

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

Room 801
Federal Courthouse
701 West Georgia Street
Vancouver, B.C.

April 16, 2009

PROCEEDINGS AT
HEARING (DAY 37)

ORIGINAL

McEachern & Associates
2390 Kensington Avenue
Burnaby, B.C. V5B 4E2
Phone: (604) 299-3595; Fax: (604) 299-3545
Toll-free: 1-866-366-2202

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Commissioner:	T.R. Braidwood, Q.C.
Commission Counsel:	A. Vertlieb, Q.C.
Associate Commission Counsel:	P. McGowan
Counsel for Zofia Cisowski:	W. Kosteckyj, S. Whiteley, S. Parhar

(ii)

Counsel for Government of Canada:	J. Brongers, H. Roberts
Counsel for Vancouver Airport Authority:	D. Stewart, C. Friesen
Counsel for B.C. Civil Liberties Association:	G. Pastine, S. Dubinsky
Counsel for Government of Poland:	D. Rosenbloom
Counsel for Corporal Benjamin Robinson:	R. Harris
Counsel for Constable Gerry Rundel:	T. Beaubier
Counsel for Constable Bill Bentley:	D. Butcher
Counsel for Constable Kwesi Millington:	R. Hira, Q.C.
Counsel for Public Service Alliance of Canada:	C. Buchanan, B. Matthews
Counsel for City of Richmond:	J. Goulden, M. Kleisinger, G. Trotter
Counsel for TASER International, Inc.	D. Neave, J. Spencer
Registrar:	L.N. Giles
Court Recorder:	P. Kealy, C.V.R., C.M.
Transcriber:	P. Kealy

1
Brad Fawcett
In chief by Mr. Vertlieb

Vancouver, B.C.
April 16, 2009

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2
3
4 THE REGISTRAR: Order. The hearing is now resumed.
5 THE COMMISSIONER: Good morning.
6 MR. VERTLIEB: Mr. Commissioner, the next witness is
7 Sgt. Brad Fawcett.
8

9 BRAD FAWCETT, a witness,
10 sworn.
11

12 THE REGISTRAR: State your full name, please.
13 A Sergeant Brad Fawcett, F-a-w-c-e-t-t,
14 identification number 1558 of the Vancouver Police
15 Department.
16 THE REGISTRAR: Thank you. Kindly be seated. Counsel.
17 MR. VERTLIEB: Thank you, Mr. Giles.
18 THE REGISTRAR: You may be seated.
19 A Thank you.
20

21 EXAMINATION IN CHIEF BY MR. VERTLIEB:
22

23 Q Sergeant Fawcett, you're a member of the Vancouver
24 Police Department?
25 A That's correct, Mr. Commissioner.
26 Q And you're here because you gave an opinion at the
27 request of the RCMP on this case?
28 A That's my understanding, Mr. Commissioner.
29 Q Just by way of your background, how many years
30 have you been with the Vancouver Department?
31 A Nineteen years.
32 Q Were you a member of any police force before
33 joining Vancouver Police?
34 A No, I wasn't, Mr. Commissioner.
35 Q So the extent of your policing has always been
36 with the Vancouver Police Department, and then
37 conjoint with that, at the Justice Institute?
38 A That's correct.
39 Q Your rank is sergeant?
40 A Yes.
41 Q And how long have you had that rank?
42 A Approximately five years, Mr. Commissioner.
43 Q Now, for the last seven or so years, you have been
44 a use of force instructor?
45 A Mr. Commissioner, it's about -- approximately ten
46 years in total, a little over seven years with the
47 Vancouver Police Department and the last almost

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1 two years at the Police Academy at the Justice
2 Institute of B.C.
3 Q Now, officer, just so you know, we want you to
4 feel free to sit down. You can stand or sit, as
5 you wish.
6 A Thank you.
7 Q Now, we've heard in phase 1 of this inquiry from
8 your brother officer Clive Milligan, and he's also
9 a sergeant with Vancouver Police. You know him?
10 A I do, Mr. Commissioner.
11 Q So on the subject of use of force, I want you to
12 be aware as you're here with us today that the
13 Commissioner has already had extensive information
14 from Sgt. Milligan some months ago. The
15 Commissioner also heard from Corporal Gillis of
16 the RCMP, who is a use of force instructor. And
17 so the Commissioner has already a number of months
18 ago heard presentations on use of force and is
19 familiar with the wheel that's used here in our
20 country to discuss use of force.
21 A I understand.
22 Q Okay. So because of that, we're not going to go
23 into a lot of the terminology because it's been
24 canvassed in another session. But I mentioned the
25 wheel, and in fact, in our country, the use of
26 force framework is taught off a wheel. Is that
27 correct?
28 A The model is circular in design; that's correct.
29 Q And your training is on a national use of force
30 model that is in some ways slightly different from
31 the RCMP?
32 A That's correct, Mr. Commissioner.
33 Q But on the subject of an intermediate weapon such
34 as a Taser, for all intents and purposes, can the
35 Commissioner conclude that your training and use
36 of force approach is similar to the RCMP use of
37 force approach?
38 A Yes, I believe he can.
39 Q The language is slightly different. For example,
40 you would use the word "assaultive."
41 A That's correct.
42 Q Where you understand the RCMP uses the word
43 "combative."
44 A That's correct, Mr. Commissioner.
45 Q From your perspective, Sgt. Fawcett, do you see
46 the two words as essentially the same?
47 A Yes, Mr. Commissioner, I do.

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1 Q And your understanding -- you were explaining this
2 earlier. Your understanding is that part of that
3 is because the RCMP wants to have words that can
4 translate more easily into the French language?
5 A That's correct, Mr. Commissioner.
6 Q So when you're giving your evidence, you're using
7 a different use of force framework than the RCMP,
8 but for the purposes of our work here, it's
9 essentially the same?
10 A I don't know if I'd agree that the framework is
11 different. I mean, the model is simply a
12 reflection of the law, Mr. Commissioner, and the
13 underlying principles are the same regardless.
14 The picture, if you will, is slightly different,
15 but the underlying principles and the laws that
16 support it are the same regardless of RCMP or
17 municipal.
18 Q But that's exactly my point. Because I want the
19 Commissioner to understand that even though your
20 use of force framework may in some words appear
21 different or look a bit different, for the
22 purposes of what we're doing here, it's the same
23 discussion.
24 A I would agree, Mr. Commissioner.
25 MR. VERTLIEB: Okay. Now, we're just going to obtain a
26 copy of your report. At this moment, Mr.
27 Commissioner, we just have the one copy for you.
28 We'll have more. This has been distributed to all
29 of the participants, of course.
30 Q Sgt. Fawcett, do you have your report with you?
31 It's the one dated March 3 of 2008.
32 A The copy I have, Mr. Commissioner, is dated
33 February 29th of '08.
34 Q Interesting. Okay. The one that we have is dated
35 08/03/03, suggesting March 3 of '08. Hmm. Did
36 you do two reports?
37 A No, I didn't, Mr. Commissioner.
38 Q You see the one that Mr. Giles, our registrar, has
39 just given you which is March 3 of '08?
40 A I do, yes.
41 Q The one on your date was what?
42 A It was February 29th, I believe. I believe that's
43 just an autofill date that the computer put in
44 when I saved it on the hard drive, Mr.
45 Commissioner.
46 Q Okay.
47 THE COMMISSIONER: So they're the same?

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1 A I believe them to be, yes, Mr. Commissioner.

2 MR. VERTLIEB:

3 Q You've just done the one report?

4 A That's correct, Mr. Commissioner.

5 Q And after you did it, you didn't make any changes
6 to your report?

7 A No, Mr. Commissioner.

8 Q Okay. Well, because the one we all worked from is
9 dated March 3 of '08, let's work from that. And
10 you have a copy in front of you?

11 A I do.

12 MR. VERTLIEB: Maybe that should be marked as an
13 exhibit, please.

14 THE COMMISSIONER: Yes, next exhibit.

15 THE REGISTRAR: That will be marked as Exhibit Number
16 89.

17

18 EXHIBIT 89: Report of Sergeant Brad Fawcett
19 dated March 3, 2008

20

21 MR. VERTLIEB:

22 Q Now, just so the Commissioner is clear, to come to
23 your opinion, you were given written material?

24 A That's correct, Mr. Commissioner.

25 Q And that was given to you by some member of the
26 RCMP?

27 A That's correct. A member of the Integrated
28 Homicide Investigation Team.

29 Q Was it Corporal Brassington?

30 A I believe I had most of my dealings with Corporal
31 Brassington, Mr. Commissioner.

32 Q And you were given statements that were prepared
33 representing the statements of the four RCMP
34 involved?

35 A That's correct, Mr. Commissioner.

36 Q You were given statements of eye witnesses?

37 A Also correct.

38 Q To understand your opinion, is it the case that
39 your entire opinion was based on the written
40 statements given to you as opposed to having any
41 interviews with any of the witnesses?

42 A It was based on all the materials provided to me
43 by the investigator, Mr. Commissioner. I did not
44 personally interview anybody.

45 Q So you've at no point spoken with any of the four
46 RCMP?

47 A Not to my knowledge, Mr. Commissioner, no.

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1 Q At no point have you spoken with any of the
2 civilian witnesses?
3 A No, I did not.
4 Q So your entire opinion is based on written
5 material provided to you by the RCMP?
6 A That's correct, Mr. Commissioner. Well, the
7 material in totality, not just limited to written
8 material, Mr. Commissioner.
9 THE COMMISSIONER: Were videos provided?
10 A Yes, they were, Mr. Commissioner.
11 MR. VERTLIEB:
12 Q You had videos of the Pritchard video?
13 A That's correct, Mr. Commissioner.
14 Q You had a transcript from the 911 calls?
15 A That's correct.
16 Q Okay.
17 A I also had video, I believe, from the Vancouver
18 Airport.
19 Q And your report also contains appendices which
20 were part of your report?
21 A That's correct, Mr. Commissioner.
22 Q Now, you understand that your opinion, then, is
23 based on the material provided to you and none of
24 it's based on the evidence that's unfolded here in
25 this courtroom?
26 A That's correct, Mr. Commissioner.
27 Q And do you agree that if any of the underlying
28 facts that you took into account are not found to
29 be the case, then that would go to the weight of
30 your opinion?
31 A Absolutely.
32 MR. HIRA: Isn't that a question of law?
33 THE COMMISSIONER: Not quite. Mixed fact and law.
34 MR. HIRA: In other words, it's something for you to
35 deal with as opposed to the witness.
36 THE COMMISSIONER: With his help.
37 MR. VERTLIEB:
38 Q And so in coming here today, none of your opinion
39 is based on anything that you may have heard about
40 this case as it's unfolded before the
41 Commissioner?
42 A That's correct, Mr. Commissioner.
43 Q And you haven't been paying attention or trying to
44 follow the evidence as it's unfolding?
45 A I've actually been trying to avoid it, Mr.
46 Commissioner.
47 Q And so you're not reading the media accounts or

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1 listening to any of the broadcasts?
2 A I haven't been following any of the broadcasts via
3 the Internet, Mr. Commissioner, although the
4 coverage has been somewhat pervasive.
5 Q Now, sergeant, just so you know, the appendices
6 are not attached to your report that's before you
7 and before the Commissioner, and we will get that
8 to the Commissioner as part of your report. But
9 we don't intend to -- we don't feel we need it for
10 the purpose of this.
11 A I understand.
12 Q But I do want to have you just identify the use of
13 force framework.
14 THE COMMISSIONER: I think this should be 89A.
15 MR. VERTLIEB: Thank you.
16 THE REGISTRAR: so marked.
17
18 EXHIBIT 89A: National Use of Force
19 Framework Chart
20
21 MR. VERTLIEB:
22 Q This Exhibit 89A is the use of force framework
23 that you use in your work?
24 A That's the visual representation of it, Mr.
25 Commissioner, yes.
26 Q And you're familiar with the RCMP one that has the
27 picture of the officer in the middle?
28 A I am, yes, Mr. Commissioner.
29 Q Now, at the core of this wheel, for your work the
30 core there does not have a picture of the police
31 officer?
32 A That's correct.
33 Q But at the core is the key to use of force
34 analysis, the subjective perception of the
35 officer?
36 A That's correct, Mr. Commissioner.
37 Q So even though your use of force framework does
38 not have the photo of a police officer, you
39 approach it the same way?
40 A That's correct. It's an officer-centred model,
41 Mr. Commissioner.
42 Q And it's officer-centred to reflect the reality
43 that the officer is as good as the information he
44 or she gets when they're involved in a particular
45 case?
46 A That's correct, whether it's observed, broadcast
47 or however it's relayed to them, Mr. Commissioner.

- 1 Q So that if an officer sees somebody with what he
2 or she thinks is a weapon and it turns out to be a
3 plastic gun, for example, the officer can't be
4 criticized after the fact that it was a plastic
5 gun and how crazy could you have been to use a
6 firearm?
- 7 A Generally speaking, that's correct, Mr.
8 Commissioner.
- 9 Q So the focus in use of force is the officer's
10 perception and what he or she knew about the event
11 going in?
- 12 A That's correct.
- 13 Q So just to deal with use of force jargon just for
14 a moment, in your use of force, 89A, you use the
15 terminology under intermediate weapons, you use
16 "active resistance." Do you see that?
- 17 A I'm sorry. Under the category of intermediate
18 weapons?
- 19 Q Yeah. You use the terminology "active resistance"
20 in 89A?
- 21 A That's correct, Mr. Commissioner.
- 22 Q And you understand that in the RCMP, that would be
23 simply "resistant"?
- 24 A That's correct, Mr. Commissioner.
- 25 Q And where your use of force wheel has the term
26 "assaultive," you understand the RCMP uses
27 "combative"?
- 28 A I do, Mr. Commissioner.
- 29 Q Okay. And as you understand the rules of
30 engagement at October of 2007, an intermediate
31 weapon could be used if there was active
32 resistance or assaultive behaviour?
- 33 A Yes, Mr. Commissioner.
- 34 Q And that means that these are options that can be
35 used. It doesn't mean these are options that must
36 be used?
- 37 A That's correct.
- 38 Q You're familiar with the IMIM, which is the RCMP
39 model?
- 40 A I am, Mr. Commissioner.
- 41 Q And do you teach the same thinking, that is the
42 best use of force is the one that can inflict the
43 least amount of harm?
- 44 A Generally speaking, that's correct, Mr.
45 Commissioner.
- 46 Q So to make the point, just because you can use an
47 intermediate weapon doesn't mean you should use

8
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1 it?

2 A That's correct. You have to take into regard the
3 totality of circumstances.

4 Q Now, in your report you mention a number of
5 civilian witnesses, and it starts in your report
6 under the section of "Witness Perceptions," page
7 2.

8 A That's correct, Mr. Commissioner.

9 Q And you carry on for a number of pages up to page
10 13.

11 A That's correct, Mr. Commissioner.

12 Q Now, you include those for your analysis but
13 you're not suggesting that that information as
14 it's set out in your report, page 2 to 13, was
15 actually known to these four RCMP?

16 A No, Mr. Commissioner.

17 Q And you don't know what they actually knew at the
18 time other than what might be in their statements
19 as reflected in their written material given to
20 you?

21 A That's correct. Or what's included in the 911
22 transcripts, Mr. Commissioner.

23 Q So to understand their subjective appreciation of
24 the events concerning Mr. Dziekanski, the key part
25 of your report would be the "Police Perceptions"
26 starting at page 13?

27 A That's correct, Mr. Commissioner.

28 Q Now, just to look at that part of your report,
29 just for example at page 14, you're talking about
30 Officer Bentley, and this is a gentleman never --
31 you don't know him personally but --

32 A Not that I'm aware of, Mr. Commissioner.

33 Q Do you remember that he was the younger looking
34 person in the Pritchard video? Of the four
35 officers he appeared to be the youngest looking?

36 A That's my recollection.

37 Q In his statement that you paraphrase, the first
38 paragraph towards the bottom of that main
39 paragraph on page 14 -- do you see where you say:

40
41 He noted --

42
43 You mean Bentley.

44
45 -- that the suspect appeared to be,
46 '...fighting through the tazor, he was
47 screaming, his fists were clenched.'

1
2 Do you see that language?
3 A I do, Mr. Commissioner.
4 Q Now, just so the Commissioner understands -- I
5 think it's clear, but I want to make sure it's
6 absolutely clear -- this is language you have
7 extracted from his written statement?
8 A That's correct, Mr. Commissioner.
9 Q That gave you an impression, though, in some way
10 that impacted on your opinion because you've
11 highlighted that fact in your report. You've
12 highlighted a number of facts, but that's one of
13 them.
14 A I believed that to be relevant to the use of force
15 opinion, yes, Mr. Commissioner.
16 Q What was it that you were trying to convey by
17 referencing that comment, "fighting through the
18 tazor"?
19 A That the Taser was not being effective in the
20 first instance, Mr. Commissioner.
21 Q You of course don't know whether the Taser was
22 effective on the first firing?
23 A I don't know if anybody would know that.
24 Q Well, certainly whether others might or might no,
25 you don't know?
26 A I -- no, I don't, Mr. Commissioner.
27 Q You've never spoken, incidentally, with Officer
28 Baltzer from Delta Police Department?
29 A Have I spoken with him?
30 Q Yes.
31 A Yes, I sit on a committee with him, Mr.
32 Commissioner.
33 Q But about this case?
34 A Only in the context of advising him that I
35 provided his name and others to the IHIT
36 investigator as somebody that might be able to
37 assist them with the data download of the device
38 that was used at the time.
39 Q Yes. But you've never gone and spoken with
40 Baltzer about your view of this case or his view
41 of the Taser?
42 A No, Mr. Commissioner.
43 Q Now, dealing, then, with your opinion, if we go to
44 page 37, the last sentence:
45
46 The reasonableness of a particular use of
47 force must be judged from the perspective of

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1 a reasonable peace officer on the scene,
2 rather than with 20/20 vision of hindsight.

3

4 A Yes.

5 Q And that's a fair summary of this discussion you
6 and I have just had about the fact that use of
7 force is to be looked at subjectively?

8 A Yes, Mr. Commissioner.

9 Q Now, when you looked at this case from the police
10 perspective, I just want to make sure that you had
11 all the written statements. Do you recall having
12 three statements from Officer Bentley?

13 A I don't recall how many statements I had from each
14 person, Mr. Commissioner.

15 Q I don't remember in your report, and I may have
16 missed it, an itemization of the particular
17 statements. That's why I'm just asking you here.
18 Do you remember seeing more than one report for
19 each of these officers?

20 A I seem to recall there were some handwritten notes
21 as well as some what appeared to be transcripts or
22 a typed out version of the same thing.

23 Q As far as you know, you were given all of the
24 officers' written statements?

25 A That was my understanding, Mr. Commissioner.

26 Q So returning, then, to Officer Bentley at page 14,
27 in the second paragraph, you say:

28

29 ...Bentley approached the male with...Rundel
30 and...Robinson and "took him down"...

31

32 A Yes.

33 Q And you put "took him down" in quotes.

34 A That would have been from what I read in his
35 statement, Mr. Commissioner.

36 Q Right. I just wanted to make that point. Now,
37 why did you think that that fact was important to
38 put in your report? What was your reasoning for
39 doing that?

40 A I guess just giving a flavour of the officers'
41 perception of their actions.

42 Q And the flavour that you were getting from reading
43 their statements is one of an incident that had a
44 considerable amount of physical force around it?

45 A Generally speaking, yes, Mr. Commissioner.

46 Q So that's the flavour that came to you as you were
47 reading those written statements?

11
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1 A Yes, Mr. Commissioner.

2 Q That's fine. No, that's fair. I just want the
3 Commissioner to understand that's how you came to
4 view this event.

5 A I understand.

6 Q And so again at page 15, the language used, he did
7 not go down.

8 A I'm sorry, where on page 15 are you?

9 Q Let me find it. Rundel -- fourth paragraph:

10
11 ...Rundel described the suspect as
12 demonstrating "combative behaviour" and being
13 aggressive.

14
15 A few sentences later:

16
17 He indicated that the first taser deployment
18 did not cause the suspect to fall to the
19 ground and he remained standing with clenched
20 fists and making motions towards the
21 officers.

22
23 Do you see that sentence?

24 A Sorry, I'm still trying to find it. You said the
25 fourth paragraph down?

26 Q Yes, sir. Sorry, sergeant. Page 15, fourth
27 paragraph.

28 A Yes.

29 Q You see the sentence starting, "He indicated"?

30 A I do now, yes, Mr. Commissioner.

31 Q So let me just read it again:

32
33 He indicated --

34
35 Meaning Rundel.

36 A Yes.

37 Q

38
39 -- that the first taser deployment did not
40 cause the suspect to fall to the ground and
41 he remained standing with clenched fists and
42 making motions towards the officers.

43
44 A Yes, I have that, Mr. Commissioner.

45 Q Now, I'm not asking you to comment on whether or
46 not that actually is a correct fact. That's not
47 your job and I'm not asking you that. But what

1 was in your mind as to why you took that part of
2 the Rundel narrative out and made a note of it in
3 your report? Just tell the Commissioner again why
4 you (indiscernible - overtalking) --
5 A Because I believed it to be relevant to the use of
6 force analysis, Mr. Commissioner.
7 Q Again, to show what you believed to be, as it was
8 portrayed in those statements, an event of
9 considerable aggression?
10 A Generally speaking, yes, Mr. Commissioner.
11 Q Now, if it turns out at the end of the day that
12 the Commissioner has a different view about the
13 facts around whether or not Mr. Dziekanski went
14 down with the first tasing, you understand
15 that's a fact that would go to an opinion formed
16 by you, but you're doing the best you can with the
17 information you had?
18 MR. BUTCHER: I'm going to rise for a moment, if I may,
19 because the witness, as he has pointed out, didn't
20 just have the written material. He had the video.
21 And later in the report, he makes some comments
22 about the fact that the statements are not
23 consistent with the video. And so it's not fair
24 to be suggesting to him that he's relying entirely
25 upon the written material.
26 THE COMMISSIONER: Well, I didn't understand it to be
27 entirely.
28 MR. VERTLIEB: No, it's not.
29 THE COMMISSIONER: Go ahead.
30 MR. VERTLIEB: Thank you.
31 Q Now, sergeant, the video that's been known as the
32 Pritchard video, you were given those video
33 portions to watch?
34 A I received a DVD containing several video clips,
35 one of which I believe to have been the Pritchard
36 video.
37 Q Yes. And you referred to those in your report?
38 A I do, yes, Mr. Commissioner.
39 Q And you took those into account in providing your
40 opinion?
41 A I did, yes.
42 Q Now, I want to just ask you something. At page
43 24 -- and this is part of your analysis of the
44 Pritchard video. Do you want to just have a quick
45 look and make sure that we're --
46 A I'm on page 24, Mr. Commissioner.
47 Q And this is where you go into notes of your view

1 of the Pritchard video and all the observations
2 you make? Just to put it to you, sergeant, it
3 starts at page 22. You call it the witness video.
4 A That's correct, Mr. Commissioner.
5 Q When you say witness video, we're talking about
6 the Pritchard video?
7 A That's correct.
8 Q So you look at it and you make notes of the
9 various things you see on it?
10 A That's correct, Mr. Commissioner.
11 Q So just so you understand, we here have done what
12 you did as well, and that is looked at it and then
13 we've broken it down in slow motion and sometimes
14 frame by frame. Did you find that it was the kind
15 of video that even when you thought you saw what
16 happened, when you looked at it a second time you
17 saw things that you didn't see the first time?
18 A I routinely experience that, Mr. Commissioner.
19 Q How many times did you actually watch the
20 Pritchard video?
21 A I would -- I believe at least four, Mr.
22 Commissioner. I believe I watched it once as I
23 was reviewing each officer's version of events as
24 well as some of the witness video -- sorry,
25 witness statements. I was looking for
26 correlations.
27 Q You haven't watched it since you wrote your
28 report?
29 A No, I haven't, Mr. Commissioner. Although I have
30 caught clips on the news on occasion.
31 Q Fair enough. I just want to ask you something at
32 paragraph xiv on page 24.
33 A Yes?
34 Q Have you read that?
35 A I'm reading it now, yes.
36 Q Just go ahead and read it and I'll ask you the
37 question. Let me know when you're finished.
38 A Yes, I've read it, Mr. Commissioner.
39 Q I want to ask you this. You say that three of the
40 officers are standing with what appears to be non-
41 threatening postures.
42 A That's correct.
43 Q And you're talking at the time when the three
44 officers first approach Mr. Dziekanski inside that
45 room?
46 A That's my recollection, yes, Mr. Commissioner.
47 Q You mentioned the officers were appearing to be

1 non-threatening postures.
2 A Yes.
3 Q You don't mention that about Mr. Dziekanski. Did
4 you think he was in a threatening posture?
5 A I believe I described him standing facing the
6 window with his arms at his sides.
7 Q The reason I'm asking you is you mention non-
8 threatening posture for the police and you didn't
9 use that language for Mr. Dziekanski. Is there
10 some reason?
11 A No. I thought I was being more specific
12 describing specifically how he was standing.
13 Q Then the next paragraph, xv, you say:
14
15 The deceased suddenly turns his back and
16 throws both hands up.
17
18 A Yes.
19 Q You don't know why that happened, do you?
20 A I don't know. My perception at the time was, "I'm
21 done talking."
22 Q Right. And that perception came to you from
23 reading the statements of one or more of the
24 police officers?
25 A Well, reading all the statements that I had as
26 well as my own perception as a viewer of the
27 video.
28 Q So when you wrote this part of your report, you
29 didn't realize that Corporal Robinson had pointed
30 with his finger before Mr. Dziekanski turned his
31 back?
32 A Not that I recall, Mr. Commissioner.
33 Q No, I didn't think you did, but I want this to
34 help explain your --
35 A Yeah --
36 Q -- report in the context.
37 A -- I understand.
38 Q Now, at paragraph xix --
39 A Yes, I've read it, Mr. Commissioner.
40 Q And we've heard this a number of times, and I
41 don't have any desire to play it again so we all
42 hear Mr. Dziekanski yelling. I have no desire to
43 do that. Others may but I don't intend to take
44 you through that. But you say, though: "The male
45 continues yelling" -- you of course mean Mr.
46 Dziekanski.
47 A That's correct.

1 Q -- "and he turtles up on his right side."
2
3 Did it occur to you that when he turtled up, as
4 you put it, that that was the result of the spasms
5 and the pain that he was feeling?
6 A I'm describing the behaviour that's observed in
7 the video, Mr. Commissioner. The underlying
8 reason for that, nobody can truly speak to.
9 Q Okay. Now, in your report, as I read page 25, and
10 you're still discussing the video -- and I could
11 have this wrong -- I don't recall you bringing
12 into your discussion any commentary about the use
13 of the Taser in the push stun mode. Am I correct
14 in that?
15 A I believe you're correct.
16 Q So nowhere do you opine about the use of the push
17 stun mode as it may have been used in this case?
18 A I don't recall doing so, Mr. Commissioner.
19 Q You do remember seeing Mr. Dziekanski and the
20 officers in some kind of physical dispute when
21 he's on the ground and they're trying to handcuff
22 him?
23 A I do recall that, yes.
24 Q Did as part of your analysis include a
25 consideration of whether or not his physical
26 responses were because of any pain he was feeling
27 from the push stun mode use?
28 A His response may be due to that, but what matters
29 in terms of the use of force analysis is what was
30 the officer's perception of the resistance. If
31 the officer perceived it to be a response to the
32 push stun, if you will, then that would be one
33 thing. If the officer's perception was it was
34 conscious resistance on the part of the subject,
35 then that's another matter, Mr. Commissioner.
36 Q And you don't know which it was?
37 A We can't know by watching the video, Mr.
38 Commissioner, no.
39 Q As part of that struggle -- and I'll just use that
40 word, struggle -- between Mr. Dziekanski and the
41 police when he was on the floor in the process of
42 being handcuffed -- and do you think "struggle" is
43 a fair word to use to describe that?
44 A I would say it's a fair word, Mr. Commissioner.
45 Q Did you consider at all that part of that struggle
46 could have been Mr. Dziekanski trying to fight to
47 get air?

1 A Well, again, I consider that, but the use of force
2 opinion relies on what the officer's perception of
3 the struggle was. Did the officer perceive it to
4 be a struggle for air? Again, that speaks to one
5 thing. If the officer's perception was he was
6 struggling to defeat their attempts at control,
7 again it's another matter, Mr. Commissioner.
8 Q So your opinion doesn't reflect which of those two
9 it is?
10 A It does not. Only what the officer's perception
11 of that resistance was.
12 Q So did any part of your opinion consider whether
13 or not one of the officers may have had part of a
14 leg on his upper -- on his neck area, on or near
15 the neck?
16 A I would have expected to see a knee in that
17 general area, Mr. Commissioner.
18 Q Your recall is you did not see it that way?
19 A I'm sorry?
20 Q Your recall is you did not see any knee on a
21 neck --
22 A No, no, I --
23 Q -- or part of a leg?
24 A I would have expected to have seen at least one
25 knee in that general area, Mr. Commissioner. If
26 it's -- and they're engaged in trying to apply
27 handcuffs on a prone subject, at least one of his
28 knees should have been above the shoulder, between
29 the shoulder and the neck, if you will. On an
30 angle towards the opposite hip would be the ideal.
31 Q Now, I wanted to then move to page 27.
32 A I'm there, Mr. Commissioner.
33 Q And this is the evidence of witnesses? This is
34 under your section "Use of Force Analysis."
35 A Yes, Mr. Commissioner.
36 Q Just so we're clear, when you were writing your
37 opinion, you had written statements of a number of
38 various eye witnesses?
39 A That's correct, Mr. Commissioner.
40 Q And you at no point spoke with them?
41 A I did not.
42 Q Would it be fair to say that you formed the
43 opinion from your interpretation of these witness
44 statements that Mr. Dziekanski's behaviour was
45 threatening to people who were just there at the
46 airport?
47 A People and property, Mr. Commissioner.

- 1 Q So you got the impression that the civilians, the
2 non-police, had an element of fear about them as
3 this event was unfolding?
- 4 A That appeared to come through in their written
5 statements, Mr. Commissioner.
- 6 Q And that was the impression you gleaned -- and I'm
7 not criticizing your coming to that impression.
- 8 A I understand.
- 9 Q But that's the impression that you had reading
10 those statements?
- 11 A That's correct, Mr. Commissioner.
- 12 Q And that impression helped you form your view of
13 this case --
- 14 A That's correct.
- 15 Q -- as you ultimately expressed it in this writing?
- 16 A Yes, Mr. Commissioner.
- 17 Q So just so we're clear, you don't know this, but a
18 gentleman named Joginder Dhari came and spoke to
19 the Commissioner about the case and he said that
20 he didn't see any threatening gestures by Mr.
21 Dziekanski. That's not known to you?
- 22 A No.
- 23 Q A gentlemen named Canzon, a Jame Canzon, he's told
24 the Commissioner that he, meaning Canzon, was not
25 afraid of Mr. Dziekanski and thought Mr.
26 Dziekanski was harmless. This was not known to
27 you?
- 28 A No.
- 29 Q Now, you did have a witness statement from a Lorne
30 Meltzer which you read?
- 31 A I did, Mr. Commissioner.
- 32 Q And just to refresh your memory, because we don't
33 expect you to remember all of these people with
34 that kind of detail, he was the limousine driver.
- 35 A Yes, Mr. Commissioner.
- 36 Q He made the comment, amongst many comments, that
37 he thought Mr. Dziekanski appeared to calm down
38 when Dziekanski saw the police arrive. You did
39 not have that sense from reading Mr. Meltzer's
40 statement?
- 41 A Not in his written statement, no, Mr.
42 Commissioner.
- 43 Q Mr. Meltzer also told the Commissioner that he
44 didn't feel personally in fear of Mr. Dziekanski.
45 That wasn't something that came through just
46 reading his statement?
- 47 A Not in the written statement, no, Mr.

- 1 Commissioner.
- 2 Q Now, Mrs. Ashrafinia, you know her name because
3 you had a statement from her.
- 4 A That's correct, Mr. Commissioner.
- 5 Q She's come here and she was here quite a long
6 time. She told the Commissioner similar things,
7 that Mr. Dziekanski looked relieved when he saw
8 the RCMP. This is unknown to you based on your
9 view of the written material?
- 10 A No. My only knowledge of her version of events
11 came from her written statement, Mr. Commissioner.
- 12 Q But when you hear, though, that two people have
13 said that Mr. Dziekanski looked relieved when he
14 saw the police, that's a different flavour than
15 what you were getting when you were doing your
16 work on the case a number of months ago?
- 17 A It's certainly a different flavour than what they
18 provided in their written statements, Mr.
19 Commissioner.
- 20 Q Another witness, Marja Bosnjak -- and I believe
21 you had some written material from her as well.
- 22 A Yes, Mr. Commissioner.
- 23 Q She also said to the Commissioner that Mr.
24 Dziekanski looked relieved when he saw RCMP. Now
25 again, this is a flavour of this case that you did
26 not have when you were forming your opinion?
- 27 A Not in her written statement, no, Mr.
28 Commissioner.
- 29 Q She said that Mr. Dziekanski was looking confused,
30 looking for help. Did you have that sense when
31 you were thinking about your view of this matter,
32 that Mr. Dziekanski was looking for help?
- 33 A I don't recall that being in her written
34 statement, Mr. Commissioner.
- 35 Q She also actually said she wasn't afraid of him.
36 That didn't come through from what you were
37 reading about her?
- 38 A Not that I recall from her written statement.
- 39 Q You remember another airline person named
40 Genevieve Deziel? Does that name ring a bell?
- 41 A It does, Mr. Commissioner.
- 42 Q She told the Commissioner that she didn't have any
43 fear for herself or colleagues. Again, that's a
44 flavour that did not come through as you were
45 reading this material?
- 46 A Not in her written statement, no, Mr.
47 Commissioner.

1 Q That's fine. Again, just to make the point, you
2 formed your opinion with the best information that
3 was provided to you?
4 A That was my understanding and intention, Mr.
5 Commissioner.
6 Q Thank you. Now, you give an opinion in your
7 written report made over a year ago about the use
8 of the Taser the first time.
9 A Yes, Mr. Commissioner.
10 Q Do you understand that the Taser was used multiple
11 times?
12 A Well, I understand it was cycled multiple times,
13 yes, Mr. Commissioner.
14 Q Is it a fair understanding of your opinion that
15 you focused on the first use of the Taser and
16 whether or not in your opinion that was a
17 reasonable approach to take?
18 A I believe I took into account the -- how many --
19 each cycle that was reported in the written
20 statements that were provided to me, Mr.
21 Commissioner.
22 Q Did you ever in your opinion, though, provide an
23 opinion of the use of the Taser in the probe mode
24 when Mr. Dziekanski was on the ground, in other
25 words the second time it was fired?
26 A Cycled the second time?
27 Q Yes.
28 A If it was reported or captured in the written
29 statements, yes, Mr. Commissioner.
30 Q You don't have an opinion on the use of the Taser
31 in the push stun mode. We've already covered
32 that. Right?
33 A I don't recall commenting on it, Mr. Commissioner.
34 Q In your report, you do recognize at page 32 that
35 there appears to -- page 32, fourth paragraph.
36 A Yes.
37 Q And this is after you've discussed the video that
38 you were watching.
39 A Yes, Mr. Commissioner.
40 Q I'll just read this sentence or two to you. You
41 say -- well, let me start earlier:
42
43 The witness video supports the version of
44 events reported by the officers.
45
46 And that was a conclusion that you came to. That
47 was your professional opinion?

1 A Sorry, in the fourth paragraph?

2 Q No, I'm sorry. I'm above. I just want to put it
3 in context.

4 A Oh.

5 THE COMMISSIONER: It's the first paragraph.

6 MR. VERTLIEB:

7 Q The first paragraph. You see, "The witness video
8 supports the version of events reported by the
9 officers"?

10 A Yes.

11 Q And that was your opinion based on what you were
12 seeing of the case at that time?

13 A That's correct, Mr. Commissioner.

14 Q You say:

15

16 The video only captures the upper body, head,
17 and some arm movements of the deceased
18 immediately after the first CED deployment.
19 The deceased's left arm appeared to swing
20 sharply down towards his --

21

22 You've written "hop." You mean hip?

23 A Hip, yes.

24 Q

25

26 -- and his right arm rises to the side of his
27 head in a movement consistent with striking
28 or throwing.

29

30 A That's correct.

31 Q Now, I'm not here to criticize at all, but we've
32 looked at that video a number of times, and it
33 seems that the right arm comes up after the Taser.
34 Do you understand that now to be the case, or you
35 were not clear about that when you wrote your
36 report?

37 A I can't say I'm clear on it now. I haven't
38 watched the video for --

39 Q All right. You say, "The stapler can be seen held
40 in his hand." Do you mean again the right hand?

41 A Yes, Mr. Commissioner.

42 Q You say, "The deceased was seen moving to his
43 right, generally away from the officers." Now,
44 you're not suggesting there that it was a
45 conscious, voluntary movement to his right?
46 You're just stating that as a fact?

47 A Just describing the movement, Mr. Commissioner.

21
Brad Fawcett
In chief by Mr. Vertlieb

1 Q You state, "He was yelling and then collapses to
2 the ground near the end of the CED cycle."

3 A That's correct.

4 Q

5

6 Constable Millington was shown moving towards
7 the deceased. Doing so is consistent with
8 training and is intended to prevent the
9 probes becoming dislodged and/or the
10 insulated conductive wires from breaking.

11

12 A That's correct.

13 Q

14

15 Ashrafinia recalled at least one of the
16 officers commanding the deceased to "get
17 down" during the CED application.

18

19 Now, here is where I wanted to ask you:

20

21 The perception of the officers was that they
22 were forced to wrestle the deceased to the
23 ground. This perception is not supported by
24 the witness video.

25

26 A Yes.

27 Q That was clear to you?

28 A Yes, Mr. Commissioner.

29 Q Here's the sentence I wanted to ask you about:

30 "This discrepancy is minor in nature and easily
31 understood." Why did you characterize that as a
32 minor in nature discrepancy?

33 A I believe I go on to explain it in the following
34 sentence, Mr. Commissioner. When a person's
35 sympathetic nervous system is activated, if you
36 have formulated a plan -- and again, I use the
37 heading perception versus recall -- it's an
38 officer's perception of what is going on. If I
39 intend to carry out a certain act and in the final
40 outcome -- for instance, I intend to tackle
41 somebody to the ground -- when I recall that
42 event, I may recall the intended plan, not what
43 actually happened. It's just a function of how we
44 store memory, Mr. Commissioner.

45 Q You didn't see the discrepancy as anything other
46 than inadvertent? You just thought it was an
47 inadvertent discrepancy, not intentional?

1 A Absolutely, Mr. Commissioner. We at the Police
2 Academy are routinely running recruits through
3 simulations and taping them, and it is routine to
4 have their version of events when we debrief them
5 contradicted by the video in very similar manners,
6 if you will.

7 Q Now, the next area I wanted to ask you about is
8 your discussion about tactical repositioning. You
9 mention this at the bottom of page 36.

10 A I have it, Mr. Commissioner.

11 Q And you give an opinion about tactical
12 repositioning as followed by the officers in this
13 case.

14 A Yes, Mr. Commissioner.

15 Q Let's just start with the top of page 37:

16
17 However, officers must be able to disengage
18 safely. In the incident in question the
19 officers and witnesses reported their
20 perception that the deceased was going to
21 assault them. It would have been impossible
22 for the officers to outdistance the threat
23 given their proximity to the deceased
24 throughout the incident.

25

26 A That's correct, Mr. Commissioner.

27 Q Now, that's an opinion that you're giving based on
28 the opinion that you were forming of the facts
29 as --

30 A -- provided in the written statements. That's
31 correct, Mr. Commissioner.

32 Q So when you say in your opinion that you come to
33 this conclusion presumably because officers and
34 witnesses report their perception that the
35 deceased was going to assault them.

36 A That's correct, Mr. Commissioner. And again, that
37 is limited to the information provided in the
38 written statements.

39 Q Fair enough. And when you discuss tactical
40 repositioning, you discuss it from a legal
41 perspective and not really a factual perspective.

42 A Well, it's --

43 Q There's no legal obligation to reposition?

44 A Or to retreat, no, not from a known threat. And
45 the simple fact is that it's almost physically
46 impossible to avoid one. The person facing
47 forward can move forward at six times faster than

1 the person trying to go backwards.
2 Q But your discussion of tactical repositioning
3 isn't meant to discuss it in the context of those
4 facts at that time. You're talking about it in
5 the sense there's no legal obligation to
6 reposition?
7 A No, there's not, Mr. Commissioner.
8 Q I just wanted to make sure the Commissioner knew
9 the reference point that you brought to the
10 discussion.
11 A I understand.
12 Q Have I covered that fairly in terms of your
13 opinion?
14 A I believe that's correct, Mr. Commissioner.
15 Q And then you come to your concluding comments.
16 Now, in your analysis, did you know that Corporal
17 Robinson had actually pulled his baton?
18 A I don't recall specifically. I believe it was
19 Constable Bentley that described his transition to
20 a baton during the encounter.
21 Q You're right. And Bentley said that in his
22 statement. We heard, though, here in the inquiry
23 room from Corporal Robinson that he actually did
24 pull the baton but didn't extend it. You did not
25 know that during --
26 A No, I don't believe that was captured in his
27 written statement, Mr. Commissioner.
28 Q No, it wasn't. So again, your opinion is based on
29 what you were getting at the time in the material
30 that you referenced.
31 A That's correct.
32 Q The very last sentence of your report, you state:
33 "Their perceptions" -- you're meaning the police
34 officers?
35 A Yes.
36 Q -- "are influenced by their training" --
37 A Absolutely.
38 Q Of course -- "past experience with similar
39 situations" --
40 A Yes, Mr. Commissioner.
41 Q -- "and the knowledge that several people were
42 witnessing their actions."
43 A Yes, Mr. Commissioner.
44 Q Now, I'm not going to cover the training. We've
45 heard about that and that's not something we need
46 you to help us with. And you don't train the RCMP
47 anyway?

- 1 A I have done so, but not as a matter of routine,
2 no.
- 3 Q There's no knowledge that you had in forming
4 opinion about any of these officer's past
5 experience with similar situations?
- 6 A No, Your Honour. It's just common knowledge, if
7 you will, if I've been successful doing a certain
8 technique or tactic, you tend to rely on that
9 technique or tactic when faced with future events
10 because it worked for you in the past. Similarly,
11 if you were unsuccessful trying something, you
12 tend to avoid relying on that particular technique
13 or tactic if it failed to work for you in the
14 past.
- 15 Q Totally understandable. When you formed your
16 opinion about this case, did you know that this
17 case with Mr. Dziekanski was in fact the first
18 time Officer Millington had ever used the Taser?
- 19 A I don't believe that was -- I don't recall if that
20 was in any of his interviews, Mr. Commissioner.
- 21 Q And just the last comment. I just want you to
22 explain what you meant by this when you state,
23 "the knowledge that several people were witnessing
24 their actions." What does that mean?
- 25 A Well again, people tend to perform differently
26 depending on the stage they're on, if you will.
27 If you're working in the north lane of 100 East
28 Hastings, for example, versus another part of
29 town, and your understanding of what public
30 perception is of the police in that general area,
31 all those things can have an impact on an
32 officer's use of force decision-making.
- 33 Q So that's a comment of general application, a
34 matter of common sense from your perspective?
- 35 A To me it is, yes, Mr. Commissioner.
- 36 Q You're not intending it to be specific to these
37 four officers in that case?
- 38 A No. It's a concluding sentence, if you will, that
39 I use often to remind the triers of facts in
40 whatever venue that that process does occur.
- 41 Q I just wanted to be sure before we conclude about
42 the material that you had. By chance, did you
43 ever make up a list of all the material that you
44 were given?
- 45 A I believe in general terms I detail it in the
46 preamble, just what I'm relying on. And in
47 general terms, it's the information provided by

Brad Fawcett

In chief by Mr. Vertlieb

Cross-exam by Mr. Kosteckyj (for Zofia Cisowski)

1 the Integrated Homicide Investigation Team
2 investigator, and I returned it to them in its
3 entirety.

4 Q Oh. So you don't have it with you any more?

5 A No.

6 Q Okay. So there's no way you could list now for us
7 the specific documents that you had?

8 A No. I believe we had a general discussion about
9 keeping that information, the information I relied
10 on, separate from any other things they may have
11 been doing. But again, that's just my
12 recollection of the conversation we had when I
13 returned the items to them.

14 Q So the best we can do is simply read your report
15 and get a general sense of what you were looking
16 at?

17 A At present, yes, Mr. Commissioner.

18 Q That's fine. We've had a chance to discuss your
19 report and your opinion. Do we take it that you
20 would have responded the same way?

21 A I would think any group of officers, you'd have a
22 range of responses depending again on their
23 strengths and weaknesses, their success and
24 failures in similar situations. Would I have done
25 the same thing? Probably not.

26 MR. VERTLIEB: Thank you.

27 MR. KOSTECKYJ: Walter Kosteckyj, counsel for Zofia
28 Cisowski.

29

30 CROSS-EXAMINATION BY MR. KOSTECKYJ ON BEHALF OF ZOFIA
31 CISOWSKI:

32

33 Q Sergeant, the test that an officer has to meet
34 when using force is an objective test, is it not?
35 Do you know what I mean by that?

36 MR. HARRIS: I'm going to rise. That's a question of
37 law.

38 MR. KOSTECKYJ: Well, I'm just going to -- let me do it
39 this way.

40 Q You've given an opinion, correct?

41 A I have, Mr. Commissioner.

42 Q And you've given an opinion as an expert witness?

43 A Well, I've provided a report.

44 Q Yeah, that's an expert --

45 A I haven't been qualified as an expert here today.

46 I haven't been qualified as an expert in relation
47 to this report.

- 1 Q You were asked to give a report because you have
2 an expertise.
- 3 A That's correct, Mr. Commissioner.
- 4 Q And in your report, you concluded that there was a
5 reasonable use of force by these four police
6 officers. That's what the purpose of this report
7 was?
- 8 A That's correct. Well, the purpose wasn't to come
9 to that conclusion. The purpose was to provide
10 the opinion.
- 11 Q Right. And you came to that opinion and that's
12 what the purpose of the report was, to provide
13 your opinion?
- 14 A That's correct, Mr. Commissioner.
- 15 Q Okay. And in your report at page 37, you say
16 that -- and my learned friend asked you about
17 this:
18
19 The reasonableness of a particular use of
20 force must be judged from the perspective of
21 a reasonable peace officer on the scene...
22
23 Right?
- 24 A That's correct.
- 25 Q And the point as to why I say that is because in
26 part of your evidence you talked about the
27 perspective that a police officer brings, correct?
- 28 A That's correct, Mr. Commissioner.
- 29 Q So it's not just what he perceives. What he
30 perceives has to be reasonable, correct? It's
31 measured against --
- 32 A Yes, Mr. Commissioner.
- 33 Q It's measured against what is a reasonable
34 perspective, correct?
- 35 A Well, the reasonable perspective of another
36 reasonable officer, if you will.
- 37 Q Right. Now, in analyzing how an officer reacts,
38 what you are doing is taking a look at the
39 information that an officer has at the time that
40 he meets with the suspect, correct?
- 41 A That's certainly one of the things you consider,
42 Mr. Commissioner.
- 43 Q Well, what else is there?
- 44 A Well, the broadcast information, everything
45 they've been told en route to the scene.
- 46 Q Well --
- 47 A It's also the tone of voice of the dispatcher as

1 they're providing the information, the body
2 language of the people proximal to the incident.
3 There's a whole myriad of things you're going to
4 take into account as you're approaching.
5 Q Well, let's talk about that a little bit. You get
6 radio calls and that's one of the things you take
7 into account, correct?
8 A Yes, Mr. Commissioner.
9 Q And you also know that a lot of radio calls are
10 based upon information that's obtained from people
11 at the scene, correct?
12 A That's correct, Mr. Commissioner.
13 Q And so you don't always take all of the
14 information you get on a radio call at face value,
15 do you, sir?
16 A You certainly give it significant weight, Mr.
17 Commissioner.
18 Q Yeah. And what you normally do is when you arrive
19 on the scene, you try to confirm or disprove what
20 the information is that you got. You measure it
21 against the objective standard of what you see
22 when you get there?
23 A Generally speaking, I agree, Mr. Commissioner.
24 Q Right. So the radio call is only one piece of
25 information but it's a piece of information that
26 as a police officer you're actually taught to
27 test, to make sure that the information you're
28 receiving over the radio waves is accurate,
29 correct?
30 A Well, how are we defining "test"?
31 Q Well, by speaking to a complainant.
32 A If time allows for interviewing other persons.
33 And again, if I walk into a scene and I'm
34 immediately approached by a number of people
35 saying, "That's the person over there," you know,
36 how much testing is required, I guess is what I'm
37 asking.
38 Q All right. Well, let's talk about that. In this
39 particular case, when you were determining whether
40 the police officers' response was appropriate,
41 seeing the tape and speaking to the witnesses of
42 things that occurred before the police arrived was
43 not relevant, was it, sir?
44 A In terms of what?
45 Q In terms of your assessment of whether or not the
46 police officers acted in a reasonable way.
47 A Well, it has to -- as I spoke with counsel

1 earlier, it speaks to the reasonableness. Was
2 their perception based on the totality of what was
3 going on there?
4 Q Only --
5 A Their perception, which appeared to be shared by a
6 number of other civilian witnesses.
7 Q Only if the police officers actually spoke to
8 someone and got that same information from someone
9 at the scene, correct?
10 A No. Again, as I advised counsel, I listed those
11 people and their perceptions in terms of
12 validating or invalidating the perceptions of the
13 officers. I didn't indicate at any time that the
14 officers spoke to those people.
15 Q Well, take it that we've heard evidence that none
16 of the police officers spoke to anybody at the
17 scene.
18 MR. BUTCHER: That's not a correct (indiscernible - not
19 at microphone) of facts.
20 MR. KOSTECKYJ:
21 Q Well, let us just assume for a second, officer,
22 that these four police officers, when they
23 arrived, did not speak to any complainant, got no
24 background information other than to be told,
25 there's a guy, he's freaking out. That's it.
26 MR. BUTCHER: I'm going to object to that because my
27 client has given evidence that he did speak to a
28 witness. So that's an irrelevant assumption.
29 MR. KOSTECKYJ: Well.
30 MR. BUTCHER: When I get to this witness I'm going to
31 put that to him in a hypothetical sort of
32 situation. So if my friend wants to put
33 hypotheticals or the facts to the witness, that's
34 fair enough. I'm just going to ask that he get it
35 right.
36 THE COMMISSIONER: Well, a hypothetical is not
37 something you get right. Go ahead.
38 MR. KOSTECKYJ:
39 Q So I'm asking you to assume, sir, that none of
40 these four police officers spoke to anybody at the
41 scene other than to be told, "There's a guy
42 freaking out. He doesn't speak English. He
43 speaks Russian." Got that? You understand that,
44 sir?
45 A I got it, Mr. Commissioner.
46 Q So how would it be relevant as to what the witness
47 statements were to your determination as to

1 whether force was reasonable or not in those
2 circumstances?
3 A Shared perception, as I explained, Mr.
4 Commissioner. It goes to validate or invalidate
5 the perception of the officer in terms of the
6 tenor of violence that existed or did not exist at
7 a particular scene.
8 Q Well, if there's no shared experience in the sense
9 that the witnesses, none of them, have spoken to
10 the police officers or indicated to the police
11 officers what they've seen or what their
12 experience with this man is, how is it that that
13 can be relevant to your determination?
14 THE COMMISSIONER: I think you're both on different
15 pages.
16 MR. KOSTECKYJ: All right.
17 THE COMMISSIONER: The sergeant is saying that if two
18 people reach the same conclusion as to the degree
19 of perceived violence, then one validates the
20 other.
21 A That's correct, Mr. Commissioner.
22 MR. KOSTECKYJ: All right.
23 Q But in terms of your analysis, isn't your analysis
24 really supposed to start with the police officers
25 arriving on the scene and the information that
26 they received from the radio call?
27 A I think I capture that quite accurately in the
28 report, Mr. Commissioner.
29 Q But isn't that the case?
30 A I'm not sure --
31 Q Well, the point I'm making is this. You went into
32 great detail in describing what the witnesses said
33 in their statements, correct?
34 A I would have best described it as a summary of
35 each of the witnesses that were captured in the
36 Integrated Homicide Investigation Team file.
37 Q Then I guess -- how much of an influence did what
38 the witnesses have to say in those statements
39 influence your opinion?
40 A I don't know if I can quantify that, Mr.
41 Commissioner.
42 Q Well, did it have some influence on your opinion?
43 A I can't say one way or the other, Mr.
44 Commissioner. I try to look at it as in the
45 centre of the model, if you will, with the
46 situation. What is the situation?
47 Q Okay. Well, let's talk about the fact that you

- 1 also when you were looking at this looked at the
2 Canada Customs tape, page 19. Do you see that in
3 your report?
- 4 A What paragraph are you referring to?
- 5 Q Well, paragraph i, Canada Customs, clip 1. Do you
6 see that?
- 7 A Yes.
- 8 Q It says: "...appears to show the deceased
9 entering the customs area..." Do you see that?
- 10 A Yes.
- 11 Q And you make a value judgment, do you not, sir?
12 You say that he "appears to be unique in
13 comparison to other people in the area."
- 14 A Yes.
- 15 Q That's a value judgment, sir?
- 16 A Well, it's certainly an observation.
- 17 Q All right. And in Roman number iii, "...he
18 appears to be walking counter to others in the
19 area and then walks back..." That's a value
20 judgment. That's you --
- 21 A It's an observation of his behaviour in that video
22 clip.
- 23 Q And how did you come to that conclusion? How did
24 you come to the conclusion he's walking counter to
25 the others?
- 26 A I guess the flow of pedestrian traffic was going
27 one way and he was walking counter to it.
- 28 Q Okay. Now, tell me, why was that Canada Customs
29 film important to your assessment? Why was it
30 important for you to see that film? How did it
31 affect your assessment?
- 32 A It didn't contribute to the use of force analysis.
33 I'm simply letting the reader know what material
34 was considered, what -- they provided a number of
35 clips and I reviewed them.
- 36 Q Well, wasn't the purpose of putting that material
37 in there to put a negative inference on the way
38 that Mr. Dziekanski was behaving?
- 39 A I don't know how you can draw a negative
40 inference. It simply describes a behaviour.
- 41 Q All right. So what you're telling us is that this
42 film and all of this stuff from the Customs
43 people, this Customs film, was irrelevant to your
44 determination?
- 45 A Generally speaking, aside from the Pritchard
46 video, there wasn't -- I can say, Mr.
47 Commissioner, I've watched hours of video that was

1 provided to me by the investigators, and aside
2 from the Pritchard video, none of it contributed
3 to the use of force analysis.

4 Q All right. So it wasn't relevant to your
5 determination?

6 A No. But it was provided to me and I felt
7 obligated to comment on it.

8 Q Okay. You talk about this one-plus-one theory.

9 A Yes, Mr. Commissioner.

10 Q And the one-plus-one theory is that you use a
11 greater amount of force than what you're visited
12 with? Is that a fair assessment?

13 A It's a little more holistic than that, Mr.
14 Commissioner.

15 Q Well, why don't you explain it to us.

16 A Well, you -- we don't respond on par, if you will,
17 with the force that we're faced with. We
18 respond -- I dislike using the term "levels" but
19 it's easiest to understand -- one level above the
20 force that we're faced with. If there's one
21 suspect, we assume there's a second one we haven't
22 discovered yet. If we find one weapon or one
23 piece of evidence, we assume there's others we
24 haven't found yet. As I say, it's more holistic
25 than simply what level of force you're responding
26 with.

27 Q All right. Well, in this particular case, there
28 were four police officers, correct?

29 A That's correct, Mr. Commissioner.

30 Q Those police officers were fully kitted out?

31 A That's my understanding, yes.

32 Q Well, you were aware that they were all wearing
33 sidearms?

34 A Yes, Mr. Commissioner.

35 Q You were aware that they were all wearing
36 protective vests, bulletproof vests or protective
37 vests?

38 A Yes, Mr. Commissioner.

39 Q You were aware that they had pepper spray?

40 A I believe that was captured, yes, Mr.
41 Commissioner.

42 Q You were aware that they all had extendable
43 batons?

44 A Yes, Mr. Commissioner.

45 Q You were aware that at least one of them had a
46 Taser?

47 A Yes, Mr. Commissioner, I was.

- 1 Q Now, by sheer force of numbers, one individual
2 versus four, isn't that a relevant factor to how
3 much force is reasonable in a certain
4 circumstance?
- 5 A Well, it is if I'm going to use physical strength
6 through numbers.
- 7 Q Right. Now, nowhere in your report do you mention
8 that the fact that there were five Taser
9 deployments. Is that accurate?
- 10 A I don't believe I discuss that, no, Mr.
11 Commissioner.
- 12 Q In fact, you didn't know that there were five
13 Taser deployments, did you, sir?
- 14 A I don't believe so. I believe Constable Baltzer
15 of the Delta Police Department dealt with the
16 Taser download data.
- 17 Q The only thing you had were the statements and the
18 information that you received from Corporal
19 Brassington; is that --
- 20 A That's correct, Mr. Commissioner.
- 21 Q Is it fair to say that you, when you were
22 preparing this report, knew or were aware of only
23 two Taser deployments?
- 24 A I don't recall if it was two or three, Mr.
25 Commissioner, but it was limited in number, yes.
- 26 Q Well, did you make a note of that? Did you
27 consider that to be significant?
- 28 A The number of Taser deployments?
- 29 Q Absolutely.
- 30 A Well, again, as I discuss in the report, simply
31 because a Taser is deployed doesn't mean any
32 current at all is going into a subject.
- 33 Q It also doesn't mean that it isn't going into the
34 subject.
- 35 A No. You have to base your use on your absorbed --
36 the observed impact that the tool is having on the
37 subject that you're dealing with.
- 38 Q Well, do you think it's significant that when you
39 have four police officers at a scene and they give
40 statements, that at least three of them don't seem
41 to know that there's more than two deployments?
- 42 A No.
- 43 Q You don't?
- 44 A Well, we're not -- the person operating the Taser
45 isn't yelling out, "I've deployed it once. I've
46 deployed it a second time. I'm deploying it a
47 third time."

- 1 Q Well, isn't it significant as to whether or not a
2 Taser is used after a subject is already down?
- 3 A Well, again, it depends on what's the perceived
4 resistance on the part of the Taser operator if
5 another deployment is necessary or a drive stun is
6 necessary.
- 7 Q Perceived resistance, sir, or reasonable
8 perception?
- 9 A Well, again, in law it must be a reasonable
10 perception, Mr. Commissioner.
- 11 Q Right. So the point that I'm making to you, sir,
12 is that once the person is down, it's relevant as
13 to when he's down in relation to when other
14 deployments of the Taser take place, correct?
- 15 A Well, again, it depends on the reasonable
16 perception of the operator.
- 17 Q The reasonable --
- 18 A Whether he's on the ground or not isn't a defining
19 variable determining what the reasonableness of a
20 Taser deployment, Mr. Commissioner.
- 21 Q Yeah, but it's a factor, isn't it?
- 22 A It would be something the operator might take into
23 consideration, yes, because on the ground it's
24 more likely that the Taser probes will be
25 dislodged, that the conductive wires can be torn
26 in the struggle on the ground. Those sorts of
27 issues can certainly arise.
- 28 Q Yeah. But when you're looking at it and you see
29 that a suspect has been Tasered and as a result of
30 the Taser, if you're aware of it, is taken to the
31 ground --
- 32 A Mm-hmm.
- 33 Q -- is it something that you have to take into
34 account as to whether excessive use of force has
35 been used if there's been four more deployments
36 after he's down on the ground and is wrestling
37 around with four officers?
- 38 A Well, again, Mr. Commissioner, it depends on the
39 rationale underlying the use of the device by the
40 operator.
- 41 Q Well --
- 42 A The fact that they're on the ground is not the
43 defining variable.
- 44 Q I guess the point is, you never took that into
45 account because you didn't know about it, did you?
- 46 A I don't believe it was captured in the written
47 statements, Mr. Commissioner.

1 Q So the short answer is you never took it into
2 account?

3 A I believe there was some discussion about the
4 number of deployments but I don't recall
5 specifically how many, Mr. Commissioner. I took
6 into account the ones that were recorded in the
7 written statements.

8 MR. HARRIS: I'm going to rise for a moment. I've been
9 quiet. Now I'm concerned because it's been
10 suggested to this witness that nowhere in his
11 report is it indicating how many times the Taser
12 was deployed, and that is factually wrong. I
13 refer the examiner to page 26 of this officer's
14 report.

15 MR. BUTCHER: And to page 33 and 34.

16 MR. HIRA: Which includes push stun mode as well at
17 page 34.

18 MR. KOSTECKYJ:

19 Q Well, help me out, officer. Do you recollect how
20 many times you knew the Taser was deployed?

21 A No, Mr. Commissioner. As I say, once I turned the
22 file in -- or returned the file and the report to
23 the IHIT investigators, I haven't looked at it
24 since. And en route to this commission, I was not
25 asked to bring anything with me. And again, I
26 didn't refer to it other than to print a copy off
27 of my hard drive this morning on the way here. My
28 understanding -- sorry. I wasn't sure in what
29 capacity I was being called here today and I
30 didn't want to taint my evidence by having
31 referred to a document that I was not asked to
32 refer to.

33 THE COMMISSIONER: Well, at page 26 under "CED Download
34 Report" -- and I haven't read the whole
35 report -- "The download indicated that the taser
36 had been activated five times in relatively quick
37 succession."

38 MR. KOSTECKYJ:

39 Q Go to page 26.

40 THE COMMISSIONER: I think we'll take the morning break
41 now.

42 MR. KOSTECKYJ: Thank you.

43 THE REGISTRAR: The hearing is now recessed for ten
44 minutes.

45

46

(WITNESS STOOD DOWN)

47

1 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
2 (PROCEEDINGS RESUMED)
3

4 THE REGISTRAR: The hearing is now resumed.
5

6 BRAD FAWCETT, a witness,
7 recalled.
8

9 CROSS-EXAMINATION BY MR. KOSTECKYJ ON BEHALF OF ZOFIA
10 CISOWSKI, continuing:
11

12 Q Sir, before the break we were talking about the
13 deployments, and my learned friend pointed out
14 that in the report you had the download report
15 from Constable Baltzer and that there were a total
16 of 31 seconds in deployments. Now, did you
17 consider the number of deployments to be important
18 in your analysis?

19 A Well, only so much as in if the number in front of
20 it would have been too few and the number beyond
21 would have been too many.

22 Q Well, were you aware, sir, that there is a general
23 policy that multiple deployments are frowned
24 against?

25 A I am. But again, there's no -- correlation and
26 causation are two different things. People tend
27 to die in custody after a certain number of
28 applications. But again, there's no science that
29 indicates that there's a relationship between the
30 two.

31 Q All right. To the best of your knowledge, there's
32 no science that says that?

33 A Currently I'm not aware of any, Mr. Commissioner.

34 Q All right. But did you think it important to
35 comment on the number of deployments in the
36 circumstances? Did you consider that because
37 there were more than two deployments, for example,
38 that that was a significant thing to comment on?

39 A Not particularly, Mr. Commissioner. Only in the
40 context of the operator and what the operator
41 indicated was appropriate to accomplish his or her
42 purpose.

43 Q But was it your purpose to determine whether the
44 number of deployments, for example, was
45 reasonable?

46 A Well, again, Mr. Commissioner, that's predicated
47 upon the perception of the operator.

- 1 Q The perception and as to whether it was reasonable
2 in the circumstances, which is what you were
3 assessing?
- 4 A Yes, Mr. Commissioner.
- 5 Q All right. Now, would it have been relevant to
6 your determination to know that the police
7 officers did not communicate between themselves
8 when they came upon Mr. Dziekanski?
- 9 A Only in terms of tactical considerations, if you
10 will, Mr. Commissioner.
- 11 Q Well, do you think that that was a relevant
12 consideration, something that you should have
13 thought about or taken into account, the fact that
14 four police officers come upon this gentleman and
15 they say they have no communication between
16 themselves? Is that an important factor,
17 consideration?
- 18 A Again, Mr. Commissioner, I would say it's a
19 consideration but not necessarily a critical one
20 or a fatal one, if you will.
- 21 Q Well, do you think it was important to know that
22 one of the police officers didn't know that Mr.
23 Dziekanski didn't speak English? Would that have
24 been an important consideration?
- 25 A Again, Mr. Commissioner, it's a consideration. In
26 terms of value, how important it is, at the end of
27 the day the officers have to stabilize a situation
28 regardless of the language barriers or other
29 barriers they might face.
- 30 Q But if a police officer doesn't know there's a
31 language barrier, isn't aware of that, isn't that
32 an important consideration when you're dealing
33 with someone who doesn't speak English?
- 34 A Well, again, what was the officer's perception
35 about the language barrier if one existed at all?
- 36 Q Okay. Well, my point is simply this. If one of
37 the four officers walked in there not knowing that
38 this man didn't speak English, would that have
39 been something you should have thought about in
40 your report, something you should mention if you
41 knew about it?
- 42 A No, I don't believe so, Mr. Commissioner.
- 43 Q You don't think it's an important consideration
44 that one of four officers who's dealing with a man
45 who doesn't speak the language that that's an
46 important factor?
- 47 A It depends what that officer's particular role was

- 1 intended to be in the encounter.
- 2 Q Okay. Now, would it be important for you to know
3 that Mr. Dziekanski, if this in fact is proven,
4 was being given instructions by more than one
5 officer in very short order? Would that have been
6 important?
- 7 A Again, it's a consideration, Your Honour, but not
8 a particularly important one. I would expect in a
9 multiple officer-subject encounter that there will
10 be multiple commands being given by various
11 people.
- 12 Q Well, is that really good police work, to be
13 giving multiple commands at the same time?
- 14 A No. Ideally, Mr. Commissioner, you have a contact
15 officer and cover officers, and the contact
16 officer would deal with the direct communications
17 with the subject. But that's predicated upon
18 degree of training, depth of training, working in
19 a team control environment, if you will.
- 20 Q But when you train people, that's what you do.
21 You try to train them to have one contact officer
22 that's dealing with an individual, especially
23 someone that might be distraught, correct?
- 24 A That's correct, Mr. Commissioner.
- 25 Q All right. Did you mention that anywhere in your
26 report, that that is an important consideration
27 that you have a contact person?
- 28 A I don't recall commenting on it, Mr. Commissioner.
- 29 Q All right. You wouldn't consider it significant
30 that police officers that were involved didn't
31 know how many deployments took place, of the
32 Taser?
- 33 A Not particularly, no, Mr. Commissioner.
- 34 Q Now, people can perceive things in different ways.
- 35 A Absolutely, Mr. Commissioner.
- 36 Q For example, somebody might see one thing as
37 passive resistance and someone might see it as
38 active resistance and yet another might see it as
39 assaultive behaviour, correct?
- 40 A It's possible, yes, Mr. Commissioner.
- 41 Q Like for example, if I give you a hypothetical.
42 You come across an individual. He's six foot two,
43 230 pounds. You're a police officer, and you want
44 to take that person under arrest and you tell him
45 to come with you. And you have lawful grounds to
46 do that.
- 47 A I understand.

- 1 Q And he says, "I'm not coming." Somebody might
2 consider that to be passive resistance and look
3 further into the situation, correct?
- 4 A Well, again, it's more than just the verbal
5 statement. If he, for example, bladed his body,
6 balled his fists and says, "I'm not coming," then
7 one officer might certainly describe that as
8 assaultive behaviour.
- 9 Q Somebody might say it's assaultive and somebody
10 might say it's active resistance. Somebody might
11 say it's passive resistance, right?
- 12 A Again, a person standing behind them might not see
13 the facial expression, might simply see the back
14 of the person and not see any muscular tension,
15 and as you say, might describe it as passive or
16 active. Somebody from a different perspective or
17 having a different vantage point might describe it
18 entirely different, Mr. Commissioner.
- 19 Q And if there's more than one officer -- two, three
20 or four -- different techniques might be used or
21 applied to deal with that individual?
- 22 A Simultaneously, Mr. Commissioner, yes.
- 23 Q Now, I want to talk to you a little bit about what
24 one of my learned friends has described as the
25 colourful wheel. I think --
- 26 A Yes, Mr. Commissioner.
- 27 Q -- it's --
- 28 A The National Use of Force Framework?
- 29 Q Yeah, the National Use of Force Framework. Do you
30 know a little bit of the history of that?
- 31 A I do. I was on the select working group that
32 developed that particular model, Mr. Commissioner.
- 33 Q Now, as I understand it, this use of force
34 framework actually, the notion of it, originated
35 with police officers in Tampa, in Florida. Is
36 that accurate? Somewhere in the United States.
- 37 A Well, use of force models, as I understand them,
38 began with the Federal Law Enforcement Training
39 Center -- came out with the first one that I'm
40 familiar with, and they've been evolving ever
41 since, yes, Mr. Commissioner.
- 42 Q And that was brought to Canada and various --
- 43 A Originally in Ontario, that's correct.
- 44 Q Right. And then subsequently the Victoria Police
45 Force started to us this, a similar model,
46 correct?
- 47 A Well, the -- under the auspices of the Canadian

- 1 Association of Chiefs of Police, this was adopted
2 as a national model. However, no department is
3 bound by it, if you will. They are free to adopt
4 their own models. Many had pre-existing ones that
5 they may choose to adhere to. But again, this is
6 just a visual representation of the law and case
7 law that has evolved over the centuries.
- 8 Q But it's a static model. It's meant to give
9 somebody a view and might be interpreted by police
10 officers as the go-ahead as opposed to being
11 permissive. Do you understand what I'm saying?
- 12 A I'll just try to paraphrase, if I may.
- 13 Q Should I -- let me restate it if it's not exactly
14 clear. But the point is this. This permits you
15 to use force, certain types of force in certain
16 circumstances, but it doesn't oblige you to do it,
17 correct?
- 18 A This does neither of those things. It simply
19 provides -- it's a teaching aid, if you will. The
20 law authorizes the use of force.
- 21 Q Right.
- 22 A This simply gives guidance in terms of use of
23 force decision-making, if you will, Mr.
24 Commissioner.
- 25 Q But it tries to put it into a document that a
26 recruit or a cadet or a police officer can take
27 away with them.
- 28 A Yes, that's correct, Mr. Commissioner.
- 29 Q But you understand what I'm saying. It permits
30 the use of certain types of force in certain
31 situations. It doesn't oblige you to use that
32 force in those circumstances, does it?
- 33 A That's correct, Mr. Commissioner.
- 34 Q Because you have to take into account all of the
35 other things like the number of police officers
36 that are present and the like, correct?
- 37 A Well, many, many variables, that's correct, Mr.
38 Commissioner.
- 39 Q Right. But that would be one of them, the number
40 of police officers you have?
- 41 A That's an officer consideration, yes.
- 42 MR. KOSTECKYJ: Right. Now, Exhibit 45, if that could
43 be put to the witness.
- 44 Q That's the RCMP version of this colourful wheel,
45 correct?
- 46 A That's correct, Mr. Commissioner.
- 47 Q And you had a copy of that to consider?

- 1 A I did, yes.
- 2 Q Now, at the centre of that colourful wheel is the
3 concept of CAPRA. Do --
- 4 A That's correct, Mr. Commissioner.
- 5 Q -- you see that? And that's the centre of all of
6 these models, correct? Does the Vancouver Police
7 Force use CAPRA?
- 8 A No, we do not, Mr. Commissioner.
- 9 Q All right. But you're familiar with the concept
10 of CAPRA as it's used by the RCMP?
- 11 A Yes, I am, Mr. Commissioner.
- 12 Q And what do you understand that to be?
- 13 A That it's an officer-centred model. Again, the
14 RCMP uses this in a -- not simply in use of force
15 guidance but it captures their community policing.
16 They're talking in terms of intervention and
17 managing calls, where the National Use of Force
18 Model is strictly limited to providing guidance in
19 use of force decision-making, Mr. Commissioner.
- 20 Q Well, let's just go to the RCMP one, this
21 document, Exhibit 45 --
- 22 A Yes.
- 23 Q -- With CAPRA in the centre. You said that it's
24 police-centred. Is that what you told me?
- 25 A Officer-centred, yes.
- 26 Q I actually -- we've heard evidence here from
27 numerous police officers that the whole notion of
28 CAPRA is that it's client-centred. Do you
29 understand that, sir?
- 30 A The figure, if you will, of the officer in the
31 centre is indicative of the decision-making
32 process. It's not the community making decisions
33 about the use of force by an officer at the time.
34 It's the officer involved in the situation. The
35 officer has to take into account all the community
36 policing initiatives of the RCMP, the
37 organizational values and all those sorts of
38 things.
- 39 Q Yeah, but at the centre core of CAPRA is the
40 principle that the RCMP is a client-based
41 organization, the client being the suspect, the
42 client being the witnesses. Do you understand
43 that, sir?
- 44 A Yes, Mr. Commissioner.
- 45 Q You do? Because what --
- 46 A I'm taking your word for it, yes.
- 47 Q All right. Well, I'm just wondering whether you

1 took that into account when you were assessing
2 this, that you were aware of the CAPRA principles
3 that are applied and used by the RCMP in their
4 training when you gave your opinion.

5 A Yes, Mr. Commissioner.

6 Q What did you understand those CAPRA principles to
7 be?

8 MS. ROBERTS: Mr. Commissioner, I hesitate to
9 interrupt, but CAPRA is a model used by the RCMP
10 for issues outside and including the use of force.
11 So I'm not sure if Mr. Kosteckyj has fully
12 understood that. It is not simply something
13 designed for the use of force model or guidance.
14 And I think they may be speaking of two different
15 matters as a result.

16 THE COMMISSIONER: Well, the interplay between the two
17 is at foot. And so far -- I'm trying to figure
18 this out, of course. As I understand it,
19 Exhibit 89A is an indication as to decision-making
20 referrable to force, whereas the CAPRA concept is
21 more of a management of a situation model. But I
22 stand to be corrected.

23 MR. KOSTECKYJ:

24 Q Well -- what do you understand CAPRA to stand for,
25 sir, in the context of the use of force?

26 A I don't recall the acronym right now, Mr.
27 Commissioner.

28 Q All right. Well, what do you generally understand
29 CAPRA to stand for?

30 A Mr. Commissioner, when I'm looking at the RCMP
31 model, I'm applying it in the use of force
32 analysis, not in terms of its managing other
33 issues outside of the use of force. And as I say,
34 that's my understanding of the CAPRA -- the RCMP
35 model is it's not simply a use of force model,
36 that it is intervention management.

37 Q All right. Well --

38 A It's not limited solely or to provide guidance
39 solely in use of force decision-making.

40 Q Do you understand that one of the principles of
41 CAPRA is assessment?

42 A As it is with both models, Mr. Commissioner.

43 Q All right. And when you have four police officers
44 at a scene, like in the scene where the police
45 officers came upon Mr. Dziekanski, did you see any
46 reason why one of those four police officers could
47 not have interviewed a complainant?

- 1 A I suppose at any time they'd have to believe that
2 three officers would be sufficient to contain and
3 stabilize the situation in order for one of them
4 to break away and carry those acts out.
- 5 Q Yeah.
- 6 A But that would be -- by the same token they could
7 have -- the individual officers could have
8 determined that they couldn't afford to release
9 one officer to do that.
- 10 Q Well, that would have required some discussion
11 between the officers, right?
- 12 A Yes. Obviously they can't all four conclude that
13 I'm going to leave and go interview people and all
14 four of them start breaking away to do that.
- 15 Q Well, but somebody could have assigned -- the
16 lead, the person that was in charge, could have
17 said --
- 18 A He certainly could have delegated.
- 19 Q -- get some background, right?
- 20 A Yes, they could have delegated somebody to
21 initiate that process.
- 22 Q Well, did you think that that might be something
23 important in these circumstances?
- 24 A It's not relevant to the use of force analysis,
25 Mr. Commissioner. What could have happened, what
26 might have been done was not something I was asked
27 to comment on.
- 28 Q All right. You didn't think that it was relevant,
29 for example, that all four of the officers jumped
30 over the barricade. Did you make any note of
31 that -- just the approach to the scene? Was that
32 a factor that you considered in any way?
- 33 A I believe I describe them walking assertively into
34 the critical area.
- 35 Q But the notion that all four of them jumped over
36 the barricade to confront Mr. Dziekanski. You saw
37 that on the tape?
- 38 A Yes, I did, Mr. Commissioner.
- 39 Q Well, did you consider that to be significant in
40 any way?
- 41 A It just seemed to be the most direct route that
42 was -- I believe there was a yellow-jacketed
43 security person in the cordoned-off walkway area
44 and they entered proximal to him.
- 45 Q Did you consider it to be important to the use of
46 force as to whether or not there were other people
47 in the secure area where Mr. Dziekanski was, where

- 1 the police confronted him? We've been referring
2 to it as the IRL.
- 3 A Well, the tactical environment is always something
4 you take into consideration, Mr. Commissioner.
5 Certainly it's an uncontrolled area into which
6 they could expect at any time people to be
7 unwittingly walking into that area.
- 8 Q Did you in your use of force analysis consider
9 that he was in what we've been told is a semi-
10 secure area so other people weren't in that area
11 with him? Did you consider that to be important?
- 12 A No, Mr. Commissioner.
- 13 Q All right. Wouldn't it have been important to
14 your consideration as to whether the use of force
15 was necessary or not at the time that it was used,
16 in part have to take into account what other
17 people were in the area or might be affected by
18 the use of force?
- 19 A Yes, Mr. Commissioner.
- 20 Q Did you make mention of that anywhere, the fact
21 that --
- 22 A I believe I described it as an unsecured area into
23 which the officers could reasonably expect at any
24 time people to enter. I believe we had evidence
25 of cleaning staff being able to walk through, limo
26 drivers, and certainly anybody disembarking or
27 moving through the Customs and Immigration area
28 might have found their way there.
- 29 Q Now, did it make any difference to you that the
30 area could have been easily secured to prevent
31 anybody else from coming in?
- 32 A Not in terms of the use of force analysis, no, Mr.
33 Commissioner.
- 34 Q All right.
- 35 A Again, it's a hypothetical.
- 36 Q Now, did it concern you at all that no warning was
37 given about the use of the Taser before it was
38 deployed?
- 39 A Not particularly, Mr. Commissioner. It depends on
40 the perception of the officer. If they believe
41 they can gain voluntary compliance through the
42 implied use and a warning, then that may be
43 entirely appropriate and reasonable. If the
44 officer's perception was that providing the
45 warning might have made that particular force
46 option ineffective in terms of the subject being
47 able to defeat it or the situation was emergent

- 1 enough that he felt he had to deploy it without a
2 warning, then that would be appropriate and
3 reasonable.
- 4 Q Yeah. Well, did you see any reason that a warning
5 couldn't have been given here? Did you see any
6 reason that that couldn't have been done?
- 7 A None that I recall off the top of my head. But
8 again, what I might have done isn't the issue.
9 What was the perception of the operator at the
10 time the decision to deploy the Taser was made.
- 11 Q The reasonable perception?
- 12 A That's correct, Mr. Commissioner.
- 13 MR. KOSTECKYJ: Right. Those are my questions. Thank
14 you.
- 15 MS. ROBERTS: Mr. Commissioner, Mr. Butcher has advised
16 me that he is unavailable after today and he may
17 be up to two hours with Sgt. Fawcett, so I'm
18 prepared to let him go before me if that's
19 agreeable to you.
- 20 THE COMMISSIONER: Yes, certainly.
- 21 MR. BUTCHER: Thank you very much. Mr. Commissioner, I
22 seek to qualify this witness as an expert in the
23 use of force, including the use of Tasers by
24 police officers in British Columbia.
- 25 THE COMMISSIONER: Yes, go ahead.
- 26 MR. BUTCHER: And in the area of the training of police
27 officers in the use of force in British Columbia.
28 And we have been provided with a copy of his
29 résumé.
- 30 MR. KOSTECKYJ: With respect, what we're concerned
31 about is someone who's qualified in training RCMP
32 officers. So I don't have an issue with the fact
33 that this gentleman is an expert in the training
34 of officers in British Columbia, but I'm not sure
35 that he can give evidence that would be relevant
36 to the training of RCMP officers.
- 37 MR. BUTCHER: I appreciate that. And we will hear from
38 him what training he has participated in with the
39 RCMP, and I think it's just as useful to hear from
40 him as to whether or not certain steps taken by
41 these officers are consistent with the training
42 applied to police officers generally in the
43 province.
- 44 THE COMMISSIONER: Let's start one point at a time.
45 What is your first expertise you're advancing?
- 46 MR. BUTCHER: The use of force by police officers in
47 British Columbia including the use of Taser.

1 THE COMMISSIONER: All right. Start on it.

2 MR. BUTCHER: And I have a copy of his...

3

4 CROSS-EXAMINATION BY MR. BUTCHER ON BEHALF OF CONSTABLE
5 BILL BENTLEY:

6

7 Q Officer, this is a document that was provided to
8 us by the Commission, and I suspect it's a little
9 dated. Are you able by looking at the document to
10 tell us when this CV was written?

11 A I'd say it's a little over a year old,
12 approximately a year and a half old, Mr.
13 Commissioner.

14 Q When you prepared the report that has been marked
15 in this proceeding, you were an instructor at the
16 Justice Institute of British Columbia; is that
17 correct?

18 A That's correct, Mr. Commissioner.

19 Q Can you tell us what the Justice Institute is and
20 what you were doing there?

21 A The Justice Institute of British Columbia is an
22 umbrella, if you will, that trains the majority of
23 the emergency responders in the province,
24 including police, fire, ambulance, corrections,
25 and a variety of other clients. Specifically I am
26 seconded to the Police Academy where I'm
27 responsible for use of force training of recruits
28 as well as advanced programs.

29 MR. VERTLIEB: Mr. Commissioner, if it's of any help
30 and to save time, there was never any thought in
31 our mind for a moment that this gentleman wasn't
32 an expert in the field. It was clear reading his
33 résumé and listening to him and speaking with him.
34 So we've never had any issue about our friends
35 being able to lead expert opinion evidence out of
36 him, if that saves any time.

37 MR. BUTCHER: If that is the sense of the room, then
38 obviously I would invite the Commissioner -- you
39 to make a ruling that he's entitled to --

40 THE COMMISSIONER: Let's just have again the expertise
41 you're advancing.

42 MR. BUTCHER: The use of force by police officers in
43 British Columbia, including the use of Tasers, and
44 the training of police officers in the use of
45 force, including Tasers, in British Columbia.

46 MR. VERTLIEB: The training issue is one that I think
47 Mr. Kosteckyj fairly raised, and that is that this

Brad Fawcett

Cross-exam by Mr. Butcher (for Constable Bill Bentley)

1 gentleman is not training the RCMP, and I don't
2 think anyone is suggesting he is. But certainly
3 he is a use-of-force expert and he's known to be
4 in the field in that way. I just was trying to
5 save some time but maybe I haven't helped.

6 THE COMMISSIONER: I understand. I'll accept that.

7 I'll agree with your suggested qualification.

8 MR. BUTCHER: Thank you. As well, I'm going to ask at
9 the beginning that --

10 THE COMMISSIONER: Maybe we should mark this as an
11 exhibit.

12 MR. BUTCHER: Certainly.

13 THE COMMISSIONER: Ninety?

14 THE REGISTRAR: That will be marked as Exhibit number
15 90.

16

17 EXHIBIT 90: *Curriculum Vitae* of Sergeant
18 Brad Fawcett

19

20 MR. BUTCHER: And I should indicate, as Ms. Roberts has
21 said, that that document was Appendix 1 to his
22 report.

23 We've been provided with some other documents
24 that were appendices to his report. I don't
25 intend to refer to all of them in my examination,
26 but I do intend to refer to this document, which
27 is entitled "The Incident Management Intervention
28 Model." I believe this was Appendix 6 to his
29 report. Sorry, it's Appendix 5. I'm going to ask
30 that be marked as the next exhibit.

31 THE COMMISSIONER: Yes.

32 THE REGISTRAR: That will be marked as Exhibit 91.

33

34 EXHIBIT 91: Incident Management/Intervention
35 Model

36

37 MR. BUTCHER:

38 Q Even though we've forgone the need to qualify you,
39 sergeant, I'm going to just ask you a few
40 questions about your background as a police
41 officer. I understand that you've spent the
42 majority of your operational time in the patrol
43 division of the Vancouver Police Department; is
44 that correct?

45 A That's correct, Mr. Commissioner.

46 Q And can you tell us what your duties there have
47 been?

- 1 A I was a supervisor in charge of a squad in the
2 Downtown East Side. I was also a supervisor in
3 charge of a unit in the crowd control unit. Prior
4 to that I was an acting supervisor in southeast
5 Vancouver in charge of a patrol squad. I spent
6 seven and a half years as a full-time use of force
7 instructor as well as the control tactics
8 coordinator for the Vancouver Police Department.
- 9 Q And how much time did you spend at the Justice
10 Institute in the secondment you described earlier?
- 11 A I'm in my second year now, Mr. Commissioner.
- 12 Q And is that your current position?
- 13 A It is.
- 14 Q And as I understand it, every new municipal police
15 officer in the province has to take the training
16 at the Police Academy that you provide.
- 17 A That's correct, Mr. Commissioner.
- 18 Q How many use of force instructors are there at the
19 Justice Institute or Police Academy in particular?
- 20 A There's two full time, myself and one other, and
21 we have a part-time contractor that is working
22 with us. We also bring in instructors as needed
23 depending on the subject matter that we're
24 teaching that day and how many instructors we
25 might need for safety reasons.
- 26 Q Are you able to tell us how many graduates pass
27 through the Police Academy in a typical year?
- 28 A Five classes of approximately 50, Mr.
29 Commissioner. Sorry, 30. So approximately 150 a
30 year.
- 31 Q Now, can you tell us as well what your role was,
32 as disclosed earlier in your examination, in the
33 development of the National Use of Force Model?
- 34 A I was appointed to a select working committee
35 under the auspices of Human Resources Division of
36 the Canadian Association of Chiefs of Police to
37 research, develop and implement what was hoped to
38 be a national use of force model.
- 39 Q Is it fair to say that the differences between
40 that use of force model and the RCMP IMIM are
41 really differences over terminology, differences
42 over semantics, rather than differences over
43 substance?
- 44 A Generally speaking, that's correct, Mr.
45 Commissioner. As I say, the models are simply a
46 reflection of the law.
- 47 Q I'm going to ask you to go to your report for a

- 1 moment. At various times in both the examination
2 by Mr. Vertlieb and the examination by Mr.
3 Kosteckyj, you were asked about this issue of the
4 subjective and objective aspects of an analysis of
5 use of force. Do you remember that?
- 6 A Yes, Mr. Commissioner.
- 7 Q And if you can go to your report at page 35,
8 please.
- 9 A I'm there.
- 10 Q At page 35, you make reference to section 25 of
11 the *Criminal Code*.
- 12 A That's correct.
- 13 Q That and the self-defence and defence of others
14 provisions that follow from 25 through to 37 of
15 the *Criminal Code* form the basis for the law that
16 you've been referring to throughout your
17 examination?
- 18 A That's correct, Mr. Commissioner.
- 19 Q And in your report, you've specifically extracted
20 section 25 and noted that the police officer is
21 justified in doing anything that he's required or
22 authorized to do and in using as much force as is
23 necessary for that purpose, provided he acts on
24 reasonable grounds.
- 25 A That's correct, Mr. Commissioner.
- 26 Q And you've told us as well that the focus of the
27 use of force analysis is always on the perception
28 of the individual officers.
- 29 A Well, that's correct, but you have to start at the
30 centre of the model, Mr. Commissioner, not with
31 the subject behaviour or the officers' use of
32 force or their perception. It always starts with
33 why they're there in the first place.
- 34 Q But would it be correct to say that the law and
35 indeed your analysis, generally and in this case,
36 require you to measure that subjective perception
37 with the reasonableness of a reasonable police
38 officer?
- 39 A That's correct, Mr. Commissioner.
- 40 Q And so when you were preparing this report, you
41 were taking that requirement into account as well
42 as what you read about the officers' own
43 perceptions in their statements?
- 44 A That's correct, Mr. Commissioner.
- 45 MR. BUTCHER: If I can just have a look at the National
46 Use of Force Wheel that we've marked. And if we
47 can have Exhibit 45 as well, please.

1 THE REGISTRAR: He has it.
2 MR. BUTCHER: It's the IMIM.
3 Q Now, I mentioned earlier that there were
4 differences in terminology. In the RCMP model,
5 verbal intervention is used to describe what your
6 model describes as communication?
7 A That's correct, Mr. Commissioner.
8 Q The RCMP model has simply one category of subject
9 behaviour described as resistant, but your
10 National Use of Force Model divides that between
11 passive and active resistance?
12 A That's correct, Mr. Commissioner.
13 Q And again, you told us earlier that there's a
14 difference between language only in the category
15 of combative or assaultive subject behaviour.
16 A That's correct, Mr. Commissioner.
17 Q Now, I'm going to take you to the IMIM, the
18 written document --
19 A I have it.
20 Q -- and ask you to go to page 8 of 10 of that
21 document.
22 THE COMMISSIONER: This is Exhibit 91, is it?
23 MR. BUTCHER: Exhibit 91.
24 THE COMMISSIONER: And page what?
25 MR. BUTCHER: Page 8.
26 THE COMMISSIONER: Page 8.
27 MR. BUTCHER: Sorry. Let's go back to page 7.
28 Q On page 7, a definition is provided of the
29 categories of resistance of individuals.
30 A That's correct, Mr. Commissioner.
31 Q Does your National Use of Force Model differ in
32 any significant way in the categorizations that
33 are provided by the RCMP in this document?
34 A Not substantially, no, Mr. Commissioner, although
35 we certainly go to great lengths to explain that
36 the threat doesn't have to be a verbal threat. It
37 merely has to be the perceived threat. In other
38 words, a subject doesn't have to state, "I'm going
39 to assault you." The officer merely has to
40 reasonably perceive that to be the case.
41 Q Can you please provide us with the definition of
42 combative or assaultive behaviour.
43 A It mirrors as closely as possible that found in
44 the *Criminal Code of Canada*, Mr. Commissioner,
45 that by an act or gesture causes a person to
46 believe that they're about to be assaulted or
47 force is going to be applied to them unwillingly,

1 if you will.

2 Q So it does not require the actual delivery of a
3 blow to be classified as assaultive or combative?

4 A Absolutely not, Mr. Commissioner.

5 Q I'm going to now ask you to go to your report and
6 I'm going to ask you some specific questions about
7 some points that you made.

8 THE COMMISSIONER: Mr. Butcher, nobody has said very
9 much about leading and there's a certain leeway
10 here. So far all of the things you've mentioned,
11 I think, have been ordinary matters that leading
12 questions would not come into the fore. But if
13 you're getting to matters that are controversial,
14 I would appreciate it if you didn't lead.

15 MR. BUTCHER: Thank you.

16 Q I'm going to take you to page 26 and to the very
17 bottom of that report.

18 A I have it.

19 Q You wrote this:

20

21 The responding officers were aware that they
22 were responding to a call in which the
23 subject of the complaint had demonstrated a
24 willingness, ability, intent, and means to
25 violently damage property.

26

27 Now, I have heard previously, in other cases, of
28 something called the AIM principle. Are you
29 familiar with that?

30 A I am, Mr. Commissioner.

31 Q Is that what you're referencing there with the use
32 of the words "ability, intent, and means"?

33 A That's correct, Mr. Commissioner. It also
34 includes opportunity.

35 Q And can you please tell us what the AIM principle
36 is?

37 A It's an acronym generally used for instructional
38 purposes, Mr. Commissioner, to help officers
39 understand the justification for using force. The
40 subject has to have the ability, intent, means,
41 opportunity. For example, somebody may be
42 threatening you with a knife, for instance, but if
43 they're on the other side of an eight-foot chain-
44 link fence, they don't necessarily have the
45 opportunity to carry out that threat.

46 Q The next concept that I want to review in your
47 report is on page 27, which is what you've

1 described as the reactionary gap concept. You
2 have given a description there of what that is,
3 but perhaps you can tell the Commissioner what
4 that is and what is taught to police officers with
5 respect to that concept.

6 A Well, the technical definition of reactionary gap,
7 Mr. Commissioner, is the distance outside the
8 longest technique of a subject that you're dealing
9 with at the moment. Generally speaking, for an
10 unarmed subject that's going to be outside their
11 ability to kick, which is approximately one and a
12 half to two meters, or four to six feet if you
13 will. It's to provide the officer an opportunity
14 to perceive, analyze, evaluate and initiate a
15 motor response to a perceived threat. And we know
16 from hard lessons learned over the years that it
17 takes about three-quarters of a second for a
18 person to go through that process. Officers are
19 instructed in that concept from recruit training,
20 and it's reinforced in service that when they're
21 dealing with subjects, they should stay outside
22 the reactionary gap distance. And again, if the
23 subject is brandishing something, then the
24 reactionary gap is increased.

25 Q In various places in the report, you make
26 reference to the concept of tactical
27 repositioning. Can you tell us about that.

28 A Tactical repositioning is a concept -- again, we
29 have to remember that police officers don't have a
30 duty to retreat from a known threat. They may
31 choose to reposition themselves in order to gain a
32 tactical advantage. In other words, they may
33 position themselves between the subject and an
34 exit point. They may place themselves such that
35 there's a physical barrier between themselves and
36 an armed person so the armed person can't access
37 them, or have more difficulty accessing them with
38 whatever weapon they might be brandishing.
39 Generally speaking that's the concept, Mr.
40 Commissioner. They may choose to reposition in
41 order to de-escalate a scenario.

42 Q And perhaps you could, by reference to the
43 diagrams, Exhibit 45 or 89A, illustrate how the
44 concept of tactical repositioning fits into the
45 model.

46 A The difference between the National Use of Force
47 Framework and the IMIM, if I can use the short

- 1 form, is the intervention management model has the
2 tactical repositioning detailed in grey. It's the
3 outer ring of the model, if you will. In the
4 National Use of Force Framework, tactical
5 repositioning is simply a consideration, a
6 tactical consideration the officer might consider.
- 7 Q And by having it in the outer ring -- well, I'm
8 going to ask it this way. What significance can
9 be given to the fact that it's in the outer ring
10 on the RCMP model?
- 11 A Well, some people misunderstand and believe that
12 that's underlying the whole model, that you have
13 to consider disengagement first. It simply is a
14 visual reminder to officers, if you will, that
15 tactical repositioning is something they consider
16 if time and opportunity present itself.
- 17 Q At any time in an incident?
- 18 A That's correct, Mr. Commissioner. It's ongoing
19 throughout.
- 20 Q Now, Commission counsel pointed out to you that
21 your report relied in part upon a review that you
22 undertook of the statements provided by various
23 eye witnesses and the police officers involved in
24 the incident.
- 25 A That's correct, Mr. Commissioner.
- 26 Q Has anybody attempted to provide you with a set of
27 facts that are consistent with the evidence that
28 has been heard by the Commissioner during these
29 proceedings?
- 30 A No, Mr. Commissioner.
- 31 Q What I am going to ask you to do, officer, is to
32 assume some facts with respect to my client,
33 Constable Bentley, and I'm going to ask you to
34 review the video for us here and provide us with
35 your opinion with respect to the steps that he
36 took with respect to the intervention with Mr.
37 Dziekanski. So I'm going to ask you to assume --
- 38 THE COMMISSIONER: Have you written this out?
- 39 MR. BUTCHER: I have and that's what I was looking for,
40 the copies of it, and I don't see them.
- 41 THE COMMISSIONER: It's customary to have it in
42 writing.
- 43 MR. BUTCHER: I do have it in writing and that's what
44 I'm looking for. I've got one copy here and --
- 45 THE COMMISSIONER: Well, I don't want to delay these
46 proceedings, but we are five minutes from lunch.
47 And also I would think the sergeant would like an

1 opportunity to read it. So I suggest we adjourn,
2 you find a copy --

3 MR. BUTCHER: Sure.

4 THE COMMISSIONER: -- give it to the sergeant, and
5 indeed your friends, so that he can reflect on
6 what you're about to do.

7 MR. BUTCHER: The one thing that I can do in those five
8 minutes is ask that the witness have Exhibit 40.

9 THE COMMISSIONER: Yes.

10 MR. BUTCHER:

11 Q This is a document that you have seen, sergeant.
12 It's a recording of the radio broadcast between
13 the Richmond dispatch and the officers.

14 THE REGISTRAR: Do you want the full exhibit?

15 MR. BUTCHER: Yes, please.

16 THE REGISTRAR: 40 A to F?

17 MR. BUTCHER: Yes.

18 Q I'm going to ask that you begin by assuming that
19 four officers, Constables B., M. and R. and
20 Corporal R., were having lunch in the early hours
21 of the morning when this broadcast was given over
22 the radio at 1:26:48. And it's page 2 of 7 of
23 Exhibit 40B. The dispatcher says:

24
25 Some one...member for an intoxicated male
26 throwing luggage around, Level Two.

27
28 And officer responds: "Two-Three."

29
30 Copy Two-Three. We don't have much
31 information. It came from Ops. Report of a
32 fifty-five year old male at the Arrivals
33 Reception Lobby throwing luggage around. He's
34 non-white. Has dark hair and a white coat.

35
36 I'm going to ask you to assume that immediately
37 after receiving that message, the four officers
38 left the sub-detachment and drove in separate cars
39 to the airport and that en route a second
40 broadcast was received at 1:28:08, in which the
41 dispatcher advised simply as follows. The
42 recording is longer but this is the key part of
43 the broadcast:

44
45 Echo-Two-Three, Ops just updated us that the
46 male is now throwing chairs through glass
47 windows in the same area.

Brad Fawcett

Cross-exam by Mr. Butcher (for Constable Bill Bentley)

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I'm going to ask you to assume that Ops is the International Airport Operations dispatch.
A So assumed.
MR. BUTCHER: And that might be an appropriate place to break.
THE COMMISSIONER: All right. We'll break for lunch.
THE REGISTRAR: The hearing is now adjourned until 2:00 p.m.

(WITNESS STOOD DOWN)

(PROCEEDINGS ADJOURNED FOR NOON RECESS)
(PROCEEDINGS RECONVENED)

THE REGISTRAR: The hearing is now resumed.

BRAD FAWCETT, a witness,
recalled.

MR. BUTCHER: Mr. Commissioner, I have now provided all counsel with a copy of the assumed statement of facts. I've given two copies to Mr. Giles.
THE COMMISSIONER: Thank you.
MR. BUTCHER: There are some typographical errors in this document -- it was put together yesterday -- and I'll point those out as I go through it.

CROSS-EXAMINATION BY MR. BUTCHER ON BEHALF OF CONSTABLE BILL BENTLEY, continuing:

Q But first, officer, I just want to confirm this. You and I have had a number of professional dealings in the past in other cases?
A That's correct, Mr. Commissioner.
Q Do you remember when we last spoke to each other or last met with each other prior to just before the proceedings started today?
A Quite some time ago. I estimate a year or more.
Q And that was with respect to a completely unrelated matter?
A That's correct, Mr. Commissioner.
Q And you've not had any prehearing interviews with myself or with counsel for any of the other police officers?
A No, I have not, Mr. Commissioner.
Q Before going back onto the statement of assumed

1 facts and reviewing the video, I want to take you
2 to page 25 of your report, please. Presumably
3 this case provided you with better evidence than
4 many others that you have to review because of the
5 existence of the video recording.

6 A Generally speaking that's true, Mr. Commissioner,
7 although video is becoming more and more a part of
8 the process.

9 Q About three-quarters of the way down the page on
10 page 25, you make a comment about the limits of
11 this particular video recording.

12 A That's correct, Mr. Commissioner.

13 Q And can you tell us how the video was helpful and
14 how it was not helpful?

15 A Well, Mr. Commissioner, the video provides a one-
16 dimensional view of the incident and only that
17 portions that are available to the lens, to the
18 recording device in question, whether digital or
19 analog. Obviously it doesn't record or capture
20 details that are not facing it, if you will, on
21 the opposite side of the body, for instance, or
22 below a barrier.

23 Q And so you make the point in the last sentence on
24 that page that the position of the man who later
25 became the deceased in this case prevents the
26 viewer from observing facial expressions and other
27 physical cues that might be visible to those
28 viewing the encounter from the vantage point of
29 the officers.

30 A That's correct, Mr. Commissioner.

31 Q If I can go back to the statement of assumed facts
32 for a moment, I put to you just before the lunch
33 break the telephone calls that were received --
34 sorry, the radio broadcasts that were received by
35 the officers. I'm going to then ask you to assume
36 that after the call came in, one of them,
37 Constable M. or Constable Millington, took
38 responsibility as lead investigator on the file.
39 The officers left their office, proceeded to the
40 scene, arriving in a minute or two, and that at
41 the scene Constables Bentley and Rundel considered
42 themselves assist officers. Corporal Robinson
43 recognized that he was the supervisor.

44 Now, that term "assist officer" is one that
45 was used by some of the RCMP officers in this
46 case. You used in your evidence "cover officer."
47 Do you understand them to mean the same thing?

1 A Very similar, yes, Mr. Commissioner.

2 Q Can you tell us what the difference is in the
3 expected role of the lead investigator and the
4 cover officer or the assist officer?

5 A The lead investigator or the contact officer is
6 generally considered responsible for all dealings
7 with the subject. That would include taking
8 statements, gathering name, date of birth,
9 residency, that sort of thing, broadcasting,
10 communicating with dispatch, although there are
11 always exceptions, if you will. It's not a cast-
12 in-stone rule. For instance, if one officer is
13 engaged in communicating with the subject, another
14 officer could very well be updating dispatch to
15 ease that process along, if you will.

16 Q So there's a theoretical framework that exists for
17 these different roles, but in practice they may
18 be used quite differently.

19 A Certainly. I may initiate the contact with the
20 subject and it may become apparent quite quickly
21 that the subject has absolutely no interest in
22 talking to me, they're addressing all their
23 responses to my partner or another officer at the
24 scene, then it would make perfect sense for --
25 even though I may be the lead investigator in
26 terms of the investigation, that that other person
27 assume the contact role in terms of dealing with
28 the subject. For whatever reason, there appears
29 to be a rapport being established and it would be
30 silly of me to try to intervene in that.

31 Q I'm next going to ask you to assume that en route
32 at 1:28, the dispatch updated them with the call
33 that we reviewed before lunch. I'm going to ask
34 you to assume that all four officers worked on the
35 same watch and that Corporal Robinson was their
36 regular corporal and supervisor. I'm going to ask
37 you to assume that three of the officers had all
38 the same standard issue police tools, that is
39 baton, pepper spray and service pistol, but one
40 officer, Constable Millington, was also wearing a
41 Taser in addition to those standard issue police
42 tools. I'll ask you to assume that they were all
43 wearing standard issue Kevlar vests.

44 I'll ask you to assume that Constable
45 Millington is six foot one tall and weighs 205
46 pounds, had a long-standing interest in physical
47 fitness. I'll ask you to assume that Constable

1 Bentley is five foot nine inches tall and weighs
2 160 pounds. And that should be Corporal Robinson
3 is five foot eight inches tall and weight 155
4 pounds. And I'm afraid I couldn't find the height
5 or weight of the other officer. But let's just
6 for the purposes of the assumption assume that
7 he's five ten and 180 pounds.

8 MR. HIRA: And is fit.

9 MR. BUTCHER:

10 Q And that all of those officers are physically fit.

11 A Understood.

12 Q I'm going to ask you to assume that Constable
13 Bentley, that's my client, graduated from the RCMP
14 Depot in May 2006, that between May 2006 and
15 September 2007 he was assigned to general duty in
16 the city of Richmond, that between September 2007
17 and October the 14th, 2007 -- that's the date of
18 this incident -- he was assigned to the airport
19 detachment, in other words that he had been there
20 for six weeks or less.

21 I'm going to ask you to assume that between
22 2004 and 2005, he had worked as a front line-- and
23 that's a typographical error. It should be worked
24 as a front line CBSA officer at the Ambassador
25 Bridge in Windsor, that he had participated in
26 about 100 arrests all together in his career.

27 I'm going to ask you to assume that Constable
28 Bentley was the most junior member in attendance,
29 that the other two constables had graduated from
30 Depot in May and October of 2005, and that
31 Corporal Robinson had graduated from Depot in July
32 of 1996 and that his policing career included
33 stints in the Chase and Merritt detachments before
34 he was assigned to the Richmond Detachment.

35 I'm going to ask you to assume that on
36 arrival at the airport, Constable Bentley was
37 approached by an airline employee who, to his
38 understanding, seemed very excited, was talking
39 fast with a very high tone of voice and that she
40 pointed out a male who Constable Bentley correctly
41 believes to be the subject of the complaint that
42 they have been sent to the airport to investigate.
43 This airline employee had told him that the
44 subject of the complaint was breaking glass or
45 attempting to break the glass. That Officer
46 Bentley thought that this was an in-progress
47 rather than a concluded call and that he thought

1 that, as said again, that the incident was still
2 in progress when he arrived at the airport. He
3 thought the safety of the public was at risk and
4 he thought that there was insufficient time to
5 speak to the complainants, that there was an
6 urgency to deal with the subject of complaint
7 first. That again is another typo. That should
8 be subject of complaint.

9 I'm going to ask you to assume that Constable
10 Bentley walked towards the subject of the
11 complaint. He saw him standing there. His
12 perception of the subject was that he had his eyes
13 wide open, his hands were at his side, and that he
14 had debris at his feet. He had a gut instinct
15 that this man was going to fight with the police.
16 He didn't expect a fight but wanted to be prepared
17 for it. He thought the behaviour of this person
18 was not that of a rational person, that perhaps he
19 was emotionally disturbed or unpredictable.

20 Officer Bentley then jumped over the railing
21 and the officers -- I'm going to ask you as well
22 to assume that the officers did not discuss the
23 matter with each other prior to engaging the
24 subject of complaint and that no plan is
25 developed. And the next comment should be -- next
26 line should be deleted from this.

27 I'm going to ask now, in addition to those
28 assumptions, that the video be played and that we
29 begin maybe at 2 minutes and 30 seconds on the
30 second Pritchard video.

31 MR. LUNN: With or without sound?

32 MR. BUTCHER: With sound, please.

33
34 (VIDEO BEING PLAYED)

35
36 MR. BUTCHER: Stop the video there.

37 Q Sergeant Fawcett, we have all heard on this video
38 that somebody in attendance said out loud that the
39 man behind the doors that you have been able to
40 see in the video speaks Russian but that Officer
41 Bentley has said that he did not hear that. I'm
42 going to ask you to assume that fact.

43 MR. BUTCHER: Carry on, please. Stop it there for a
44 moment, please.

45 Earlier I filed a collection of photographs
46 that I think is Exhibit 45 or 49. It's 49. In
47 Exhibit 49 at tab 1 is a still of one image from

1 the video that we've just watched.

2 Perhaps, Mr. Lunn, if you could just go back
3 very briefly.

4 A I have that image, Mr. Commissioner.

5 MR. BUTCHER: Okay, can we stop there, please.

6 Q Now, I'm going to ask you to assume that at the
7 point depicted in the photograph at tab 1 of
8 Exhibit 49 and the point on the screen at the
9 moment, which is what time?

10 MR. LUNN: We're at 3:31.

11 MR. BUTCHER: Thank you.

12 Q That Constable Bentley says to the subject, "Hi,
13 how are you, sir? How's it going, bud?" And that
14 Constable Bentley's assessment of this man's
15 demeanour at this point in time is that he seemed
16 calm, his arms were at his side and that he seemed
17 cooperative. And that immediately after Constable
18 Bentley spoke those introductory words, Constable
19 Millington, the lead investigator, took over and
20 began to engage the subject of the complaint by
21 asking him for a passport or identification, and
22 that at this point Constable Bentley assumed
23 little or no force would be required to effect the
24 arrest.

25 Have you got any comments that can assist the
26 Commission about the interaction of the police and
27 Constable Bentley in particular to this point in
28 time, to the point where they are asking for
29 identification? And particularly make reference
30 to how that might fit in with how you train police
31 officers in British Columbia to deal with
32 situations like this.

33 A Mr. Commissioner, I would -- it's not at all
34 unusual in terms of the approach. We're going to
35 insert as close to the problem area as we can.
36 Typically you want to contain the problem.

37 MR. HARRIS: I'm having difficulty hearing back here.
38 Could you stand closer to the microphone.

39 A Typically you want to contain the scene first in
40 terms of you don't want to allow the suspect to
41 escape, for example, or provide opportunities to
42 otherwise escalate their behaviour or endanger
43 anybody else. Once we've contained it, then we're
44 going to do what we can to stabilize it. And then
45 we have to investigate, report, and ultimately
46 testify on it. In terms of their approach, unless
47 there was another route close to the subject where

1 one or two of the officers could have inserted, if
2 you will, and approached in a triangulated
3 fashion, might have been the only other
4 alternative that would make sense under the
5 circumstances.

6 MR. BUTCHER:

7 Q It's not particularly clear from the image on the
8 screen how far the officers are from the subject
9 of complaint at this point. But how far would you
10 expect officers to be from a person they were
11 talking to, given the information that they've
12 received over the radio and from the airline
13 employee?

14 A Well, given the broadcast information being an
15 intoxicated male throwing things about, I hope
16 that they would maintain a reactionary gap of
17 perhaps double the standard, if you will, simply
18 because we know from experience that intoxicated
19 people tend to do unpredictable things and we
20 don't want to place ourselves in jeopardy, if you
21 will, if we have the ability to avoid it.

22 Q Now, you probably saw all of the officers jumping
23 over the railing there, and indeed in the left-
24 hand corner of that screen the last officer over
25 is still trying to climb over the railing. Do you
26 have any comment or concern about them doing that?
27 It's been a subject of criticism by some in this
28 hearing.

29 A Not particularly.

30 Q Is there anything that they should have done
31 differently?

32 A I don't know the full length of that barrier, but
33 certainly the time it might take the officers to
34 circumnavigate that route would provide ample
35 opportunity for a suspect to either, again,
36 barricade themselves, arm themselves, escape.

37 Q Would you expect the police officers to go back,
38 say, 50 or 60 feet, go around the railing and walk
39 back on the other side, or would you expect them
40 to simply hop over as they did in this case?

41 A I have no issue whatsoever, Mr. Commissioner, with
42 them hopping over. Like I say, our first tactic,
43 if you will, is to contain the problem. And if
44 the length of time it's going to take to attend to
45 the area is going to provide greater opportunity
46 for that problem to escalate or move into another
47 uncontrolled area, then we're not doing our job.

- 1 Q Would it be part of the training that officers
2 receive in a situation like this, again given the
3 information that they've received, to go directly
4 to the subject of the complaint or to start
5 interviewing potential eye witnesses first?
- 6 A Mr. Commissioner, we contain first. You contain
7 the problem area right away, almost regardless of
8 the call. If it's a break and enter, we contain
9 the house first. We'll then try to locate
10 witnesses et cetera to determine what else might
11 be going on there.
- 12 Q Would you expect the officers, in a case like this
13 with this information, to need to develop a plan,
14 to talk together to develop a plan as to how to
15 deal with the situation?
- 16 A Well, Mr. Commissioner, in the grand scheme of
17 policing, if you will, dealing with an intoxicated
18 person that's acting out, who's causing a
19 disturbance, who's causing mischief, is not an
20 uncommon occurrence. It's not the type of call
21 where I'd expect officers have to convene prior to
22 contact and formulate a plan of -- to contain that
23 particular problem. It's the type of call they're
24 going to deal with almost daily in the Metro
25 Vancouver area.
- 26 Q Dealing with the IMIM or National Use of Force
27 Model, what level of force are the officers using
28 at this point in their interaction?
- 29 A It's a combination of officer presence and
30 tactical communications, Mr. Commissioner.
- 31 Q You've used a phrase I don't think we've heard
32 before, tactical communications. What does that
33 mean?
- 34 A Well, we tend to communicate for a purpose, Mr.
35 Commissioner, either to try to gain voluntary
36 compliance or to direct or compel cooperation.
37 We're using it tactically. In terms of the model,
38 it simply categorizes communication.
- 39 MR. BUTCHER: I'm going to ask, Mr. Lunn, if you can
40 just play the video forward to the point where Mr.
41 Dziekanski puts his arms up in the air. Can we
42 stop there for a minute. What time are we at?
- 43 MR. LUNN: 3:41.
- 44 MR. BUTCHER: Thank you.
- 45 Q Now, are you able to identify Constable Bentley in
46 that --
- 47 A I am, Mr. Commissioner.

1 Q And again, from a training and use of force model
2 perspective, can you tell us what he's doing in
3 that picture?

4 A He appears to be reaching towards his left hip
5 with his left hand. He's looking down towards the
6 subject's right.

7 Q What about just in terms of his positioning and
8 the roles of the different officers?

9 A He would appear to be acting as a cover officer,
10 Mr. Commissioner.

11 Q Now, I'm going to go back to the assumed statement
12 of fact for a while, top of page 4.

13 I'm going to assume that after that initial
14 interaction, the subject of the complaint turned
15 around, waved his arms up in the air and walked
16 away. That Constable Bentley thought that in
17 doing that, the subject was trying to evade the
18 police and was being defiant and that he
19 considered it to be an escalation in his
20 behaviour, but that in fact, the subject may have
21 been evasive and defiant or may have been
22 cooperating with a command from one or more of the
23 police officers. And I'm going to ask you that
24 the first command was to -- I'm going to ask you
25 to assume these facts. That Officer Millington
26 had asked the man for his passport, that the
27 passport was in the suitcases in the bottom right-
28 hand corner of the photograph, and that when it
29 appears that Mr. Dziekanski may have been going to
30 the suitcases, the corporal, Robinson, whose hand
31 you may see in a minute come through, gives a
32 direction to put his arms or hands on the table.
33 I'm going to ask you to assume all of those
34 things, and both Constable Bentley's perception of
35 what is happening and what some of the other
36 witnesses have told us --

37 A I understand, Mr. Commissioner.

38 Q -- about what was happening. I'm going to ask you
39 to --

40 MR. BUTCHER: If we can go forward again for a moment,
41 please. Can we stop there, please. What time do
42 we have?

43 MR. LUNN: 3:45.

44 MR. BUTCHER:

45 Q We can move forward just a few seconds, but I'm
46 going to ask you to assume that in that time
47 Constable Bentley had seen the subject of

1 complaint looking from side to side. He thought
2 he was looking for an object to use against the
3 officers. He had concerns for his personal safety
4 and that of other officers and any member of the
5 public who may enter the area. And that in just a
6 moment he saw him grab a stapler with his right
7 hand and swing it out in front of the officer, and
8 this is actually a moment or two before the point
9 in the photograph. At this point Constable
10 Bentley was about an arm's length away from the
11 subject of complaint and he thought he was going
12 to be hit with the stapler. Constable Bentley
13 then tactically repositioned back and moved to the
14 side, which is, I think, what we have seen or what
15 we see on the screen at the moment.

16 Can you tell us -- or I should say this. In
17 your report, you make reference to the officers
18 triangulating around the subject.

19 A That's correct, Mr. Commissioner.

20 Q Can you tell us about that?

21 A It's a common tactic, Mr. Commissioner, hope to
22 compel compliance by having a subject realize
23 they're facing insuperable odds, if you will, that
24 there's no escape route, that they're facing a
25 number of officers, and the easiest course of
26 action, if you will, is to comply with the
27 commands of the officers or to cooperate.

28 MR. BUTCHER: I'm going to ask that the video be played
29 forward for a few moments again. Stop, please.

30 Q Again, you're able to identify Constable Bentley
31 as the officer who has just moved from the centre
32 of the screen away to the right of the screen?

33 A That's correct, Mr. Commissioner.

34 Q I'm going to ask you to assume that he told us
35 that he then continued to tactically reposition
36 away because of what he had seen and that off
37 screen, before we see him again, I'm going to ask
38 you to assume that he grabbed his baton and
39 deployed it, and by that I mean took it out of its
40 holster and extended it, but that he had not yet
41 made a decision to use it.

42 A I understand, Mr. Commissioner.

43 Q Can you please tell us how that conduct of
44 Constable Bentley would fit within the use of
45 force model and the training provided to police
46 officers in British Columbia.

47 A It would be entirely consistent with training,

1 Mr. Commissioner, to create distance, to
2 transition to an appropriate force option. In
3 this case an intermediate weapon such as a baton
4 adds length to the reach of the officer, if you
5 will, and may allow him to use it to encourage
6 compliance through its implied use. In other
7 words, just brandishing the baton may be
8 sufficient to gain the subject's voluntary
9 compliance. It may escalate to striking nerve
10 motor points in order to create a motor
11 dysfunction, have the subject fall to the ground
12 and then gain control that way. And certainly
13 consistent with the one-plus-one theory. Once the
14 subject, in the perception of the officer, the
15 opinion of the officer, has indicated an intention
16 to resist or to assault, then it would be entirely
17 appropriate to transition to an intermediate
18 weapon.

19 Q Now, you've mentioned the one-plus-one theory.
20 Perhaps you should tell us about that.

21 A As I mentioned earlier, Mr. Commissioner, it's
22 a -- police officers are instructed that they
23 don't have to respond on par, if you will, with
24 the nature of the resistance that they believe
25 they're facing. They can respond one level above,
26 if you will, although I'm uncomfortable with the
27 term "level." By the same token, it's more
28 holistic than that. It applies also to if you
29 find one weapon, you assume there's a second one
30 you haven't found. If you're dealing with one
31 subject, you can assume there's an accomplice you
32 haven't found yet. You add one, if you will, to
33 the entirety of the context of the encounter.

34 Q I'm going to ask you -- this is getting towards
35 the bottom of page 4 -- that during the seconds
36 that we've just watched, Officer Bentley heard the
37 subject of the complaint making what he describes
38 as noises and that he did not rush at the subject
39 because he feared that there was a good chance
40 that he would get hurt if he engaged him with just
41 his hands. And I'm going to ask you again to
42 assume that as he displayed the baton, he saw
43 Constable Millington deploy the Taser.

44 Where in the use of force continuum are
45 officers trained that it is appropriate to use
46 either the baton or the Taser?

47 A Well, they're both intermediate weapons and fall

- 1 within that category, Mr. Commissioner. And
2 again, they both run that scale of escalation from
3 implied use to actual deployment. Subject
4 behaviours that -- again, if we're talking about
5 combative or assaultive subjects, we rely on the
6 definition found in the *Criminal Code of Canada*.
7 You don't actually have to be assaulted. One can
8 just simply reasonably believe that an assault is
9 imminent. That's why I discuss section 37, use of
10 force to prevent an assault.
- 11 THE COMMISSIONER: In the particulars here, what is the
12 nature of the assault that you are assuming
13 existed in order to have a response one level
14 above it?
- 15 A Any level of resistance, if you will, if a subject
16 is demonstrating active resistance, and then an
17 officer could escalate.
- 18 THE COMMISSIONER: Well, are we talking here the -- I
19 know that it doesn't relate to the officer that
20 Butcher is representing, but the Taser at this
21 point in the narrative is being used. Now, what
22 is the reason for the use of the Taser? What is
23 the justification at that moment for the use of
24 the Taser?
- 25 A Well, we work on a theory of preclusion, if you
26 will. If the officer --
- 27 THE COMMISSIONER: Of?
- 28 A Preclusion. We preclude lower levels of force as
29 being ineffective and/or inappropriate, and higher
30 levels of force not being justified or appropriate
31 given a set of circumstances. If the officer
32 believed that officer presence, communications,
33 were ineffective, we tried them and they didn't
34 work, or it would be inappropriate by virtue of
35 the subject characteristics or the subject
36 behaviour, in this case, in the hypothetical, the
37 officer's perception that the male had armed
38 himself and was preparing to assault the officers.
- 39 THE COMMISSIONER: So now what is the nature of this
40 assault that you're speaking of that the officers
41 were afraid of?
- 42 A I'm referring to the hypothetical that was --
- 43 THE COMMISSIONER: Yes?
- 44 A -- described by Mr. Butcher.
- 45 THE COMMISSIONER: And what is that?
- 46 A That the officer's perception was that the subject
47 had armed himself with the stapler that he'd

1 picked up off the counter and was preparing to
2 attack him or one of the other officers.

3 THE COMMISSIONER: Preparing to attack the other
4 officers with the stapler?

5 A Well, with the stapler or hands, feet, teeth,
6 whatever else happens to come into play.

7 THE COMMISSIONER: And that's what you say justified
8 the use of the Taser?

9 A Generally speaking, yes.

10 THE COMMISSIONER: All right.

11 MR. BUTCHER: Perhaps if we can go back to Exhibit 91,
12 just to follow up on your question, and go to page
13 7. I'm going to read the definition of combative
14 in the RCMP IMIM into the record:

15
16 The person attempts or threatens to apply
17 force to anyone, e.g. punching, kicking,
18 clenching fists with intent to hurt or
19 resists, threats of an assault. In the case
20 of a person operating a vehicle, they attempt
21 to collide with the police vehicle, another
22 vehicle or a pedestrian.

23
24 I've read that correctly?

25 A Yes, I believe that's correct, Mr. Commissioner.

26 Q In the training that you provide in British
27 Columbia for the municipal officers with respect
28 to assaultive behaviour is similar or identical to
29 that?

30 A Extremely similar.

31 Q And the point is that the training and policy of
32 the RCMP, correct or not, clearly instruct police
33 officers that there's no need for an actual
34 assault before they use intermediate weapons?

35 A No. As I mentioned earlier, Mr. Commissioner,
36 section 37 of the Code specifically says you don't
37 have to be assaulted before you take steps to
38 prevent one.

39 MR. BUTCHER: Now, just so, Mr. Commissioner, you're
40 clear and the witness is clear, everybody else is
41 clear, I'm not going to focus on the use of the
42 Taser. Others are going to do that.

43 Q Going back to the video, I'm going to continue
44 with the assumptions. I'm going to ask you to
45 assume that the subject of the complaint does not
46 collapse to the ground immediately but does fall
47 to the ground without any officer involvement.

1 Constable Bentley believed that he -- he, that is
2 the subject of the complaint -- had briefly
3 attempted to fight through the Taser. And that
4 once on the ground, Corporal Robinson was the
5 first officer who went to try to control and
6 handcuff the subject of the complaint, and that
7 Constable Bentley then put his baton down on the
8 ground and that his baton is never physically used
9 or deployed against the subject of the complaint.
10 So I'm going to ask you to assume all of those
11 things.

12 A I understand.

13 MR. BUTCHER: Can we please play the video to the point
14 where Corporal Robinson starts to try to restrain
15 Mr. Dziekanski.

16 MR. LUNN: Continue with sound?

17 MR. BUTCHER: With sound. Stop it there.

18 Q Now, I'm going to ask you to assume that's about
19 ten or twelve feet that Mr. Dziekanski moved
20 between the place where he was tasered and the
21 place where he is on the ground. I don't know if
22 we have any evidence of precisely how much
23 distance that is or how big a distance it is.
24 How many times have you seen people tasered
25 with the probe mode?

26 A Dozens, Mr. Commissioner.

27 Q Are they usually police officers in training?

28 A Most recently, yes, Mr. Commissioner.

29 Q How many times in the field, in operational
30 conditions?

31 A Approximately a dozen, Mr. Commissioner.

32 Q And I'm only talking about the probe mode. Is
33 that ability shown by Mr. Dziekanski to move that
34 distance before collapsing to the ground typical
35 in the experience that you've had?

36 A I would say it's atypical, Mr. Commissioner.
37 Providing good probe contact and all other things
38 being equal, it would be atypical.

39 Q What is the typical response of a subject in
40 operational conditions?

41 A What's described as lock-up, Mr. Commissioner.
42 They tend to go rigid and collapse to the ground.

43 Q I'm going to ask before we play the video again
44 just for you to assume the following facts with
45 respect to Constable Bentley's involvement in the
46 restraint of this subject. Firstly, that Corporal
47 Robinson is the first person in, Constable Rundel

1 is the second officer to attempt to assist in the
2 restraining, and that Constable Bentley moves in
3 as the third officer to try to assist in the
4 restraining of this man. When he moves in, he
5 believes that the Taser has been deployed twice.
6 The subject put up a very big struggle for more
7 than a minute. And I'm going to ask you to assume
8 that Constable Bentley took out his handcuffs and
9 that at some point during the attempt to handcuff
10 the subject, he grabbed Constable Bentley's
11 handcuffs away from him. The struggle continues
12 for about one minute and five seconds before
13 handcuffs are placed and those handcuffs come from
14 Constable Rundel. And I'm going to ask you to
15 assume that as soon as the handcuffs are on,
16 Constable Bentley gets up and then moves away and
17 collects and collapses his baton.

18 MR. BUTCHER: I'm going to ask you now to review the
19 video and at the point we're at -- and just to
20 make sure I've got the time, can we have the time
21 on the record, please.

22 MR. LUNN: Yes, it's 4:06.

23 MR. BUTCHER: If we can play the video.

24 Q At this point, sergeant, Constable Bentley is not
25 in the photograph, not in the image. He's away to
26 the right on the screen.

27 A I understand.

28 MR. BUTCHER: Stop it there.

29 Q Not shown on the video is Constable Millington,
30 the black officer, moving around and using the
31 Taser in touch stun at some point in the area that
32 is covered by the man's head.

33 A I understand, Mr. Commissioner.

34 MR. BUTCHER: If we can carry on. Stop it there. And
35 the time, please?

36 MR. LUNN: 5:04.

37 MR. BUTCHER:

38 Q We've stopped the video at the point where
39 Constable Bentley is just getting up and leaving
40 on the left part of the screen. We have just seen
41 three and sometimes four officers engaged with
42 this man. Is there any comment that you can give
43 to the Commissioner about the fact that there are
44 so many officers involved in the handcuffing
45 process?

46 A Mr. Commissioner, that's not uncommon to have
47 multiple officers trying to restrain a lone

- 1 subject. That's not uncommon at all. In fact,
2 they're trained in team control tactics in terms
3 of what parts of the body need to be controlled to
4 try to mitigate the person regaining their feet or
5 their knees, prevent biting, that sort of thing.
6 Typically one officer controls the head, one
7 officer controls the feet, trying to get the legs
8 straight and get as much weight at the end of the
9 lever as possible, and then two control officers
10 trying to control the arms and hands of a subject.
- 11 Q Do you do scenarios with your young trainees?
12 A Yes, we do, Mr. Commissioner.
- 13 Q And would there be a scenario like this, where a
14 man wrestles with the police, resisting
15 handcuffing for a period of time, that they're
16 taught how to work as a team together? Is that
17 what you're saying?
18 A At the provincial Police Academy, at the JIBC,
19 they are, yes, Mr. Commissioner.
- 20 Q And are you able to articulate in training terms
21 what it is you see these officers doing
22 collectively?
23 A One officer -- well, two of the officers appear to
24 be struggling to control the hands of the subject.
25 One officer was initially controlling the feet and
26 then stood up and moved around to the upper torso.
27 It looked like Constable Bentley was assisting
28 with the application of handcuffs and then he
29 regains his feet. But again, you can't see
30 because another officer's back is to the camera.
- 31 MR. BUTCHER: Can we roll the camera forward. Can we
32 stop there for a minute.
- 33 Q You've seen Constable Bentley get up and walk away
34 several feet from the subject of the complaint.
35 Are you able to see what he's doing?
36 A He's manipulating or appears to be manipulating
37 something in his hands, Mr. Commissioner.
- 38 MR. BUTCHER: Carry on. Stop it there.
- 39 Q We just saw --
- 40 MR. BUTCHER: Can we have the time, please.
- 41 MR. LUNN: Yes, 5:39.
- 42 MR. BUTCHER:
- 43 Q We just saw Constable Bentley collapse his baton.
44 Perhaps you should tell us a little bit about the
45 ASP baton. How long is it when it's in the
46 holster on the duty belt?
47 A Mr. Commissioner, the ASP batons are taper-locked

1 or friction-locked batons. They have barrels in
2 varying sizes that bind together. They taper at
3 the middle barrel in the striking section such
4 that when you extend it, metal binds against
5 metal. They come in various lengths. Most police
6 services issue either a 21-inch baton or a 26-inch
7 baton. Collapsed, they're approximately nine or
8 eleven inches in the holster depending on which
9 one you're deployed with. They're designed to be
10 collapsed by overcoming the friction by striking
11 the striking tip dynamically against a hard
12 surface.

13 Q Some force is required to do that, I presume?

14 A That's correct, Mr. Commissioner, especially if
15 the baton is not straight up and down. If it's on
16 an angle when you strike, then again you're just
17 binding metal against metal.

18 MR. BUTCHER: Carry on for a minute, please, with the
19 video.

20 MR. LUNN: That's the end of that video.

21
22 (VIDEO STOPPED)

23
24 MR. BUTCHER: Thank you. If we can just play the next
25 video very quickly. How long is it?

26 MR. LUNN: Just over one minute.

27 MR. BUTCHER: Thank you. I'm just trying to find the
28 time between the two videos. Can we play this
29 one?

30
31 (VIDEO BEING PLAYED)

32 (VIDEO STOPPED)

33
34 MR. BUTCHER: Thank you.

35 Q I'm going to ask you to assume at the moment that
36 there was a very short period of time between
37 those two videos. I'm going to go back to the
38 statement of assumed facts for a moment. That at
39 01:31:38, there was a radio broadcast made
40 indicating that there was one in custody. That at
41 01:32:25, Constable Bentley began a radio
42 broadcast asking for ambulance attendance or EHS
43 attendance, and that 12 second after that
44 broadcast ended, at 01:32:49, he asked for EHS to
45 be upgraded to a Code 3 dispatch. And at 01:34,
46 he was directed by Corporal -- that should be
47 Corporal Robinson -- to leave the subject of

1 complaint and start taking statements, that he
2 leaves the immediate -- and that should be
3 immediate scene -- and does not return, and that
4 he thought that he was leaving the subject of the
5 complaint in very capable hands. I'm going to ask
6 you to assume those last involvements of Constable
7 Bentley.

8 A I understand, Mr. Commissioner.

9 Q Having taken those assumed facts and having seen
10 the video, I'm going to ask you to assume
11 specifically that there's a minute and five
12 seconds between the end of the first video that I
13 showed you and the beginning of the second video,
14 which we don't have any record of what happened,
15 at least no visual record of what happened.

16 I'm going to go back to my questions, two
17 very generic questions. Having focused on
18 Constable Bentley's actions in those three or four
19 minutes between -- I'm going to stop and ask you
20 to assume one more fact, that the EHS call was
21 made -- both EHS calls were made during the period
22 between the two video clips.

23 A I understand.

24 Q Given those assumed facts and the video that you
25 have seen, are you able to provide any assistance
26 to the Commissioner with respect to the conduct of
27 Constable Bentley in this incident? Was it within
28 the training that is provided to police officers
29 in British Columbia, and if so, why?

30 A Mr. Commissioner, it certainly appears to be
31 consistent with training. As mentioned, they
32 respond, they insert close to the critical
33 incident. As I mentioned, we want to contain the
34 event. They triangulate on the subject. He
35 initiated communications with him. Constable
36 Millington, who was previously identified in the
37 hypothetical as the contact officer or the lead
38 investigator, assumed that role from him. He
39 repositioned himself according to, again in the
40 hypothetical, what was described as his perception
41 of the subject behaviour, that being going from
42 cooperative to -- I'm sorry, I don't remember the
43 exact term used to describe it, but non-complaint,
44 and then ultimately accessing the stapler off the
45 desk and the officer's perception that he intended
46 to assault them with it or with feet, hands, or
47 anything else.

1 And he then, again, moves farther away,
2 transitions to an intermediate weapon,
3 specifically the baton, expanded the baton in
4 anticipation of perhaps having to use it. Once it
5 became apparent that the baton was not going to be
6 necessary due to the deployment of the Taser, he
7 put the baton on the ground. That wouldn't be my
8 first option. I'd prefer that it be reholstered
9 just in case the subject got control of it during
10 the dynamics of the encounter or somebody else
11 picked it up. But again, that's not really a
12 matter for discussion in the hypothetical.

13 Once the subject was on the ground, he
14 assisted in restraint and the application of
15 handcuffs. That would all be consistent with
16 standard police practice, Mr. Commissioner.

17 Q Is there anything that you've heard in the assumed
18 facts or seen on the video that would suggest that
19 he did anything outside of the practice or
20 standards expected by the Incident Management and
21 Intervention Model?

22 A Nothing particularly glaring, Mr. Commissioner.
23 Like I said, I'm not an advocate of putting
24 weapons on the ground where somebody else might
25 find them. We can be critical of relative
26 positioning in terms of how close he was at the
27 initial contact, but that's as much a product of
28 the tactical environment in which they were
29 operating. They're limited by the doorway and the
30 location of the walls, the location of the desk,
31 and the location of the subject when they're
32 dealing with him.

33 Q Anything that you have heard in the assumed facts
34 or seen on the video that could be characterized
35 in any way as misconduct?

36 A I did not see any, no, Mr. Commissioner.

37 Q I want to go back now to your report. There has
38 been much made in and outside of this hearing of
39 the fact that Mr. Dziekanski was armed only with a
40 stapler, and on page 28 of your report, in the
41 last paragraph, you said this:

42
43 A stapler held in a fist maintains the
44 integrity of the fist upon impact, adds
45 weight to a punch, and provides a variety of
46 impact surfaces (a subject can strike with a
47 "loaded fist" or with the top or bottom or

1 the stapler.

2

3 A That's correct, Mr. Commissioner.

4

5

6 The behaviour demonstrated by the deceased is
7 classified as Assaultive.

8

9

 And then you went on to say:

10

11

 He had the apparent means, ability, intent,
12 and opportunity to assault the officers or
13 anyone else who entered into the immediate
14 area.

15

16

 That obviously was your opinion when you wrote the
17 report. Does it remain your opinion today?

18

18 A Based on the information I have, yes, Mr.
19 Commissioner.

20

20 Q Maybe this is asking for something repetitive, but
21 what is it about a stapler in a hand that makes it
22 potentially dangerous for a police officer?

23

23 A Well, it makes it potentially dangerous for
24 anyone. I mean, the simple physics of it are --
25 kinetic energy is one-half mass times velocity
26 squared. Any weight I add to my punch increases
27 the kinetic energy upon impact. It also focuses
28 energy. For instance, if I strike in an ice pick
29 fashion with an object protruding below my hand,
30 the bottom of your fist, Mr. Commissioner, is
31 padded, if you will, by the muscle. It absorbs
32 energy on impact. Anything rigid that projects
33 under that that is smaller in surface area is
34 going to focus that energy and will penetrate
35 deeper into whatever target I strike. Similarly,
36 anything striking -- extending from the top of the
37 hand, if I strike with that.

38

38 MR. BUTCHER: I wonder if the witness could please have
39 the stapler.

40

40 THE REGISTRAR: I would have to get it from the locker
41 downstairs.

42

42 MR. BUTCHER: This is perhaps a good time for a break.

43

43 THE REGISTRAR: The hearing will recess for ten
44 minutes.

44

45

46

 (WITNESS STOOD DOWN)

47

Brad Fawcett

Cross-exam by Mr. Butcher (for Constable Bill Bentley)

1 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
2 (PROCEEDINGS RECONVENED)
3

4 THE REGISTRAR: The hearing is now resumed.
5

6 BRAD FAWCETT, a witness,
7 recalled.
8

9 CROSS-EXAMINATION BY MR. BUTCHER ON BEHALF OF CONSTABLE
10 BILL BENTLEY, continuing:
11

12 Q Sergeant, I just want to clarify one thing. When
13 were going through your evidence the before the
14 break, after I'd read you the assumed facts and
15 shown you the video and you were providing some
16 answers to my questions, were you taking into
17 account the statements that you'd been provided
18 from the witnesses or the civilians in providing
19 your answers?

20 A I'm sorry?

21 Q Were you taking into account only the assumed
22 facts and the video or were you also taking into
23 account --

24 A No, just the assumed facts that you provided when
25 you were speaking.

26 Q And the video we watched?

27 A That's correct, Mr. Commissioner.

28 Q Now, I want to get back to this issue of whether
29 or not the stapler could be considered a weapon.

30 MR. BUTCHER: I've asked that the stapler be brought
31 up. I'm going to ask you to take it out of the
32 bag, please.

33 Q Now, we've talked a little bit about reaction
34 times and the use of a stapler in a clenched fist.
35 Have you seen in your police experience people use
36 weapons against police officers in their clenched
37 fists?

38 A Yes, I have, Mr. Commissioner.

39 Q And are they necessarily things that are
40 considered weapons or might they be any object?

41 A Well, no, Your Honour, they can be anything,
42 whatever, as I described in this case. It's a
43 weapon of opportunity. Certainly we have
44 incidents of people ripping their belts off and
45 using those as a flail, if you will, picking up
46 bricks, rocks, objects off the ground, whatever is
47 near at hand, whatever comes immediately to mind

Brad Fawcett

Cross-exam by Mr. Butcher (for Constable Bill Bentley)

1 that one sees in their peripheral vision even.
2 And certainly when we're talking about weapons,
3 I'm speaking specifically about weapons as defined
4 in section 2 of the *Criminal Code*.

5 Q I'm going to ask you to step out of the box for a
6 moment with the stapler in your hand and stand
7 about four feet away from me. Just demonstrate
8 how quickly and how effectively you can use that
9 as a weapon against me, without actually using it,
10 please.

11 THE REGISTRAR: This might hurt.

12
13 (WITNESS DEMONSTRATES)

14
15 UNIDENTIFIED SPEAKER: Can we see that again?

16 THE COMMISSIONER: Are you going to put on the record?

17 MR. BUTCHER:

18 Q You were able to move that distance of four or six
19 feet in less than a second?

20 A I would estimate well under that, Mr.
21 Commissioner.

22 Q And deliver three blows to me?

23 A That's correct.

24 Q Can you describe the amount of force that you were
25 attempting to use?

26 A Controlled.

27 Q That brings me, and particularly that
28 demonstration brings me to an answer that you gave
29 at the end of your direct exam by Commission
30 counsel. The question was, would you have done
31 things the same way in this case. I think your
32 answer was either no or not necessarily.

33 A My background, my understandings of my skill and
34 abilities, what's been successful for me in the
35 past, what I've been unsuccessful doing in the
36 past might ultimately guide me to use something
37 else or attempt something else prior to or other
38 than what those officers did in that set of
39 circumstances.

40 Q Now, looking at your résumé, you have rather a
41 significant background in the martial arts.

42 A That's correct.

43 THE COMMISSIONER: We just saw that.

44 MR. BUTCHER:

45 Q And was that something that you were taking into
46 account when you answered Commission counsel's
47 question about whether or not you'd have done

1 things differently?

2 A Exactly, Mr. Commissioner. As I say, my knowledge
3 of my skill and abilities might lend me to -- or
4 cause me to respond in another manner.

5 Q One of the issues, one of the questions that is
6 being raised in this case is why didn't these
7 officers, particularly given that there were four
8 of them, use simple physical force, or what you
9 might call empty hand control techniques.

10 A Well, it's certainly an option. But again,
11 there's -- when you have multiple officers,
12 multiple subjects -- sorry, multiple officers
13 trying to control a lone subject, quite often what
14 you find is the officers are fighting each other
15 as much as the subject. In other words, if I grab
16 onto the left arm and another officer grabs onto
17 the right arm and we're attempting to use a
18 trained technique such as straight arm bar
19 takedown, which requires rotational movement to
20 the outside, one of us is going to perceive the
21 subject pulling away. In other words, I'm pulling
22 the left arm one way and the other officer is
23 pulling the right arm in the opposite direction.
24 In that context we're struggling with each other
25 as much as the subject.

26 You also have to have some confidence in your
27 team, if you will. You need to have a clear
28 understanding of who's doing what. We can't all
29 congregate on one side of the body, for example.
30 You would want to have some understanding as to
31 who's going to control the head, who's going to
32 control the feet, who's controlling the arms. And
33 that would necessitate moments in time in order to
34 determine that.

35 The officers are also not required to attempt
36 physical control before trying another force
37 option. They merely have to preclude it by virtue
38 of it being inappropriate, having due regard to
39 the circumstances as they perceive them, Mr.
40 Commissioner.

41 Q Well, perhaps I can ask the question in a slightly
42 different way. What would be the relative
43 advantages and disadvantages in this situation of
44 Taser, baton, pepper spray and empty hand physical
45 control?

46 A Well, in terms of injury potential, if you will,
47 the force option most likely to result in injuries

1 to officers and subject is physical control. Once
2 we grab onto people, at the first sign of
3 resistance officers are instructed to deliver knee
4 strikes, deliver blows to the middle of the thigh,
5 if you will, so the subject is going to be
6 receiving blunt trauma in that regard, and when we
7 take them down to the ground, they're taken down
8 dynamically. It's not a casual descent. They are
9 taken to the ground dynamically, and of course
10 that has implications in terms of injury potential
11 from abrasions, from impacting concrete, asphalt,
12 carpet, whatever the underlying surface is.

13 In terms of intermediate weapons like
14 oleoresin capsicum spray, again you have to factor
15 into account the tactical environment. Oleoresin
16 capsicum spray or pepper spray is not
17 discriminating. It's going to contaminate a large
18 area, including officers that are proximal to it.
19 We also know from some hard lessons learned on the
20 street that oleoresin capsicum spray doesn't work
21 on certain subjects, specifically those who appear
22 to be goal-oriented, those who appear to be
23 suffering from a mental disorder, or those that
24 appear to be intoxicated by drugs and/or alcohol.
25 Those sorts of people, to put it bluntly, Mr.
26 Commissioner, are not feeling pain today, and
27 oleoresin capsicum spray is primarily pain
28 dependent. If you were dealing with somebody who
29 was exhibiting or fell into one or more of those
30 broad categories, then one might wisely preclude
31 oleoresin capsicum spray as an appropriate force
32 option.

33 And as I mentioned, in the tactical
34 environment, if they deployed OC in the airport,
35 we're going to be shutting down a large portion of
36 that airport until we can decontaminate it.

37 Q And I think I saw on your résumé a note that you
38 were involved in a review of the effectiveness of
39 pepper spray conducted by the Vancouver Police
40 Department after five years of use of that tool;
41 is that correct?

42 A That's correct, Mr. Commissioner.

43 Q Can you tell the Commissioner what that review
44 found in terms of the percentage of people who are
45 found to be unaffected by pepper spray.

46 A It was approximately 30 percent of subjects were
47 unaffected, Mr. Commissioner.

1 Q I think we got to the point where you were going
2 to tell us about the benefits or advantages and
3 disadvantages of both the baton and the Taser.

4 A The baton, Mr. Commissioner, again, when it comes
5 to injury potential, if we're striking people with
6 what amounts to a steel club, then we expect a
7 variety of injuries from contusions, bruising,
8 potentially lacerations. And again, if it's an
9 uncontrolled dynamic encounter, which struggles
10 are, the subject doesn't wait politely for you to
11 target the appropriate area of the body, which
12 typically, again, is the outside thigh,
13 approximately four inches above the knee. If the
14 subject is moving as you're swinging, and quite
15 often that's the case, they're likely to get
16 impacted somewhere other than where you intended,
17 which can result in fractures, tearing of
18 connective tissue, that sort of thing.

19 And again, it adds reach to a punch, for lack of
20 of a better word. It extends the reach of the
21 officer by the length of the baton. But if the
22 subject you're dealing with has long lever lengths
23 -- for example, long arms, long legs -- then the
24 baton may not in fact give you that distance
25 advantage. It does run the scale of escalation,
26 however, from implied use all the way to deadly
27 force, which is one significant advantage of that
28 particular tool.

29 So in other words, I can brandish the baton
30 and threaten to use it and hopefully cause
31 compliance simply through the threatened use of
32 it, or I can target parts of the body where I hope
33 to create a temporary motor dysfunction, which
34 again is going to result in bruising at a minimum.
35 And if it escalates beyond that, then I have the
36 ability to attempt to break things, if you will,
37 and make it physically impossible for the subject
38 to continue the assault. And ultimately, I can
39 strike them in areas where the likely outcome is
40 grievous bodily harm or death.

41 Q What are the perceived advantages and
42 disadvantages of the Taser?

43 A Well, a Taser, again, doesn't have any
44 contamination issues in terms of the tactical
45 environment. In a closed environment like that,
46 it provides distance, allows you to stay,
47 depending on the Taser cartridge in use, somewhere

1 between 15 and 35 feet away from the subject. It
2 has a significantly higher success rate compared
3 to both batons and oleoresin capsicum sprays in
4 terms of one -- single applications being
5 effective and gaining control of subjects.

6 There's no decontamination issues. If I use
7 oleoresin capsicum spray to attempt to gain
8 control, that subject may be experiencing the
9 effects of that for upwards of an hour, and
10 certainly they're going to require
11 decontamination. Everybody who handles that
12 subject afterwards is going to have to be
13 decontaminated. Any vehicles used for transport
14 would have to be decontaminated. And it's a
15 micro-particulate, and if for example I handcuff
16 and search that person, the particulate's now on
17 my hands. If I rub my face while I'm driving, I
18 may blind myself or restrict my vision and have a
19 collision.

20 So as I mentioned, there's a lot of
21 decontamination issues that are going to arise
22 with that particular force option that are not
23 there with a device like the Taser.

24 In terms of anticipated outcomes with respect
25 to injuries, the most recent study that I've seen
26 indicates that it's the intermediate weapon that
27 is least likely to result in hospitalization.
28 There are reports of secondary injuries, blunt
29 trauma from falls, that sort of thing. But in the
30 vast majority of instances, the injuries consist
31 of second degree burns at the points of contact of
32 the probes or in the case of the drive stun where
33 the current is entering and exiting the body.

34 Q And the evidence that you've just given with
35 respect to the advantages and disadvantages of
36 each of these intermediate weapons, I presume is
37 the same as the materials that you provide, the
38 information that you provide during the teaching
39 of trainees?

40 A Generally speaking, yes, Mr. Commissioner,
41 although it's more guided by the teaching aids, if
42 you will.

43 Q I'm going to turn to another subject raised in
44 direct examination by Commission counsel and
45 commented upon on page 32 of your report. And
46 that is this issue of the reports by these
47 officers that they were all involved in wrestling

1 the deceased to the ground. How many use of force
2 reports have you undertaken in your career?
3 A Approximately a hundred, Mr. Commissioner.
4 Q How often have you found whilst reviewing the
5 circumstances of use of force by the police that
6 the description of events given by the officers is
7 not accurate?
8 A It's not uncommon at all, Mr. Commissioner. Now,
9 I'm assuming you're referring to incidents where
10 we have some ability to show definitively one way
11 or another how an incident evolved.
12 Q In those situations where you've got some
13 objective evidence --
14 A Yes, Mr. Commissioner.
15 Q -- to indicate that the officer's report is not
16 accurate.
17 A And again, I see it routinely in training, Mr.
18 Commissioner.
19 Q And presumably, you can understand that there may
20 be innocent or not so innocent reasons for that?
21 A I do, Mr. Commissioner, yes.
22 Q Can you tell us a bit about what you have learnt
23 in that work about the innocent reasons for
24 officers getting things wrong?
25 A Well, it's not limited to police officers, Mr.
26 Commissioner. There are volumes of reports
27 dealing with eye witness accounts and differences
28 between the objective. As you say, where we have
29 real evidence of something occurring and the
30 version recounted by witnesses, whether police
31 officers or others, that's hardly new or uncommon.
32 When it comes to police officers specifically, we
33 don't create automatons, Mr. Commissioner. We
34 don't pump out robocops. They are human beings in
35 police uniforms. They are for the most part
36 normal people. They are limited by their humanity
37 in terms of their ability to perceive, recall, any
38 event accurately or in terms of how it transpired.
39 Once struggles and interpersonal aggression
40 occurs, your body gets activated -- certain parts
41 of your body are activated to deal with that
42 particular incident, and that typically involves
43 activation of the sympathetic nervous system.
44 Once that part of your body is activated, that has
45 implications for both your motor performance as
46 well as your cognitive processing, your perception
47 of what's going on. All those things are taking

1 place.

2 And we have more research coming out almost
3 monthly at the present time, Mr. Commissioner,
4 mostly to do with civil trials, civil law in terms
5 of motor vehicle accidents and cell phones and the
6 impact that attention has. And it's not so much
7 that your focus is on one thing but you select out
8 certain other things within the environment. All
9 those things can have an impact on one's recall.

10 There's also the issue of change blindness,
11 which again is well researched, well documented.

12 Q My colleagues are asking -- they thought they
13 heard you say something, change blindness.

14 A That's correct, Mr. Commissioner.

15 Q Can you tell us what that is?

16 A Well, I guess to give a basic example, most people
17 believe that if something changed and if a tree
18 was removed from their front yard, they'd notice
19 it. It's changed. But in fact, the research
20 shows just the opposite, that you won't notice the
21 change is gone until you go to hang a towel on the
22 tree and it's not there. Because for years and
23 years it's been there and your mind simply keeps
24 putting it back in the picture, if you will.
25 Again, Daniel Simons at the University of Illinois
26 has done some fascinating research involving
27 students speaking to actors, having people
28 intervene or walk between them and substituting a
29 completely different person, and the vast majority
30 of people are blind to the fact that they're
31 talking to somebody new.

32 Q Another of the issues that has arisen in this case
33 is a suggestion that the officers acted
34 impetuously, in other words, that the Taser was
35 used too fast. Do you have any comment on that
36 suggestion?

37 A Well, again, based on my understanding of the
38 research as it exists today is that for the sake
39 of the subject, in order to provide what may be
40 necessary medical aid depending on the officer's
41 perception of the subject's behaviour, the root
42 causes of that -- if, for example, their
43 perception is this person is in a state of some
44 sort of acute agitated delirium, then the science
45 would indicate that this is the preferred
46 intervention in order to provide medical aid.
47 It's the least injurious, the quickest way to get

1 the person under control because there can be no
2 medical aid until control has been established.

3 Q Now, you've just raised a subject that I was going
4 to stay away from because of its controversy. But
5 in your materials you make reference to this
6 concept of agitated or excited delirium on page
7 31. Perhaps you should just tell us a little bit
8 about what you teach police officers about that
9 subject.

10 A Well, in the context of the Vancouver Police
11 Department, we began investigating the issue, I
12 believe it was in 1992, trying to explain some of
13 the deaths that were occurring in custody and
14 trying to mitigate those. The research was more
15 recently undertaken by Sgt. Darren Lauer of the
16 Victoria Police Department -- I believe it was
17 under the auspices of the Canadian Police Research
18 Council or Commission -- looking at the incident
19 of sudden and unanticipated deaths proximal to
20 restraint. Again, it's not a new phenomenon. If
21 I were to -- and perhaps it's a crass example, and
22 I apologize, Mr. Commissioner. But when we're
23 looking at unexplained, unanticipated deaths, it
24 follows the same research pattern, if you will,
25 for sudden infant death syndrome. Initially you
26 have a number of unexplained deaths and you don't
27 know why. You end up with an umbrella term such
28 as SIDS. And then we start looking at other more
29 direct causes and then we end up with shaken baby
30 syndrome and some other things, and those are
31 still being investigated. It's the same thing
32 with an umbrella term, for example, of in custody
33 deaths where we're still trying to find what are
34 some of these root causes.

35 THE COMMISSIONER: Let me just interrupt for a moment.
36 I don't understand any of the officers in their
37 testimony to talk about this as one of the reasons
38 they used the Taser, or indeed any of their
39 involvement.

40 MR. BUTCHER: No --

41 THE COMMISSIONER: As you know, this is a highly,
42 highly expert field. And I know you framed the
43 question not in terms of particularly attempting
44 to understand the concept but more in terms of how
45 you teach it. I understand that. But I'm just
46 wondering about its relevancy here.

47 MR. BUTCHER: And as I indicated, it was an area that I

Brad Fawcett

Cross-exam by Mr. Butcher (for Constable Bill Bentley)

Cross-exam by Ms. Roberts (for Government of Canada)

1 hadn't particularly intended to go into.

2 Q But perhaps I can leave it at this. In one of the
3 appendices that has not yet been marked, to your
4 report -- and it is something called a CPRC
5 report -- there is a description of how that
6 phenomenon is identified and described. Is that
7 correct?

8 A I believe that's correct, Mr. Commissioner.

9 Q And I'm content to leave it with the reference to
10 that document.

11 MR. BUTCHER: Those are my questions of the witness,
12 Mr. Commissioner. I don't know if you want this
13 document marked as an exhibit.

14 THE COMMISSIONER: Yes.

15 MR. BUTCHER: I think it probably should be.

16 THE COMMISSIONER: Yes. Statement of Assumed Facts.

17 THE REGISTRAR: That will be marked as Exhibit 92.

18

19 EXHIBIT 92: Statement of Assumed Facts
20 related to Constable Bentley

21

22 THE REGISTRAR: That document just marked is the
23 Statement of Assumed Facts.

24 MR. HIRA: As there will be other statements of assumed
25 facts, Mr. Commissioner, may I suggest that it be
26 marked as Statement of Assumed Facts regarding
27 Officer Bentley or Constable Bentley?

28 THE COMMISSIONER: We'll put the word Bentley on it.
29 Yes, Ms. Roberts.

30 MS. ROBERTS: Sgt. Fawcett, my name is Helen Roberts.
31 I'm on for the Government of Canada.

32

33 CROSS-EXAMINATION BY MS. ROBERTS ON BEHALF OF THE
34 GOVERNMENT OF CANADA:

35

36 Q I will not review any of the matters covered by
37 Mr. Butcher but there are a few things that I did
38 want to ask you. At page 27 of your report, and
39 indeed during your evidence today, you talked
40 about a reactionary gap.

41 A That's correct, Mr. Commissioner.

42 Q And in your report, and I think you said the same
43 thing today, is that you would want a police
44 officer or would train them to want to be four to
45 six feet from an unarmed subject?

46 A Generally speaking, that's correct.

47 Q If the person had a weapon, is there a particular

- 1 distance that you would train the police officers
2 that they should be away from the subject?
- 3 A Well, in very general terms, Mr. Commissioner, you
4 add the length of the weapon to the reactionary
5 gap, and again, keeping in mind a subject's
6 ability to cover distance quickly. We have
7 studies showing that the average person -- we're
8 not talking track athletes, just average people --
9 can cover 30 feet in two seconds. So depending on
10 the nature of the weapon that they're in
11 possession of and their ability to access you,
12 that can increase the reactionary gap. But again,
13 we have to keep in mind the tactical environment.
14 If we have a significant reactionary gap, then we
15 invite other people into that space. We have to
16 be able to control the space between the subject
17 and the officers. If I stand two -- if I'm
18 interviewing somebody on the sidewalk, for
19 example, Mr. Commissioner, and I'm standing on the
20 opposite edge of the sidewalk, then foot traffic
21 is going to necessarily want to walk between us
22 and I can't allow that. So I may have to in fact
23 be closer than the ideal, if you will, but
24 circumstances may require it.
- 25 Q And in your report, in discussing the reactionary
26 gap, and I think you've given the same evidence
27 today, you say that it typically takes about
28 three-quarters of a second for a police officer to
29 react to a subject's conduct?
- 30 A It would be a police officer or anyone, Mr.
31 Commissioner. That's how long it would take the
32 average person, police officer or civilian, to
33 perceive, analyze and evaluate, formulate a
34 response, and to initiate motor action. Not to
35 complete the action, simply to start it.
- 36 Q Are you aware of any studies or are you able to
37 assist with how long it would take a police
38 officer to react to a subject producing something
39 that could be used as a weapon, the time from that
40 perception to be able to get a Taser out of a
41 holster? Or I suppose it would be the same for a
42 firearm. Are there any studies on that time
43 delay?
- 44 A There are. I don't recall the numbers, if you
45 will, off the top of my head, though, Mr.
46 Commissioner. But there are studies looking at --
47 and certainly it plays a significant role in

1 holster design, how long it takes, how many
2 security features, whether it involves the use of
3 fine and complex motor skills. So there are
4 certainly studies that relate to reaction time and
5 response time.

6 Q When an officer withdraws a Taser or conducted
7 energy weapon from the holster, are there steps
8 they have to physically go through in terms of a
9 safety or a clip or anything?

10 A Yes. Depending on the particular holster that the
11 officer is equipped with for the Taser, there's
12 certainly restraining devices to maintain the
13 Taser in the holster so that it doesn't fall out
14 unintentionally or provide a subject with the
15 ability to easily remove it from the officer.

16 Q So is the three-quarters of a second to make the
17 decision as to what to do or does it include
18 actually getting a tool off the police officer's
19 belt?

20 A No, the reaction time, Mr. Commissioner, is simply
21 the time it takes to start reaching -- if the
22 decision was to, say, draw a force option -- a
23 Taser, OC, baton, whatever it happens to be -- the
24 reaction time, the three-quarters of a second, is
25 just the time to initiate that response. The
26 response time would be the total time required to
27 access that particular force option. And then
28 you're looking at upwards of two seconds.

29 Q So it could be up to or more than two seconds from
30 the perception to actually firing either a Taser
31 or a firearm?

32 A That's correct, Mr. Commissioner. And in fact, if
33 it's a firearm, the reaction time might be
34 significantly higher.

35 Q Is there also a reaction time to perceiving --
36 let's say you have a firearm or a Taser at the
37 ready and it's been used once. Is there also a
38 reaction time involved in perceiving and making a
39 decision and pressing the trigger again for a
40 second deployment or a second firing?

41 A Well, Mr. Commissioner, there's actually reaction
42 time on both ends of an equation. It takes me
43 time to start an action. It also takes time to
44 stop an action. In other words, once I've made a
45 decision that I no longer have to press the
46 trigger on a Taser, for example, it takes time for
47 that action to stop. And again, that can be

- 1 three-quarters of a second for me to perceive that
2 it's no longer necessary, analyze, evaluate, and
3 then complete that motor action. So you have
4 reaction gaps on both sides of the motor action.
- 5 Q Have you heard of the expression "duty to account
6 statement"?
- 7 A I have, Mr. Commissioner.
- 8 Q Would you explain to the Commissioner what that is
9 for a police officer.
- 10 A In the municipal context it's what's known as a
11 duty to report, and I believe I described it that
12 way in the introduction. It's a requirement on
13 the part of the officers to explain in general
14 terms their actions in a particular incident under
15 review.
- 16 Q And are there guidelines for the Vancouver police
17 officers as to how long after an incident they're
18 expected to provide that report?
- 19 A My understanding is the memorandum of
20 understanding between the Police Complaints
21 Commission and the municipal police departments is
22 five days, Mr. Commissioner.
- 23 Q Do you know the reason for the five days, or why
24 there is a delay at all?
- 25 A Well, it provides -- well, first we have to
26 remember that these are not members of the public
27 engaged in some violent incident. These are
28 police officers acting in the course of their
29 employment, and there are agreements between the
30 investigating bodies, if you will, that allow
31 those people that were acting in the course of
32 their employment to seek legal guidance, agent
33 support in terms of unions, and also recall. The
34 science that we have indicates that it would take
35 approximately 72 hours to have the best
36 recollection of what happened.
- 37 Q Are you aware of any studies that show what will
38 happen if somebody gives a report before they've
39 had that 72-hour delay in which to sort of -- what
40 is that? To organize their thoughts and
41 articulate what happened and process the
42 information?
- 43 A I am, Mr. Commissioner. It's typically described
44 as flashbulb recall. People recall specific
45 moments that for them were important, and then
46 typically in the first 24 hours you try to
47 assemble those images in a manner that makes

- 1 sense. But it may not have happened that way at
2 all. And then over the preceding 48 hours -- the
3 following 48 hours, you start to recall the pieces
4 of the film, if you will, that would separate
5 those flashbulb images that were captured by the
6 person in the stress of the moment.
- 7 Q So the common wisdom that the sooner you take a
8 statement the better is not necessarily the case,
9 given your studies?
- 10 A In a use of force incident, no, Mr. Commissioner.
11 The best information that I have, and certainly
12 the information I provide to the office of the
13 Police Complaints Commissioner, to internal
14 investigators, to homicide investigators is they
15 should wait 72 hours.
- 16 Q I have another question about the Vancouver Police
17 Department. Are the police officers trained in
18 first aid and CPR?
- 19 A No, Mr. Commissioner. When they're hired, they're
20 required to have a first aid ticket, if you will,
21 first aid certification. However, that's not
22 maintained. It's not supported. It used to be
23 part of the training at the provincial Police
24 Academy until the early '90s and then it was
25 discontinued.
- 26 Q When the Vancouver officers were first aid or CPR
27 trained, were they also trained to use an
28 automatic defibrillator?
- 29 A No, Mr. Commissioner.
- 30 Q Were they trained to use oxygen?
- 31 A No, Mr. Commissioner.
- 32 Q Are you aware of any police forces in British
33 Columbia where the police officers are trained to
34 use defibrillators or oxygen?
- 35 A I believe the now defunct Esquimalt Police
36 Department had that, but they were also the
37 fire -- acted as fire fighters as well, Mr.
38 Commissioner, and I believe they had that training
39 in that capacity. Aside from them, I'm not aware
40 of any.
- 41 Q So currently that's not common or that's not known
42 in British Columbia to have police officers
43 trained to that level?
- 44 A No, Mr. Commissioner, it's not common.
- 45 Q And do you know why that is? Or why is Vancouver
46 not requiring first aid training any more?
- 47 A My understanding from my own experience when I

1 went through the training is that it was -- it's
2 costly, and in the Vancouver context, we're never
3 more than three minutes from medical aid, that
4 being fire fighters or emergency health services,
5 paramedics. And again, for the officers it's now
6 increased training time to obtain that training.
7 We now have annual certification requirements in
8 order to maintain that training. We now have to
9 provide the first aid equipment and keep them
10 properly stocked, which of course is additional
11 cost and additional liability, if a car goes out,
12 for example, that isn't properly stocked. And
13 again, increased liability. Now I'm no longer
14 just liable for my use of force; I'm also liable
15 for the first aid that I'm applying or attempting
16 to assist with.

17 Q So in Vancouver if a police officer encountered a
18 subject or -- a subject who needed medical
19 attention, they would call 911 for an ambulance?

20 A We contact police dispatch and ask them to contact
21 ambulance service; that's correct.

22 Q Thank you.

23 A That doesn't take away from, you know, applying
24 direct pressure, for example, to, you know,
25 visible bleeding or those sorts of things,
26 maintaining an open airway. That sort of thing
27 may be done but it would be based on that
28 officer's personal understanding of how to
29 accomplish that.

30 MS. ROBERTS: Thank you.

31 THE COMMISSIONER: Well, I'm noting the time. And Mr.
32 Kosteckyj, if you wish, it seems to me appropriate
33 that these hypothetical questions is new, and that
34 being so, you would have an opportunity to cross-
35 examine.

36 All right. Monday morning.

37 THE REGISTRAR: The hearing is now adjourned until
38 Monday morning.

39
40 (WITNESS STOOD DOWN)

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42 (PROCEEDINGS ADJOURNED TO APRIL 20, 2009, AT
43 10:00 A.M.)
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