) Client

- All four of the police officers failed to understand that they had clients at the scene. Neither Mr. Dziekanski, nor any of the witnesses present in the meet and greet area were treated in any client-like fashion.

The police attitude was displayed by Constable Bentley when he broke down his baton within a few feet of Mr. Dziekanski head. This behaviour showed an utter disregard for a downed man. Apart from the actual tasing, this action has generated more public criticism based upon its complete callousness. That was far from treating Mr. Dziekanski like a client or indeed the other people in the area.

2) Acquire and analyse information

- The police failed to acquire and analyse any information with the exception of the radio call, which they know to be information that needs to be verified on scene. In this case, there were four police officers and not one interviewed or obtained any information or even tracked down a complainant to seek pertinent information. There were an array of people who were prepared and could have explained to the police what had happened and how Mr. Dziekanski had gotten into the state of excitement after his verbal altercation with a limo driver who was still standing in the vicinity. These officers had to walk past all the complainants to get to Mr. Dziekanski. Bentley and Rundel were the only officers who even had any interaction with anybody in the meet and greet area prior to confronting Mr. Dziekanski. The extent of that interaction was a woman pointing towards Mr. Dziekanski and saying "he's over there". Constable Bentley entered the area without even hearing that Mr. Dziekanski didn't speak english. He was in such a hurry to

get to Mr. Dziekanski that he blocked out any information that he should have gathered simply by listening. It's clear from the Pritchard video that the information was being relayed to the officers, it just wasn't registering.

- The point to this police training is to create more time to allow a situation to get resolved. Constable Bentley's actions in particular show the opposite can occur when one rushes into a scene without acquiring or analysing information. Constable Bentley was so eager to get to Mr. Dziekanski that he was unable to analyse the information that was being shouted at him about Mr. Dziekanski's ability to speak English.
  
- There were four police officers present, one could have gone to the Customs hall; one could have checked the area where Mr. Dziekanski was located to see if there was anyone that needed to be evacuated; one could have dealt with Mr. Dziekanski. They were so focused on what they had heard in the dispatch on getting to Mr. Dziekanski that they failed to acquire or analyse any other information. As an example, Constable Bentley thought from the outset that this was a situation where he would have a fight with Mr. Dziekanski and so it turned out to be a self-fulfilling prophecy.

### 3) Partnership

- The aspect of partnership in CAPRA never occurred. There were four police officers and none of them had any discussion among themselves, according to their evidence before confronting Mr. Dziekanski or indeed after they confronted Mr. Dziekanski. No one was assigned as the contact officer and in fact three different officers took on that role within a 10-15 second time space. In normal circumstances this would be confusing to a

client but to a non-English speaking individual who is in distress, the inconsistencies being communicated exacerbated the circumstances beyond simple confusion.

- Corporal Robinson abdicated his responsibility of leadership. He allowed three junior members with little field experience to fumble around confusing Mr. Dziekanski as to who he was dealing with. This was compounded by Corporal Robinson when he interjected himself into matters and gave him a conflicting command and directed Mr. Dziekanski to place his hands on the counter in the exact location where a stapler was located. This interaction was a direct result of four officers acting independently without even the most rudimentary plan.

#### 4) Response

- When the officers got to the response stage they failed to provide any form of measured response. Even assuming that Mr. Dziekanski had a stapler in his hand, there is no evidence that he was lunging at the police officers. In spite of the sad attempts to introduce evidence through Mr. Fredericks to support the notion that Mr. Dziekanski was advancing on the police officers, no such independent evidence exists. The tasing of Mr. Dziekanski was at best a premature, hurried and panicked response. At worst, it was a pre-meditated and planned attack made without reference to the actual circumstances. Given that a mere 24 seconds had elapsed from the time the police officers came into contact with Mr. Dziekanski until the time he was felled by the taser, one is left to make the worst conclusion.
- It is to be remembered there were four officers in full kit including, protective vest, baton, pepper spray and firearm surrounding him in a semi-circle. None of the witnesses perceived him to be a threat. The perfect example was Ms. Ashrafina when she was trying to help Mr.

Dziekanski. The police officers by now knew that there was no broken glass and they could smell no alcohol on Mr. Dziekanski, so they had to be aware that the call was wrong in at least two important material ways. They also should have been able to observe that he was in a state of fatigue. As Dr. Webster pointed out in his evidence, these officers should have been able to determine that Mr. Dziekanski was having an emotional crisis as opposed to a behavioural emergency. They failed to do so.

- In all of the circumstances there was no reason that a warning could not be given to Mr. Dziekanski by showing him the taser or by directing him to drop the stapler using hand signals. Under the provisions of the RCMP operational manual they were obligated to give him a warning before discharging the taser unless time did not permit. They had ample opportunity to step back and create more time. Constable Millington, as the operator of the weapon, bears particular responsibility as would Corporal Robinson. It is his evidence that he was directing Constable Millington to deploy the taser, despite the fact that Constable Millington didn't hear the direction. Constable Rundel and Constable Bentley had opportunity to provide warnings to Mr. Dziekanski to put the stapler down. Constable Bentley and Corporal Robinson already had their batons at the ready and so the security of the four RCMP members was not in jeopardy. If worse came to worse, there was one officer for each limb as was pointed out by Mr. Nickel when he was giving his testimony.
- As Dr. Webster pointed out the officers lost control of the situation and they had the opportunity to regain it without resorting to force, but they chose not to.

- The continuing response of the police officers was also flawed. Mr. Dziekanski went to the ground as a result of the first taser deployment. Yet Constable Millington deployed the taser an additional four times. Witnesses could hear and Robinson testified that he directed an additional deployment, if not two additional deployments. Once again, it is to be remembered that the police operational manual says that the conducted energy weapon is not to be used as a restraint device. It is beyond question that is what the police officers were using it for here.
- The excuse provided by the officers as to the need for further deployments was that Mr. Dziekanski was resisting so violently. In the training of the taser they are taught that everyone reacts differently to the taser, but most importantly that there is a five second window within which they needed to handcuff Mr. Dziekanski. Instead, they watched him on the floor writhing and screaming in pain and pushing himself in a circle in the fetal position for the first two deployments.
- They did not even try to handcuff Mr. Dziekanski during the two windows of opportunity they had. When they did try to handcuff him, they were inept in their technique. Mr. Nickel, who gave evidence about developing handcuffing techniques, indicated that basic handcuffing training taught police officers to use two hands to take control of a subjects hands prior to pulling out the handcuffs. In this case, Officers Bentley and Rundel in particular were flawed in their technique prior to getting Mr. Dziekanski under control, prolonging the struggle and making it seem that Mr. Dziekanski was resisting more than was the actual case. Had they used proper technique he would have been more easily subdued.

- The TASER International bulletin of 2005 was placed into evidence through Corporal Gillis, which is exhibit 145. That bulletin advised that failure to begin restraint procedure within the five second window of opportunity could lead to prolonged taser deployments. It also warned that repeated or prolonged taser deployments impaired breathing and respiration. It goes on to say that muscle contractions can result in injuries to tissues, organs, bones, tendons, ligaments, nerves, joints, and stressful compression fractures to bones and vertebra. It repeatedly warns about prolonged or continuous exposure and repeated exposure. It is to be remembered that in the Taser bulletin it warns that taser devices can cause strong muscle contractions, (Page 2 paragraph 4). It is to be remembered that Corporal Gillis gave evidence and acknowledged his awareness of this bulletin and indicated that he incorporated the concerns raised in this bulletin into his training.
- The operational manual of the RCMP mirrors this concern. The operational manual warns against multiple deployments and continuous deployments.
- Mr. Nickel indicated that while Mr. Dziekanski was being tasered he may not have had control over his muscles and that that may have seemed like resistant behaviour. This is supported by the warnings contained in the 2005 TASER bulletin.
- In addition to the above, Constable Millington continued to apply the taser and deploy it without the other members being aware, which could have led to the perception that he was still struggling when he was just reacting to the taser.

- The Operational Manual, under which these RCMP officers were operating, also provided that the taser was not to be used as a restraint device.
- The main police response to why Mr. Dziekanski was repeatedly tasered was that the four officers maintained that they were trained that when Mr. Dziekanski was tasered he should have gone to the ground immediately, in essence, dropping like a sack of potatoes.
- All of the taser experts agreed that people react differently to taser deployments. It would be expected that this information would have been passed on to all four members involved. Constable Baltzer indicated that his reactions were often different even on the occasions when he had been tasered. Dr. Ho, a long time affiliate of TASER International, said the same thing. In cross-examination Dr. Ho reviewed the three occasions when he was tasered and on none of those occasions did he fall to the ground. He did indicate that he was supported, but it was unclear whether he would have fallen to the ground even without the support. Even Corporal Gillis acknowledged that there are different reactions to the taser. It is as if the four police officers expected that they would taser Mr. Dziekanski, that he would immediately fall to the ground and place his hands behind his back for ease of handcuffing. It is submitted that it is beyond argument that Mr. Dziekanski fell to the ground as a result of the first tasing and that it was clear to even an untrained observer that the second tasing was having an extreme effect on Mr. Dziekanski. Mr. Dziekanski grabbed his chest, went into the fetal position and circled on the floor in extreme pain. Therefore, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> deployments cannot be judged as other than excessive force and a complete violation of the operational manual warning not to use the taser as a restraint device. Contrary to the evidence provided by

Corporal Gillis and Sergeant Fawcett, the facts and images speak for themselves. Beyond question, the response from these four officers went so far beyond any reasonable use of force that the behaviour needs condemnation.

#### 5) Assessment

- There was a complete failure to abide to the CAPRA model by conducting an assessment in the aftermath of Mr. Dziekanski death. According to the officers, they never discussed or reviewed between themselves what had occurred or what could have been done better.
- Not only does this assertion defy common sense it breaches the requirements of CAPRA. The officers were adamant that they never discussed the facts with one another or anybody else.
- The exception is Constable Bentley, who says that they went into a critical incident debriefing session where they discussed each persons role. The other officers deny this. Quite frankly on this point, as well as others, their evidence is not credible. Dr. Webster who has attended numerous critical incident debriefings as a Psychologist, stated that the RCMP use the Mitchel model, which indeed requires each participant to set out the facts about what he or she did. In any event, Corporal Basra, who attended the debriefing, essentially took the fifth and stated that she didn't remember what had occurred. In light of Constable Bentley's testimony it is clear that the matters were discussed, but not in the formal way that was intended by the CAPRA model in terms of assessment.
- Also unbelievably, Corporal Gillis testified that he had never viewed the Pritchard video until he attended at the Inquiry. It would have been expected that the assessment would have been done by him, as the use

of force coordinator for the Province of British Columbia. His excuse for not watching the video was that he might be called to testify, and quite frankly, that evidence made no sense.

### **Analysis under the criminal code**

In my submission, although measuring the actions of the police officers against CAPRA is a useful exercise, at the end of the day, the police officers actions need to be judged against the provisions of the Criminal Code. That analysis requires a consideration of sections **25**, **26**, & **27** of the Criminal Code, which provide protection to police officers using force in certain circumstances.

Moreover, the police officers are trained that when they use force, the onus is upon each member using force to show that he or she met the requirements of those sections **25** through **27** of the Criminal Code. Each officer acknowledged in their evidence that the onus is on each member to justify the use and the extent of the force used, as did the use of force experts. The RCMP operational manual sets out the same requirement. The force is to be proportionate to the circumstances.

In Mr. Dziekansk's case, it is also necessary to look at sections **494** and **495** of the Criminal code, which outlines the powers of a police officer to arrest.

Additionally, section **175** of the Criminal Code, which involves causing a disturbance, and section **430**, which is the mischief section, requires consideration.

It is submitted that upon a review of these sections and a review of the officers actions in their dealings with Mr. Dziekanski in the early morning hours of October the 14<sup>th</sup> 2007, one is led to no other conclusion but that the police acted inappropriately and used excessive force in their dealings with Mr. Dziekanski.

All of the officers involved indicated that they may have been investigating either a disturbance or a mischief, contrary to sections **175** and **430** of the Criminal Code. To my recollection, Officers Bentley and Rundel considered Mr. Dziekanski arrestable. It is submitted that he was not arrestable under section **175** of causing a disturbance because no officer saw him committing the offence. As a result, sections **494** and **495** of the Criminal Code were not met.

If they were investigating a mischief, which is a hybrid offence, the Officers would have had to meet the provisions of sections **495 2(d)** and section **495 2(e)** of the Criminal Code.

Mr. Dziekanski had every right to establish his identity and to show his identification, which Millington had asked for and which the evidence shows he was attempting to do before Corporal Robinson overreacted and essentially put Mr. Dziekanski into custody. Every action of the police officers in this case showed that they were treating Mr. Dziekanski as if he was under arrest, without reference to the requirements of the Criminal Code. There was never an intent to abide by the requirements of the Criminal Code.

The police officers' only grounds for suspecting that a Mischief had occurred was based upon a radio call. When the officers arrived on the scene they knew that the information on the radio call was wrong in at least two respects. Mr. Dziekanski was not dark skinned, and there was no broken glass. Beyond that, there was no signs of any luggage being thrown around. The officers owed Mr. Dziekanski a proper investigation, which nobody conducted. The only discussion with the people in the waiting area lasted for a second or two at most when a woman said, "he's over there." The practical reality is that the officers needed to make time in this situation.

Without belabouring the point, there were four officers in full kit and one disraught and tired client for them to deal with. As Dr. Webster pointed out, it was up to the trained police officers to take control and calm the client before resorting to force.

Even if it can be argued that Mr. Dziekanski was arrestable, the force visited upon him by the four police officers was excessive and contrary to Sections 26 and 27 of the Criminal Code. This is once again on the basis that there were four police officers present and that even if Mr. Dziekanski had a stapler in his hand, the reaction of the police officers was excessive. All four were parties to that action and all four must be held accountable. In the circumstances, the force to Mr. Dziekanski was applied too quickly and without appropriate warning and, as stated above, the repeated deployments of the taser device were excessive.

### **Summary**

The officers all pointed to the IMIM as the rationale for their actions. The IMIM is simply a training tool and it provides no jurisdiction for use of force and the officers are told that. The officers need to be guided by the provisions of the Criminal Code. The use of force needs to be justified and measured in the context of Section 25 of the Criminal Code and that did not happen.

### **Aftermath**

It is submitted that the aftercare Mr. Dziekanski received was wholly lacking and amounts at the very least to police misconduct. It is to be remembered that Mr. Dziekanski was handcuffed and taken into custody by the four police officers and he therefore became their charge.

Immediately after he was handcuffed, Mr. Dziekanski lost consciousness. That was not seriously disputed by any of the officers and it conforms with the

evidence of the independent witnesses who were watching from behind the glass.

Constable Bentley was initially called for a routine call at 01:32:25, according to exhibit 40B, the E-Comm records. By his evidence, he upgraded the call to a code 3 at 01:32:49 because he saw Mr. Dziekanski turning blue. At least five independent witnesses who were standing behind the glass also observed Mr. Dziekanski turning blue. Those witnesses were Sima Ashrafina, Alison Kula, Genevieve Diezel, Maria Bosnjak, and Lance Rudek.

Robinson confirmed that he saw Mr. Dziekanski's ear turning blue, but his explanation was that he assumed that Mr. Dziekanski had bruised his ear.

Constable Bentley and Corporal Robsinson also heard Mr. Dziekanski making snoring sounds while he was unconscious. They were the two officers in the nearest proximity to Mr. Dziekanski.

The most basic first aid knowledge would lead one to conclude that an unconscious person turning blue and making snoring sounds is in extreme danger. It is submitted that a person with common sense, but with no first aid training would be lead to the same conclusion.

It is highly significant that Mr. Enchelmaier who says he was monitoring the pulse of Mr. Dziekanski never observed Mr. Dziekanski turning blue. One wonders how it would be possible for him to be monitoring Mr. Dziekanski and not make that simple observation, when almost anyone else who took the time to observe Mr. Dziekanski confirmed the colour change, which raised a circulation problem.

All of the police officers were questioned about whether they knew what the ABC's of first aid were. They all indicated that they knew what each letter stood for. The ABC's are: Airway, Breathing, Circulation. In addition, much has

been made about the fact that Mr. Enchelmaier is a highly qualified first aid practitioner who is very familiar with the ABC's. Yet, the police officers and Mr. Enchelmaier failed to assess the ABC's properly. Not one person said that they ever checked Mr. Dziekanski's airway and their excuse for this was that he was breathing so they assumed that his airway was fine. However, it is in evidence that Mr. Dziekanski had laboured breathing (snoring), which would potentially speak to an airway issue, but they never checked this.

Neither Cpl. Robinson or Mr. Enchelmaier made any special note of the fact that Mr. Dziekanski was turning blue. Had they taken the time to make this observation, as others had, they would have been aware of the fact that he was having a serious circulation issue.

Nobody, either from the Airport Authority or from the RCMP, thought to get a defibrillator on scene nor oxygen. In addition, not one of those officers considered bringing in a first aid kit from the car where they would have had access to a pocket mask. No assistance of any kind was even considered.

None of the police officers showed Mr. Dziekanski enough dignity to even remove their gloves. Corporal Robsinson removed one glove for a few seconds and replaced it. We acknowledge that Corporal Robsinson claimed that he took the glove on and off each time he assessed Mr. Dziekanski, but we submit that that is incredulous.

Richmond Fire arrived on scene at 01:45 and Captain Graeme gave evidence that in his opinion Mr. Dziekanski was already dead upon their arrival.

BC Ambulance arrived within two minutes of Richmond Fire and they observed that Mr. Dziekanski was centrally cyanotic, which takes time to set in and means that his face and chest area were turning blue.

The point being, that Mr. Enchelmaier and Corporal Robinson claim that they were monitoring Mr. Dziekanski up until approximately two minutes before Richmond Fire arrived. This could only lead to the conclusion that they were failing to properly assess Mr. Dziekanski.

It was the view of Corporal Robsinson that Richmond Fire had detected a breath when they arrived, but the witnesses from Richmond fire confirmed that no breath was found.

The only somewhat independent witness that has even suggested that Mr. Enchelmaier was monitoring Mr. Dziekanski was Mr. Sambrook. It should be remembered that in his evidence he said that he was more concerned with the running of the airport than he was about what was going on with Mr. Dziekanski because he assumed that others were taking care of that. The witnesses who said that they did not see Mr. Dziekanski being monitored were: Ms. Ashrafina, who remained on the scene for approximately five minutes after Mr. Dziekanski was tasered; Ms. Bosjnak; Ms. Ms. Deziel; Ms. Kula; Ms. Mr. Rudek; Mr. D'Sa, who says that Mr. Enchelmaier sent him to block the publics' view of the scene and also said that he didn't see anyone monitoring Mr. Dziekanski.

Constables Millington, Rundel and Bentley all assumed that someone was monitoring Mr. Dziekanski, but they never actually observed anyone doing it. They were content to rely on their assumptions that someone else was taking responsibility for Mr. Dziekanski's well-being. Corporal Robsinson turned over the first aid responsibility to Mr. Enchelmaier not knowing the first aid credentials of Mr. Enchelmaier. Everyone made assumptions, and no one was really monitoring him properly.

It is believed that Mr. Enchelmaier was giving his evidence in good faith and probably believed that he did continuously monitor Mr. Dziekanski, but that flies in the face of the cyanosis and the findings of Richmond Fire. The video

shows that Mr. Enchelmaier made one attempt to take the pulse of Mr. Dziekanski for approximately six seconds and then he stood back.

Captain Graeme, the Richmond Fire chief said that when he arrived on the scene, there was nobody within 10ft of Mr. Dziekanski. It was also Captain Graeme's evidence and the firemen with him that Corporal Robinson refused to remove Mr. Dziekanski's handcuffs so that he could be properly assessed and helped. Corporal Robinson also refused BC Ambulance upon their first request. The lame excuse given by Corporal Robinson for his refusal was based upon the fact that Mr. Dziekanski might come to and begin struggling again. This explanation makes no common sense when Mr. Dziekanski had been unconscious at this point for at least 6 minutes. None of the other officers seemed to feel that leaving the cuffs on was necessary at that point.

There was also much evidence about the recovery position and whether the police officers had taken the time to firstly place him in that position and secondly, keep him in that position. None of the independent witnesses observed Mr. Dziekanski in what can be called a true recovery position. When Richmond Fire arrived he was laying prone with head turned to the side and his hands still cuffed behind him. One the witnesses thought that one of his legs may have been bent slightly. An unconscious person who is handcuffed could not possibly be kept in the recovery position unless he was supported in that position at all times, and that simply wasn't the case here.

### **Statements by the four RCMP officers**

Each of the RCMP officers involved gave statements at the time of the incident. Each of the officers denied that they had discussed with the others, either at the scene or at the detachment, any of the details of the incident. They also denied that they had discussed the events at any later time. The one exception being Constable Bentley, who said that there had been a debriefing,

known as a critical incident debriefing, where each officer told their version of events. Yet we know they worked together for 2-3 more weeks on the same watch. Then three of them went on a weekend course where they were lodged at the same facility.

There has been previous discussion of the model that is used by the RCMP at the debriefing, namely the Mitchel Model. An expert, Dr. Webster, testified that the Mitchel model included a component where each officer told about his recollection of events.

From the outset each of the four officers knew that an in-custody death entailed an investigation into the events and that as part of that investigation there would be determination of whether the force used had been reasonable in the context of sections **25** through **27** of the Criminal Code. The officers knew that the onus was on them to justify their use of force. It is inconceivable that they would not have had these discussions at the scene or in the following hours until they met with the IHIT investigators. Beyond that, this case attracted international notoriety and the four officers continued to work together at the airport for approximately two months. It defies logic and common sense that they would not have discussed these issues in the course of their working together while the notoriety of the events grew.

In Corporal Robinson's case, he was specifically asked whether he had discussed the events with anybody else and in any other circumstances. He failed to mention that he had been at the IHIT debriefing on the morning of October the 14<sup>th</sup> after which the RCMP media liason officers made statements to the public. Those comments made from the media relations people will be discussed later on. The fact of Corporal Robinson's attendance at the briefing was highly significant. It is difficult to imagine why an event, where he was meeting with an IHIT squad and providing information to them at a debriefing,

would not have been disclosed through his own evidence. This raises further concerns of credibility with respect to his evidence.

Each of the officers took the stand and the same significant differences arose between what they said in their statements and what they said on the stand. The commonalities were:

- 1) They all indicated that he was aggressive or resistant in some way when they initially arrived.
- Officer Bentley said in his October 14<sup>th</sup> statement that prior to Mr. Dziekanski having the stapler he exhibited the following behaviours:
    - o Page 2: he looked like he was waiting to fight.
    - o Page 2: It was like he was looking for a weapon.
    - o Page 19: his demeanour gave the impression that there was going to be a fight.
    - o Page 19: right away he started to back up, looking for something to grab.
    - o Page 19: Mr. Dziekanski was in a fighting stand prior to having the stapler.
  - Officer Rundel said in his October 14<sup>th</sup> statement that prior to Mr. Dziekanski having the stapler he was exhibiting the following behaviours:
    - o Page 21: he said that Mr. Dziekanski was unkempt and kind of sloppy
    - o Page 21: When they arrived Mr. Dziekanski seemed unresponsive to them

- Officer Millington said in his October 14<sup>th</sup> and 15<sup>th</sup> statement, and the taser report, that prior to Mr. Dziekanski having the stapler he exhibited the following behaviours:
- Taser report:
  - o The male would not respond to hand signals and was moving around erratically.
- October 14<sup>th</sup> statement:
  - o Page 1: When we got in...a male was yelling and it wasn't making sense...He backed away and was still yelling...there were chairs lying around...he didn't listen to anything we were saying
- October 15<sup>th</sup> statement:
  - o Page 1: when we got to the male he was yelling and in an agitated state...he was moving around erratically.
  - o Page 1: I tried to calm him down using hand signals and I mentioned passport and ID, but he didn't seem to understand.
  - o Page 2: He knocked some things over and backed away from us.
  - o Page 9: he was agitated and moving around in an irregular fashion...he was moving around erratically...that's when we tried to communicate with him.
  - o Page 11: We tried to speak to him...he stepped back and looked at us...he had a defiant or agitated look
  - o Page 12: his eyes were really wide and he seemed like he was sweaty...I didn't smell any alcohol on him, but he definitely was not all there...he seemed more paranoid than angry...then he backed up and started knocking things off the desk
- Corporal Robinson said in his October 15<sup>th</sup> statement that prior to Mr. Dziekanski having the stapler he exhibited the following behaviours:
- October 15<sup>th</sup> statement:

- Page 2: the male seemed agitated...he was being quite aggressive, so I told him to put his hands on the table.
  - Page 8: The male was obviously agitated, you could just tell by his body language...the hand movement...his overall demeanour...obviously angry and pissed off, angry...when he re-positioned himself near the table.
  - Page 9: he wasn't like flat-footed...it was almost like he's trying to size up, there's 4 members there and I think it's like a quick thinking of options...the hands don't stop moving...It's most likely clenching.
- 2) They all indicated that Mr. Dziekanski was being combative with the stapler and three of them indicated that he was holding the stapler up high.
- Officer Bentley said in his handwritten notes, his October 14<sup>th</sup> and November 22<sup>nd</sup> statement that when Mr. Dziekanski had the stapler he exhibited the following behaviours:
    - October 14<sup>th</sup> statement:
      - Page 2: Mr. Dziekanski was aiming the stapler at the members
      - Page 7: He grabs the stapler and he kind of flings it out in front of him and he's kind of holding it up, pointing it towards the members...he kind of swung it out in a fast motion...almost like he was trying to hit myself and Corporal Robinson.
      - Page 8: He was becoming super combative
    - Page 51 of his handwritten notes:
      - The subject grabbed the stapler and came at members screaming.
    - November 22<sup>nd</sup> statement:
      - Page 7: He grabbed the stapler and swung it at me
      - Page 8: ...when he swung the stapler...

- Officer Rundel said in his handwritten notes, his October 14<sup>th</sup> and 18<sup>th</sup> statements that when Mr. Dziekanski had the stapler he was exhibiting the following behaviours:
- October 14<sup>th</sup> statement:
  - o Page 5: he had the stapler up above his head and then Millington deployed the taser.
  - o Page 12: He`s not responding to our commands and walking away...grabbing the stapler and then getting into combative behaviour
- October 18<sup>th</sup> statement:
  - o Page 5: when Mr. Dziekanski picked up the stapler he had both fists in the air with the stapler and was motioning towards the members
- Handwritten notes:
  - o He said that Mr. Dziekanski had his arms up and he said that he was yelling
- Officer Millington said in his TASER report, his October 14<sup>th</sup> and 15<sup>th</sup> statements that when Mr. Dziekanski had the stapler he was exhibiting the following behaviours:
- October 14<sup>th</sup> statement:
  - o Page 1: He picked up a stapler...knocking things over and he approached us
- October 15<sup>th</sup> statement:
  - o Page 2: he knocked some things over and backed away from us. At that point we were all around him and he picked up the stapler and started moving towards us which was a combative behaviour.
  - o Page 13: he raised the stapler high and had it open and started advancing towards us.

- Page 33: he was coming towards us as if he wanted to fight...I got the impression that he wanted to hurt us.
- TASER report:
  - The male then knocked items off a desk and grabbed a stapler...the male swung the stapler wildly with his arms at the members.
- Corporal Robinson said in his October 15<sup>th</sup> and 18<sup>th</sup> statements that when Mr. Dziekanski had the stapler he was exhibiting the following behaviours:
  - October 15<sup>th</sup> statement:
    - Page 2: The male was in a combative state...swinging the stapler.
    - Page 2: He was trying to hit us with it. Robinson said that he was going to pull his defensive baton.
    - Page 9: It's not where he was listening to anything we're trying to do...he started swinging the stapler at us
    - Page 9: it all happened really quick to where he grabbed the stapler and started swinging at us...his eyes were on everyone...I was telling him to put his hands on the table and telling him to calm down.
    - Page 10: He grabbed the stapler...he just started swinging it and I knew there was yelling at that point.
    - Page 11: so he grabbed the stapler and I remember him taking a step forward and then he was swinging the stapler up high..like he's swinging it to try to push us back or attempt to hit us...It's aggressively step swing, so that's when it's like it's a step back, because I know that I probably confused him a bit.
    - Page 12: It was very quick...step forward...swing...step back.
  - October 18<sup>th</sup> statement:

- Page 10: That`s when he looked like he was going to do it...that`s when he grabbed the stapler and started swining it.
  - Page 10: When he grabbed the stapler there was a lot of articulation on our part and then I instruced Millington to deploy the taser.
  - Page 11: He took a step forward and was swinging the stapler up high and attempted to hit us...he was swinging it and attempted to push us back
- 3) In their statements they all indicated that Mr. Dziekanski was fighting through the taser and that he had to be taken down to the ground.
- Officer Bentley said in his October 14<sup>th</sup> statement that Mr. Dziekanski had fought through the taser and that he had to be taken down to the ground.
- Page 2: He appeared to be fighting through the taser
  - Page 2: Corporal Robinson and Constable Rundel took down the male.
  - Page 9: The subject was fighting through the taser
  - Page 11: when the taser gets deployed he appears to be fighting through it.
  - Page 12: He`s fighting through it and he keeps fighting through it
  - Page 12: it seemed to me that when the taser ran out he was going to continue fighting
  - Page 12: he looked like he was focused on fighting through it
  - Page 12: Robinson and Rundel moved in to try to take him down...I believe he was taken down to the ground...Yeah he was taken down to the ground.

- Officer Rundel said in his October 14<sup>th</sup> statement that Mr. Dziekanski had fought through the taser and that he had to be taken down to the ground.
  - o Page 6: After the first taser blow, Mr. Dziekanski was still motioning towards the members.
  - o Page 6: Robinson and Bentley and myself wrestled him to the ground
  - o Page 16: The taser training also taught us about excited delirium. It almost sounded like this is what was being...characteristics brought out in this guy...his behaviour was unusual...he was aggressive...out of the ordinary stuff...a lot of times there`s super human strength as well...which he was demonstrating...he was very strong.
  
- Officer Millington gave the indication in his handwritten notes and in his October 14<sup>th</sup> and 15<sup>th</sup> statements that Mr. Dziekanski had fought through the taser and he said that he had to be wrestled to the ground.
- October 14<sup>th</sup> statement:
  - o Page 1: eventually we were able to wrestle him to the ground.
  - o Page 4: He didn`t fall, members had to wrestle him to the ground
- October 15<sup>th</sup> statement:
  - o Page 2: I pulled out the taser and shot him...he felt the effects...we went in and got him to the ground...Robinson said hit him again...it wasn`t really working...I did a push stun on his shoulder.
  - o Page 14: I cycled it twice while he was standing...he hadn`t gone to the ground and we were able to wrestle him to the ground.
  - o Page 28: You could hear the clacking for the 2<sup>nd</sup> deployment and you could tell that it wasn`t effecting him
- Handwritten notes:

- ...TASER deployed three times male did not go down...stayed on feet until members wrestled to ground.
- Robinson said in his handwritten notes and in his October 15<sup>th</sup> that Mr. Dziekanski had fought through the taser and that he had to be brought to the ground.
- Page 2: after Millington deployed the taser the man was still standing...still with clenched fists...still being quite aggressive and he was trying to fight through the taser.
  - Page 3: I instructed him to use it again because the male was not going down as a result of the taser.
  - Page 12: I've got an eye on Kwesi and it was at that point that I asked Kwesi to use the taser...I was going for my baton when I told Kwesi to deploy it...it didn't drop him...the individual was still standing...it was almost like he was trying to fight through it.
  - Page 13 / 14: like he's still standing...it was like he was trying to fight through the taser...the individual hadn't dropped at that point.
  - Page 13: He wasn't trying to run away, he was just trying to fight through the taser.
  - Page 14: he had to be wrestled to the ground...he didn't collapse on his own...he had to be physically brought to the ground...he was up and we were on him and he was still fighting through all of us...so it did take all four of us to try and control him.
- 4) They all indicated in their statements that Mr. Dziekanski continued to resist and struggle while he was on the ground and they were trying to handcuff him. It should be remembered that only Officer Millington knew how many times he was tasing Mr. Dziekanski.

- Officer Bentley indicated in his October 14<sup>th</sup> statement that Mr. Dziekanski was still struggling and resisting while Mr. Dziekanski was on the ground.
  - o Page 2: Corporal Robinson and Constable Rundel took down the male...at that point he was still resisting heavily, fighting back with members...it was a long struggle but we were finally able to get the handcuffs on.
  - o Page 14: ...tried to get the handcuffs on him but it was really hard cause he was fighting intensely with us...he was just...using whatever force to prevent us from handcuffing him...strongly resisting the members.
  
- Officer Rundel indicated in his October 14<sup>th</sup> statement that Mr. Dziekanski was still struggling and resisting while Mr. Dziekanski was on the ground
  - o Page 6: Once he was on the ground he was resisting and it was just a matter of wrestling and putting pressure on his arms.
  - o Page 6: Mr. Dziekanski was no longer resisting but Corporal Robinson was still holding his shoulders down.
  
- Officer Millington indicated in his October 14<sup>th</sup> statement that Mr. Dziekanski was still struggling and resisting while Mr. Dziekanski was on the ground.
  - o As per number three comments.
  
- Corporal Robinson indicated in his October 15<sup>th</sup> statement that Mr. Dziekanski was still struggling and resisting while Mr. Dziekanski was on the ground.
  - o Page 3: the male was struggling with us and it was quite the struggle to get the handcuffs on.

- o Page 3: we were able to get him on the ground and he was still fighting, kicking, pushing...and we were still trying to get the cuffs on.
- o Page 3: I put him in a wrist lock...trying control him with an arm lock...and trying to position my body with my leg on his top shoulder area.
- o Page 14: he was still fighting all the way through it...kicking, pulling his arms in...
- o Page 15: really difficult trying to control him because he was just fighting and there was pushing and didn't really have an opportunity to swing at me from where I was positioned on him...

The commonality in the statements indicates that there had been discussion among the officers about the events. A troubling aspect beyond the errors in the statements, is the fact that the police officers did nothing to correct those errors until they were cross-examined under oath. Constable Bentley, Millington and Rundel maintained that they had accurately reported in their statements up until the time that they were on the stand, and while on the stand they tried to rationalize what they had said in their statements. In Corporal Robinson's case, he was the last to give evidence and resiled from a number of points in his statements after having the benefit of the previous officers testimony.

It is submitted that on the whole one is left with the inescapable conclusion that the four officers, knowing they had to justify the use and amount of force, made statements to meet the legal threshold they had to cross. One is left with the further inescapable conclusion that the members collaborated between themselves before statements were given.

Beyond that it appears clear that the members were prepared to embellish the actions of Mr. Dziekanski to justify the force they ultimately used.

In particular, it is submitted that Corporal Robinson knew he was going to have to justify his actions as well as those of the other three members. Corporal Robinson's embellishments began early on. One of Corporal Robinson's first contacts was to Staff Sergeant Wright. The notes of Staff Sergeant Wright are found at Exhibit 183. Staff Sergeant Wright appeared to be a careful note-taker. He said his notes were made within the minutes of his conversation with Corporal Robinson which occurred at 02:00 hours on October 14. In that significant note at 02:00 hours, (page 100 of the notes, Exhibit 183) he makes the following note of what he was told by Corporal Robinson;

- "subject was @ a counter and when approached began throwing items at the glass, i.e., chairs, etc."
- Unco-operative
- 4 members at the scene

It is submitted that Corporal Robinson was trying to tell Staff Sergeant Wright that he was on scene and was witnessing these events before engaging Mr. Dziekanski. This of course is not true.

### **RCMP Media Reports and the loss of public confidence**

It is submitted that there should be a recommendation made by the Commission that police agencies should not investigate in-custody deaths. It is submitted that the Office of the Police Complaints Commission should be expanded and given additional powers to conduct investigations into in-custody death matters. It is further submitted that in order to conduct those inquiries, it is necessary to have established an investigative arm of the Police Complaints Commission with appropriate powers under the Police Act.

In the handling of this matter by the RCMP they have demonstrated that it is inappropriate for police agencies to investigate themselves.

In the immediate aftermath of Mr. Dziekanski's death Sergeant Lemaitre made a media release on behalf of the RCMP, outlining what the RCMP said had occurred at the airport.

Included in that release were statements that Mr. Dziekanski had been tasered twice and that the police had taken all steps possible to calm him down prior to deploying the conducted energy weapon against him.

After this pronouncement by Sergeant Lemaitre, a witness came forward, Ms. Ashrafina, to contradict the RCMP description of events. Among other things, Ms. Ashrafina said that there had been at least four discharges of the conducted energy weapon. Sergeant Lemaitre made a further media disclosure denying what Ms. Ashrafina had said, and said words to the effect of, "he could go on the record and confirm that there were only two CEW deployments" and that Ms. Ashrafina's accounts were effectively wrong.

A report was generated by Constable Baltzer on October the 24<sup>th</sup>, 2007, concluding that there were five CEW deployments. That information was kept from the public at the order of Superintendent Rideout. The excuse given by Superintendent Rideout was that he had refused to comment on this and other evidentiary issues to protect the integrity of the investigation.

On November 30<sup>th</sup> 2007, the RCMP were, however, prepared to comment on the monitoring of Mr. Dziekanski prior to Richmond Fire arriving on scene. The RCMP became aware that a freedom of information request was going to disclose the Richmond fire report, which indicated that Mr. Dziekanski was not being monitored when they arrived. In order to protect the RCMP reputation Superintendent Rideout ordered a media release to pre-empt the disclosure that was coming to say that the RCMP members had properly monitored Mr. Dziekanski.

Superintendent Rideout gave the evidence that he approved the release of the information that the RCMP members had been monitoring Mr. Dziekanski on the basis that it was “stable” evidence. This was based upon the statements of Constables Bentley, Millington, Rundel and Trevor Enchelmaier. It is to be remembered that the evidence of these police officers on the stand was that they assumed that monitoring was being conducted but never actually witnessed it. Other witnesses, including Ms. Deziel, Ms. Ashrafina, Ms. Bosjnak, Ms. Kula, Mr. D`Sa and Mr. Rudek saw no evidence of monitoring. The RCMP claim that the information was stable and this is non-sensical.

When asked to explain why the information about the number of taser deployments was not made public, it was somehow suggested that this might compromise the investigation. In our submission, all this did was discredit a witness who had come forward and potentially prevented other witnesses from coming forward. It was obvious that the investigation was more concerned with protecting the image of the RCMP than with the protecting the integrity of the investigation.

Exhibit 98 in these proceedings contained the original media release. That release claimed that the three officers attempted to speak with the man, who continued to ignore their commands. It went on to say that the male remained violent and agitated and that after he was tasered and was on the ground and handcuffed, he continued to be combative, kicking and screaming.

The RCMP made efforts to prevent the release of the Pritchard video. The rationale was to protect the integrity of the investigation. The RCMP media relations people had the opportunity to view the video before they gave the media release. Superintendent Rideout confirmed in his evidence that if it had not been for the court application by Mr. Pritchard to get his video back, the

video would have continued to be suppressed and it is likely that it would never have seen the light of day.

Public confidence in the RCMP was lost after the video was released. The discrepancy between the RCMP reports released to the media and the images on the video were at odds.

Confidence in the RCMP was further destroyed when in December of 2007, it was revealed by the Crown Prosecutor's Office, that the taser had been deployed against Mr. Dziekanski on five occasions not two.

The principles of policing were enunciated by Robert Peel in the 1830's and one of the nine principles was that police cannot be effective without public confidence and public support. The RCMP and other police agencies, need to be able to show that investigations which involve their members are transparent and subject to public scrutiny, which was not done here.

It seems that the nine principles of policing, which can even found on the web pages of certain police forces including the New Westminster police force, have been forgotten and the time has come for all police forces to get back to those nine principles.

### **YVR Misconduct**

It is submitted that the actions of Robert Ginter, the airport response coordinator, could only be described as misconduct and disregard for Mr. Dziekanski's well-being. I would go so far as to say that his acts were unconscionable.

Placed into evidence is exhibit 83, the emergency medical plan. This exhibit contains the medical emergency provision, of what I would describe as the standing orders for YVR. In the description section on page one it says, "This section contains detailed position, specific procedures for mobilizing for a

Medical Emergency.” On page 2, a medical emergency is described as, “any person that requires medical treatment.” Page 4 sets out the required actions for an airport operations officer. In short, it sets out the basic procedure that any time there is a code three call the airport’s ERS (trained first responders) are to be called. Only the ERS supervisor has the discretion to decide not to attend the call. It is obvious that the rationale for that order is that the ERS supervisor is in the best position to make a determination as to whether attendance at a scene will put the airport at risk.

Mr. Ginter, on his own initiative and without consulting with the ERS supervisor, ordered the operations centre not to advise the ERS supervisor of the Code 3 call that was made in Mr. Dziekanski’s case.

The evidence is clear that ERS can respond much quicker to calls in the terminal buildings of YVR than can Richmond Fire, or for that matter BC Ambulance. Andrew Caldwell’s evidence was that on a timed test it took four minutes and twenty seconds to get to the international terminal.

When Carla Hanson, the airport operations officer, became aware of the code 3 she warned Mr. Ginter to turn down his radio set as she was going to tone ERS, which makes a loud radio sound. Mr. Ginter specifically told Carla Hanson, “don’t do an announcement, just have ambulance come.” Ms. Hanson was concerned enough to ask, “is Greg (Greg Sambrook) okay with that? They did just say it was a code three.” Mr. Ginter’s reply was, “yeah, we’re fine.” (Exhibit 26(c), at audio 24)

Mr. Ginter’s actions were contrary to the provisions of the medical emergency management plan. This action in our submission was based on the fact that he had had a disagreement with the ERS supervisor early in the evening over the fixing of a pot hole in a runway that didn’t need to be used until the following day. Andrew Caldwell was in email communication with

Heather Staller throughout this incident. One of the first emails was Mr. Caldwell stating that he "didn't expect anything positive out of Bob or Greg," and he said this when Ms. Staller told him that Bob (Ginter) and Greg (Sambrook) had gone down to the IRL to investigate what was going on with the Mr. Dziekanski. This speaks to the fact that there were still issues between Ginter, Sambrook and Caldwell and, in our submission, those petty issues effected a man's life.

Mr. Ginter's explanations for not calling ERS ring hollow. His explanations were that he didn't feel it was necessary to call ERS as the ambulance was already on the way. He also offered another excuse, being that if an emergency should occur ERS would be on the scene with Mr. Dziekanski and wouldn't be able to respond. It is to be remembered that it was 01:30 and the last international flight had already arrived. It is also significant that earlier in the evening, when the airport was busy, that Mr. Ginter was prepared to dispatch ERS to fix a pot hole for an unneeded runway. Mr. Ginter had made no assessment of Mr. Dziekanski's condition and doesn't even seem to have been aware of the fact that he was unconscious until one minute before Richmond Fire arrived.

Also pursuant to the Emergency Management Plan on page 6, the Airside Duty Manager and Terminal Duty Manager, which were effectively the roles assumed by Robert Ginter as the Airport Response Co-ordinator, were required to attend such a medical call with an automated external defibrillator (AED), or to arrange for an AED to be brought to the location. There was an AED in reasonable proximity at the top of the escalator, but Mr. Ginter took no initiative on his own, nor did he dispatch anyone else to get the AED. It is to be remembered that there were security personnel available who Mr. Ginter could have asked to retrieve the AED. Moreover, Mr. Ginter could have fulfilled this function himself as he was not needed on scene.

When he made the decision to call off ERS, it was done in a split second and without thought to the possible harm that it could do to Mr. Dziekanski, and was motivated solely by his previous dispute with Andrew Caldwell.

At the end of the day, it is possible that Mr. Dziekanski could have been saved by the dispatch of ERS.

### **Mr. Sambrook**

Mr. Sambrook was the senior supervisor on duty that night. He had taken a radio and attended at the scene, but he claims not to have been aware that ERS had been called off. Worse still, he claims that he was unaware that it was a Code 3 until Richmond Fire arrived. This evidence, makes little sense in the context of his supervisory role and the fact that he had a radio with him.

It makes more sense when considered in the context that he too had had a disagreement with the ERS supervisor over the pothole issue and that he acquiesced in Mr. Ginter's decision knowingly.

### **Medical Evidence and the Cause of Death**

There was much discussion between various medical experts about the mechanism of Mr. Dziekanski's death. Some of the experts only provided reports and did not testify. Essentially, the experts fell into two camps:

- 1) Those who believed that the CEW was a primary contributory factor in causing a cardiac arrhythmia, which led to Mr. Dziekanski's death
- 2) Those who believe that Mr. Dziekanski died as a result of a syndrome known as sudden death during restraint and that the mechanism of how death occurs in such cases is unknown, and that such deaths occurred before the advent of the CEW and that therefore the CEW had no role to play in Mr. Dziekanski's death.

It is our submission the best medical evidence available leads to the conclusion that CEW deployments were a significant contributing factor to Mr. Dziekanski's death along with the fact that while he was under restraint his breathing was impaired by the restraint procedures. As a combination of those factors, he died.

We will provide a brief review of medical evidence provided by each of the experts. We say that the best evidence was provided by Drs. Chambers, Kerr, Tseng & Butt.

The spectre of excited delirium was raised by some of the experts, but it is important to remember that none of the police officers raised that issue except in retrospect. Had the officers been of the view that excited delirium came into play at the time, they would have been required to call for medical back assistance immediately, which did not occur in this case.

The strongest advocates in favour of finding excited delirium were Dr. Lu, a Psychiatrist, Dr. Di Maio, a pathologist.

### **Dr. Di Maio**

With all due respect to Dr. Di Maio, it is our view that he is not qualified to give a psychiatric opinion on the issue of excited delirium. We know that he co-authored a book on the topic with his wife, who is described as a forensic nurse. The introduction to the book, in our view, establishes Dr. Di Maio's bias in that it seeks to give an explanation and rationalise why police officers should not be blamed in cases of in-custody death.

We make the further observations about Dr. Di Maio's report. At page three of his report, he concluded that the first activation of the CEW appeared ineffectual. It is submitted that that is just plain wrong, and that in fact Mr. Dziekanski was felled to the ground as a result of the first CEW deployment. At

page four of the report, Dr. Di Maio concluded that two of the deployments occurred while Mr. Dziekanski was standing, which again is wrong. He also suggests on page five that Mr. Dziekanski failed to respond to multiple attempts by the police to calm him down. In fact, Mr. Dziekanski was calm when the police arrived and responsive to their requests.

Beyond that, excited delirium has not been identified as an authentic syndrome in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Additionally, there is a warning in the DSM-IV that delirium is not to be diagnosed in forensic matters.

Even among those who advocate the existence of excited delirium, one of two key factors needs to be present:

- 1) The subject must be under the influence of an illicit drug, like cocaine and / or
- 2) The subject must have previously diagnosed mental illness. Neither of which were present in Mr. Dziekanski's case.

Dr. Di Maio's general biases towards the existence and findings of excited delirium have to be taken into account in assessing his report.

### **Dr. Lu and Dr. Janke**

Dr. Lu, a Psychiatrist, was the other witness who suggested the existence of delirium. In his review of the evidence at page 7, he referred to eye witness testimony from Lois Steckley and Adam William. It is to be remembered that Ms. Steckley was described by other witnesses as not being "all there." Her calls to airport operations are in the evidence. Adam William was not produced as a witness and, it is submitted, that this was due to his unreliability. His evidence was disclosed to all council as part of the IHIT report. His statement suggested such things as, Mr. Dziekanski was trying to cut his wrists and that he was

throwing computers at the five or six police officers who were trying to deal with him. In short, for Dr. Lu to place any reliance on those witnesses places his opinion in doubt.

Dr. Lee, the pathologist did not believe that Mr. D was in delirium based upon his review of the tape as well as his anatomical findings. Dr. Lee went on to say that making a finding of delirium in a non-clinical setting is a near impossible task. Admittedly, he is not a Psychiatrist, but Dr. Janke is and he was critical of Dr. Lu's findings.

In fact, Dr. Janke said in his opinion that based upon what can be observed, Mr. Dziekanski was not in a state of delirium. It was suggested that Dr. Janke doesn't work in the same clinical setting and does not see delirium as often as Dr. Lu, which was admitted by Dr. Janke. However, Dr. Janke set out in detail where he departed from Dr. Lu. In fact at page 6 he says that the Pritchard video shows an individual who was at times agitated and at times angry, but that that this was consistent with an individual who had been in transit for approximately 30 hours and in all likelihood had little in the way of restorative sleep. He also pointed out that Mr. Dziekanski was experiencing a severe language barrier and had been unable to communicate in a meaningful or comprehensive fashion for his entire time in the airport.

We submit that Dr. Janke's further comments on page six and seven of his report, particularly that the interpretation of Mr. Dziekanski's comments, were responsive to his environment and that he was not displaying any confusion or disorientation.

It is our submission that the strongest piece of evidence speaking about Mr. Dziekanski's state of mind is to be found when he saw the taser pulled and his last words were: "have you gone nuts? (have you lost your minds?)"

In reviewing the rest of the medical evidence, I will deal first with those experts who I would refer to as the usual suspects in a TASER related matter namely Dr. Ho, Dr. Swerdlow and Dr. Panescu.

### **Dr. Ho**

Dr. Ho is an emergency room physician. Dr. Ho is clearly on the payroll of TASER International. He was introduced to TASER International by Mr. Johnson who had been a security guard at the clinic where Dr. Ho works and Mr. Johnson subsequently went on to set up a research program for TASER. He recruited Dr. Ho, who is an active police officer. Dr. Ho has conducted numerous studies on the effects of the taser. In spite of the fact that some of his studies have been peer-reviewed, it is submitted that they have little scientific validity. The sample sizes to his studies are extremely small and his subjects are principally volunteer police officers. Additionally, they are conducted on subjects who are expecting to be tasered. The most useful piece of evidence was that he himself had been tasered on three occasions and that he had not fallen to the ground like a sack of potatoes on any of those occasions. He went on to say that having a taser deployed on him was like being hit by a jackhammer.

Dr. Ho essentially says that Mr. Dziekanski's death was caused by his elective physical resistance and in his underlying cardiomyopathic condition. Other more qualified and independent witnesses discounted the cardiomyopathy.

### **Dr. Swerdlow**

Dr. Swerdlow, who has an impressive background in cardiac electrophysiology, took the simple view that for a taser to have contributed to Mr. Dziekanski's death, Mr. Dziekanski would have had to exhibit signs of ventricular fibrillation or ventricular tachycardia immediately after the last application of the taser, and that due to the fact that his rhythm was shown to be asystole, that had not occurred. He also placed a great deal of weight in on the evidence of Trevor Enchelmaier.

### **Dr. Panescu**

There was also a report by Dorin Panescu, who has a PhD in electrical and computer engineering. He has never practiced as an engineer because he has never been certified by any engineering society in North America and he has never passed any exams to become certified. He has worked with electrical devices like defibrillators and he has given evidence only on behalf of TASER International. He calls himself an independent consultant but we submit that it is clear that he has a bias.

It was essentially Dr. Panescu's view that there had not been direct capture of the heart in the circumstances of Mr. Dziekanski's death and that the temporal relationship between the discharge of the taser and the death of Mr. Dziekanski excluded the taser from any responsibility in the death of Mr. Dziekanski. We say that the evidence of Drs. Kerr, Chambers and Tseng is more compelling and provides a more thorough analysis.

### **Dr. Sloane**

There was also a report which had been obtained by IHIT from Dr. Sloane, an emergency room physician from Delmar California. It was never explained as to why the IHIT investigators found it necessary to go to California to get an emergency room physician with a specialty in alcohol withdrawal. I would have thought that with the level of alcohol related issues in all jurisdictions including

our own, an expert closer at hand would have been easy to come by. This doctor opines that Mr. Dziekanski was in a state of agitated delirium and alcoholic withdrawal and that this would have placed him at an increased likelihood of suffering from sudden in-custody death syndrome, which as we know has no explained mechanism of death. Suffice it to say that we discount the value of this report and commend the more thorough examination conducted by Dr. Chambers.

Drs. Tseng, Chambers and Kerr, agree with some of Dr. Swerdlow's general propositions but provided a better analysis as to what was going on during Mr. Enchelmaier's monitoring and the subsequent death of Mr. Dziekanski.

### **Dr. Lee**

Three Pathologists gave reports and two testified. Dr. Lee, conducted the autopsy and concluded that he died as a consequence of restraint. He also indicated that there was dilated cardiomyopathy, which may have put him at an increased risk for developing an arrhythmia, but would not have caused death by itself. He further stated that the added stress of the physical restraint along with the decreased ability to breath was as a result of being pinned in the prone position, may have been enough to elicit a fatal arrhythmia. He also indicated that the signs of chronic alcohol abuse raised the possibility that alcohol withdrawal might partly explain his agitation. These two factors have been seized upon during a cross-examination by lawyers for Canada and TASER international as suggestive of the fact that Mr. Dziekanski's death can be explained as death due to his cardiomyopathy and alcohol withdrawal.

Dr. Pollanen and Dr. Butt, who are both pathologists, do not believe that the cardiomyopathy discussed by Dr. Lee contributed to Mr. Dziekanski's death.

### **Dr. Butt & Dr. Pollanen**

Dr. Butt examined the microscopic slides of section of the heart that were provided to him by Dr Lee, and he found these slides to be normal, and he could not conclude that there was any alcoholic cardiomyopathy. Dr. Pollanen agreed that heart disease did not contribute to Mr. Dziekanski's death. Dr. Lee himself thought that he would have been able to confirm cardiomyopathy microscopically, but was unable to do so.

Dr. Pollanen went on to discuss the taser and concluded that Mr. Dziekanski did not die of a taser induced cardiac arrhythmia, but he did believe that the taser may have played a putitive adverse non-cardiac role in Mr. Dziekanski's death, but provides little explanation of how this may have contributed to Mr. Dziekanski's death beyond saying that Mr. Dziekanski appears more (dis)stressed and agitated after the deployment of the taser.

Dr. Butt felt that it was inappropriate for Dr. Lee not to comment on the role of the taser given the circumstances of Mr. Dziekanski's death. He concluded that Mr. Dziekanski's death was likely related to his heart and somehow to nerve conduction pathways in his heart and an arrhythmia. He goes on to say that given this "I believe that increasing exertion and stress seen following the discharge of the CEW likely contributed to the death of Robert Dziekanski. As well the death may have had a respiratory component."

It is submitted that the best witnesses for the explanation of the mechanism causing the death of Mr. Dziekanski are provided by Drs. Kerr, Tseng and Chambers.

### Dr. Tseng

Dr. Tseng comes with an incredible list of credentials. He is a Cardiologist with a specialty in surgery, an Electrophysiologist, an Epidemiologist, as well as being an Assistant Professor in Medicine. Dr. Tseng concluded that:

- 1) Mr. Dziekanski died as a result of a hemodynamically unstable ventricular tachycardia leading to cardiac arrest and death by one of three mechanisms:
  - a. A direct induction of hemodynamically unstable VT by taser discharge over the anterior chest .
  - b. Triggering of hemodynamically unstable VT by the adverse physiologic effects (stress, pain, and adrenaline surge) of taser discharge over the chest abdomen.
  - c. Contribution of the adverse physiologic effects resulting from taser discharges to the syndrome of in-custody death.
- 2) A diagnosis of alcoholic cardiomyopathy which has been made by several forensic pathologists would have made Mr. Dziekanski even more vulnerable to ventricular tachycardia, either by direct induction by taser discharge or indirectly via the adverse physiologic effects of taser discharge.
- 3) A number of scientific and medical studies support the conclusion that the taser either directly caused or contributed to Mr. Dziekanski's death.
- 4) Without exposure to taser discharges, Mr. Dziekanski would very likely not have experienced sudden death.

In short, Dr. Tseng believed that Mr. Dziekanski suffered a ventricular tachycardia, which degenerated to a ventricular fibrillation and subsequently to asystole and death.

Dr. Tseng explained on the second and third pages of his report how Mr. Enchelmaier could have been feeling a pulse for Mr. Dziekanski during his monitoring of him and that Mr. Dziekanski still could have been suffering from ventricular tachycardia. He places significance on the agonal breathing that was described (snoring sounds) and on the difference in the pulse rates as described by Mr. Enchelmaier.

Dr. Tseng says two things about Mr. Enchelmaier's monitoring and the fact that he was feeling a pulse.

- 1) Mr. Encheimaier may have mistakenly been feeling his own pulse while he was checking Mr. Dziekanski, meaning that the taser could have directly captured his heart inducing ventricular tachycardia
- 2) That Mr. Enchelmaier was in fact feeling Mr. Dziekanski's pulse and his description of his pulse could be consistent with sustained ventricular tachycardia meaning that the taser played a contributory role in his death.

Dr. Tseng was supported in his conclusions that the taser either directly caused or contributed to Mr. Dziekanski's death by research that he had conducted in fifty California cities, which demonstrated a six fold increase of in-custody death after the deployment of the taser.

Dr. Tseng was challenged by council for TASER international and questioned about the probe location on Mr. Dziekanski. He was shown a photograph that he had not previously seen showing the location of the one confirmed taser probe in Mr. Dziekanski's chest. He said that his opinion of direct capture was strengthened after viewing this photo. Much has been made that the second probe was likely located in the lower part of Mr. Dziekanski's shirt and was making intermittent contact with his body. It should be remembered that there was a mark on Mr. Dziekanski's abdomen, which could have been the second taser probe.

In my examination of Dr. Lee, he confirmed with me that he had shown me a potential puncture mark on Mr. Dziekanski's abdomen towards his side as a possible second probe mark.

In short, Dr. Tseng finds that the taser either directly or indirectly contributed to the death of Mr. Dziekanski and he's strengthened in the view that it likely directly contributed as a result of the taser mark on Mr. Dziekanski's death.

### **Dr. Kerr**

Dr. Kerr, a Cardiac Electrophysiologist, reviewed Dr. Chambers work, and using his expertise in cardiac electrophysiology he was able to say that he was in complete support of Dr. Chambers report and findings.

He found Mr. Dziekanski's heart to be normal and he comments on the fact that there were no microscopic findings of cardiomyopathy. He goes on to say that it is difficult to extrapolate that he had a cardiomyopathy from the fact that his heart was dilated. He goes on to say that the arrhythmia that must have occurred and the intense stress on the heart could have caused an acute effect of its contractility and the apparent dilation. He further states that, if he did have cardiomyopathy it would have been mild and it would be rare for a person with mild cardiomyopathy to develop an unprovoked malignant ventricular arrhythmia.

He went on to confirm that Mr. Dziekanski's heart was of normal size and that his blood pressure was within the normal range. I also reviewed with him the evidence from Dr. Joblonska and he confirmed that the medication that was prescribed to him, the betablockers, was a very low dose and it is to be remembered that Dr. Joblonska said it was to "tune him up."

Dr. Kerr confirmed that the application of a pulse of electricity on the vulnerable period of the cardiac electrical cycle can induce ventricular arrhythmias and sudden death, even in a normal heart.

Dr. Kerr confirmed that there were two ways that the taser discharge could have effected Mr. Dziekanski. The first was that the taser exasperated his hyper-andrenergic state, led to acidosis and general severe metabolic derangement and thereby created a milieu where spontaneous malignant arrhythmias could arise. The second was that the taser could have captured the heart and induced ventricular arrhythmias, and he notes the location of the taser barb on the centre of the anterior chest. He says that it is unlikely that the taser charges directly induced ventricular fibrillation but he says that it is likely that they induced ventricular tachycardia that transitioned in ventricular fibrillation, then asystole and death. He goes on to say that he believes that there is a high probability that the multiple taser application were instrumental in the development of malignant ventricular arrhythmias and death.

### **Dr. Chambers**

Dr. Chambers is a clinical epidemiologist who had an extensive practice in family and emergency medicine in the east end of Vancouver prior to gaining his masters in epidemiology. Through the history of his practice he dealt with alcoholism related issues and therefore brought a unique perspective beyond the level of his epidemiological expertise.

Dr. Chambers used his epidemiological model to outline with great care the history of the events surrounding the tasing, the subsequent collapse and handcuffing of Mr. Dziekanski as well as the sequence of critical events, including the cyanosis, the monitoring and the findings made by the emergency medical responders. In addition, he examined with care the autopsy findings and the medical history of Mr. Dziekanski.

He then outlined a number of risk factors and went on to use his background in medicine and epidemiology to systematically eliminate the risk factors until he could give a well-reasoned opinion in the cause of Mr.

Dziekanski's death. His method demonstrates the least bias and provided the most open-minded approach to the issue.

After going through this process he determined that there was no other conclusion than that Mr. Dziekanski died of a fatal arrhythmia.

He excluded delirium tremens in his report and he went further in his evidence to exclude alcohol withdrawal.

Briefly stated, he did not believe that Mr. Dziekanski was suffering from the effects of delirium tremens nor did he believe that he was suffering from the effects of alcohol withdrawal during the course of examination on the stand. One of the features that he pointed out about alcoholic withdrawal is that normally there is a medical history of alcohol withdrawal episodes and frequent visits to the doctor for these reasons. This was not the case with Mr. Dziekanski. Moreover, he had been in the airport for nine hours and there had been no indication of the type of behaviour which would have been suggestive of alcohol withdrawal.

He also discounted excited delirium and noted particularly that the common features of excited delirium were missing, which included drug use and/or severe psychiatric illness. He also noted that the strong response to the pain of being tasered as opposed to ignoring it, including crying out and dropping to the ground also didn't support excited delirium being present.

He also ruled out that the death was related to the cardiomyopathy after consulting with Dr. Kerr.

He did think that the temporal relationships in the death of Mr. Dziekanski were compelling and needed examination. He looked into how the mechanism by which the stress of physical restraint could trigger death. He

examined the fight or flight response and how it operates and he also considered the taser as a potential contributory factor.

Ultimately, he concluded that the two most significant contributory factors in the death of Mr. Dziekanski were the act of tasing and the act of physical restraint. He felt that the mechanism of death was most likely the result of a hyper-adrenergic state that caused or brought on a fatal arrhythmia. Although, the possibility of direct capture of the heart and the development of ventricular tachycardia could not be ruled out. In Dr. Chambers further view, he felt that the tasing contributed more to the stress response and Mr. Dziekanski's subsequent death than the physical restraint and so he found the tasing to be the principle cause of death.

In his report, he noted that there was an anxiety associated with tasing. He acknowledged in examination that the presentation of the taser, which looks like a gun and the fact that it discharges probes which cause pain, can potentially heighten the anxiety feature in a way that other intermediate weapons might not.

Dr. Chambers then reviewed how the taser might have effected Mr. Dziekanski and he noted that there was a lack of much needed data and research to define and measure the tasers true risk in real-world populations.

### **Summary**

It is submitted that the Canadian Border Services agents had a positive duty to get a translator to deal with Mr. Dziekanski. The evidence of Ms. Zdravec confirms that Mr. Hutchison came looking for Mr. Dziekanski and that she told Mr. Hutchison to go home. The further evidence of Ms. Churchill-Browne confirms that the CBSA officers knew that Mr. Dziekanski's family had left and returned to Kamloops and that he would be lost once he walked out their door.

It was unconscionable to let him go without having a translator explain the circumstances.

The Airport Authority failed Ms. Cisowski on numerous fronts. They failed to provide an effective information service or to provide the systems needed to communicate with incoming passengers. Their defence lies in the privacy laws and yet an airline employee seems capable of obtaining that information from Customs and Immigration. It is a ludicrous situation that continues until today. The failure to have adequate security at the pinch-point where people are exiting the secure area should not be minimized. The verbal altercation with Mr. Meltzer which appeared to enrage Mr. Dziekanski could have been prevented and the entire incident diffused.

Beyond that the Airport Authority and its most senior management working on the evening of October 14, 2007 took it upon themselves to call off emergency medical response which may have arrived minutes earlier and saved Mr. Dziekanski's life. This action was taken contrary to the policies of the Airport and is submitted amounted to serious wrongdoing.

The RCMP officers that arrived on the scene came into a situation where their professionalism could have avoided incident. Instead, contrary to the Section of 25 of the Criminal Code, their extensive training and common sense, they escalated what should have been a routine call into an in-custody death. Given their numbers and weaponry and the fact that Mr. Dziekanski was in a sterile area, their actions were inexcusable. The aftermath of the event was compounded by what in its best light could be termed misleading statements, but could also be characterized as something much worse, a cover-up. The failure of the police to correct those mis-statements, particularly the number of taser deployments, put pressure on witnesses like Ms. Asrafina to change their evidence or to not come forward at all. Those early pronouncements also had the effect of characterizing the events in an unfair way and likely leading

witnesses to see the event in an unobjective manner. It is now beyond argument that the RCMP can no longer investigate themselves and it is necessary that a civilian entity come into being to investigate all serious police incidents and especially in-custody deaths.

All of which is respectfully submitted by Walter Kosteckyj, counsel for Zofia Cisowski.